RS 2009/2 Issued on 16 December 2009

THE TAKEOVER PANEL

MISCELLANEOUS CODE AMENDMENTS

STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE EXTERNAL CONSULTATION PROCESS ON PCP 2009/2

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1. Introduction

1.1 On 16 July, the Code Committee of the Takeover Panel (the "Code Committee") published a Public Consultation Paper ("PCP 2009/2" or the "PCP") entitled "Miscellaneous Code amendments". The purpose of this Response Statement is to provide the Code Committee's response to the external consultation process on PCP 2009/2.

(a) Number of responses received

1.2 Ten responses were received. A list of respondents can be found at Appendix B.

(b) Overview of responses

1.3 As stated in the PCP, the purpose of most of the proposed changes was either to clarify the application of existing provisions within the Takeover Code (the "Code") or to codify existing practice in relation to matters which have not previously been covered by the Code. In relation to the majority of the proposals, the respondents were either in favour of the amendments or expressed no view on them. The issues that were raised by the respondents are addressed below.

(c) Code amendments

1.4 The proposed amendments to the Code set out in Appendix A to the PCP have been adopted by the Code Committee subject to the amendments described in the main body of this Response Statement. Where new or amended provisions of the Code are set out in the main body of this Response Statement, they are marked to show changes from the provisions proposed in the PCP.

1.5 The provisions of the Code which are being introduced or amended as a result of the consultation exercise are set out in full in Appendix A to this Response Statement. In Appendix A, underlining indicates new text and striking

through indicates deleted text, as compared to the current provisions of the Code.

1.6 In addition to this Response Statement, the Code Committee is also publishing today RS 2009/1 ("Extending the Code's disclosure regime"). The Code Committee has adopted amendments to Rule 26 both in RS 2009/1 and in this Response Statement. However, as the amendments adopted in RS 2009/1 will not come into effect until 19 April 2010, the amendments to Rule 26 adopted in this Response Statement only are shown in Appendix A.

(d) Implementation

1.7 The amendments introduced as a result of this Response Statement will take effect on 25 January 2010. Amended pages of the Code will be published and sent to subscribers to the Code in advance of that date. The Code as revised will be applied to all offers and possible offers which are announced on or after 25 January 2010.

2. Mandatory bids and the "chain principle" – Note 8 on Rule 9.1

Q.1 Do you agree with the proposed amendments to Note 8 on Rule 9.1?

2.1 PCP 2009/2 set out proposals relating to mandatory bids and the "chain principle" with the intention of strengthening the presumptions in favour of requiring a chain principle bid and thereby increasing the protection available to shareholders.

2.2 Most of the respondents were supportive of the proposals although a number of points were raised in relation to specific parts of the proposals and these points are addressed in paragraphs 2.5 and 2.6 below. One respondent, however, expressed objections to the proposals which it considered were illogical and were disproportionate in that, in its view, problems rarely arise in relation to Note 8 on Rule 9.1.

2.3 The Code Committee has reviewed the proposals in the light of all the comments received. As noted in the PCP, cases involving the chain principle are relatively rare, but difficulties have arisen from time to time in applying Note 8 in practice. The Code Committee, therefore, continues to believe that Note 8 should be amended so that it operates in a more straightforward and predictable manner, but has decided to revise the proposals to address some of the concerns raised.

2.4 Repeated below is the relevant extract from the PCP describing the parties involved in transactions to which Note 8 applies, namely as follows:

> "(a) the company in respect of which a chain principle mandatory bid obligation may be triggered (i.e. the company referred to in Note 8 as the "second company") is "Company C";
>
> (b) the company which is interested, either directly or indirectly through intermediate companies, in a controlling block of shares in Company C (i.e. the company referred to in Note 8 as the "first company") is Company B; and
>
> (c) the person or concert party which may incur a mandatory bid obligation in relation to Company C as a result of acquiring over 50% of the voting rights of Company B is Acquirer A.".

2.5 The Code Committee recognises that, as one respondent noted, where a chain principle mandatory bid for Company C is, or would be, required as result of Acquirer A (or a group of persons acting in concert including Acquirer A) acquiring shares resulting in a holding of over 50% of the voting rights of Company B, the costs of, and associated with, that bid for Company C may affect the attractiveness of Company B to Acquirer A. As a result, shareholders in Company B may either receive a lower consideration for their shares where a bid for Company C is required or Acquirer A may decide not to proceed with its acquisition of shares in Company B.

2.6 The Code Committee also recognises that, if the threshold of the tests set out in paragraph (a) of Note 8 on Rule 9.1 for triggering the Panel's consideration of whether a mandatory bid by Acquirer A was required for Company C is lowered from 50% to 30% as proposed, there might automatically be an increase in the number of situations where "chain principle" bids would be likely to be required with the attendant possibility of an increase in the number of incidences of Company B's shareholder value being adversely affected. The Code Committee considers that this possible market impact is not desirable.

2.7 In addition to proposing the reduction of the percentage threshold at which the tests in paragraph (a) of Note 8 are triggered, the Code Committee proposed:

(a) to amend paragraph (b) of the Note to provide a more objective assessment of the intentions of Acquirer A such that a chain principle bid would normally be required if Company B's holding in Company C might reasonably be considered to be significant to the decision of Acquirer A in acquiring control of Company B; and

(b) to include an additional test relating to the relative market values of the companies in paragraph (a) of the Note.

2.8 The Code Committee has concluded that its concerns about applying the chain principle in practice (in particular the difficulty in making objective judgements about whether the securing of control of Company C is one of Acquirer A's "main purposes" in acquiring over 50% of the voting rights in Company B) will be largely met by the adoption of the amendments referred to in paragraph 2.7 above. Accordingly the Code Committee will not adopt, in paragraph (a) of the Note, the lower percentage threshold proposed in the PCP of 30%: that percentage threshold will, instead, remain at 50%.

2.9 Some respondents asked whether all the tests referred to in paragraph (a) of the amended Note 8 would need to breach the percentage threshold for a presumption to be established in favour of a bid being required. The Code

Committee understands that, whilst the more thresholds that are breached the more likely the Panel would be to require a bid for Company C, it could, depending on the circumstances, be sufficient for a single test to be breached for the Panel to give consideration as to whether the mandatory bid obligation has been triggered.

2.10 In view of the above, Note 8 will be amended so that it reads as follows:

> "*… The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-*
>
> *(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, profits and market values of the respective companies. Relative values of 50%~~30%~~ or more will normally be regarded as significant; or*
>
> *(b) securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company.*".

3. Management incentivisation - Note 4 on Rule 16

Q.2 Do you agree with the proposed amendment to Note 2 on Rule 16, the proposed deletion of Note 4 on Rule 16, the proposed adoption of new Rule 16.2 and the Notes thereon, the amendment to paragraph 4 of Appendix 1 and the related amendments [referred to in section 3 of the PCP]?

(a) Introduction

3.1 Section 3 of the PCP set out proposals aimed at clarifying and simplifying the manner in which, and increasing the consistency with which, the Code applies to management incentivisation arrangements, regardless of their nature, and to reduce the range of circumstances in which consultation with the Panel is required. Accordingly, it proposed the replacement of Note 4 on Rule 16 with a new Rule 16.2.

3.2 Whilst most respondents were supportive of the proposed changes or agreed with some of the proposed amendments, a number of respondents expressed concerns about the proposals. The concerns raised are addressed in following paragraphs.

(b) Proposed application of the provisions to all management, regardless of whether they are shareholders in the offeree company

3.3 Rule 16 provides that, except with the consent of the Panel, an offeror may not make arrangements with shareholders in relation to an offer if there are favourable conditions attached which are not being extended to all shareholders. Existing Note 4 on Rule 16 provides certain exceptions to the restrictions in Rule 16, namely in relation to management incentivisation. An element of the proposals in the PCP was to extend the ambit of the Code in this area to all members of management, regardless of whether they were interested in shares in the offeree company.

3.4 A number of respondents stated that the underlying philosophy of Rule 16 derives from General Principle 1 and is concerned with the equivalent treatment of shareholders. Those respondents thought it wrong, in principle, for the new proposals to apply to members of the management who were not interested in shares in the offeree company, albeit that it was recognised as being unusual for members of the management of the offeree company not to hold (or otherwise be interested in) shares.

3.5 The Code Committee agrees that the underlying philosophy of the existing Note 4 is concerned with the equivalent treatment of shareholders and agrees that it should be made clear that new Rule 16.2 is focussed on members of management who are also interested in shares.

3.6 The Code Committee continues to believe that, for the reasons stated in paragraph 3.6 of the PCP (relating to influencing a board recommendation and

the possible reduction of the consideration available for non-management shareholders), management incentivisation arrangements may also be relevant to offeree company shareholders even where members of the management are not interested in offeree company shares. However, the Code Committee acknowledges that these concerns only arise in practice in a limited number of cases.

3.7 In view of the various considerations referred to above, the Code Committee is adopting the new Rule 16.2 in a form that applies only to members of management who are interested in shares of the offeree company. However, in order to enable the Panel to address the concerns outlined above, Note 4 on Rule 16.2 will require the Panel to be consulted where significant and/or unusual incentivisation arrangements are proposed in relation to members of the management of the offeree company who are not interested in shares of the offeree company. In such cases, the Panel will then be in a position to discuss with the independent adviser to the offeree company the reasons for such arrangements and whether it would be appropriate for additional steps to be taken to safeguard the interests of offeree shareholders over and above disclosing such arrangements in the offer documentation.

(c) Definition of "management"

3.8 The existing Note 4 on Rule 16 refers to "management of the offeree company" and, whilst recognising that the term encompasses a wider group than the board of directors, the PCP did not propose any changes to the use of this term. However, a number of respondents have asked for clarification of the term "management" and raised concerns that the PCP suggested a change in approach.

3.9 The Code Committee understands that the Executive's current practice is not to apply a rigid definition of "management", but that it normally interprets the term as applying to directors and to senior executives who have the power to

make managerial decisions affecting the future development and business prospects of the company. The Code Committee believes that offeree companies can benefit from this flexible approach particularly when considering which individuals can be included within the term "management" for the purposes of a management buy-out ("MBO"), management buy-in or similar transaction.

3.10 The reference to "management" in existing Note 4 on Rule 16 has not, to date, caused problems in practice to the Panel nor, as far as the Code Committee is aware, to practitioners. The Code Committee agrees with the Executive's approach to interpreting the expression "management", recognising that, in relation to some companies, "management" will only encompass the board of directors. The Code Committee expects that the Panel will continue to be consulted on all MBO or similar situations or otherwise where it is unclear which individuals should be included as "management".

(d) Shareholder approval

3.11 The Code Committee has been advised that, as stated in paragraph 3.21 of the PCP, as a result of the implementation of the European Directive on Takeover Bids (Directive 2004/25/EC, the "Directive"), where members of the management who are shareholders in the offeree company are offered shares in the offeror on a different basis from that offered to other offeree company shareholders, a vote of independent shareholders in the offeree company must be held in order to approve the arrangements.

3.12 In those cases where a shareholder vote is not required as a result of the implementation of the Directive as referred to in paragraph 3.11 above, a number of respondents suggested that, regardless of the size or nature of the arrangements, requiring shareholder approval was unnecessary because they believed that the issue is solely one of transparency which could be addressed satisfactorily by requiring appropriate disclosure in the offer documentation.

3.13 Whilst the Code Committee agrees that transparency in relation to management incentivisation arrangements is fundamental, it believes that, in addition to requiring the offeree company's independent adviser to express an opinion on the proposed arrangements, the Panel should have the right to require shareholders' approval to be sought in the circumstances where the arrangements are so significant in size or unusual in their nature. The Code Committee considers that without these additional safeguards, and if disclosure only was required, insufficiently high profile would be given to such incentivisation arrangements.

3.14 As the Code Committee stated in the PCP, it believes that any resolutions required by either Note 2 on Rule 16.1 or what will become the new Rule 16.2 should be voted on separately by the relevant independent shareholders in the offeree company on a poll. In addition, the Code Committee is in agreement with the Panel's practice of permitting (in both cases) a condition relating to the passing of such resolutions to be inter-conditional with a condition relating to any other resolutions relating to the offer, such that the offer itself may be permitted to lapse if either resolution was not approved.

3.15 A number of respondents queried whether the benefit of requiring a vote on management incentivisation arrangements was undermined in cases where the relevant offer resolutions were inter-conditional (or in cases where the resolution in relation to the management incentivisation arrangements is the only resolution and the offer might therefore lapse if such resolution was not approved). The respondents observed that, in such cases, shareholders who voted against a resolution to approve management incentivisation arrangements would put at risk the offer itself and that, as a result, shareholders might feel pressured into voting in favour of proposals to which they objected. The Code Committee recognises this risk, but agrees that it continues to be appropriate to allow such resolutions to be inter-conditional, as the alternative of requiring disclosure only of such arrangements would not be consistent with the approach outlined in paragraph 3.13 above.

3.16 The Code Committee would expect that, save as required as a result of the implementation of the Directive, following the adoption of the new Rule 16.2, shareholders' approval of management incentivisation agreements will only be required in limited circumstances.

(e) The opinion of the offeree company's independent adviser

3.17 A number of respondents were concerned that the reference in paragraph 3.14 of the PCP to paragraph 3.6 of the PCP (relating to influencing a board recommendation and the possible reduction of the consideration available for non-management shareholders), implied that the points highlighted would have to be taken into consideration by an independent adviser when giving its opinion on the arrangements on every occasion. The Code Committee did not intend this inference to be drawn and believes that, in light of the concerns raised, the Rule should simply require the independent adviser to the offeree company to state that the arrangements are "fair and reasonable" and that the proposed inclusion of the additional words "so far as shareholders are concerned" should not be adopted.

3.18 In line with current practice, when forming a view on whether the management incentivisation arrangements are "fair and reasonable" the Code Committee expects the independent adviser to the offeree company to consider whether the additional incentives being provided to management as part of the arrangements are fair and reasonable in the context of the managers acting in their capacity as such or whether, implicitly, the arrangements also include additional benefits and incentives which are being made available to them because they are also interested in shares.

3.19 The Code Committee would also like to clarify that, in arriving at its opinion, it will be appropriate for the independent adviser to take into account all relevant circumstances such that, for example, the adviser may consider an

incentivisation arrangement that is very significant in size to be fair and reasonable if it can be justified by reference to the particular skills of the individual, the circumstances of the company in question or comparable remuneration packages provided to management of peer group companies.

3.20 The Code Committee has also made some minor drafting changes to the new Rule 16.2 to make clear that, as stated in paragraph 3.15 of the PCP, the requirement to give a fair and reasonable opinion arises both where agreement has been reached and where discussions have reached an advanced stage.

(f) Details of arrangements and discussions

3.21 A small number of respondents felt that the requirement to set out "full details" of the proposed management incentivisation arrangements would result in excessive disclosure. The Code Committee's intention was to ensure that shareholders would be made aware of all salient details rather than to require disclosure of the proposed arrangements and discussions in their entirety. The Code Committee accepts that the inclusion of the word "full" might lead to unnecessary information being included in the documentation sent to shareholders and, therefore, has removed it from the new Rule 16.2 and has replaced it with the word "relevant".

(g) Significant and/or unusual arrangements

3.22 The proposed new Rule 16.2(b) was drafted to include the following sentence:

> "**Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or best practice, the Panel must be consulted and its consent to the arrangements obtained.**".

Concerns were raised regarding the inclusion of the words "best practice", which were considered by some respondents to set an unduly high benchmark against which to measure proposed incentivisation arrangements. It was not the Code Committee's intention to require the Panel to be consulted in cases other than those where the proposed arrangements are out-of-line with good practice and, therefore, it considers that it would be helpful to reflect that in the new Rule and to refer to "good practice" rather than "best practice".

(h) Extent to which new remuneration packages are subject to new Rule 16.2

3.23 It is sometimes the case that members of the offeree company's management who will form part of the management of the enlarged group if the offer is successful are offered enhanced remuneration packages that reflect their position in the enlarged group. In some cases the management of the offeree company may receive a significant uplift in their remuneration packages so that they will be rewarded on an equivalent basis to existing management of the offeror (having regard to the roles assumed within the enlarged group). It is also often the case that managers will be offered the opportunity to participate in the offeror's employee share plans, which will give them a right to receive shares in the offeror at a point in the future. A number of respondents were concerned that remuneration arrangements of this nature might be required to be approved by shareholders.

3.24 As explained in the PCP, the Code Committee considers that Rule 16.2 should apply to all incentivisation arrangements for members of the management of the offeree company who are interested in shares regardless of the specific form of the arrangements. Consequently, in considering whether management incentivisation arrangements are fair and reasonable, the independent adviser will need to have regard to the whole of the remuneration package being offered.

3.25 However, where it is clear that any revised remuneration being offered reflects the existing remuneration policy of the offeror and is being offered for the reasons outlined above, although such arrangements would need to be disclosed and an opinion provided by the independent adviser to the offeree company, the Code Committee would not view such arrangements as significant and/or unusual and would not expect advisers to need normally to consult the Panel.

(i) Extent to which Rule 15 offers and proposals are subject to new Rule 16.2

3.26 A number of respondents questioned whether the introduction of the proposed Note 1 on Rule 16.2 (now included as paragraph (c) of Rule 16.2, but amended to refer to management who are or will become shareholders in both the offeree and the offeror, whereas as proposed, the reference was to management who are or will become "interested in shares") meant that offers and proposals made to management option holders in accordance with Rule 15 might be subject to shareholder approval where the management team were being offered a "roll-over" opportunity by an offeror. The Code Committee considers that Rule 15 offers and proposals should not normally be subject to shareholder approval pursuant to Rule 16.2 and has introduced a new Note 1 on Rule 16.2 to that effect.

(j) Incentivisation arrangements entered into or discussed after the publication of the offer document

3.27 A number of respondents suggested that it would be appropriate to include an express requirement to provide offeree shareholders with details of incentivisation arrangements where they are proposed after the offer document has been published or where changes are made to existing arrangements or proposals, details of which have already been sent to shareholders.

3.28 The Code Committee believes that any change to the status of management incentivisation arrangements or discussions should be discussed with the Panel and, in the event they are material, for disclosure of relevant details to be made, for the offeree company's independent adviser to state its opinion that the arrangements are fair and reasonable and, if so merited, for shareholders' approval to be sought. Accordingly, the Code Committee has included an express provision as to the potential effect of changes to the status of management incentivisation arrangements or discussions as an additional Note (Note 3) on the new Rule 16.2.

(k) The requirement to consult the Panel

3.29 A number of respondents were concerned that, notwithstanding the contrary view expressed in the PCP, the effect of the proposals would be that, in practice, the level of consultation with the Panel would increase.

3.30 The Code Committee notes that, as drafted, the current Note 4 on Rule 16 requires consultation in all cases and whilst in practice consultation has not taken place in every case, the new Rule should implement a much reduced consultation requirement.

3.31 The Code Committee considers that it is possible that, for an initial period following the implementation of the new Rule, advisers may exercise a degree of caution and choose to consult the Executive in order to gauge whether their interpretation of Rule 16.2 accords with the Executive's. However, the Code Committee expects that, even if this is the case, the period of increased consultation will be of limited duration. The Code Committee also believes that the cause of some of the concerns expressed will be removed as a result of the various amendments to the original proposals set out in this Response Statement.

(l) Consequential amendments

3.32 In addition to the changes to the proposals set out in the PCP referred to above, the Code Committee has made some minor drafting changes to the new Rule 16.2 to make it clear that details of agreed arrangements or, where discussions are advanced, proposed arrangements need to be disclosed. The wording and format of Rule 16.2(a) have also been amended slightly, mainly to address the concern that the words "proposes to enter into" would be interpreted widely and would include discussions regarding management incentivisation proposals that had yet to reach a sufficiently advanced stage that it was appropriate for the Rule to apply. These amendments are set out in paragraph 3.33 below. In view of the points made by respondents referred to in paragraphs 3.12 and 3.13 above, the Code Committee has introduced a cross-reference to Rule 16.2 into Rule 25.4. This amendment is set out in Appendix A below.

(m) Proposed amendments

3.33 Set out below is the new Rule 16.2 and its Notes as the Code Committee is adopting it. The Rule and its Notes are marked up to show the changes from the proposals contained in the PCP and reflect the points made above. The other amendments proposed in the PCP in relation to what becomes Rule 16.1 are set out in Appendix A:

> "**16.2 MANAGEMENT INCENTIVISATION**
>
> **(a) Except with the consent of the Panel, where an offeror has:**
>
> **(i) entered into; or**
>
> **(ii) reached an advanced stage of discussions on proposals ~~proposes~~ to enter into**
>
> **any form of incentivisation arrangements with members of the offeree company's management who are interested in shares in the offeree company, relevant details of the arrangements or proposals must be disclosed and the independent adviser to the offeree**

company must state publicly that in its opinion the arrangements are fair and reasonable ~~so far as shareholders are concerned~~. If it is intended to put incentivisation arrangements in place following completion of the offer, but either no discussions or only limited discussions have taken place, this fact must be stated publicly and ~~full~~ relevant details of the discussions disclosed. Where no incentivisation arrangements are proposed, this must be stated publicly.

(b) Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or ~~best~~ good practice, the Panel must be consulted and its consent to the arrangements obtained. The Panel may also require, as a condition of its consent, that the arrangements be approved at a general meeting of the offeree company's shareholders.

(c) Where the members of the management are shareholders in the offeree company and, as a result of the incentivisation arrangements, they will become shareholders in the offeror on a basis that is not being made available to all other offeree company shareholders, such arrangements must be approved at a general meeting of the offeree company's shareholders.

(~~c~~d) Any approval as required by paragraph (b) or (c) above must be by a separate vote of independent shareholders, taken on a poll.

NOTES ON RULE 16.2

~~*1. Requirement for general meeting approval*~~

~~*Where the relevant members of management are interested in any securities of the offeree company and, as a result of the incentivisation arrangements, they will become interested in securities of the offeror on a basis that is not being made available to all shareholders, such arrangements must be approved at a general meeting of the offeree company's shareholders.*~~

1. Rule 15

Where members of the management of the offeree company are to receive offeror securities pursuant to an appropriate offer or proposal made in accordance with Rule 15, Rule 16.2 (a) and (b) will apply, but shareholder approval will not normally be required under this Rule in respect of such offer or proposal.

2. Management retaining an interest

If the only shareholders in the offeree company who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of this Rule are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree company propose to sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

3. Where incentivisation arrangements are put in place following the offer being made or the proposed arrangements are amended

Where, following the offer document being published, there is a change in the terms of any agreed or proposed management incentivisation arrangements or the offeror enters into, or reaches an advanced stage of discussion on proposals to enter into any form of management incentivisation arrangements, the Panel must be consulted. The Panel may require details of the changes to the arrangements or status of the discussions to be disclosed, the independent adviser to state publicly that in its opinion the arrangements are fair and reasonable and, if appropriate, a separate vote of independent shareholders to be held to approve the arrangements.

4. Incentivisation of members of management who are not interested in shares in the offeree company

Where members of management who are not interested in shares in the offeree company are to be offered significant and/or unusual incentivisation arrangements by the offeror, the Panel must be consulted.".

4. Requirement for display documents to be published on a website and other amendments to Rule 26

Q.3 Should the Code be amended to require display documents to be made available for inspection on a website in addition to hard copy form until the end of the offer (and any related competition reference period)? Do you have any comments on the proposed amendments to Rule 26 or the new Notes 2, 3, 4 and 5?

Q.4 Do you agree that the Code should be amended to delete Rule 26(c) as suggested above? Do you agree that Rules 26(d) and (f) should be amended as suggested above?

4.1 Section 4 of the PCP set out proposals for documents that are required to be available for inspection in connection with an offer to be published on a website in addition to being put on display in hard copy form and for the list of documents that are required to be put on public display to be amended.

4.2 Although one respondent was concerned that the proposals may lead to the unnecessary distribution of proprietary information to persons who are unconnected with the transaction in question, all other respondents were in agreement with the proposals.

4.3 One respondent questioned whether it was appropriate to retain the requirement for documents to be put on display in hard copy form at premises in the City of London. The Code Committee considers that, whilst most people are now able to access information published on websites, others may not be able to do so or may choose to review the information in hard copy form. In view of this, the Code Committee believes that the requirement for display documents to be made available for inspection on a website should be in addition to, rather than in substitution of, the requirement to make those documents available for review in hard copy form.

4.4 In view of the above, the Code Committee has adopted the amendments to Rule 26 and the notes thereon in the form set out in the PCP.

5. When there is no need to make an offer – the Note on Rule 2.7

Q.5 Do you agree that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel?

Q.6 Do you agree that Note 5 on Rule 21.1 should be deleted?

Q.7 Do you agree with the proposed amendment to the Note on Rule 2.7 as set out above and to the proposed consequential amendments?

5.1 Section 5 of the PCP proposed (i) to codify current practice whereby, if an offeror does not wish to proceed with making an offer it has previously announced because subsequently a higher offer has been announced by a third party, the Panel must be consulted and (ii) the deletion of Note 5 on Rule 21.1.

(a) Note on Rule 2.7

5.2 The PCP proposed that the Note on Rule 2.7 should be amended to make clear that the ability of an offeror to choose not to proceed with an offer where a higher competing offer has been made should be subject to the consent of the Panel in all circumstances.

5.3 Whilst all the respondents were in agreement with this approach, one respondent queried whether the point at which the lower offeror should be permitted by the Panel not to proceed with its offer should be once the higher offeror has announced a firm intention to make an offer and not, as proposed, the point at which the higher offeror has made its offer (i.e. published its offer document).

5.4 The Code Committee considers that the likelihood of the higher offeror not proceeding with its offer having made a firm announcement of its intention to do so is remote. For this reason, and given the additional financing costs that might have to be incurred by the lower offeror, the Code Committee has decided that the appropriate time after which the lower offeror can (with the Panel's consent) be released from its obligation to make its offer is the making by the higher offeror of an announcement of its firm intention to make an offer. However, the Code Committee understands that in the event that the higher offeror's offer was subject to a pre-condition, the Panel would be unlikely to agree to the lower offeror not proceeding with its offer until such time as any pre-conditions attaching to the making of the higher offeror's offer had been satisfied.

5.5 A number of respondents suggested that the factors that the Code Committee identified in paragraph 5.7 of the PCP as factors to which the Panel would be likely to have regard in deciding whether to permit a lower offeror not to proceed with its offer should be set out in the Note on Rule 2.7. The Code Committee believes that this is not necessary.

5.6 The Code Committee is adopting the Note on Rule 2.7 as set out in paragraph 5.14 below.

(b) Deletion of Note 5 on Rule 21.1

(i) Introduction

5.7 The Code Committee also considered the second limb of the Note on Rule 2.7, which relates to Note 5 on Rule 21.1.

5.8 Note 5 on Rule 21.1 currently provides as follows:

> "*5. Where there is no need to make an offer*
>
> *The Panel may allow an offeror not to make an offer if, at any time during the offer period prior to the publication of the offer document:-*
>
> *(a) the offeree company passes a resolution in general meeting as envisaged by this Rule; or*
>
> *(b) the Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting.*".

5.9 The PCP proposed that Note 5 should be deleted. This was on the basis that:

(a) any matter which is subject to Rule 21.1 (which restricts the board of an offeree company from taking certain action which might have the effect of frustrating an offer unless the company obtains the prior approval of its shareholders in general meeting) would normally be the subject of a condition to an offer; and

(b) Rule 2.7 provides that an offeror which has announced a firm intention to make an offer will normally be required to make the offer unless it is permitted to invoke a pre-condition or condition to its offer in accordance with Rule 13 (and therefore taking into account the materiality test set out in Rule 13.4(a), which provides that an offeror should not invoke any pre-condition or condition so as to cause an offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to the right to invoke the pre-condition or condition are of material significance to it in the context of the offer).

The Code Committee considered that Note 5 on Rule 21.1 was inconsistent with Rule 2.7, in that it does not make reference to the materiality test in Rule 13.4(a), and should therefore be deleted.

(ii) Respondents' comments

5.10 Of the five responses which were received in relation to this question, one response was in favour of the proposed deletion of the Note and the remaining four responses were against it. The reasons cited by the respondents for wishing to retain the Note were, in summary, as follows:

(a) certain respondents considered that Note 5 on Rule 21.1 was a stand-alone provision, entirely separate from Rule 13, which sets out circumstances in which an offeror which has announced a firm intention to make an offer will be permitted not to make that offer, irrespective of whether it is able to invoke a condition to its offer (either because the offer is not subject to an appropriate condition or because the circumstances which potentially give rise to the right to invoke the condition are not sufficiently material to satisfy the test set out in Rule 13.4(a)). These respondents considered that Note 5 should be retained so as to continue to provide an exception for an offeror from having to make an offer in the circumstances provided in that

Note, in addition to the exception provided for in the first limb of Rule 2.7; and

(b) certain other respondents acknowledged that Note 5 on Rule 21.1 was linked to Rule 13, but suggested that this could be addressed by amending Note 5 to make clear that, in deciding whether to exercise its discretion under the Note to permit an offer not to have to post its offer, the Panel should have regard to Rule 13.4(a). These respondents believed that the Note should be retained so that the consequences of an offeree company taking frustrating action are clear in the Code.

(iii) The Code Committee's conclusions

5.11 The Code Committee has concluded that, notwithstanding that a majority of respondents wished to retain the provision, Note 5 on Rule 21.1 should be deleted. This conclusion is based on the following analysis:

(a) it is clear from Rule 2.7 that an offeror which has announced a firm intention to make an offer will be required to proceed and make that offer unless it would otherwise be permitted to invoke a pre-condition or condition to which it has announced that offer to be subject, taking into account the materiality test set out in Rule 13.4(a). Therefore, in deciding whether to exercise its discretion under Note 5 on Rule 21.1, the Panel must have regard to Rule 13. Although the Code Committee would have no objection in principle to Note 5 on Rule 21.1 being amended to make this clear (and being retained in these terms), the Code Committee considers that this would render the Note effectively redundant, and that it would therefore be preferable for it to be deleted; and

(b) a separate reason for deleting the Note is that to retain it would imply that an offeror is more likely to be able to withdraw an offer which has been announced, but not yet made, than it is to lapse an offer that has been made. However, this is not correct given that Rule 2.7 makes

clear that the test for determining whether an offeror can withdraw an offer which it has announced but has not yet made is the same as the test for determining whether an offeror can lapse an offer which it has made. In both cases, the relevant test is whether the offeror is permitted to invoke a condition to the offer, taking into account the materiality test set out in Rule 13.

5.12 However, taking account of the points raised by respondents, the Code Committee notes that, albeit that this has never happened to date, the situation could arise in the context of an offer, either before or after the publication of the offer document, of the board of an offeree company being authorised to take 'frustrating action' for the purposes of Rule 21.1, either because that action had been approved by shareholders in the offeree company or with the consent of the Panel pursuant to the final paragraph of Rule 21.1, in circumstances in which the action in question was contrary to the offeror's wishes but in which the offeror could not withdraw or lapse the offer. The fact that the offeror would not be permitted to withdraw or lapse the offer could arise because either:

(a) the offer was not subject to an appropriate condition (for example, because the offer was a mandatory offer under Rule 9 which, under Rule 9.3(a), can be subject only to a 50% acceptance condition); or

(b) even though the offer was subject to an appropriate condition, the action in question was not, in the opinion of the Panel, of material significance to the offeror in the context of the offer such that it was not permissible for the offeror to invoke the condition under Rule 13.

5.13 In such circumstances, albeit that the offeror could not withdraw or lapse its offer, the Panel might, exceptionally, nonetheless consider whether it might be appropriate for the offeror to be permitted to reduce the value of its offer, if the terms of the offer so permitted. For example, this might be appropriate where, following the announcement of a firm intention to make an offer, the board of the offeree company were to seek and obtain shareholder approval for

the payment of a non-ordinary course interim dividend of an amount which was not sufficient to trigger the materiality test in Rule 13.4(a).

(c) The amendments

5.14 In view of the points considered in sub-sections (a) and (b) above, the Code Committee is deleting Note 5 on Rule 21.2 and adopting the Note on Rule 2.7 as follows:

> "*When there is no need to make an offer*
>
> *With the consent of the Panel, an announced offeror need not make an offer if a competitor has already announced a firm intention to make ~~made~~ a higher offer.*".

6. Offerors who decide not to pursue a UK or EU competition clearance or who are prohibited from making an offer by the Competition Commission or the European Commission – Rule 12.2

Q.8 Do you agree that Rule 12.2 should be amended as proposed?

6.1 Section 6 of the PCP proposed amendments to Rule 12.2 to clarify the period of time for which an offeror who decides not to pursue a competition clearance or who is prohibited from making an offer following a competition reference will be prevented from making a new offer. All the respondents to Question 8 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

7. No obligation to extend - Rule 31.3

Q.9 Do you agree with the proposed amendment to Rule 31.3?

7.1 In Section 7 of the PCP, the Code Committee explained that, as drafted, Rules 13.4(a) and 31.3 were inconsistent because the right not to proceed with an offer referred to under Rule 31.3 only applies where it is the acceptance

condition alone that is being invoked. The Code Committee, therefore, proposed to amend Rule 31.3 to remove the inconsistency and make it clear that the only circumstance in which the obligation to extend an offer falls away at the first or any subsequent closing date is if the acceptance condition has not been satisfied by that date. All the respondents to Question 9 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

8. Intentions of the directors of the offeree company with regard to alternative offers – Rule 25.3(a)(v)

Q.10 Do you agree that Rule 25.3(a)(v) should be amended as proposed?

8.1 In Section 8 of the PCP the Code Committee explained that:

(a) pursuant to Rule 25.1(a) the board of the offeree company "must send its opinion on the offer (including any alternative offers) to the offeree company's shareholders and persons with information rights"; and

(b) Rule 25.3(a) provides that the first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state various details including, by virtue of sub-paragraph (v), "whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer".

The Code Committee stated that it was of the view that, where the offeror has made alternative offers, the offeree board's circular should make clear which, if any, of the offers the directors of the offeree company intend to elect for and proposed an amendment to Rule 25.3(a)(v) to that effect.

8.2 A number of respondents to Question 9 either disagreed with the proposed amendment or queried the value of the information which would be disclosed

if the proposal was adopted. Concerns were expressed that the directors' decisions would be influenced by their personal circumstances and, therefore, simply being aware of which alternative offer the directors were intending to elect for would provide other shareholders with little or no guidance as to the relative merits of each of the alternatives available.

8.3 Whilst the Code Committee accepts the validity of the concerns expressed, it is also concerned that, in certain cases, the difference in the nature of the consideration offered under alternative offers may be significant, for example where the consideration under one alternative offer is entirely cash and under the alternative offer comprises securities which have not been admitted to trading. In such cases, an awareness of which of the alternative offers the directors of the offeree company intend to elect for may be relevant to shareholders in reaching their own decision.

8.4 In view of the above, the Code Committee has decided not to adopt the amendment to Rule 25.3(a)(v) as proposed in the PCP. Instead, the Rule will be amended so as to give the Panel the power to require directors of the offeree company to state which alternative offer they intend to elect for, but not to make it a requirement in all cases.

8.5 Some respondents expressed concerns that the amendment as proposed would have the effect of forcing offeree company directors to decide which alternative they wished to elect for at an earlier stage than they would have done otherwise. The Code Committee considers that, as the revised amendment is likely to result in the information being required to be stated only in a limited number of cases, it is reasonable, in such circumstances and in view of the benefit to shareholders, to require the directors of the offeree company to come to a decision by the time that the offeree board's circular is sent to shareholders. Where, following the publication of the offeree board circular, a director decides to elect for an alternative other than the one indicated in the documentation the Panel must be consulted to establish whether and, if so, how this information should be communicated to offeree company shareholders.

8.6 The Code Committee also considers that, whilst it will not be a requirement to explain the reasons why a director intends to elect for a particular offer, an explanation of the relevant factors taken into account by the directors in making their decisions may be helpful to shareholders.

8.7 In light of the above the Code Committee is adopting Rule 25.3(a)(v) as set out below:

> "**25.3 INTERESTS AND DEALINGS**
>
> **(a) The first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state:—**
>
> …
>
> **(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept the offer (and, if there are alternative offers, and if so required by the Panel, which alternative they intend to elect for) or to reject the offer.**".

9. Material changes - Rule 27.1

Q.11 Do you agree that Rule 27.1 should be amended as proposed?

9.1 In Section 9 of the PCP the Code Committee explained that, under Rule 27.1, documents sent by an offeror or the board of the offeree company to shareholders of the offeree company and persons with information rights subsequent to the publication of the offer document and the first major offeree board circular respectively must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period and, if there have been no such changes, must state that this is the case. The Code Committee stated that it considered that an additional item should be added to the list of matters which must specifically be updated, namely any known material changes in the financial or trading position of the company in question, and proposed an amendment to Rule 27.1 to that effect.

All the respondents to Question 11 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

10. Vendor of part only of an interest in shares – Note 6 on Rule 9.1

Q.12 Do you agree that Note 6 on Rule 9.1 should be amended as proposed?

10.1 In Section 10 of the PCP, the Code Committee explained that sometimes a person will sell part only of his shareholding in a company to a purchaser and will retain the remainder. The Code Committee noted that the third sentence of Note 6 stated that:

> "*The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser in such a way as effectively to allow the purchaser to exercise a significant degree of control over the retained shares, in which case a general offer would normally be required.*".

The Code Committee stated that it considered that it was correct that a mandatory offer should be required in circumstances where a purchaser has, in effect, acquired a significant degree of control over the shares retained by the vendor, but that it believed that the purchaser of the shares in such circumstances should be treated as having acquired an interest in the shares retained by the vendor (in accordance with paragraph (2) of the definition of "interests in securities") and not that the vendor and the purchaser should be considered to be acting in concert with each other as regards the company in question. The Code Committee therefore proposed to amend Note 6 on Rule 9.1 to reflect this.

10.2 All the respondents to Question 12 agreed with this proposal. However, two respondents observed that, depending on the circumstances, it would still be possible for the vendor and the purchaser to be acting in concert and suggested that the Note should be drafted to reflect this possibility. The Code Committee agrees with this suggestion and has, therefore, adopted Note 6 as set out below.

> *"6. Vendor of part only of an interest in shares*
>
> *… The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser and/or has effectively allowed the purchaser to acquire a significant degree of control over the shares retained by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case a general offer would normally be required.…".*

11. Partial offers by means of a scheme of arrangement – Rule 36

Q.13 Do you agree that Rule 36 should be amended as proposed?

11.1 In Section 11 of the PCP the Code Committee explained that in Section 16 of PCP 2007/1 ("Schemes of arrangement") it had proposed that certain provisions of the Code should be disapplied in the context of a scheme of arrangement and that those provisions included certain provisions of Rule 36 regarding partial offers. The Code Committee also explained in PCP 2009/2 that, whilst it was not aware of any case in which a partial offer had been implemented by means of a scheme of arrangement, it believed that it was not necessary for Rules 36.4, 36.5 and 36.7 to be disapplied in the event that a partial offer was implemented by means of a scheme of arrangement and, therefore, proposed the necessary amendments to give effect to that. All the respondents to Question 13 agreed with this proposal and the Code Committee has, therefore, adopted these amendments.

APPENDIX A

Amendments to the Code

Introduction

10 ENFORCING THE CODE

…

(c) Compensation rulings

Where a person has breached the requirements of any of Rules 6, 9, 11, 14, 15, 16.1 or 35.3 of the Code, the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. …

Rule 2.7

2.7 CONSEQUENCES OF A "FIRM ANNOUNCEMENT"

…

NOTE ON RULE 2.7

When there is no need to make an offer

With the consent of the Panel, ~~A~~an announced offeror need not make an offer if a competitor has already announced a firm intention to make~~made~~ a higher offer~~ or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1~~.

Rule 9.1

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

…

NOTES ON RULE 9.1

…

6. Vendor of part only of an interest in shares

Shareholders sometimes wish to sell part only of their shareholdings or a purchaser may be prepared to purchase part only of a shareholding. This arises particularly where a purchaser wishes to acquire shares carrying just under 30% of the voting rights in a company, thereby avoiding an obligation under this Rule to make a general offer. The Panel will be concerned to see whether in such circumstances the vendor is acting in concert with the purchaser ~~in such a way as~~ and/or has effectively ~~to~~ allowed the purchaser to ~~exercise~~ acquire a significant degree of control over the shares retained ~~shares~~by the vendor such that the purchaser should be treated as having acquired an interest in them by virtue of paragraph (2) of the definition of interests in securities, in which case a general offer would normally be required. …

…

8. The chain principle

… The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the interest in shares which the first company has in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors including, as appropriate, the assets, ~~and~~ profits and market values of the respective companies. Relative values of 50% or more will normally be regarded as significant; or

(b) ~~one of the main purposes~~ securing control of the second company might reasonably be considered to be a significant purpose of acquiring control of the first company ~~was to secure control of the second company~~.

Rule 11.2

11.2 WHEN A SECURITIES OFFER IS REQUIRED

…

NOTES ON RULE 11.2

…

4. Management retaining an interest

~~In a management buyout or similar transaction, if the only offeree shareholders who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of Note 4 on Rule 16 are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree propose to sell, in exchange for offeror securities, more than 10% of the offeree's shares.~~

~~*If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree shares), the Panel will normally require such securities to be made available to all shareholders on the same terms.*~~

See Note 2 on Rule 16.2.

Rule 12.2

12.2 COMPETITION REFERENCE PERIODS

…

(b) If the offer period ends in accordance with Rule 12.2(a):-

…

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.

NOTES ON RULE 12.2

…

4. Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority

Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.

Rule 16

RULE 16. SPECIAL DEALS AND MANAGEMENT INCENTIVISATION

16.1 SPECIAL DEALS WITH FAVOURABLE CONDITIONS

…

NOTES ON RULE 16.1

…

2. Offeree company shareholders' approval of certain transactions — eg disposal of offeree company assets

… At this meeting the vote must be a separate vote of independent shareholders and must be taken on a poll. Where a sale of assets takes place after the offer has become unconditional, the Panel will be concerned to see that there was no element of pre-arrangement in the transaction.

…

~~*4. Management retaining an interest and other management incentivisation*~~

~~*Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Panel is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the Panel would not normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Panel will require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, the Panel will also require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders and must be taken on a poll. Holdings of convertible securities, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer.*~~

~~*Where the offeror wishes to arrange other incentivisation for management to ensure their continued involvement in the business, the Panel willrequire, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements are fair and reasonable.*~~

~~*The Panel must be consulted in all circumstances where this Note may be relevant.*~~

16.2 MANAGEMENT INCENTIVISATION

(a) Except with the consent of the Panel, where an offeror has:

(i) entered into; or

(ii) reached an advanced stage of discussions on proposals to enter into

any form of incentivisation arrangements with members of the offeree company's management who are interested in shares in the offeree company, relevant details of the arrangements or proposals must be disclosed and the independent adviser to the offeree company must state publicly that in its opinion the arrangements are fair and reasonable. If it is intended to put incentivisation arrangements in place following completion of the offer, but either no discussions or only limited discussions have taken place, this fact must be stated publicly and relevant details of the discussions disclosed. Where no incentivisation arrangements are proposed, this must be stated publicly.

(b) Where the value of the arrangements entered into or proposed to be entered into is significant and/or the nature of the arrangements is unusual either in the context of the relevant industry or good practice, the Panel must be consulted and its consent to the arrangements obtained. The Panel may also require, as a condition of its consent, that the arrangements be approved at a general meeting of the offeree company's shareholders.

(c) Where the members of the management are shareholders in the offeree company and, as a result of the incentivisation arrangements, they will become shareholders in the offeror on a basis that is not being made available to all other offeree company shareholders, such arrangements must be approved at a general meeting of the offeree company's shareholders.

(d) Any approval as required by paragraph (b) or (c) above must be by a separate vote of independent shareholders, taken on a poll.

NOTES ON RULE 16.2

1. Rule 15

Where members of the management of the offeree company are to receive offeror securities pursuant to an appropriate offer or proposal made in accordance with Rule 15, Rule 16.2 (a) and (b) will apply, but shareholder approval will not normally be required under this Rule in respect of such offer or proposal.

2. Management retaining an interest

If the only shareholders in the offeree company who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of this Rule are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree company propose to

sell, in exchange for offeror securities, more than 10% of the offeree company's shares.

3. Where incentivisation arrangements are put in place following the offer being made or the proposed arrangements are amended

Where, following the offer document being published, there is a change in the terms of any agreed or proposed management incentivisation arrangements or the offeror enters into, or reaches an advanced stage of discussion on proposals to enter into any form of management incentivisation arrangements, the Panel must be consulted. The Panel may require details of the changes to the arrangements or status of the discussions to be disclosed, the independent adviser to state publicly that in its opinion the arrangements are fair and reasonable and, if appropriate, a separate vote of independent shareholders to be held to approve the arrangements.

4. Incentivisation of members of management who are not interested in shares in the offeree company

Where members of management who are not interested in shares in the offeree company are to be offered significant and/or unusual incentivisation arrangements by the offeror, the Panel must be consulted.

Rule 19.10

19.10 DISTRIBUTION OF DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO THE PANEL AND OTHER PARTIES TO AN OFFER

(b) …

Documents must also be sent in hard copy form to the Panel and the advisers to all other parties to the offer at the time of publication. Such documents, announcements or information must not be released to the media under an embargo (see also ~~the~~ Note 1 on Rule 26).

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

…

NOTES ON RULE 21.1

…

~~*5. When there is no need to make an offer*~~

~~*The Panel may allow an offeror not to make an offer if, at any time during the offer period prior to the publication of the offer document:*~~

~~*(a) the offeree company passes a resolution in general meeting as envisaged by this Rule; or*~~

~~*(b) the Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting.*~~

~~*6*~~*5. Service contracts*

…

~~*7*~~*6. Established share option schemes*

…

~~*8*~~*7. Pension schemes*

…

~~*9*~~*8. Redemption or purchase by an offeree company of its own securities*

…

~~*10*~~*9. Shares carrying more than 50% of the voting rights*

…

Rule 24.5

24.5 SPECIAL ARRANGEMENTS

… **and full particulars of any such agreement, arrangement or understanding.**

See also Rule 16.2.

Rule 25.3

25.3 INTERESTS AND DEALINGS

(a) The first major circular published by the offeree board in connection with the offer (whether recommending acceptance or rejection of the offer) must state:—

…

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept ~~or reject~~ the offer (and, if there are alternative offers, and if so required by the Panel, which alternative they intend to elect for) or to reject the offer.

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

Except with the consent of the Panel, copies of the following documents must be made available for inspection and published on a website from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer ~~period~~ (and any related competition reference period). The offer document or offeree board circular must state which documents are so available ~~and~~, the place (being a place in the City of London or such other place as the Panel may agree) where inspection can be made and the address of the website on which the documents are published:—

…

~~(c) all service contracts of offeree company directors;~~

(c~~d~~) any report, letter, valuation or other document any part of which is exhibited or referred to in any document published by or on behalf of the offeror or the offeree company (other than the service contracts of offeree company directors and any material contracts that are not entered into in connection with the offer);

(d~~e~~) … **;**

(e~~f~~) any material contract entered into by an offeror or the offeree company, or any of their respective subsidiaries, in connection with the offer that is described in the offer document or offeree board circular (as appropriate) in compliance with Rule 24.2(a), Rule 24.2(c) or Rule 25.6(a);

(f~~g~~) … **;**

(g~~h~~) … **;**

(h~~i~~) … **;**

(i~~j~~) … **;**

(j~~k~~) … **;**

(kl) … **;**

(lm) … **;**

(mn) … **;**

(no) … **;**

(op) … **; and**

(pq) … **.**

NOTES ON RULE 26

1. Copies of documents

…

2. Website to be used for publication

A party to an offer should normally use its own website for publishing documents to be on display. If a party to an offer does not have its own website, or intends to use a website maintained by a third party for this purpose, the Panel should be consulted.

3. "Read-only" format

Documents on display on a website must be published in a "read-only" format so that they may not be amended or altered in any way.

4. Shareholders, persons with information rights and other persons in non-EEA jurisdictions

See Note 3 on Rule 19.11 and the Note on Rule 30.3.

5. Amendment, variation or updating of documents on display

If a document on display is amended, varied or updated during the period in which it is required to be on display under Rule 26, then the amended, varied or updated document should also be put on display.

Rule 27.1

27.1 MATERIAL CHANGES

Documents subsequently sent to shareholders of the offeree company and persons with information rights by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such

changes, this must be stated. In particular, the following matters must be updated:-

…

(b) any known material changes in the financial or trading position (Rules 24.2(a)(iv) and 25.2);

(~~b~~c) … **;**

(~~c~~d) … **;**

(~~d~~e) … **;**

(e~~f~~) … **;**

(~~f~~g) … **; and**

(~~g~~h) … **.**

Rule 31.3

31.3 NO OBLIGATION TO EXTEND

There is no obligation to extend an offer if the acceptance condition~~s of which are not met~~ has not been satisfied by the first or any subsequent closing date.

Rule 35.3

35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE

… **In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16.1).**

Rule 36

36.4 OFFER FOR BETWEEN 30% AND 50%~~*~~

…

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL~~*~~

…

36.7 SCALING DOWN~~*~~

…

~~*This Rule is disapplied in a scheme.~~

NOTES ON RULE 36

…

4. Schemes of arrangement

The Panel should be consulted where it is proposed to implement a partial offer by means of a scheme of arrangement.

Rule 37.3

37.3 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEREE COMPANY

(a) Shareholders' approval

… **Where it is felt that the redemption or purchase is in pursuance of a contract entered into earlier or another pre-existing obligation, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained (Notes 1~~, 5~~ and ~~10~~9 on Rule 21.1 may be relevant).**

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

…

4 WHITEWASH CIRCULAR

…

(f) Rule 16.2 (management incentivisation);

(~~f~~g) … ;

(g~~h~~) … ;

(~~h~~i) … ;

(i~~i~~j) … ;

(j~~j~~k) … ;

(~~k~~l) … **;**

(~~l~~m) … **;**

(~~m~~n) … **; and**

(~~n~~o) … **.**

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

…

14 PROVISIONS DISAPPLIED IN A SCHEME

…

(k) … **; and**

(l) … **~~; and~~.**

~~(m) Rules 36.4, 36.5 and 36.7 (partial offers).~~

APPENDIX B

List of respondents

Ashurst LLP

Association for Financial Markets in Europe (formerly the London Investment Banking Association)

BVCA (The British Private Equity and Venture Capital Association)

DLA Piper

GC 100 Group

Salmaan A Khawaja of Grant Thornton

Institute of Chartered Accountants in England and Wales

Quoted Companies Alliance

Share Plan Lawyers

Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law