



UNITE RESPONSE TO TAKEOVER PANEL CONSULTATION:

PROFIT FORECASTS, QUANTIFIED FINANCIAL BENEFIT STATEMENTS, MATERIAL CHANGES IN INFORMATION AND OTHER AMENDMENTS TO THE TAKEOVER CODE

This response is submitted by Unite the union. Unite is the UK's largest trade union with over 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, energy, construction, transport, local government, education, health and not for profit sectors.

Executive Summary

Unite believe that the code committee proposals surrounding profit forecast, financial benefit statements and other amendments to the Takeover Code are a move in the right direction and, if properly implemented, can strengthen the position of employees and their representatives during any takeover process.

The key stance of Unite during any takeover is the protection of employees and there should be no detrimental effect on terms and conditions, wages or enforced redundancies when one company is taken over by another. The amendments and changes to the takeover code are therefore welcomed by Unite, as they look to provide more detailed information but there must be guidance as to how this information is provided to employee representatives and what the penalties are for renegeing on previously published business plans.

Unite still have concerns around the lack of detail required on the long term plans of the offeror and feel that the amendments to the profit forecast would not provide sufficient information as to the long term impact on employees.

A key point to note is the proposed change to Rule 28.6(b) which is welcomed as it clarifies what information is currently acceptable as a profit forecast.

“An estimate of profit for a period which has already expired should be treated as a profit forecast”

Unite welcomes the move to the proposed:

“A profit estimate is a profit forecast for a period which has expired and for which audited results have not yet been published”

This can be positively interpreted in that information is to be made available at the earliest possible moment and employee representatives can take a view on the financial position before any takeover has been completed.

Unite has stated in previous consultations that shareholders are not the only stakeholders in a company and that those working in any company have a very important interest in the outcome of a takeover. As such, employees in a company have at least an equal interest in the outcome of any takeover as any other stakeholder.

1. Comments On Questions relating to PCP 2012/1

Q1 Do you have any comments on the proposed new definitions of “profit forecast”, “profit estimate” and “ quantified financial benefits statement” and the proposed amendments of the definitions of “cash offeror and “offer period”?

Unite believe that the revised definitions would be of benefit to employees within the company and particularly welcome the comment that the code committee considers that a party to an offer should not be able to avoid the requirements of Rule 28 by, for example, describing a statement in relation to future profits as a “target” and making a statement that the target does not constitute a forecast of future profits. So the note on this to clarify that a statement in relation to a target for profits (or losses) will normally be treated as a profit forecast is positive.

The quantified financial benefits statement is also a welcome addition but gives rise to concerns due to highlighting that a company must quantify any financial benefits expected to arise from cost saving measures. In the experience of Unite the majority of cost saving measures have a direct negative impact on employees and result in plant closures, revised terms and conditions and the like. Whilst transparency in this area is welcome, and Unite would only request as much information as possible where a takeover would without question have an impact on our members, this definition could push the offeror into outlining draconian cost saving measures in order to appeal to a wide audience and pacify aggressive investors.

As stated in previous responses Unite do not believe that there are sufficient measures in place to hold companies who break the Rules to account and so any penalties faced by the parties must be made expressly clear.

Q2 Do you agree that the requirements for assumptions to be stated for the third party reports to be obtained should be retained for profit forecasts and quantified financial benefits statements which are first published during an offer period? Do you have any comments on proposed new rule 28.1(a)?

Unite believe that it is certainly in the interests of stakeholders that any assumptions used by the reporting accountants and financial advisors be retained so as to provide transparency and accountability. The process of preparing the profit forecasts and the quantified financial benefit statement should be clear and consistent with the accounting policies of the party to the offer and stakeholders must be able to scrutinize these assumptions. Rule 28.1(a) and (b)

go some way in recognizing that these assumptions provide the framework for decisions that will ultimately effect employees.

Q3 Do you agree that the requirements for assumptions to be stated for the third party reports to be obtained should be retained for profit forecasts which have been published following the making of an approach or, in appropriate circumstances, the first active consideration of a possible offer? Do you have any comments on the proposed new rule 28.1(b) and Note 1 on rule 28.1?

As in response to Q2

Q4 Do you agree with the proposed new requirements with regard to an outstanding profit forecast? Do you have any comment on the proposed new rule 28.1 (c)?

The proposed new Rule 28.1(c) assists with holding those charged with the management of the party to the offer to account should there be changes to profit forecasts and so the confirmation of directors that if a profit forecast is published before an approach has been made by or on behalf of an offeror to the offeree company with regard to a possible offer is welcomed by Unite. There must be consistency with profit forecasts before and after any offer has been made so Rule 28.1(c) provides sufficient guidelines in that a statement by the directors must be released should the profit forecast be no longer valid and an explanation of why that is the case.

Q5 Do you agree with the proposed new ability for the panel to grant a dispensation from the proposed new rules 28.1(a) and (b) in relation to ordinary course profit forecasts? Do you have any comments on the proposed new note 2 on rule 28.1?

In theory Unite could see why the Panel would wish to grant dispensation in certain circumstances especially if normal requirements of a profit forecasts are met but this could set a precedent of granting unnecessary dispensation. Provided any dispensation is only given on the issue of ordinary course profits and the relevant party is required to obtain reports on it from reporting accountants and its financial advisers, Unite form the opinion that this would be sufficient in understanding the business case of the offeror and offeree and any changes to the profit forecast must be explained by the directors as in Rule 28.1(a)(ii).

Q6 Do you agree with the proposal for the panel to be able to grant a dispensation from the proposed new rules 28.1(a) and (b) in relation to profit forecasts for certain future financial periods? Do you have any comments on the proposed new note 3 on rule 28.1?

As in response to Q5

Q7 Do you agree with the proposed requirement to publish corresponding profit forecasts for the current and intervening financial periods where a profit forecast for a future financial period is published? Do you have any comments on the proposed new rule 28.2?

Unite are concerned with the panel focus on Shareholders, analysts and other market participants without mention of employee representatives within proposed Rule 28.2. Unite believe that employees are very significant stakeholders within any takeover process and therefore the requirement for detailed financial information is just as important and the other stakeholders mentioned.

We do note that within Rule 28.2 there is no mention of what stakeholder should be entitled to the information but in the preceding paragraph (6.9) there is not a mention of employees or their representatives only the above stakeholders.

Q8 Do you agree that reports should always be required to be obtained on a profit forecast where the offer is a management buy-out or is made by the existing controller of the offeree company? Do you have any comments on the proposed new note 4 on rule 28.1?

The principle in note 4 on Rule 28.1 of having to provide the same information in a management buy-out or offer by controller is welcomed by Unite and we feel that the same rigorous process should be adhered to in any takeover bid. The effects on employees could be the same whether the takeover is proposed by an external or an internal offeror.

Q9 Do you have any comments on the proposed new note 5 on Rule 28.1 with regard to profit ceilings?

As in response to Q5

Q10 Do you agree that the code should expressly provide the panel with the ability to grant a dispensation from the requirements of rule 28 where the offer would not result in a material increase in the equity share capital of the offeror? Do you have any comments on the proposed new note 6 on rule 28.1?

No comment

Q11 Do you have any comments on proposed new note 7 on Rule 28.1 in relation to the compilation of profit forecasts and quantified financial benefits statements?

Unite fully support new note 7 on Rule 28.1 and feel this is an area that must be suitably enforced during the takeover process.

A profit forecast and quantified financial benefits must be in line with accounting policy on understandability and reliability. That is to say as in point (i) it must not be so complex or include such extensive disclosure that it cannot be readily understood; and (ii) it must be supported by a thorough analysis of the business of the party (or parties) to the offer and must represent factual and not hypothetical strategies, plans and risk analysis.

Q12 Do you have any comments on the proposed new rule 28.3 with regard to assumptions in relation to profit forecasts and quantified financial benefit statements?

As in response to Q11

Q13 Do you agree that the exemption from the requirements of rule 28 for certain profit estimates should be extended as proposed? Do you have any comments on proposed new rule 28.4?

Unite do have concerns over Rule 28.4 as it is not clear as to what exactly a party to an offer which is not admitted to trading on a UK regulated market or on AIM or PLUS is. A number of predatory investors would not be listed on markets but that should not exclude them from having to provide profit estimates and dispensation from Rule 28.1 should not be granted solely on this basis. Experience tells us that aggressive cost cutting measures including plant closure and enforced redundancies are unfortunately one of the main drivers of these measures.

As stated in the opening summary, Unite the Union has a duty of care toward members and as employee representatives, would request as much information as possible before any takeover is completed regardless of the status of the offeror.

Q14 Do you have any comments on the proposed new rule 28.5 in relation to quantified financial benefit statements?

Unite support new Rule 28.5 and particular (e), (f), (g) and (h).

Q15 Do you have any comments on the proposed new rule 28.6 with regard to a profit forecast for part of a business?

The proposed change to Rule 28.6(b) is welcomed as it clarifies what information is currently acceptable as a profit forecast.

“An estimate of profit for a period which has already expired should be treated as a profit forecast”

Unite welcomes the move to the proposed:

“A profit estimate is a profit forecast for a period which has expired and for which audited results have not yet been published”

This can be positively interpreted in that information is to be made available at the earliest possible moment and employee representatives can take a view on the financial position before any takeover has been completed.

Q16 Do you have any comments on the proposed new Rule 28.7 (a), then proposed amendments to note 5 on rule 19.1, or the proposed note 1 on rule 28.7, with regard to references by a party to an offer to third party or average forecasts with respect to its own profits?

Unite is supportive of new Rule 28.7 and believes that should a party to the transaction choose to use third party profit forecasts the sole responsibility for publishing such material should be retained by the offeror or offeree provided the

third party profit forecasts meet all the criteria outlined in proposed new Rule 28.1.

Q17 Do you have any comments on the proposed new rules 28.7(b) and (c), and the proposed new notes 2 to 4 on rule 28.7, with regard to a party to an offer referring to consensus profit forecasts with respect to the profits of another party to the offer?

Again, Unite is supportive of new Rules 28.7(b) and (c) and the proposed new notes 2 to 4 on the basis that there should be a high level of accountability when it comes to meeting the criteria set out in proposed new Rule 28.1.

Employees and employee representatives must be able to have access to clear and concise data and in the form of profit estimates there must be a transparent process with responsibility held by the parties to the offer being accountable for what is disclosed.

Q18 Do you have any comments on the proposed new rules 27.1 and 27.2(a)(i) with regard to material changes in information?

Unite agree strongly that if there are any material changes in information disclosed in any document or announcement previously published by it in connection with the offer then the offeree company's employee representatives must have a document containing the relevant information and also any subsequent related documents.

The listings in proposed new rule 27.2 (a), (b) and (c) appear to be complete and cover issues relevant to Unite as Employee representatives and Unite particularly welcome (d) in that directors must release a statement confirming that (i) that the profit forecast, quantified financial benefits statement or asset valuation (as appropriate) remains valid, (ii) where reports were obtained on a profit forecast of quantified financial benefit statement, that the reporting accountants and financial advisers have confirmed that their reports continue to apply and (iii) where an opinion on value was obtained on an asset valuation, that the independent valuer has confirmed that its opinion continues to apply.

Q19 Do you have any comments on the proposed new rules 27.2(a)(II), 27.2(B) and 27.2(c) in relation to the requirement to update certain matters in any subsequent document?

As in response to Q18

Q20 Do you have any further comments on the proposed new rule 27 and the related code amendments?

As in response to Q18

Q21 Do you have any comments on the proposed amendments relating to the current rule 28.4?

Unite welcome a consistent approach to the takeover process and the amendments to current rule 28.4 support this approach. Employees of the offeree company deserve to know that once information has been used in a public arena for the purpose of supporting a takeover bid, that this information should not be open to unnecessary change without full disclosure and so Unite welcome the proposed amendment the third sentence of Rule 28.4 to Rules 24 and 25:

“If a company’s forecast is published first in an announcement, it must be repeated in full, together with the reports, in the next document published in connection with the offer by that company.”

Q22 Do you have any comments on the proposed amendments to rule 26 in relation to documents on display?

Unite support the proposed amendments to Rule 26 as we feel it would strengthen the process by ensuring that any new documents are made available but there should be a more rigid consultation framework outlined in order that all relevant stakeholders, and in particular employees of the offeree company, are made fully aware of any new information.

Comments on questions relating to PCP 2012/2

Unite support the general view that pensioners of a company pension scheme should be taken into account in any takeover and the information relating to the offeror company’s intentions should be made available to these stakeholders in addition to employee representatives.

Q1 Do you have any comment on the amendments to rules 24.2(a) and (b) relating to the requirement for an offeror to disclose, among other matters, its intentions with regard to the offeree company’s pension scheme(s)?

Unite in the capacity of representing employees and therefore members of various company pension schemes fully support rule 24.2 but there is no need to amend the title and remove “regarding the offeree company, the offeror company and their employees” as we feel that within the rule it is not made expressly clear that the offeror must state its intentions for these stakeholders.

Q2 Do you have any comment on the proposed amendments to rule 25.2(a) relating to the requirement for the offeree board to include in the offeree board circular its views on, amongst other matters, the effects of implementation of the offer on the offeree’s company’s pension scheme(s)?

Unite Support the proposed amendments.

Q3 Do you have any comments on the proposed amendments to rules 2.12(a),2.12(b), 24.1, 25.1, 32.1, 32.6(a) and 27.1(b) and note 6 on rule 20.1 in each case relating to the information to be disclosed to the trustees of an offeree company’s pension scheme(s)?

Unite support the proposed amendments.

Q4 Do you have any comments on the proposed amendments to rule 25.9(d) and note 1 on that rule and to rule 32.6 regarding the rights of the trustees of an offeree company’s pension scheme(s) to make known their views on the effects on the scheme(s)?

Unite support the proposed amendments.

Q5 Do you have any comments on the proposed amendments to rule 2.12(d) and to rule 32.1 regarding the requirement for the trustees of the offeree company's pension scheme(s) to be informed of their rights under the code to make known the effects of the offer on the scheme(s)? do you have any comments on the proposed amendment to rule 19.2 relating to directors responsibility statements?

Unite support the proposed amendments.

Q6 Do you have any comments on the proposed new rule 24.3(d)(xvi) and new rule 26.2(i) relating to the requirement for the offer document to include a summary of any agreement between the offeror and the offeree company's employee representatives or trustees of the offeree company's pension scheme(s) in relation to any of the matters described in rule 24.2 and to the requirement for any such agreement(s) to be put on display?

Unit support the proposed new rule 24.3 (xvi) and new rule 26.2(i).

Comments on questions relating to PCP 2012/3

Q1 Do you agree that a residency test should be removed from the code?

No comment

Q2 Do you agree that the residency test should not be retained in relation to offers for certain categories of company?

No comment

Q3 Do you have any comments on the proposed amendments to sections 3(a)(i) and (ii) of the introduction of the code?

No comment

Q4 Do you have any comments on the proposed amendments to the ten year rule and the introduction of a new definition of "multilateral trading facility"?

No comment

Q5 Do you have any comments on the proposed consequential amendments to the code set out in appendix B?

No comment

Conclusion

Whilst Unite are generally supportive of the amendments and new rules outlined in PCP 2012/1 and PCP 2012/2 the main areas of concern remain that in any takeover process there should be no detrimental effect on the employees. So there should be no jobs lost, no plant closures and no cuts to the terms and conditions of employee pensions.

Such guarantees are difficult to enforce, using the Takeover Code as a source of guidance, but any parties to an offer must be held to account and made to provide the business proposal that includes 'profit estimates' to all stakeholders involved in the takeover process. As stated within the Takeover Code itself, this should be understandable and reliable so as to promote transparency and build trust between prospective employers and employees, as well as the other stakeholders including pensioners. This is good accounting practice as well as good business conduct.

Unites previous consultation responses contain information still pertinent to the current Takeover code Rules and Notes and so should be taken as part of this response.

http://www.epolitix.com/fileadmin/epolitix/stakeholders/UNITE_RESPONSE_TO_TAKEOVER_PANEL_CONSULTATION_-_SENT_270511.pdf

**Simon Dubbins
Director of Research
Unite the Union
128 Theobald's Road
Holborn
London
WC1X 8TN**

Contact for further information:

Alex Ryan : 020 7611 2663
Email: alex.ryan@unitetheunion.org

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