

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London EC4M 7DY

By email: supportgroup@thetakeoverpanel.org.uk

28 September 2012

Our Ref MED
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Dear Sir/Madam,

Consultation Paper PCP 2012/3 – Companies Subject to the Takeover Code

We write in response to Consultation Paper PCP 2012/3 on *Companies Subject to the Takeover Code*.

Memery Crystal LLP is a London law firm but our practice is international in character. In particular, a large proportion of our corporate client base consists of AIM-listed companies involved in the natural resources sector. Often these companies will have a holding company in the UK, the Channel Islands or the Isle of Man, but their place of central management and control is outside of these jurisdictions and they are listed on AIM, which is not a regulated market, and so they are not currently subject to the Takeover Code.

We write in response to the consultation paper and the specific questions therein.

Q1 – Do you agree that the residency test should be removed from the Code?

We are broadly in favour of the removal of the residency test from the Code and we agree that this would remove a large amount of existing confusion and uncertainty.

However, we have the following concerns about the implementation of the proposal.

(a) Application to companies with no connection to the UK

Whilst the ‘residency test’ resulted in a certain amount of uncertainty, it did have the benefit of excluding from the reach of the Code companies with absolutely no connection with the UK save for their place of incorporation.

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As a fundamental point, we would question how effectively the Panel would be able to govern a takeover of a company which was, for example, incorporated in the UK but listed on the Hong Kong Stock Exchange, managed in Hong Kong and with no business in the UK and, perhaps, no material percentage of shareholders in the UK. We would also question the benefit to the shareholders of such a company in having this additional level of regulation and cost of compliance which they may not ever have been expecting. This is very different to the situation envisaged in paragraph 2.14(b) of the consultation paper – if a company is actually admitted to the UK's Main Market its board and shareholders would expect a high level of UK regulatory scrutiny, including in relation to takeovers. This would not be the case in the example of the 'Hong Kong' company above.

One solution would be to retain an element of the residency test such that the Code would only apply to public companies incorporated in the UK, the Channel Islands or the Isle of Man where (i) their shares are admitted to trading on a regulated market or any other stock exchange within such jurisdictions; or (ii) their place of central management and control is within such jurisdictions. This is similar to the exemption you envisage in paragraph 2.15 of the consultation paper

This still removes a large element of uncertainty in that companies incorporated in such jurisdictions and listed on AIM would automatically be included under the first limb. The existing uncertainty would remain for unlisted companies or companies listed outside of such jurisdictions, but arguably this is a much smaller group of companies than those currently subject to the residency test.

As an alternative, we would suggest that paragraph 3(d) of the Introduction to the Code should give the Panel the power to waive the application of the Code at the request of a company's board where the Panel consider appropriate and provided that the Company is not admitted to trading on a regulated market or any other stock exchange within the UK, the Channel Islands or the Isle of Man.

(b) Application to existing convertible securities

At the time that the residency test is removed a person may hold a warrant, convertible debt instrument, or other convertible security in a company which formerly was not subject to the Code. Such a security may either not have been 'whitewashed' because at the time of grant the company granting it was not subject to the Code; or the security may have been informally 'whitewashed' in accordance with the requirements of the company's articles of association which often seek to replicate the protections afforded by Rule 9 of the Code where a company is not actually subject to the Code but is AIM-listed and has UK shareholders who would expect some form of similar protection. Such an informal 'whitewash' would often require shareholder approval under the articles.

Any subsequent exercise of the conversion right would require the holder to make a mandatory bid under Rule 9 if as a result the thresholds in Rule 9.1 were breached. It is not difficult to envisage circumstances where it could be manifestly unfair that the holder could be forced to make a bid, or its rights to exercise the convertible security are effectively subject to further whitewash and therefore shareholder approval, where this was not in the original contemplation of the parties. This is particularly so if at the time

shareholders actually did approve the grant of the convertible security and its future exercise under the applicable 'whitewash' provisions of the company's articles as outlined above.

Note 10 to Rule 9.1 makes clear that the Panel will not normally require a mandatory bid to be made upon exercise of rights of conversion or subscription where the convertible security itself was whitewashed at the time of issue. Obviously in the example given above a formal whitewash will not have been obtained if, at such time, the Code did not apply to the relevant company.

Accordingly, we would suggest that at the very least the Panel has the power, upon the application of the company's board or the holder of the convertible security, to waive the requirement to make a mandatory bid under Rule 9 in the circumstances outlined above.

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

We do not agree with this – see paragraph (a) under our answer to Q1 above.

Q3, Q4 and Q5

We have no comments on the matters raised in these questions.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'M. Crystal', is written over the typed name 'MEMERY CRYSTAL LLP'.

MEMERY CRYSTAL LLP