

RS 2009/3 Issued on 5 March 2010

THE TAKEOVER PANEL

AMENDMENTS TO RULE 5.2(c)(iii)

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2009/3**

1. Introduction and summary

- 1.1 This Response Statement sets out the response of the Code Committee of the Takeover Panel (the “**Code Committee**”) to the external consultation process in relation to the proposals in PCP 2009/3 (“Amendments to Rule 5.2(c)(iii)”), which was issued by the Code Committee on 9 December 2009 (the “**PCP**”). Unless the context otherwise requires, words and expressions defined in the Takeover Code (the “**Code**”) have the same meanings when used in this Response Statement.
- 1.2 In summary, the PCP proposed the amendment of Rule 5.2(c)(iii) of the Code, such that Rule 5 (“Timing restrictions on acquisitions”) would permit acquisitions of interests in shares in the offeree company by a unilateral offeror following the first closing date of its offer (or, if earlier, the first closing date of any competing offer).
- 1.3 Having considered the responses to the PCP following the expiry of the consultation period, the Code Committee has adopted the amendments to Rule 5.2(c)(iii) as proposed in the PCP. The amended provision will come into effect on Monday, 8 March 2010.

2. Rule 5 and the proposal to amend Rule 5.2(c)(iii)

- 2.1 The primary purpose of Rule 5 is to provide an opportunity for the board of directors of the offeree company to consider an offer and give advice to the company’s shareholders before a person can obtain or consolidate effective control of the company.
- 2.2 Rule 5.1 therefore imposes restrictions on acquisitions of interests in shares carrying voting rights in a company to which the Code applies, as follows:

“5.1 RESTRICTIONS

Except as permitted by Rule 5.2:—

(a) when a person (which for the purpose of Rule 5 includes any persons acting in concert with him) is interested in shares which in the aggregate carry less than 30% of the voting rights of a company, he may not acquire an interest in any other shares carrying voting rights in that company which, when aggregated with the shares in which he is already interested, would carry 30% or more of the voting rights; and

(b) when a person is interested in shares which in the aggregate carry 30% or more of the voting rights of a company but does not hold shares which carry more than 50% of the voting rights, he may not acquire an interest in any other shares carrying voting rights in that company. ...”.

2.3 However, the restrictions on acquisitions in Rule 5.1 are not absolute and certain exceptions are provided in Rule 5.2. For example, Rule 5.2(c)(iii) provides as follows:

“5.2 EXCEPTIONS TO RESTRICTIONS

The restrictions in Rule 5.1 do not apply to an acquisition of an interest in shares carrying voting rights in a company by a person:—

...

(c) after the person has announced a firm intention to make an offer provided that, at the time of the acquisition, there is no pre-condition to which the making of an offer is subject and:

...

(iii) either:

(1) the first closing date of that offer has passed and it has been announced that such offer is not to be referred to the Competition Commission (or such offer does not come within the statutory provisions for possible reference) and it has been established that no action by the European Commission will any longer be taken in respect of such offer pursuant to Council Regulation 139/2004/EC (or such offer does not come within the scope of such Regulation); or

(2) the first closing date of any competing offer has passed and it has been announced that such competing offer is not to be referred to the Competition Commission (or such competing offer does not come within the statutory provisions for possible reference)

and it has been established that no action by the European Commission will any longer be taken in respect of such offer pursuant to Council Regulation 139/2004/EC (or such offer does not come within the scope of such Regulation); ...”.

- 2.4 As noted in paragraph 2.9 of the PCP, the effect of Rule 5.2(c)(iii) is that, in the case of a unilateral offer, the minimum period of time afforded to the board of the offeree company to give advice to its shareholders will normally be 21 days from the date on which the offer document is published, i.e. the first closing date of the offer. Unless the offer falls outside the statutory provisions for possible reference to the Competition Commission and the scope of the EC Merger Regulation, this period is, in effect, extended until the date on which it is confirmed that the offer will not be the subject of a “phase II” investigation by the Competition Commission or the European Commission.
- 2.5 As noted in paragraph 2.10 of the PCP, the rationale underlying the “competition limb” of Rule 5.2(c)(iii) is that a unilateral offeror should be prevented from taking advantage of the uncertainty that might be created by the outstanding possibility of a competition reference in order to put the outcome of its offer beyond doubt (for example by purchasing shares through the 50% threshold, following which the offer would become unconditional).
- 2.6 The Code Committee reviewed this rationale in the PCP, concluding that outstanding competition issues provided inadequate reason for restricting an offeror from acquiring interests in the shares of the offeree company and therefore for restricting shareholders from selling their shares in the offeree company. In essence, the Code Committee concluded that the board of an offeree company would have adequate opportunity between the announcement by a unilateral offeror of its firm intention to make an offer and the first closing date of the offer to give its advice to offeree company shareholders, including, if necessary, an explanation that the existence of outstanding competition issues might lead to market uncertainty and resultant downward pressure on the offeree company’s share price.

2.7 In addition, the Code Committee noted in the PCP that the exception in Rule 5.2(c)(iii) for offers which do not come within the statutory provisions for possible reference to Office of Fair Trading (the “OFT”) was, in effect, redundant. Whereas it might be thought that an offeror with no substantive competition issues to overcome might be able to take advantage of this exception with relative ease, this is not in fact the case. This is because:

- (a) the statutory provisions for possible reference are wide and extend even to offers in which there is no realistic prospect that the merger will be referred by the OFT to the Competition Commission; and
- (b) even if the offer does fall outside the statutory provisions for possible reference, the Panel is not competent to adjudge this and a unilateral offeror will therefore be required either:
 - (i) to procure a “found-not-to qualify” decision from the OFT. This is likely to involve the offeror incurring significant costs; or
 - (ii) to provide confirmations from the offeree company (and any competing offerors) that they agree with the assessment of the offeror’s competition lawyers that the offer falls outside the statutory provisions for possible reference. However, such confirmations are unlikely to be forthcoming, given that the offeror will be a unilateral offeror.

2.8 The PCP therefore proposed the amendment of Rule 5.2(c)(iii), such that Rule 5 would permit acquisitions of interests in shares in the offeree company by a unilateral offeror following the first closing date of its offer (or, if earlier, the first closing date of any competing offer), irrespective of whether:

- (a) it had been confirmed that the offer (or any competing offer) would not be subject to a phase II investigation by the UK or EC competition authorities; or

- (b) the offer (or any competing offer) fell within the jurisdiction of the UK or EC competition authorities.

3. Responses to the consultation and the Code Committee's conclusions

3.1 Six responses to the PCP were received. Five of the respondents submitted their comments on a non-confidential basis. A list of the non-confidential respondents can be found in the Appendix to this Response Statement. The Code Committee would like to thank the respondents for their comments.

3.2 In summary:

- (a) four respondents agreed with the proposed amendments to Rule 5.2(c)(iii);
- (b) one respondent disagreed with the proposals; and
- (c) the sixth respondent considered that there were arguments both in favour of and against the proposals and that it might be preferable for any amendments to Rule 5.2(c)(iii) to be reconsidered as part of a wider review of Rule 5.

3.3 The respondent who disagreed with the proposed amendments considered that:

- (a) the Code Committee had not put forward a convincing case as to why circumstances had changed since 1989, when Rule 5.2(c)(iii) was brought into its current form, such that the restrictions to the exceptions introduced then should be removed now;
- (b) amendments to the Code should not facilitate the acquisition or consolidation of control of a company by a unilateral offeror unless the argument for change was compelling. The respondent considered that the effect of the proposals would be to reverse an amendment specifically intended to protect offeree company shareholders and noted that currently

“greater shareholder stewardship is being promoted in many quarters”;
and

- (c) it would be preferable for the proposed amendment to Rule 5.2(c)(iii) to be considered as part of the wider review of Rule 5 that the Code Committee had stated in the PCP that it proposed to undertake.

3.4 The Code Committee continues to believe that there is a compelling case for amending Rule 5.2(c)(iii) as proposed in the PCP. The Code Committee agrees with one of the respondents who noted that it seemed arbitrary that the speed with which a unilateral offeror could gain control of an offeree company was determined by whether the bid fell within the statutory provisions for a possible competition reference. In particular, the Code Committee understands that the narrowness of the exception in Rule 5.2(c)(iii) has, in a number of cases, operated unduly harshly against offerors in circumstances where there was no realistic prospect of the OFT referring the offer to the Competition Commission. The Code Committee has considered whether it would be possible to broaden the exception in Rule 5.2(c)(iii) for such cases whilst continuing to restrict acquisitions by offerors which are more likely to have substantive competition issues but has concluded that this is not feasible.

3.5 The Code Committee notes that the purpose of Rule 5 is not to prohibit a person from acquiring or consolidating control of a company to which the Code applies. The purpose is rather to regulate the speed with which such control is acquired or consolidated and to give the board of the offeree company a sufficient period of time in which to communicate its advice to shareholders. If, having received that advice, shareholders nonetheless wish to sell their shares in the knowledge that this might result in their being acquired by a unilateral offeror, the Code Committee does not believe that the Code should prevent this.

3.6 The Code Committee notes that two respondents considered that it would be preferable for any amendments to Rule 5.2(c)(iii) to be made following the more general review of Rule 5 which the Code Committee stated in the PCP that it was proposing to undertake in due course. It is not currently clear to the Code

Committee when such a general review of Rule 5 might be undertaken. However, for the reasons given above, the Code Committee believes that Rule 5.2(c)(iii) has been identified as operating unsatisfactorily. The Code Committee believes that Rule 5.2(c)(iii) should be amended regardless of any further amendments that might be made following a general review of Rule 5 and that this should be done as soon as is practicable.

- 3.7 In the light of the above, the Code Committee has decided to adopt the amendments to Rule 5.2(c)(iii) as proposed in the PCP, so that it will read as follows:

“5.2 EXCEPTIONS TO RESTRICTIONS

The restrictions in Rule 5.1 do not apply to an acquisition of an interest in shares carrying voting rights in a company by a person:—

...

(c) after the person has announced a firm intention to make an offer provided that, at the time of the acquisition, there is no pre-condition to which the making of an offer is subject and:

...

(iii) the first closing date of that offer or of any competing offer has passed; ...”.

- 3.8 The amendments will take effect on Monday, 8 March 2010. The electronic version of the Code on the Panel’s website will be updated as of that date so as to reflect the amendments. Hard copies of the relevant amended pages of the Code will be published in due course.

4. Impact of the amendments

- 4.1 As mentioned in the PCP, the Code Committee believes that the amendments to Rule 5.2(c)(iii):

(a) are a proportionate response to the problems identified in the PCP;

- (b) will not result in material costs being incurred by parties to offers or other market participants; and
- (c) will, in certain circumstances, result in cost savings for offerors who will no longer be required to file unnecessary merger notices with the OFT.

APPENDIX**Non-confidential respondents**

1. DLA Piper UK LLP
2. GC100 Group
3. The Institute of Chartered Accountants in England and Wales
4. The Quoted Companies Alliance
5. 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