

RS 2014/2 23 December 2014

THE TAKEOVER PANEL

POST-OFFER UNDERTAKINGS AND

INTENTION STATEMENTS

**RESPONSE STATEMENT BY THE
CODE COMMITTEE OF THE PANEL FOLLOWING
THE CONSULTATION ON PCP 2014/2**

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1. Introduction

(a) Background

1.1 On 15 September 2014, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2014/2**” or the “**PCP**”) in which it proposed to amend the Takeover Code (the “**Code**”) so as to introduce a new framework for the regulation of statements made by offerors and offeree companies relating to any particular course of action they commit or intend to take, or not take, after the end of the offer period (the “**new framework**”).

1.2 The stated objectives of the new framework were to:

- (a) provide clarity for shareholders and other stakeholders as to the status of statements made by offerors and offeree companies in relation to action they will, or will not, take following the offer;
- (b) increase the effectiveness of the enforcement tools available to the Panel when offerors or offeree companies choose to make voluntary commitments; and
- (c) enable offerors and offeree companies to make informative statements of intention.

1.3 In summary, the Code Committee’s intention was that the new framework should:

- (a) distinguish between:
 - (i) “**post-offer undertakings**”, i.e. statements relating to any particular course of action that an offeror or offeree company *commits* to take, or not take, after the end of the offer period

and with which it will be required to comply for the period of time specified in the undertaking, unless a qualification or condition set out in the undertaking applies; and

- (ii) “**post-offer intention statements**”, i.e. statements relating to any particular course of action that an offeror or offeree company *intends* to take, or not take, after the end of the offer period, which will be required to be accurate statements of the party’s intentions at the time that they are made and based on reasonable grounds;
- (b) in view of the distinction between them, apply separate requirements to post-offer undertakings and post-offer intention statements; and
 - (c) enhance the Panel’s ability to monitor compliance with and, therefore, enforce post-offer undertakings by:
 - (i) requiring an offeror or offeree company which makes a post-offer undertaking to provide periodic written reports to the Panel; and
 - (ii) enabling the Panel to require the appointment of an independent supervisor to monitor compliance with a post-offer undertaking.

(b) Responses to the consultation

1.4 The consultation period in relation to PCP 2014/2 ended on 24 October 2014. The Code Committee received comments on the consultation questions from 20 respondents, including from trade and professional associations, financial advisers and accountancy firms, academics, a law firm and a firm of chartered secretaries. The respondents who submitted comments on a non-confidential basis are listed in Appendix A and copies of their responses have been published on the Panel’s website at www.thetakeoverpanel.org.uk. The

remaining respondents submitted their comments on a confidential basis. The Code Committee thanks all of the respondents for their comments.

- 1.5 Respondents were generally supportive of the new framework for the regulation of post-offer undertakings and post-offer intention statements and of the proposed amendments to the Code. In particular, most respondents supported the “two tier” regime on which the new framework would be based. However, a significant number of the respondents considered that a party to an offer which made a post-offer undertaking should be permitted to include qualifications or conditions which referred to unspecified events of “*force majeure*” or to events, acts or circumstances beyond the party’s control.

(c) *The Code Committee’s conclusions*

- 1.6 Having considered the responses to the consultation, the Code Committee has, in most cases, adopted the amendments to the Code which were proposed in PCP 2014/2. However, the Code Committee has introduced modifications to certain of the proposals.
- 1.7 The Code Committee continues to believe that the introduction of the new framework by means of the adoption of the amendments to the Code set out in this Response Statement is a proportionate means of addressing the issues with the current framework identified by the Code Committee, as described in Section 1 of the PCP.

(d) *Code amendments*

- 1.8 The amendments to the Code which the Code Committee has adopted in this Response Statement are set out in Appendix B. In Appendix B, except as otherwise stated, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code. 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 as they were proposed to be amended in the PCP.

(e) ***Implementation***

- 1.9 The amendments to the Code introduced as a result of this Response Statement will take effect, and revised pages of the Code will be published, on Monday, 12 January 2015.
- 1.10 Statements made by a party to an offer before the implementation date will continue to be governed by the provisions of the Code currently in force, including the current Note 3 on Rule 19.1. Statements made by a party to an offer on or after the implementation date will be governed by the provisions of the Code as amended as a result of this Response Statement.
- 1.11 In the case of any doubt as to the application of the Code to any statements made by a party to an offer, the Panel should be consulted.

2. Scope and application of the new framework

(a) *Introduction*

2.1 In Section 2 of the PCP, the Code Committee described the relevant provisions of the current Code and the relevant powers of the Panel. In summary, the Code Committee explained in Section 2 of the PCP:

- (a) the requirement under Rule 24.2 for an offeror to state its intentions with regard to the business, employees and pension schemes of the offeree company;
- (b) the requirement under the current Note 3 on Rule 19.1 for a party to an offer to comply with statements of intention;
- (c) the Panel's power to make compliance rulings under Section 10(b) of the Introduction to the Code;
- (d) the Panel's power to seek court enforcement under section 955 of the Companies Act 2006;
- (e) the Panel's disciplinary powers and sanctions under Section 11 of the Introduction to the Code; and, accordingly
- (f) the Panel's current responsibility for enforcing voluntary commitments.

(b) *Scope of the new framework*

2.2 As indicated elsewhere in this Response Statement, respondents generally supported the proposed requirements which would apply when a party chooses to make a post-offer undertaking.

2.3 However, a small number of respondents considered that enforcing post-offer undertakings after the end of an offer period went beyond the Panel's remit, and that this might be undesirable or lead to unintended consequences. One respondent queried whether post-offer undertakings should, in fact, be enforced through the market abuse regime for false or misleading statements.

2.4 The Code Committee notes the concerns expressed by these respondents but wishes to emphasise (as it did in paragraph 2.17 of the PCP) that, given the existing application of the Panel's enforcement and disciplinary powers in relation to various provisions of the Code, the Panel is already responsible for the enforcement of voluntary commitments made by a party to an offer relating to action to be taken, or not taken, after the end of an offer period. As regards the market abuse regime administered by the Financial Conduct Authority, this will continue to operate in parallel with the provisions of the Code. However, the Code Committee does not believe that it would be appropriate for post-offer undertakings to be enforceable only through the market abuse regime and understands that, in any event, the market abuse regime does not operate to require parties to comply with undertakings which they have made.

(c) ***Role of advisers***

2.5 A number of respondents sought clarification as to whether the Panel would regard an adviser which had advised a party to an offer in relation to the making of a post-offer undertaking or a post-offer intention statement as having any continuing role with regard to that undertaking or intention statement after the end of the offer. For example, respondents sought clarification as to:

- (a) whether the new framework would have the effect of imposing any additional new or on-going responsibilities on an adviser to a party to an offer;

- (b) the expected relationship, if any, between an adviser and any supervisor appointed under the proposed new Rule 19.7(g); and
 - (c) the extent to which an adviser would be expected to be involved in any investigation or action taken by the Panel in the event that a party to an offer did not comply with the terms of a post-offer undertaking or took action different from that described in a post-offer intention statement.
- 2.6 With regard to advisers' responsibilities, the Code Committee believes that the Panel will expect an adviser to a party to an offer at the time that a post-offer undertaking or intention statement is made to provide competent advice to that party as to the requirements for, and consequences of, making the undertaking or statement. The Code Committee notes paragraph 3(f) of the Introduction to the Code makes clear that financial advisers have a responsibility to ensure, so far as they are reasonably able, that their client and its directors are aware of their responsibilities under the Code and will comply with them. In particular, Note 1 on Rule 19.1 explains that the Panel regards financial advisers as being responsible for guiding their clients with regard to any information published during the course of an offer.
- 2.7 However, the Code Committee recognises that an adviser's mandate is likely to come to an end once the offer has ended and would not, therefore, expect an adviser to be responsible for ensuring, for example, that its former client complies with the terms of a post-offer undertaking after that time.
- 2.8 Similarly, the Code Committee would not expect the party's original advisers to have any on-going relationship with any supervisor appointed under the new Rule 19.7(i).
- 2.9 In view of the above, the Code Committee envisages that an adviser's involvement in any subsequent investigation or action by the Panel would be limited to responding to questions in relation to the advice which it gave at the time that the post-offer undertaking or intention statement was made. For example, the Code Committee believes that, as part of any such investigation,

the Panel would wish to establish whether any breach of the Code arose, in whole or in part, from an adviser's failure to ensure that its client was aware of its responsibilities under the Code at the time that the post-offer undertaking or intention statement was made.

(d) Enforcement

2.10 One respondent sought clarification as to the measures which the Panel might use to enforce a post-offer undertaking or to remedy a breach of a post-offer undertaking.

2.11 As indicated above, Section 2 of the PCP described the enforcement tools which are available to the Panel, i.e. the power to make compliance rulings under Section 10(b) of the Introduction to the Code and the power to seek court enforcement under section 955 of the Companies Act 2006. These enforcement tools are not being changed and will apply to the requirements of the Code introduced under the new framework.

2.12 As indicated in Section 2 of the PCP, the Panel's enforcement powers are most effective if the Panel is able to act in anticipation of a contravention of a rule-based requirement in order to restrain a person from doing a particular thing or otherwise to secure compliance with the requirements of the Code. By contrast, where a person has already acted in contravention of a rule-based requirement, it may be more difficult for the Panel to make a compliance ruling requiring the action taken to be unwound or to obtain a court order to this effect. This emphasises the need for the Code to provide a framework that will enable the Panel to take early action prior to a contravention of a post-offer undertaking occurring, as proposed in the PCP.

(e) Sanctions

2.13 One respondent asked which of the Panel's sanctions could be applied in the event of a breach of the Code's requirements in relation to post-offer

undertakings and which could be applied in the event of a breach of the Code's requirements in relation to post-offer intention statements.

- 2.14 As indicated above, the Panel's disciplinary sanctions for breach of the Code (as distinct from its powers to enforce the Code) are set out in Section 11 of the Introduction to the Code and were described in Section 2(f) of the PCP. The Code Committee believes that the disciplinary sanction, if any, which should be imposed on a person who breaches a requirement of the Code will depend on the particular circumstances of the case, regardless of whether the breach relates to a post-offer undertaking made under the new Rule 19.7 or to a post-offer intention statement made under the new Rule 19.8.

3. Post-offer undertakings

(a) *The distinction between “post-offer undertakings” and “post-offer intention statements”*

(i) *Introduction*

3.1 In Section 3(a) of the PCP, the Code Committee proposed that the new framework for the regulation of statements made by parties to an offer (i.e. offerors and offeree companies) in any document, announcement or other information published in relation to the offer should distinguish between:

- (a) a “**post-offer undertaking**”, i.e. a statement relating to any particular course of action that the party *commits* to take, or not take, after the end of the offer period; and
- (b) a “**post-offer intention statement**”, i.e. a statement relating to any particular course of action that the party *intends* to take, or not take, after the end of the offer period.

It was proposed that new definitions of a “post-offer undertaking” and a “post-offer intention statement” should be introduced into the Code to this effect.

3.2 In addition, the Code Committee proposed that it should be made clear in the Code that a commitment or undertaking which a party to an offer has given directly to one or more identified parties, including a government agency such as the Competition and Markets Authority (the “**CMA**”), would not be subject to the requirements applicable to post-offer undertakings or the enforcement regime applicable to such undertakings. This was on the basis that any commitment or undertaking given directly to one or more such identified parties should be enforced by that party or parties by means of the appropriate contractual or other regime applicable to the commitment or undertaking. The Code Committee proposed to introduce a Note on the new definition of “post-offer undertaking” to this effect.

(ii) *Summary of respondents' views and the Code Committee's response*

- 3.3 In general, respondents strongly supported the distinction proposed to be made between “post-offer undertakings” and “post-offer intention statements”, although one respondent questioned the need for a separate definition of a “post-offer intention statement”.
- 3.4 Two respondents sought clarification as to whether or not a statement of commitment or intention which had been made by a party prior to the commencement of an offer period would fall to be treated as either a post-offer undertaking or a post-offer intention statement. The Code Committee confirms that it is not intended that such statements should be treated as a post-offer undertaking or post-offer intention statement and notes that the new definitions relate to statements “made by a party to an offer in any document, announcement or other information published in relation to the offer” [*emphasis added*]. In view of this, if any statement made prior to the commencement of the offer period were to be repeated as a post-offer undertaking or a post-offer intention statement in any document, announcement or other information published in relation to the offer, the Code Committee considers that it would then be subject to the new framework.
- 3.5 One respondent sought clarification of the application of the new framework to statements made orally, rather than in writing. The Code Committee expects that, if an oral statement was made by a party to an offer or a representative of such a party which appeared to be a commitment to take or not to take action after the end of the offer period, the Panel Executive (the “**Executive**”) may require the relevant party to make an announcement either clarifying the status of the statement or, if it had been made incorrectly, withdrawing it. If, as a result of that clarification, the statement were to become a post-offer undertaking, the provisions of the new Rule 19.7 would clearly then apply.

- 3.6 Another respondent queried whether the new framework would apply to a statement made privately by a party to an offer if the statement was then published by the “beneficiary” of the statement. The Code Committee’s intention is that the new framework should apply only to post-offer undertakings and post-offer intention statements published by a party to an offer itself and not to private statements made by a party which are then published by the beneficiary or by a third party. In order to make this clear, the Code Committee has made the following modification to the new definitions of both a “post-offer undertaking” and a “post-offer intention statement”:

“A statement made by a party to an offer in any document, announcement or other information published by it in relation to the offer ...”.

- 3.7 The Code Committee notes that, under the new Rule 19.7, a party to an offer may only make a post-offer undertaking after having consulted the Panel and that any post-offer undertaking must expressly state that it is being made as a post-offer undertaking. The Code Committee therefore believes that a party to an offer should not be able to make a post-offer undertaking inadvertently.
- 3.8 A number of respondents commented on the proposed Note on the definition of “post-offer undertaking”, which was intended to make clear that certain types of commitment or undertaking would not be regarded as post-offer undertakings for the purposes of the Code. As proposed in the PCP, the Note provided as follows:

“NOTE ON POST-OFFER UNDERTAKING

A commitment or undertaking given directly to one or more identified parties, including to a government or governmental agency in order to obtain an official authorisation or regulatory clearance, will not be regarded as a post-offer undertaking.”.

- 3.9 Two respondents drew attention to the phrase “*given directly to one or more identified parties*” and queried whether the use of this phrase meant that commitments given to, for example, employees, pension scheme trustees or

creditors generally would fall within the Note (and would not therefore be regarded as post-offer undertakings).

3.10 Separately, one respondent queried whether a deed poll¹ entered into by a party to an offer would fall within or outside the regime for post-offer undertakings. The respondent was concerned that the enforcement of a deed poll might prove impractical where the beneficiaries comprised a wide group and considered that a party to an offer might therefore use a deed poll to make commitments to a wide community without then being subject to the Code's requirements for post-offer undertakings. The respondent considered that one way of dealing with the issue might be for there to be a requirement for a party to an offer to consult the Panel when entering into a deed poll and for the Panel to have discretion as to the approach to be taken. The respondent suggested that, if the party then chose to enter into a deed poll, it should be required to state that it was not a post-offer undertaking and so would not therefore be subject to the reporting and monitoring regime for post-offer undertakings.

3.11 In proposing the Note on the definition of "post-offer undertaking" in the PCP, the Code Committee's intention was to make clear that a commitment which an offeror or offeree company gives to an identified person or group of persons, and which is capable of enforcement by that person or group of persons - whether under the law of contract or otherwise - will not be regarded as a post-offer undertaking for the purposes of the Code. For example, where an agency, such as the CMA or the European Commission, procures "behavioural undertakings" from an offeror in relation to anti-trust matters, the Code Committee believes that the relevant legislative provisions will provide a regime for the enforcement of those "behavioural undertakings" by that agency and that it would be inappropriate for them also to be subject to enforcement by the Panel as post-offer undertakings. In addition, where an

¹ A "deed poll" is a deed executed by one person alone which can be enforced by a third party or parties in whose favour it is executed. A person can therefore unilaterally undertake an enforceable obligation to another person or class of persons by executing a deed poll in their favour. The beneficiaries do not have to be a party to the document or provide consideration in order to be able to enforce the deed poll. *Source: Practical Law*

offeror has entered into a contractual arrangement with, for example, the offeree company's employees, pension scheme trustees or creditors, the appropriate person to enforce that contract will be the party or parties entitled to do so pursuant to the contract.

3.12 The Code Committee believes that the provisions of the new Rule 19.7 provide a clear framework by means of which a party to an offer may make a commitment to take, or not take, a particular course of action after the end of the offer period. Accordingly, the Code Committee considers that it would not generally be appropriate for a party to an offer which wishes to make such a commitment to do so by means of a deed poll. If, exceptionally, a party to an offer did wish to make such a commitment by means of a deed poll, the Code Committee considers that the party should be required to consult the Panel in advance so that the Panel can consider whether the proposed commitment would more appropriately be made as a post-offer undertaking, in which case the requirements of the new Rule 19.7 would apply.

3.13 The Code Committee also believes that if, with the agreement of the Panel, the party to the offer proceeded to make a commitment other than by means of a post-offer undertaking, the party should normally be required, when referring to the commitment in any announcement or document, to make clear that the commitment had not been made as a post-offer undertaking in accordance with the requirements of the new Rule 19.7 and that it would therefore not be enforceable by the Panel as a post-offer undertaking.

3.14 In view of the above, the Code Committee has:

- (a) adopted an amended version of the proposed Note on the definition of "post-offer undertaking", as follows:

"NOTE ON POST-OFFER UNDERTAKING"

A commitment ~~or undertaking given~~ relating to action to be taken, or not taken, after the end of the offer period made directly to, and enforceable by, one or more identified parties (whether by name or as

a member of an identified class of persons), including an undertaking given to a government or governmental agency in order to obtain an official authorisation or regulatory clearance, will not be regarded as a post-offer undertaking.”; and

- (b) adopted a Note 1(b) on the new Rule 19.7, as follows:

“1. Commitments which are not regarded as post-offer undertakings

...

(b) A party to an offer which proposes to make a commitment to take, or not take, any particular course of action after the end of the offer period other than by means of a post-offer undertaking must consult the Panel in advance. The Panel will then consider whether the proposed commitment would more appropriately be made as a post-offer undertaking. If, with the agreement of the Panel, the party to the offer makes that commitment by the proposed means, the Panel will normally require any reference to the commitment in any document, announcement or other information published by it in relation to the offer to make clear that the commitment has not been made as a post-offer undertaking in accordance with the requirements of Rule 19.7 and that the commitment will therefore not be enforceable by the Panel as a post-offer undertaking.”.

(b) Making a post-offer undertaking and the consequences of doing so

(i) Introduction

3.15 In Section 3(b) of the PCP, the Code Committee proposed that the new framework should have certain features with regard to the making of a post-offer undertaking and the consequences of doing so. In summary, these features, which were reflected in the proposed new Rules 19.7(a) to (e), were as follows:

- (a) a party to an offer should be required to consult the Panel in advance if it wishes to make a post-offer undertaking;
- (b) a post-offer undertaking should be required:

- (i) expressly to state that it is a post-offer undertaking;
 - (ii) to specify the period of time for which the undertaking is being made or the date by which the course of action committed to will be completed; and
 - (iii) to state prominently any qualifications or conditions to which the undertaking is subject;
- (c) the terms of any post-offer undertaking made by a party to an offer, including any course of action committed to be taken, or not taken, and the qualifications or conditions to which the post-offer undertaking is subject, should be specific and precise, be readily understandable and capable of objective assessment, and not depend on subjective judgements of the party to the offer or its directors. In particular, in paragraph 3.9 of the PCP, the Code Committee stated that it did not consider that a party to an offer should be permitted to include qualifications or conditions with regard to:
- (i) a “material change of circumstances”;
 - (ii) directors’ “fiduciary duties”; or
 - (iii) unspecified events of “*force majeure*”;
- (d) any post-offer undertaking made by a party to an offer other than in a document published by that party in connection with the offer should be required to be included in the next such document published by that party. In addition, the Panel should be able to require a document to be sent to the offeree company’s shareholders and persons with information rights and made readily available to its employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its pension scheme(s);

- (e) a party to an offer should be required to comply with the terms of any post-offer undertaking for the period of time specified in the undertaking and to complete any course of action committed to by the date specified in the undertaking;
 - (f) a party to an offer should be excused compliance with the terms of a post-offer undertaking only if a qualification or condition set out in the undertaking applies;
 - (g) if a party to an offer wishes to rely on a qualification or condition to a post-offer undertaking in order to take, or not take, a course of action otherwise than in compliance with the terms of that undertaking, that party should be required to consult the Panel in advance and obtain the Panel's consent to rely on that qualification or condition; and
 - (h) except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate) with the Panel's consent, the party should be required promptly to make an announcement describing the course of action it has taken, or not taken, and explaining how and why the relevant qualification or condition applies.
- (ii) *Application of the new framework to post-offer undertakings made by an offeree company*

3.16 Two respondents sought confirmation that the new framework would apply to a post-offer undertaking made by an offeree company (in addition to an offeror).

3.17 The Code Committee confirms that the new framework will apply to post-offer undertakings made by an offeree company in the same way as it will apply to undertakings made by an offeror.

(iii) *Application of the new framework to post-offer undertakings following a subsequent takeover of a party to an offer*

3.18 One respondent queried whether a post-offer undertaking made by a party to an offer would continue to be binding following a subsequent takeover of that party.

3.19 The Code Committee considers that a post-offer undertaking made by the offeree company during the course of an offer would not bind an offeror which acquired the offeree company (whether the original offeror or a subsequent offeror) unless that offeror had endorsed the post-offer undertaking as its own undertaking.

3.20 However, the Code Committee considers that a post-offer undertaking made by an offeror would continue to bind that offeror in the event that it were subsequently to be acquired by a third party.

(iv) *Appropriateness of a post-offer undertaking*

3.21 One respondent queried whether there might be circumstances in which the Panel could, or should, refuse to allow a post-offer undertaking to be made, for example, where:

- (a) the proposed qualifications and conditions were so numerous as to render the undertaking worthless or where the nature of the qualifications and conditions had the effect of negating the undertaking;
- (b) it was proposed that the undertaking would remain in effect for a period of more than five years, on the basis that undertakings for a longer period might raise legal and enforcement issues;

- (c) the proposed undertaking was, in effect, a contractual commitment in relation to an individual director or employee of the offeree company;
or
- (d) it would be more appropriate for the proposed undertaking to be included as a provision in the company's articles of association or framed as a direct contractual commitment.

3.22 The Code Committee does not believe that it is necessary for the Panel to have a power to limit the number of qualifications or conditions to a post-offer undertaking or to refuse to permit a post-offer undertaking to be made subject to particular qualifications or conditions (provided that the qualifications and conditions comply with the new Rule 19.7(c)). However, the Code Committee considers that the Panel would wish to understand the meaning and effect of any post-offer undertaking proposed to be made by a party to an offer when it is consulted under the new Rule 19.7(a) and that it would wish the proposed post-offer undertaking to be amended if its meaning or effect was unclear.

3.23 The Code Committee would expect a party to an offer only very rarely to seek to make a post-offer undertaking for a period of more than five years but does not propose to restrict this. However, the Code Committee considers that there would be a responsibility on a party making a post-offer undertaking to ensure that the undertaking was lawful. If an undertaking was proposed to be made for an extended period, the Code Committee expects that the Panel would wish to seek appropriate assurances from the party and its advisers as to its lawfulness.

3.24 The Code Committee does agree, however, that the Panel should have the discretion not to permit a party to an offer to include in a post-offer undertaking a commitment which the Panel determines would more appropriately be given in a different form. The Code Committee envisages that commitments which the Panel may determine should not be included in a post-offer undertaking may include, for example, a commitment to a specified person (for example, an individual director or employee of the offeree

company) which could be framed as a direct contractual commitment with that person.

3.25 The Code Committee has therefore introduced a Note 1(a) on the new Rule 19.7, as follows:

“1. Commitments which are not regarded as post-offer undertakings

(a) The Panel may decide not to permit a party to an offer to make a post-offer undertaking where the Panel determines that the proposed commitment would more appropriately be given in a different form (including, for example, a commitment to a specified person which could be included in a private contract with that person).”

(v) *Permissibility of qualifications and conditions*

3.26 Respondents generally agreed that the ability of a party to an offer to include qualifications and conditions to post-offer undertakings specifying the circumstances in which the undertaking would cease to apply would be an important aspect of the new framework.

3.27 A significant number of the respondents considered that a party to an offer which made a post-offer undertaking should be permitted to include qualifications or conditions which referred to unspecified events of “*force majeure*” or to events, acts or circumstances beyond the party’s control. Some respondents were concerned that, if such qualifications or conditions were prohibited, a party would be encouraged to include a long list of specific qualifications and conditions to its post-offer undertaking. These respondents considered that such a list would be undesirable and that, in any event, it would never be an exhaustive list of the events, acts and circumstances beyond the party’s control which could affect the party’s ability to comply with the post-offer undertaking.

3.28 The Code Committee considers that any qualifications and conditions which a party wishes to include must meet the standards of the new Rule 19.7(c). This

is to ensure that the reader is able to understand the meaning and scope of the post-offer undertaking and any qualifications and conditions to which the undertaking is subject, and that the post-offer undertaking can be enforced effectively.

- 3.29 However, the new Rule 19.7(c) is not intended to operate so as to encourage parties to set out long lists of qualifications and conditions referring to specific, but remote, possible events. The Code Committee considers that a qualification or condition, if appropriately drafted, could encompass such events without referring to each and every possible event individually and still meet the requirements of Rule 19.7(c).
- 3.30 In this regard, the Code Committee considers that a party would normally be permitted to include a qualification or condition to its post-offer undertaking which provides that the post-offer undertaking will no longer apply where the Panel determines that the party is unable to comply with the post-offer undertaking as a result of an event, act or circumstance beyond the party's control. The Code Committee considers that a qualification or condition in these terms would normally be regarded as satisfying the requirements of Rule 19.7(c), as the effect of the event (i.e. the post-offer undertaking becoming incapable of performance) would be specific and precise, readily understandable and capable of objective assessment, and would not depend on the subjective judgements of the relevant party.
- 3.31 It would be necessary for a party seeking to rely on a qualification or condition of the type referred to in paragraph 3.30 above to demonstrate to the Panel under the new Rule 19.7(f) that it was no longer able to comply with the post-offer undertaking as a result of the event, act or circumstance which had occurred. The Code Committee envisages that an event, act or circumstance which has the effect of making compliance with the post-offer undertaking more difficult, but still capable of being performed, would not be regarded as satisfying the terms of such a qualification or condition. In addition, the Code Committee considers that a qualification or condition which refers to an event, act or circumstance which has the effect of making compliance with the post-

offer undertaking more difficult, but still capable of being performed, would not be regarded as satisfying the requirements of the new Rule 19.7(c).

3.32 It would also be necessary for the relevant party to the offer seeking to rely on a qualification or condition of the type referred to above to satisfy the Panel that the relevant event, act or circumstance was outside the control of the party. The types of events which would be covered by the qualification or condition would include, for example, fires, floods, earthquakes and other “acts of God”. The Code Committee considers that, if the party could have taken steps to avoid the event, act or circumstance, or to minimise the impact of the event, act or circumstance on the party’s ability to comply with the post-offer undertaking, but had not done so, the party would not normally be regarded as free from responsibility for its failure to comply with a post-offer undertaking which is subject to a qualification or condition of the type referred to in paragraph 3.30.

3.33 In addition to a qualification or condition of the type referred to in paragraph 3.30, the Code Committee considers that it may be possible for a qualification or condition to satisfy the requirements of the new Rule 19.7(c) if it referred to the financial effect of generally-described events on the relevant party or its assets. In considering whether to permit such a qualification or condition to be included, the Panel will require the financial effect of the relevant event to be set out in a manner which is specific and precise, readily understandable and capable of objective assessment, and not dependent on the subjective judgements of the party to the offer or its directors. In order to meet these requirements in respect of such a qualification or condition, the party may be required to specify, with a high degree of detail, how the relevant financial measure will be calculated.

(vi) *Obligation not to trigger a qualification or condition*

3.34 One respondent queried whether a party to an offer which had made a post-offer undertaking would be required to use “all reasonable efforts” to comply with the undertaking.

- 3.35 The Code Committee rejects the proposition that a party to an offer should be required only to use “all reasonable efforts” to comply with the terms of any post-offer undertaking which it has made. The new Rule 19.7(e) imposes a higher standard of performance, which is that a party must ensure that it complies with a post-offer undertaking save where a qualification or condition applies. The Code Committee considers that this higher standard is appropriate given that post-offer undertakings will be made voluntarily.
- 3.36 However, the Code Committee considers that a party which has made a post-offer undertaking subject to certain qualifications and conditions should not be able to avoid compliance with the post-offer undertaking by taking action, or omitting to take action, which causes an event, act or circumstance referred to in a qualification or condition to occur. The Code Committee considers that such behaviour would amount to an abuse of Rule 19.7 and that the relevant party should not be permitted to rely on the relevant qualification or condition in these circumstances. In order to address this concern, the Code Committee has decided to introduce a Note 2 on the new Rule 19.7 as follows:

“2. Qualifications or conditions

A party to an offer which has made a post-offer undertaking subject to a qualification or condition must not take any action, or omit to take any action, which would cause an event, act or circumstance referred to in a qualification or condition to occur. In addition, if the Panel determines that a party has taken action, or omitted to take action, which has caused an event, act or circumstance referred to in a qualification or condition to occur, the party will not normally be permitted to rely on that qualification or condition in order to avoid compliance with the post-offer undertaking.”

- (vii) *“Pre-conditional” post-offer undertakings*

- 3.37 One respondent asked whether it would be possible for a party to an offer to make a post-offer undertaking that was subject to one or more pre-conditions.

3.38 The Code Committee confirms that a party to an offer which wishes to make a conditional post-offer undertaking may make the undertaking subject to a pre-condition, i.e. a condition to the effect that the party will take, or not take, the course of action set out in the post-offer undertaking only if a specific event, act or circumstance occurs.

3.39 As with any other condition, a pre-condition would need to be specific and precise, be readily understandable and capable of objective assessment and not depend on subjective judgements of the party to the offer or its directors. In addition, the Code Committee notes that, as with other post-offer undertakings, the Panel would be able to appoint a supervisor to monitor compliance with a “pre-conditional” post-offer undertaking, i.e. to monitor whether the event, act or circumstance which was the subject of the pre-condition had, or had not, occurred.

(viii) Subsequent references to a post-offer undertaking

3.40 One respondent suggested that the Code should require that, whenever a party to an offer referred to a post-offer undertaking which it had made, it should be required to refer also to any qualifications or conditions to which the undertaking was subject.

3.41 The Code Committee accepts this suggestion and has introduced the following additional sentence into the proposed Rule 19.7(e) (which will now be the new Rule 19.7(d)):

“Any subsequent reference by the party to the offer concerned to any post-offer undertaking which it has made must be accompanied by a reference to any qualifications or conditions to which the undertaking is subject or to the relevant sections of the document, announcement or other information in which they were included.”

(ix) *Reliance on qualifications and conditions*

3.42 One respondent argued that a party which had made a post-offer undertaking should not be required to obtain the Panel's consent in order to rely on a qualification or condition to the undertaking and that the Panel's role should be to review, after the event, whether a party had correctly relied on a qualification or condition.

3.43 As indicated in Section 2 above, the Code Committee believes that the new framework should maximise the chances of the Panel being able to act in anticipation of a contravention of a rule-based requirement, given the likely difficulties of enforcing a post-offer undertaking which has already been breached. Accordingly, the Code Committee considers that it is essential that a party to an offer should not be permitted to rely on a qualification or condition to its post-offer undertaking without reference to the Panel.

3.44 The Code Committee has therefore adopted the proposed Rule 19.7(d), but as new Rules 19.7(e) to (g), as follows:

~~(d)~~ A party to an offer must comply with the terms of any post-offer undertaking for the period of time specified in the undertaking and must complete any course of action committed to by the date specified in the undertaking.

(f) A party to an offer will be excused compliance with the terms of a post-offer undertaking only if a qualification or condition set out in the undertaking applies. If a party to an offer wishes to rely on a qualification or condition to a post-offer undertaking in order to take, or not take, a course of action otherwise than in compliance with the terms of that undertaking, that party must consult the Panel in advance and obtain the Panel's consent to rely on that qualification or condition.

(g) Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate) with the Panel's consent, the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the course of action it has taken, or not taken, and explaining how and why the relevant qualification or condition applies."

(x) *Employee representatives*

3.45 One respondent considered that the requirement of the proposed new Rule 19.7(e) for a party to an offer to make a document readily available to the offeree company's employee representatives, where required to do so by the Panel, should also extend to making the document available to the offeror's employee representatives.

3.46 The Code Committee agrees and has made the following amendments to the proposed Rule 19.7(e), which, as mentioned above, has been adopted as the new Rule 19.7(d):

“(ed) Any post-offer undertaking made by a party to an offer other than in a document published by that party in connection with the offer must be included in the next such document published by that party. The Panel may, in addition, require a document to be sent to the offeree company’s shareholders and persons with information rights and made readily available to its and the offeror’s employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its the offeree company’s pension scheme(s).”.

(xi) *Quantified financial benefits statements*

3.47 One respondent sought clarification of the relationship between a post-offer undertaking and a quantified financial benefits statement made by a party to an offer under Rule 28.

3.48 The Code Committee agrees with the respondent that any post-offer undertaking in relation to proposed synergies would need to be consistent with the bases of belief supporting any quantified financial benefits statement and the assumptions on which it was based. However, the Code Committee also agrees with the respondent that this does not mean that any statement of intention made in relation to the quantified financial benefits statement would be regarded by the Panel as a post-offer undertaking (unless it also satisfied the requirements for post-offer undertakings, including being clearly labelled

as such), although it believes that it would comprise a post-offer intention statement.

(c) ***The monitoring and enforcement of post-offer undertakings***

(i) *Introduction*

3.49 In Section 3(c) of the PCP, the Code Committee proposed that the new framework should have certain features with regard to the monitoring and enforcement of post-offer undertakings. In summary, these features, which were reflected in the proposed new Rules 19.7(f) and (g), and in the proposed Notes 1 and 2 on Rule 19.7, were as follows:

- (a) a party to an offer which has made a post-offer undertaking should be required to submit written reports to the Panel after the end of the offer period at such intervals and in such form as the Panel may require. Such reports should be required, as appropriate:
 - (i) to indicate whether any course of action that the party has committed to take has been implemented or completed within the specified period of time and, if not, the progress made to date and the steps being taken to implement or complete the course of action and the expected timetable for completion;
 - (ii) to confirm that any course of action that the party has committed not to take has not been taken;
 - (iii) to include such other documents or information as the Panel may require; and
 - (iv) if so required by the Panel, to be published via a Regulatory Information Service;

- (b) any written report submitted to the Panel by a party to an offer should be required to state that the report has been approved by the board of directors (or equivalent body) of the party to the offer concerned and to be signed on its behalf by a duly authorised director (or equivalent person);
- (c) the Panel should be able to require a party to an offer which has made a post-offer undertaking to appoint a supervisor to:
 - (i) monitor compliance by that party with that undertaking; and
 - (ii) submit written reports to the Panel, at such intervals and in such form as the Panel may require, as to the compliance by that party with that undertaking,in accordance with arrangements made between the Panel and the supervisor;
- (d) the party to the offer should be required to comply with any obligations imposed on it in the supervisor's terms of appointment;
- (e) as regards the appointment of supervisors:
 - (i) any supervisor should be required to be independent of the party to the offer concerned, and any person acting in concert with it, and be required to have the skills and resources necessary to perform the functions of a supervisor;
 - (ii) the identity of the supervisor and the terms of appointment should be required to be agreed by the Panel; and
 - (iii) the costs of the supervisor should be required to be met by the party to the offer which has made the post-offer undertaking.

(ii) *Requirement for a party which has made a post-offer undertaking to submit written reports*

3.50 A number of respondents made comments in relation to the proposed requirement for a party which has made a post-offer undertaking to submit written reports to the Panel and the proposed ability for the Panel to require such reports to be published, as follows:

- (a) one respondent considered that a party should not be required to submit reports as a matter of course but should only be required to report to the Panel in the event that it did not comply with a post-offer undertaking;
- (b) one respondent considered that there should be a requirement for any written report submitted to the Panel in accordance with the proposed Rule 19.7(f) to reconfirm any post-offer undertaking which had been made by the party to the offer;
- (c) one respondent considered that, rather than the Panel having the ability to require the publication of a written report submitted to it by a party to an offer, there should be a presumption in favour of publication; and
- (d) one respondent considered that the proposed new Rule 19.7(f)(iv) should permit a party to an offer to redact commercially sensitive information from the public version of its report.

3.51 The Code Committee continues to believe that the requirement for a party to an offer which has made a post-offer undertaking to submit reports to the Panel in relation to the party's compliance with a post-offer undertaking after the end of the offer period will be an important aspect of the new framework. The principal intention behind this requirement is to enhance the Panel's ability to prevent a breach of a post-offer undertaking occurring and the Code Committee therefore rejects the suggestion that such reports should be required to be made only after such a breach has occurred.

- 3.52 The Code Committee notes that it will be a requirement of the Code that a party to an offer must comply with the terms of any post-offer undertaking and the Code Committee does not believe that a requirement for a party to reconfirm a post-offer undertaking in its written report would add anything to this primary obligation.
- 3.53 The Code Committee does not believe that it is necessary for there to be a presumption that all written reports should be published and considers that the Panel should retain the discretion to determine when it is appropriate to require reports to be published.
- 3.54 The Code Committee acknowledges that there may be circumstances in which the Panel considers that a written report should be published but not in its entirety. However, rather than permitting a party to redact its report, the Code Committee considers that the Panel should be able to require the report to be published “in whole or in part”.
- 3.55 The Code Committee has therefore amended the proposed Rule 19.7(f)(iv), which will become the new Rule 19.7(h)(iv), as follows:

“(fh) A party to an offer which has made a post-offer undertaking must submit written reports to the Panel after the end of the offer period at such intervals and in such form as the Panel may require. Such reports must, as appropriate:

- (i) indicate whether any course of action that the party has committed to take has been implemented or completed within the specified period of time and, if not, the progress made to date and the steps being taken to implement or complete the course of action and the expected timetable for completion;**
- (ii) confirm that any course of action that the party has committed not to take has not been taken;**
- (iii) include such other documents or information as the Panel may require; and**

(iv) if so required by the Panel, be published, in whole or in part, in accordance with the requirements of Rule 2.9.”.

(iii) Appointment of supervisors

3.56 In general, respondents agreed with the proposed ability for the Panel to require a party to an offer which has made a post-offer undertaking to appoint a supervisor to monitor compliance with the undertaking and to submit written reports to the Panel.

3.57 A number of respondents sought clarification of:

- (a) who could be appointed as a supervisor;
- (b) the requirement in the proposed Note 2 on Rule 19.7 for a supervisor to be “*independent of the party to the offer concerned*” and the factors which would be taken into account in determining a supervisor’s independence;
- (c) how the supervisor would be selected and appointed, including by whom and when (e.g. whether this should be before the post-offer undertaking is made);
- (d) the requirements for a supervisor’s terms of appointment, including how these would be negotiated, to whom the supervisor would owe a duty of care and whether the Panel would be a party to the terms of appointment;
- (e) the Code Committee’s expectations as to the likely frequency and intervals of supervisors’ reports; and
- (f) whether the Panel would expect to engage directly with the supervisor as a matter of practice and how the Panel would enforce the supervisor’s duties.

- 3.58 The Code Committee understands that the Executive would:
- (a) expect to notify a party to an offer that is proposing to make a post-offer undertaking that it will be required to appoint a supervisor during the consultation provided for in the new Rule 19.7(a) and that the Executive would expect the identity of the supervisor and the terms of its appointment to be agreed at that time; and
 - (b) not usually require a supervisor to be appointed when the Executive is satisfied that it will be able to monitor compliance with a post-offer undertaking itself, or with the assistance of an independent third party.
- 3.59 The Code Committee expects that, usually, the party to the offer making a post-offer undertaking would be asked to nominate one or more suitably experienced and qualified supervisors and then to appoint the supervisor approved by the Executive on the terms agreed by the Executive. The Code Committee understands that the Executive would expect to assess the necessary qualifications of the proposed supervisor in the light of the requirements of the specific case, including the nature of the post-offer undertaking and the geographic area and sector concerned.
- 3.60 The Code Committee expects that, when nominating a supervisor, the party to the offer and/or the nominated supervisor will be required to provide evidence as to the independence of the supervisor from the party to the offer. In considering whether a supervisor is independent, the Code Committee would expect the Executive to have regard to any financial interest the supervisor may have in the party to the offer, or any of its affiliates, as well as any assignments or business relationships that might lead to a conflict of interest. In addition, the supervisor will usually be required to undertake not to create a conflict of interest during the term of its appointment. The arrangements for remuneration will also need to ensure that they do not impede the supervisor's independence or ability effectively and properly to carry out its functions.

3.61 The Code Committee expects that the terms of engagement would be required to provide that the supervisor must act on behalf of the Panel, and in accordance with the Panel's instructions, and be under an obligation to the Panel to carry out its functions to the best of its abilities. The supervisor would be required to report directly to the Panel at intervals that would be agreed with the Executive in the light of the requirements of the specific case. The terms would be required expressly to provide that the Panel has enforcement rights under the engagement.

(iv) *Disclosure of the supervisor's fees*

3.62 One respondent queried whether the fees of a supervisor appointed to monitor a party's post-offer undertakings would be required to be disclosed under Rule 24.16. Rule 24.16 provides that the fees and expenses expected to be incurred in connection with an offer must be disclosed by an offeror and (by virtue of Rule 25.8) by the offeree company.

3.63 It was not the Code Committee's intention that the fees of supervisors appointed to monitor undertakings after the end of the offer should fall for disclosure under Rule 24.16. In order to make this clear, the Code Committee has introduced a new Note 3 on Rule 24.16, as follows:

“3. Fees payable to supervisors appointed under Rule 19.7(i)

There is no requirement to disclose an estimate of any fees and expenses expected to be incurred in relation to a supervisor appointed under Rule 19.7(i).”

(d) *Amendments to the Code*

3.64 Save as described above, the Code Committee has adopted the new Rule 19.7 as proposed in Section 3 of the PCP. The new Rule 19.7 will therefore read as follows:

“19.7 POST-OFFER UNDERTAKINGS

(a) A party to an offer must consult the Panel in advance if it wishes to make a post-offer undertaking.

(b) A post-offer undertaking must:

(i) state that it is a post-offer undertaking;

(ii) specify the period of time for which the undertaking is made or the date by which the course of action committed to will be completed; and

(iii) prominently state any qualifications or conditions to which the undertaking is subject.

(c) The terms of any post-offer undertaking made by a party to an offer, including the course of action committed to be taken, or not taken, and the qualifications or conditions to which it is subject, must:

(i) be specific and precise;

(ii) be readily understandable and capable of objective assessment; and

(iii) not depend on subjective judgements of the party to the offer or its directors.

(d) Any post-offer undertaking made by a party to an offer other than in a document published by that party in connection with the offer must be included in the next such document published by that party. The Panel may, in addition, require a document to be sent to the offeree company’s shareholders and persons with information rights and made readily available to its and the offeror’s employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company’s pension scheme(s). Any subsequent reference by the party to the offer concerned to any post-offer undertaking which it has made must be accompanied by a reference to any qualifications or conditions to which the undertaking is subject or to the relevant sections of the document, announcement or other information in which they were included.

~~(de)~~ A party to an offer must comply with the terms of any post-offer undertaking for the period of time specified in the undertaking and must complete any course of action committed to by the date specified in the undertaking.

(f) A party to an offer will be excused compliance with the terms of a post-offer undertaking only if a qualification or condition set out in the undertaking applies. If a party to an offer wishes to rely on a qualification or condition to a post-offer undertaking in order to take, or not take, a course of action otherwise than in compliance with the terms of that undertaking, that party must consult the Panel in advance and obtain the Panel's consent to rely on that qualification or condition.

(g) Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate) with the Panel's consent, the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the course of action it has taken, or not taken, and explaining how and why the relevant qualification or condition applies.

~~**(e)** Any post-offer undertaking made by a party to an offer other than in a document published by that party in connection with the offer must be included in the next such document published by that party. The Panel may, in addition, require a document to be sent to the offeree company's shareholders and persons with information rights and made readily available to its employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its pension scheme(s).~~

(fh) A party to an offer which has made a post-offer undertaking must submit written reports to the Panel after the end of the offer period at such intervals and in such form as the Panel may require. Such reports must, as appropriate:

(i) indicate whether any course of action that the party has committed to take has been implemented or completed within the specified period of time and, if not, the progress made to date and the steps being taken to implement or complete the course of action and the expected timetable for completion;

(ii) confirm that any course of action that the party has committed not to take has not been taken;

(iii) include such other documents or information as the Panel may require; and

(iv) if so required by the Panel, be published, in whole or in part, in accordance with the requirements of Rule 2.9.

(gi) The Panel may require a party to an offer which has made a post-offer undertaking to appoint a supervisor to:

- (i) monitor compliance by that party with that undertaking; and
- (ii) submit written reports to the Panel, at such intervals and in such form as the Panel may require, as to the compliance by that party with that undertaking,

in accordance with arrangements made between the Panel and the supervisor. The party to the offer must comply with any obligations imposed on it in the supervisor's terms of appointment.

NOTES ON RULE 19.7

1. Commitments which are not regarded as post-offer undertakings

(a) The Panel may decide not to permit a party to an offer to make a post-offer undertaking where the Panel determines that the proposed commitment would more appropriately be given in a different form (including, for example, a commitment to a specified person which could be included in a private contract with that person).

(b) A party to an offer which proposes to make a commitment to take, or not take, any particular course of action after the end of the offer period other than by means of a post-offer undertaking must consult the Panel in advance. The Panel will then consider whether the proposed commitment would more appropriately be made as a post-offer undertaking. If, with the agreement of the Panel, the party to the offer makes that commitment by the proposed means, the Panel will normally require any reference to the commitment in any document, announcement or other information published by it in relation to the offer to make clear that the commitment has not been made as a post-offer undertaking in accordance with the requirements of Rule 19.7 and that the commitment will therefore not be enforceable by the Panel as a post-offer undertaking.

2. Qualifications or conditions

A party to an offer which has made a post-offer undertaking subject to a qualification or condition must not take any action, or omit to take any action, which would cause an event, act or circumstance referred to in a qualification or condition to occur. In addition, if the Panel determines that a party has taken action, or omitted to take action, which has caused an event, act or circumstance referred to in a qualification or condition to occur, the party will not normally be permitted to rely on that qualification or condition in order to avoid compliance with the post-offer undertaking.

13. Responsibility for written reports

Any written report submitted to the Panel in accordance with Rule 19.7(~~fh~~) must state that the report has been approved by the board of directors (or equivalent body) of the party to the offer concerned and must be signed on its behalf by a duly authorised director (or equivalent person).

24. Appointment of supervisor

A supervisor appointed under Rule 19.7(~~gi~~) must be independent of the party to the offer concerned, and any person acting in concert with it, and must have the skills and resources necessary to perform the functions of a supervisor. The identity of the supervisor and the terms of appointment must be agreed by the Panel. The costs of the supervisor will be met by the party to the offer which has made the post-offer undertaking.”.

4. Post-offer intention statements

(a) Introduction

4.1 In Section 4 of the PCP, the Code Committee explained that the proposed new framework for post-offer undertakings would not apply to post-offer intention statements. With regard to post-offer intention statements, the Code Committee proposed the introduction of a new Rule 19.8, which would provide as follows:

- (a) any post-offer intention statement made by a party to an offer would be required to be:
 - (i) an accurate statement of that party's intention at the time that it is made; and
 - (ii) made on reasonable grounds;
- (b) if a party to an offer had made a post-offer intention statement and, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement, that party decided either:
 - (i) to take a course of action different from its stated intentions; or
 - (ii) not to take a course of action which it had stated it intended to take,

it would be required to consult the Panel; and
- (c) except with the consent of the Panel, if such a course of action was then taken or not taken (as appropriate), the party would be required promptly to make an announcement describing the course of action it

had taken, or not taken, and explaining its reasons for taking, or not taking, that course of action.

(b) *Summary of respondents' views and the Code Committee's response*

- 4.2 In general, respondents supported the proposed new Rule 19.8 in relation to post-offer intention statements.
- 4.3 One respondent agreed with the requirements in the proposed Rule 19.8(a) that a post-offer intention statement should be an accurate statement of the party's intention at the time that it is made and that it should be made on reasonable grounds, but disagreed with the additional requirements of the proposed Rule 19.8(b).
- 4.4 The Code Committee continues to believe that the requirements of the new Rule 19.8(b), as described in paragraph 4.1(b) above, are important aspects of the new framework and that they should be adopted substantially as proposed.
- 4.5 One respondent, noting that the proposed Rule 19.7(d) (i.e. the new Rule 19.7(f)) required a party to an offer to obtain the Panel's consent if it wished to rely on a qualification or condition to a post-offer undertaking, queried why the proposed Rule 19.8(b) did not require a party to an offer to obtain the Panel's consent if it wished to act, or not to act, in a way which was different from its intentions as described in its post-offer intention statement.
- 4.6 Under the new Rule 19.7, as adopted by the Code Committee in Section 3 above, a party to an offer which has made a post-offer undertaking and which wishes to rely on a qualification or condition will be required to obtain the Panel's consent to do so. However, the Panel's consent to a party acting, or not acting, in a way which is different from the intentions described in its post-offer intention statement is not necessary because taking, or not taking, such action will not, of itself, be in breach of the Code. However, if such action is taken, or not taken, the Panel may decide to investigate whether a breach of the Code had occurred at the time when the party made the post-offer intention

statement (which is the basis for the requirement to consult the Panel in the new Rule 19.8(b)).

- 4.7 One respondent suggested that the requirement for a party to an offer to make an announcement under Rule 19.8(b) should be triggered by the party's decision to take a course of action different from its stated intentions, as opposed to being triggered by the party taking the course of action. The Code Committee has not accepted this suggestion. The Code Committee believes that it is correct that the party should be required to consult the Panel when it makes its decision but considers that it would be premature to require an announcement at that stage.

(c) *Amendments to the Code*

- 4.8 The Code Committee has adopted the new Rule 19.8 as proposed in the PCP, save for minor drafting amendments. The new Rule 19.8 will therefore read as follows:

“19.8 POST-OFFER INTENTION STATEMENTS

(a) Any post-offer intention statement made by a party to an offer must be:

- (i) an accurate statement of that party's intention at the time that it is made; and**
- (ii) made on reasonable grounds.**

(b) If a party to an offer has made a post-offer intention statement and, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement, that party decides either:

- (i) to take a course of action different from its stated intentions; or**
- (ii) not to take a course of action which it had stated it intended to take,**

it must consult the Panel. Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate),

the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the course of action it has taken, or not taken, and explaining its reasons for taking, or not taking, that course of action (as appropriate).”

5. Minor and consequential amendments

(a) *Introduction*

5.1 In Section 5 of the PCP, the Code Committee proposed to make minor amendments to Rule 19.1, consequential amendments to Rules 24, 25 and 27 and minor amendments to Rule 24.2.

(b) *Minor amendments to Rule 19.1*

5.2 In summary, the proposed amendments to Rule 19.1 comprised certain textual amendments to Rule 19.1 itself, the deletion of Notes 2 and 3 on Rule 19.1 and the consequential renumbering of Notes 4 to 8 on Rule 19.1.

5.3 Respondents agreed with the proposed amendments, which the Code Committee has adopted. Rule 19.1, as amended, will therefore read as follows:

“19.1 STANDARDS OF CARE

Each document, announcement or other information published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy. The language used must clearly and concisely reflect the position being described and the information given must be adequately and fairly presented. These requirements apply whether the document, announcement or other information is published, or the statement is made, by the party concerned or by an adviser on its behalf.”

(c) *Consequential amendments to Rules 24, 25 and 27*

5.4 In summary, the Code Committee proposed to introduce new Rules 24.2(d), 24.3(d)(xv), 25.2(c) and 25.7(c) and to amend Rules 27.2(b) and (c).

5.5 The proposed Rules 24.2(d) and Rule 25.2(c) provided as follows:

(a) Rule 24.2(d):

“(d) If any statement made in accordance with Rules 24.2(a) to (c) is a post-offer undertaking, it must comply with the requirements of Rule 19.7.”; and

(b) Rule 25.2(c):

“(c) If any statement made by the board of the offeree company is a post-offer undertaking, it must comply with the requirements of Rule 19.7.”.

5.6 A number of respondents queried the utility of proposed new Rules 24.2(d) and 25.2(c). Others queried whether they should also refer to Rule 19.8. In view of the respondents’ reservations, the Code Committee has decided not to adopt the proposed new Rules 24.2(d) and 25.2(c).

5.7 In addition, on the basis that an offeror is already required by Rule 24.2 to state in the offer document its intentions with regard to the offeree company, the Code Committee believes that there is no need to refer to post-offer intention statements in the new Rules 24.3(d)(xv) and 27.2(b)(viii). They have therefore been adopted as follows:

(a) Rule 24.3(d)(xv):

“(d) the offer document (including, where relevant, any revised offer document) must include:

...

(xv) any post-offer undertaking ~~or post-offer intention statement~~ made by the offeror (see Rules 19.7 and 19.8);; and

(b) Rule 27.2(b)(viii):

“(b) In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

...

(viii) post-offer undertakings and ~~post-offer intention statements~~(Rule 24.3(d)(xv));”.

5.8 The amendments to Rules 25.7(c) and 27.2(c) have been adopted as proposed in the PCP.

(d) *Minor amendments to Rule 24.2*

5.9 In summary, the Code Committee proposed to improve the presentation of Rule 24.2(a) by including the requirement for an offeror to state its intentions with regard to the future business of the offeree company in a separate numbered paragraph. The existing paragraphs of Rule 24.2(a) would be renumbered as a consequence and minor consequential changes made to Rules 24.2(b) and (c).

5.10 Respondents generally agreed with the proposed amendment and some respondents suggested additional drafting changes. Having considered these suggestions, the Code Committee has decided to adopt the amendments to Rules 24.2(a) to (c) as proposed in the PCP. Rule 24.2(a) will therefore read as follows:

“24.2 INTENTIONS OF THE OFFEROR WITH REGARD TO THE BUSINESS, EMPLOYEES AND PENSION SCHEME(S)

(a) In the offer document, the offeror must explain the long-term commercial justification for the offer and must state:

(i) its intentions with regard to the future business of the offeree company;

(ii) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment;

(iii) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company’s places of business;

(iv) its intentions with regard to employer contributions into the offeree company's pension scheme(s) (including with regard to current arrangements for the funding of any scheme deficit), the accrual of benefits for existing members, and the admission of new members;

(v) its intentions with regard to any redeployment of the fixed assets of the offeree company; and

(vi) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.”.

APPENDIX A

Respondents to PCP 2014/2

(excluding those who submitted comments on a confidential basis)

1. Association for Financial Markets in Europe
2. BDO LLP
3. Confederation of British Industry
4. Equiniti David Venus Limited
5. GC100 Group
6. Grant Thornton UK LLP
7. Institute of Chartered Accountants in England and Wales
8. Institute of Directors
9. Investment Management Association
10. KPMG LLP
11. NAPF
12. PricewaterhouseCoopers LLP
13. Quoted Companies Alliance
14. The Royal Society
15. Society of Biology
16. 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
17. Dr Georgina Tsagas
18. White & Case LLP

APPENDIX B

Amendments to the Code

[except as otherwise stated, underlining indicates new text and striking-through indicates deleted text]

DEFINITIONS

Post-offer intention statement

A statement made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party intends to take, or not take, after the end of the offer period, other than a post-offer undertaking.

Post-offer undertaking

A statement made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party commits to take, or not take, after the end of the offer period and which is described by that party as a post-offer undertaking.

NOTE ON POST-OFFER UNDERTAKING

A commitment relating to action to be taken, or not taken, after the end of the offer period made directly to, and enforceable by, one or more identified parties (whether by name or as a member of an identified class of persons), including an undertaking given to a government or governmental agency in order to obtain an official authorisation or regulatory clearance, will not be regarded as a post-offer undertaking.

Rule 2.9

2.9 ANNOUNCEMENT OF AN OFFER OR POSSIBLE OFFER TO BE PUBLISHED VIA A RIS

...

NOTES ON RULE 2.9

...

2. Other Rules

Announcements made under Rules 2.11, 6.2(b), 7.1, 8 (Notes 6 and 12(a)), 9.1 (Note 9), 11.1 (Note 6), 12.2(b)(ii)(A), 17.1, 19.7(g), 19.7(h), 19.8(b), 24.1 ...

Rule 12.2**12.2 COMPETITION REFERENCE PERIODS**

...

NOTES ON RULE 12.2

...

2. *After a reference or initiation of proceedings*

Following the ending of an offer period on a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.79 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 20.2 and 38.2).

Rule 19.1**19.1 STANDARDS OF CARE**

Each document, announcement or ~~advertisement~~ other information published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy. The language used must clearly and concisely reflect the position being described and the information given must be adequately and fairly presented. ~~This~~ These requirements apply whether ~~it~~ the document, announcement or other information is published, or the statement is made, by the party concerned ~~directly~~ or by an adviser on its behalf.

NOTES ON RULE 19.1**1. *Financial advisers' responsibility for publication of information***

...

2. ~~Unambiguous language~~

~~The language used in documents, announcements, information, releases or advertisements must clearly and concisely reflect the position being described. In particular, the word "agreement" must be used with the greatest care. Statements must be avoided which may give the impression that persons have committed themselves to certain courses of action (eg accepting in respect of their own shares) when they have not in fact done so.~~

~~3. — Statements of intention~~

~~If a party to an offer makes a statement in any document, announcement or other information published in relation to an offer relating to any particular course of action it intends to take, or not take, after the end of the offer period, that party will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, unless there has been a material change of circumstances.~~

42. Sources

...

53. Quotations

...

64. Diagrams etc.

...

75. Use of other media

...

86. FSMA and the Financial Services Act 2012

...

Rule 19.7

[for ease of reference, the new Rule 19.7 is not shown in underlined text]

19.7 POST-OFFER UNDERTAKINGS

- (a) A party to an offer must consult the Panel in advance if it wishes to make a post-offer undertaking.**
- (b) A post-offer undertaking must:**
 - (i) state that it is a post-offer undertaking;**
 - (ii) specify the period of time for which the undertaking is made or the date by which the course of action committed to will be completed; and**
 - (iii) prominently state any qualifications or conditions to which the undertaking is subject.**

(c) The terms of any post-offer undertaking made by a party to an offer, including the course of action committed to be taken, or not taken, and the qualifications or conditions to which it is subject, must:

- (i) be specific and precise;**
- (ii) be readily understandable and capable of objective assessment; and**
- (iii) not depend on subjective judgements of the party to the offer or its directors.**

(d) Any post-offer undertaking made by a party to an offer other than in a document published by that party in connection with the offer must be included in the next such document published by that party. The Panel may, in addition, require a document to be sent to the offeree company's shareholders and persons with information rights and made readily available to its and the offeror's employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of the offeree company's pension scheme(s). Any subsequent reference by the party to the offer concerned to any post-offer undertaking which it has made must be accompanied by a reference to any qualifications or conditions to which the undertaking is subject or to the relevant sections of the document, announcement or other information in which they were included.

(e) A party to an offer must comply with the terms of any post-offer undertaking for the period of time specified in the undertaking and must complete any course of action committed to by the date specified in the undertaking.

(f) A party to an offer will be excused compliance with the terms of a post-offer undertaking only if a qualification or condition set out in the undertaking applies. If a party to an offer wishes to rely on a qualification or condition to a post-offer undertaking in order to take, or not take, a course of action otherwise than in compliance with the terms of that undertaking, that party must consult the Panel in advance and obtain the Panel's consent to rely on that qualification or condition.

(g) Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate) with the Panel's consent, the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the course of action it has taken, or not taken, and explaining how and why the relevant qualification or condition applies.

(h) A party to an offer which has made a post-offer undertaking must submit written reports to the Panel after the end of the offer period at

such intervals and in such form as the Panel may require. Such reports must, as appropriate:

(i) indicate whether any course of action that the party has committed to take has been implemented or completed within the specified period of time and, if not, the progress made to date and the steps being taken to implement or complete the course of action and the expected timetable for completion;

(ii) confirm that any course of action that the party has committed not to take has not been taken;

(iii) include such other documents or information as the Panel may require; and

(iv) if so required by the Panel, be published, in whole or in part, in accordance with the requirements of Rule 2.9.

(i) The Panel may require a party to an offer which has made a post-offer undertaking to appoint a supervisor to:

(i) monitor compliance by that party with that undertaking; and

(ii) submit written reports to the Panel, at such intervals and in such form as the Panel may require, as to the compliance by that party with that undertaking,

in accordance with arrangements made between the Panel and the supervisor. The party to the offer must comply with any obligations imposed on it in the supervisor's terms of appointment.

NOTES ON RULE 19.7

1. *Commitments which are not regarded as post-offer undertakings*

(a) *The Panel may decide not to permit a party to an offer to make a post-offer undertaking where the Panel determines that the proposed commitment would more appropriately be given in a different form (including, for example, a commitment to a specified person which could be included in a private contract with that person).*

(b) *A party to an offer which proposes to make a commitment to take, or not take, any particular course of action after the end of the offer period other than by means of a post-offer undertaking must consult the Panel in advance. The Panel will then consider whether the proposed commitment would more appropriately be made as a post-offer undertaking. If, with the agreement of the Panel, the party to the offer makes that commitment by the proposed means, the Panel will normally require any reference to the commitment in any document, announcement or other information published by it in relation*

to the offer to make clear that the commitment has not been made as a post-offer undertaking in accordance with the requirements of Rule 19.7 and that the commitment will therefore not be enforceable by the Panel as a post-offer undertaking.

2. Qualifications or conditions

A party to an offer which has made a post-offer undertaking subject to a qualification or condition must not take any action, or omit to take any action, which would cause an event, act or circumstance referred to in a qualification or condition to occur. In addition, if the Panel determines that a party has taken action, or omitted to take action, which has caused an event, act or circumstance referred to in a qualification or condition to occur, the party will not normally be permitted to rely on that qualification or condition in order to avoid compliance with the post-offer undertaking.

3. Responsibility for written reports

Any written report submitted to the Panel in accordance with Rule 19.7(h) must state that the report has been approved by the board of directors (or equivalent body) of the party to the offer concerned and must be signed on its behalf by a duly authorised director (or equivalent person).

4. Appointment of supervisor

A supervisor appointed under Rule 19.7(i) must be independent of the party to the offer concerned, and any person acting in concert with it, and must have the skills and resources necessary to perform the functions of a supervisor. The identity of the supervisor and the terms of appointment must be agreed by the Panel. The costs of the supervisor will be met by the party to the offer which has made the post-offer undertaking.

Rule 19.8

[for ease of reference, the new Rule 19.8 is not shown in underlined text]

19.8 POST-OFFER INTENTION STATEMENTS

(a) Any post-offer intention statement made by a party to an offer must be:

- (i) an accurate statement of that party's intention at the time that it is made; and**
- (ii) made on reasonable grounds.**

(b) If a party to an offer has made a post-offer intention statement and, during the period of 12 months from the date on which the offer

period ended, or such other period of time as was specified in the statement, that party decides either:

- (i) to take a course of action different from its stated intentions; or
- (ii) not to take a course of action which it had stated it intended to take,

it must consult the Panel. Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate), the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the course of action it has taken, or not taken, and explaining its reasons for taking, or not taking, that course of action (as appropriate).

Rule 19.9

19.79 INFORMATION PUBLISHED FOLLOWING THE ENDING OF AN OFFER PERIOD PURSUANT TO RULE 12.2

...

Rule 24

24.2 INTENTIONS OF THE OFFEROR WITH REGARD TO THE BUSINESS, EMPLOYEES AND PENSION SCHEME(S)

(a) In the offer document, the offeror must explain the long-term commercial justification for the offer and must state:

- (i) ~~its intentions with regard to the future business of the offeree company; and explain the long-term commercial justification for the offer. In addition, it must state:~~
- (ii) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment;
- (iii) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company's places of business;
- (iiiy) its intentions with regard to employer contributions into the offeree company's pension scheme(s) (including with regard to current arrangements for the funding of any scheme deficit), the

accrual of benefits for existing members, and the admission of new members;

(iv) its intentions with regard to any redeployment of the fixed assets of the offeree company; and

(vi) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.

(b) If the offeror has no intention to make any changes in relation to the matters described under (a)(ii) to (iv) above, or if it considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business, it must make a statement to that effect.

(c) Where the offeror is a company, and insofar as it is affected by the offer, the offeror must also state its intentions with regard to its future business and comply with (a)(ii) and (iii) with regard to itself.

24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

Except with the consent of the Panel:

...

(d) the offer document (including, where relevant, any revised offer document) must include:

...

(xv) any post-offer undertaking made by the offeror (see Rule 19.7);

(xvi) ...

(xvii) ...

(xviii) ...

...

24.16 FEES AND EXPENSES

...

NOTES ON RULE 24.16

...

3. Fees payable to supervisors appointed under Rule 19.7(i)

There is no requirement to disclose an estimate of any fees and expenses expected to be incurred in relation to a supervisor appointed under Rule 19.7(i).

Rule 25

25.7 OTHER INFORMATION

The offeree board circular must contain:

...

(c) any post-offer undertaking or post-offer intention statement made by the offeree company (see Rules 19.7 and 19.8);

(ed)

(de) ...

Rule 27

27.2 SUBSEQUENT DOCUMENTS

(a) If, following the publication of the initial offer document or offeree board circular (as appropriate) and before the end of the offer period, an offeror or the offeree company publishes any subsequent document in connection with the offer, that document must include:

...

(ii) details of any material changes to the matters listed in Rule 27.2(b) (in the case of an offeror) or in Rule 27.2(c) (in the case of the offeree company) which have occurred since the publication of any previous document published by it in connection with the offer (or a statement that there have been no such material changes).

(b) In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

...

(viii) post-offer undertakings (Rule 24.3(d)(xv));

(~~viii~~ix) any offer-related arrangements etc. permitted under, or excluded from, Rule 21.2 (Rule 24.3(d)(xvi));

~~(ix)~~ **profit forecasts and quantified financial benefits statements (Rule 24.3(d)(xviii));**

~~(xi)~~ ... ;

~~(xii)~~ ... ;

~~(xiii)~~ ... ;

~~(xiiiiv)~~ ... ;

~~(xivv)~~ ... ;

~~(xvi)~~ ... ; and

~~(xvii)~~

(c) In the case of the offeree company, the matters referred to in Rule 27.2(a)(ii) are as follows:

...

(ix) post-offer undertakings and post-offer intention statements (Rule 25.7(c));

~~(ix)~~ **profit forecasts and quantified financial benefits statements (Rule 25.7(~~de~~)); and**

~~(xi)~~