

RS 2015/2 23 October 2015

THE TAKEOVER PANEL

**RESTRICTIONS AND SUSPENSIONS
OF VOTING RIGHTS**

**RESPONSE STATEMENT BY THE
CODE COMMITTEE OF THE PANEL FOLLOWING
THE CONSULTATION ON PCP 2015/2**

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1. Introduction

(a) Background

1.1 On 14 July 2015, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2015/2**” or the “**PCP**”) in which it proposed amendments to the definition of “voting rights” in the Takeover Code (the “**Code**”) in relation to restrictions and suspensions of voting rights and certain related amendments.

1.2 In summary, the Code Committee proposed:

- (a) to amend the definition of “voting rights” to make clear that shares which are subject to a restriction on the exercise of voting rights, or to a suspension of voting rights, should nonetheless be regarded for the purposes of the Code as having voting rights which are currently exercisable at a general meeting;
- (b) minor amendments to the Note on Rule 9.7, which relates to the calculation of the number of shares to which voting restrictions will be applied and the number of interests to be disposed of where the Panel has agreed to the disposal of interests in shares by a person as an alternative to making a mandatory offer under Rule 9.1; and
- (c) certain consequential amendments to Rule 11.1 (“When a cash offer is required”) and Rule 11.2 (“When a securities offer is required”).

(b) Responses to the consultation

1.3 The consultation period in relation to PCP 2015/2 ended on 11 September 2015. The Code Committee received comments on the consultation questions from the four respondents listed in Appendix A. Each of the responses has

been published on the Panel's website at www.thetakeoverpanel.org.uk. The Code Committee thanks the respondents for their comments.

1.4 The proposals were generally supported by the respondents.

(c) ***The Code Committee's conclusions***

1.5 Having considered the responses to the consultation, the Code Committee has adopted the amendments to the Code which were proposed in PCP 2015/2 with some minor modifications, as explained below in this Response Statement.

(d) ***Code amendments***

1.6 The amendments to the Code which the Code Committee has adopted in this Response Statement are set out in Appendix B. In Appendix B, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code.

(e) ***Implementation***

1.7 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, 23 November 2015.

1.8 The Code Committee understands that there may be a small number of companies which have in the past issued suspended voting shares and in respect of which such shares remain in issue. Any such company should consult the Panel Executive in order to obtain a ruling regarding the application of the Code to the company, taking account of the facts of the particular case.

2. Definition of “voting rights”

Q1. Should the proposed new definition of “voting rights” be introduced?

(a) *Introduction*

2.1 In Section 2 of the PCP, the Code Committee proposed that the current definition of “voting rights” in the Code should be deleted and be replaced with a new definition which would provide that any shares which are subject to a restriction on the exercise of voting rights or to a suspension of voting rights would, in each case, normally be regarded as having voting rights which are currently exercisable at a general meeting. The proposed new definition was as follows:

“Voting rights

Voting rights of a company means all the voting rights attributable to its share capital which are currently exercisable at a general meeting.

Except for treasury shares, any shares which are subject to:

- (a) a restriction on the exercise of voting rights:
 - (i) in an undertaking or agreement by or between a shareholder and the company or a third party; or
 - (ii) arising by law or regulation; or
- (b) a suspension of voting rights implemented by means of the company’s articles of association or otherwise,

will normally be regarded as having voting rights which are currently exercisable at a general meeting.”.

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

2.2 All of the respondents who expressed a view agreed that the proposed new definition of “voting rights” should be introduced.

- 2.3 One respondent commented on the reference to “treasury shares” in the proposed new definition of “voting rights”. The second paragraph of the proposed new definition provides an exception in the case of “treasury shares” from the rule that restrictions and suspensions of voting rights would normally be disregarded. “Treasury shares” are a company’s own shares which a company has purchased from other shareholders out of distributable profits. Section 726(2) of the Companies Act 2006 provides that a company must not exercise any right in respect of treasury shares, including the right to attend or vote at meetings, and that any purported exercise of such a right is void. Accordingly, the definition of “treasury shares” in the Code provides as follows:

“Treasury shares

All percentages of voting rights, share capital and relevant securities are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares by a company from treasury will normally be treated in the same way as an issue of new shares.”.

- 2.4 The respondent noted that, in addition to a purchase of its own shares out of distributable profits which then become treasury shares, there may be other circumstances in which its own shares come to be held by, or on behalf of, a company, or its subsidiary, and where the company is unable to exercise the voting rights in respect of the shares by virtue of the relevant provisions of the Companies Act 2006.
- 2.5 The Code Committee acknowledges this point and considers that the Code should provide that such shares will be treated in the same way as treasury shares for the purposes of the Code.

(c) *Amendments to the Code*

- 2.6 In the light of the above, the Code Committee has deleted the current definition of “voting rights” in the Code and has introduced the new definition proposed in the PCP and as set out in paragraph 2.1 above.

- 2.7 In addition, the Code Committee has introduced a new second paragraph into the definition of “treasury shares”, as follows:

“Treasury shares

...

Where shares in a company are held by, or on behalf of, the company itself, or by a subsidiary, and the voting rights in respect of those shares are not exercisable by virtue of the operation of applicable legislation, those shares will be treated as if they were treasury shares.”

3. Rule 9.7 and the Note on Rule 9.7

Q2. Should the Note on Rule 9.7 be amended as proposed?
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(a) *Introduction*

3.1 Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making a mandatory offer pursuant to Rule 9.1, the Note on Rule 9.7 explains the methods for calculating:

- (a) the number of interests in shares which are required to be disposed of; and
- (b) the number of shares in relation to which voting restrictions are to be applied pending completion of the disposal.

3.2 In Section 3 of the PCP, the Code Committee proposed some minor amendments to the Note on Rule 9.7 in order to make the Note clearer, including that it should be split into two separate Notes.

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

3.3 All of the respondents who expressed a view supported the proposed amendments to the Note on Rule 9.7.

3.4 Paragraphs 3.2 to 3.4 of the PCP included an example under which Shareholder A, which had initially held 290 shares in Company C (a company with 1,000 shares in issue), had, by means of an inadvertent mistake, increased its shareholding to 400 shares. As an alternative to requiring Shareholder A to make a mandatory offer (on account of its having acquired shares through the 30% threshold set out in Rule 9.1), the Panel had agreed to:

- (a) the disposal of shares by Shareholder A so as to reduce its shareholding to 299 shares; and
- (b) the application of restrictions on the exercise of voting rights by Shareholder A pending completion of the disposal, such that Shareholder A would only be able to exercise less than 30% of the voting rights in Company C.

3.5 It was noted that voting restrictions would need to be applied to 143 of the 400 shares held by Shareholder A, such that it would then be able to vote only 257 shares out of the reduced denominator of 857 shares, i.e. 29.9%. In addition, it was noted that Shareholder B, which held 300 shares in Company C, would continue to be entitled to exercise the voting rights over its 300 shares, even though this would represent 35% of the reduced denominator of 857 shares.

3.6 One respondent suggested that the example set out in paragraphs 3.2 to 3.4 of the PCP should be incorporated into the revised Notes on Rule 9.7. The Code Committee has considered this suggestion but does not believe that it is necessary or appropriate to include such an example in the Code. In any particular case, a dispensation from the requirement to make a mandatory offer will need to be specifically granted by the Panel, which will then agree the necessary calculations with the person who has triggered the mandatory offer requirement and its advisers.

(c) *Amendments to the Code*

3.7 In the light of the above, subject to a minor modification (as shown below), the Code Committee has adopted the amendments to the Note on Rule 9.7, and has split the Note into two separate Notes, as proposed in the PCP and as set out in Appendix B. The new Notes 1 and 2 on Rule 9.7 will be as follows:

“NOTES ON RULE 9.7

1. Calculation of the number of interests in shares to be disposed of

Where a disposal of interests in shares is permitted as an alternative to making a mandatory offer, the interests in shares required to be disposed of must be sufficient to take the total number of shares carrying voting rights in which the offeror and persons acting in concert with it are interested either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage in which they were interested prior to the triggering acquisition being made.

2. Calculation of the number of shares to which voting restrictions will be applied

Where voting restrictions are applied pending completion of a disposal of interests in shares permitted as an alternative to making ~~by virtue of an obligation to make a mandatory offer having arisen under:~~

(a) Rule 9.1(a), the number of shares in relation to which voting restrictions will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to exercise less than 30% of the voting rights attaching to shares in the offeree company; or

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to exercise a percentage of voting rights attaching to shares in the offeree company which is no more than the percentage of shares carrying voting rights in which that person (together with persons acting in concert with that person) was interested prior to the triggering acquisition being made.

In each case, the calculation of the number of shares in relation to which voting restrictions will be applied will be made by reference to the reduced maximum number of voting rights which may be exercised following the application of the voting restrictions by the Panel.”.

- 3.8 In addition, the Code Committee has made minor formatting changes to Rule 9.7 itself, which will now be presented as follows:

“9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS

(a) Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to:

(i) the interests required to be disposed of; and

(ii) the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested.

(b) Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting rights attaching to the shares of the offeree company in which they are interested.”.

4. Rule 11

Q3. Should Rules 11.1 and 11.2 be amended as proposed?

- 4.1 Section 4 of the PCP proposed certain amendments to Rule 11.1 (“When a cash offer is required”) and Rule 11.2 (“When a securities offer is required”), consequential upon the other amendments to the Code proposed in the PCP.
- 4.2 All of the respondents who expressed a view agreed with the proposed amendments.
- 4.3 The Code Committee has therefore amended Rules 11.1 and 11.2 as proposed in the PCP and as set out in Appendix B.

APPENDIX A**Respondents to PCP 2015/2**

1. BDO LLP
2. Institute of Chartered Accountants in England and Wales
3. The Investment Association
4. Wragge Lawrence Graham & Co LLP

APPENDIX B

Amendments to the Code

DEFINITIONS

Treasury shares

All percentages of voting rights, share capital and relevant securities are to be calculated by reference to the relevant percentage held and in issue outside treasury. A transfer or sale of shares by a company from treasury will normally be treated in the same way as an issue of new shares.

Where shares in a company are held by, or on behalf of, the company itself, or by a subsidiary, and the voting rights in respect of those shares are not exercisable by virtue of the operation of applicable legislation, those shares will be treated as if they were treasury shares.

...

Voting rights

Voting rights of a company means all the voting rights attributable to its share capital which are currently exercisable at a general meeting.

Except for treasury shares, any shares which are subject to:

- (a) a restriction on the exercise of voting rights:
 - (i) in an undertaking or agreement by or between a shareholder and the company or a third party; or
 - (ii) arising by law or regulation; or
- (b) a suspension of voting rights implemented by means of the company's articles of association or otherwise,

will normally be regarded as having voting rights which are currently exercisable at a general meeting.

[The existing definition of "voting rights" to be deleted.]

Rule 9.7**9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS**

(a) Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to:

(i) the interests required to be disposed of; and

(ii) the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested.

(b) Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting rights attaching to the shares of the offeree company in which they are interested.

NOTES ON RULE 9.7**1. Calculation of the number of interests in shares to be disposed of**

Where a disposal of interests in shares is permitted as an alternative to making ~~a~~ mandatory offer, the interests in shares required to be disposed of must be sufficient to take the total number of shares carrying voting rights in which the offeror and persons acting in concert with it are interested either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage in which they were interested prior to the triggering acquisition being made.

2. Calculation of the number of shares to which voting restrictions will be applied and the number of interests to be disposed of

Where voting restrictions are applied pending completion of a disposal of interests in shares permitted as an alternative to making ~~an obligation under Rule 9.1 a mandatory offer has arisen by virtue of~~ under:

(a) Rule 9.1(a), the number of shares in relation to which voting restrictions, ~~if any,~~ will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to ~~vote-exercise~~ less than 30% of the voting rights attaching to shares in the offeree company; or

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, ~~if any,~~ will be applied will normally be such number of shares as

results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to ~~vote no more than the exercise a percentage of interests~~ voting rights attaching to shares in the offeree company held by those persons which is no more than the percentage of shares carrying voting rights in which that person (together with persons acting in concert with that person) was interested prior to the triggering acquisition being made.

In each case, the calculation of the number of shares in relation to which voting restrictions will be applied will be made by reference to the reduced maximum number of ~~shares entitled to be voted~~ voting rights which may be exercised following the application of the voting restrictions by the Panel.

[The ordering of the paragraphs in Notes 1 and 2 on Rule 9.7 has been changed from the current Note on Rule 9.7. However, this has not been shown in the marked-up text.]

Rule 11

11.1 WHEN A CASH OFFER IS REQUIRED

Except with the consent of the Panel in cases falling under (a) or (b), a cash offer is required where:

(a) the shares of any class under offer in the offeree company in which interests are acquired for cash (but see Note 5) by an offeror and any person acting in concert with it during the offer period and within 12 months prior to its commencement represent ~~carry~~ 10% or more of the shares ~~voting rights currently exercisable at a class meeting of that class in issue~~, in which case the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class acquired during the offer period and within 12 months prior to its commencement; or

...

NOTES ON RULE 11.1

1. Price

...

~~The Panel should be consulted in advance if it is proposed to acquire the voting rights attaching to shares, or general control of them.~~

...

4. *Equality of treatment*

...

Rule 11.1(c) may also be relevant when interests in shares representing carrying 10% or more of the voting rights of a class in issue have been acquired in the previous 12 months for a mixture of securities and cash. The Panel should be consulted in all relevant cases.

...

8. *Allotted but unissued shares*

When shares of a company ~~carrying voting rights~~ have been allotted (even if provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Panel should be consulted. Such shares are likely to be relevant for the purpose of calculating percentages under this Rule.

...

11.2 WHEN A SECURITIES OFFER IS REQUIRED

Where interests in shares of any class of the offeree company representing carrying 10% or more of the shares voting rights currently exercisable at a class meeting of that class in issue have been acquired by an offeror and any person acting in concert with it in exchange for securities in the three months prior to the commencement of and during the offer period, such securities will normally be required to be offered to all other holders of shares of that class.

...

NOTES ON RULE 11.2

...

5. *Acquisitions for a mixture of cash and securities*

The Panel should be consulted where interests in shares representing carrying 10% or more of any the voting rights of a class of shares in issue have been acquired during the offer period and within 12 months prior to its commencement for a mixture of securities and cash.

6. *Acquisitions in exchange for securities to which selling restrictions are attached*

Where an offeror and any person acting in concert with it has acquired interests in shares representing carrying 10% or more of the voting rights of any class of shares in issue in the offeree company during the offer period and

within 12 months prior to its commencement and the consideration received or receivable by the vendor or other party to the transaction giving rise to the interest includes shares to which selling restrictions of the kind set out in the second sentence of Rule 11.2 are attached, the Panel should be consulted.