PCP 2004/1 issued on 25 February 2004

THE PANEL ON TAKEOVERS AND MERGERS

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

"PUT UP OR SHUT UP" AND NO INTENTION TO BID STATEMENTS

REVISION PROPOSALS RELATING TO RULES 2.4, 2.8 AND 35.1 OF THE TAKEOVER CODE

Before it introduces or amends any Rules of the Takeover Code or the Rules Governing the Substantial Acquisitions of Shares, the Code Committee of the Takeover Panel is normally required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by **23 April 2004**.

Comments may be sent by email to:

consultation@disclosure.org.uk

Alternatively, please send comments in writing to:

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The Panel on Takeovers and Mergers
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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

1. INTRODUCTION

1.1 In the Panel's 2000-2001 Annual Report, the Report by the Director General set out the general approach when a potential offeror has announced that it is contemplating making an offer, but is not in a position to commit to making a firm offer, and the offeree company requests the Panel to intervene by imposing a deadline by which the potential offeror must clarify its intentions – or, in other words, by which the potential offeror must either "put up" (by way of a firm offer announcement under Rule 2.5) or "shut up" (by way of a no intention to bid statement under Rule 2.8).

1.2 The Code Committee has been considering further this policy of "put up or shut up" and its inter-action with certain Rules of the City Code on Takeovers and Mergers (the "Code"), and also certain issues relating to no intention to bid statements under Rule 2.8, and this paper seeks views on the approach (which includes amendments to the Code, as set out in Appendix B) that the Panel should adopt in relation to these matters in the future.

1.3 The Code Committee has today also published PCP 2004/2 ("Possible offer announcements") which seeks views on the consequences that should apply under the Code when a party includes detailed or specific information in an announcement relating to a possible offer about the terms on which an offer might be made, such as the price which is being considered by the potential offeror.

2. PURPOSE OF "PUT UP OR SHUT UP"

2.1 One of the principal objectives of the Code is to provide an orderly framework within which takeover bids are conducted.

2.2 Consistent with this objective, the Code provides a standard timetable following the announcement by an offeror of a firm intention to make an offer under Rule 2.5, comprising up to 28 days in which to post the formal offer document to offeree company shareholders (Rule 30.1), a further 60 days within which the offer must become or be declared unconditional as to

acceptances (Rule 31.6) and a further 21 days within which all other conditions to the offer must be either satisfied or waived (Rule 31.7).

2.3 The rationale behind this timetable derives from the "siege principle". While an offeror should have sufficient time in which to prosecute its offer (and to seek to persuade offeree company shareholders of its merits), the offeree company should not be exposed to an excessive period of siege. Such siege, and the resulting uncertainty that arises from an offer, can often be damaging for the offeree company in that it distracts senior management, can harm morale amongst staff, creates uncertainty for suppliers and customers and has a destabilising effect on the company generally.

2.4 Often, however, an announcement will be made about a possible offer for the offeree company that does not amount to a firm offer announcement under Rule 2.5 and, in these circumstances, no formal Code timetable is imposed for the situation to be clarified although the offeree company will still be subjected to siege, especially if the potential offeror is unwelcome. As set out in more detail below, the Executive's policy of "put up or shut up" therefore permits the offeree company to request the Panel to bring to an end the uncertainty and siege that exists as a result of the potential offeror's interest by imposing a deadline by which the potential offeror must announce either a firm intention to make an offer for the offeree company (i.e. "put up") or that it has no intention to bid for the offeree company (i.e. "shut up"). In the majority of cases where such a deadline has been set in the past, the potential offeror has shut up, rather than put up.

2.5 It should be noted, however, that "put up or shut up" is not concerned with the situation where an offeree company is already the subject of a firm offer and a potential competing offeror announces that it is considering making an offer. Such statements by potential competing offerors are subject to the provisions of Note 1 on Rule 19.3, which will only normally require clarification by the potential competing offeror in the later stages of the offer period.

3. RELEVANT CODE PROVISIONS

3.1 The present basis for the Panel to intervene following the announcement of a possible offer and to put an end to siege is founded in Rule 35.1. Rule 35.1(a) prevents a person who has announced a firm intention to make an offer or who has posted an offer to offeree company shareholders from making a further offer for the same offeree company within 12 months from the date on which the previous offer is withdrawn or lapses.

3.2 In addition, however, Rule 35.1(b) states that the same restrictions may apply:

"… where a person, having made an announcement which, although not amounting to the announcement of an offer, raises or confirms the possibility that an offer might be made, does not announce a firm intention either to make, or not to make, an offer within a reasonable time thereafter. …"

3.3 Rule 35.1(b) is, therefore, specifically designed to prevent an offeree company from being under siege from a potential offeror for an undue period of time without that potential offeror actually announcing a firm intention to make an offer. As the Rule goes on to make clear, this provision will be applied:

"… if the Panel is persuaded by the potential offeree company that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the prospect of an offer. …"

3.4 It is therefore necessary for the offeree company to approach the Panel following the announcement of a possible offer to persuade the Panel that, in balancing the concerns referred to, it is appropriate to establish a deadline by which the potential offeror must clarify its intentions. The Panel will then determine what is a "reasonable time" for the potential offeror either to announce a firm offer under Rule 2.5 (which will start the normal offer timetable) or make a "no intention to bid" statement. If the potential offeror announces that it does not intend to make an offer for the offeree company,

Rule 2.8 prevents the potential offeror from making an offer for six months (subject to a material change in circumstances or any specified carve-outs).

3.5 In order to ensure that the market was aware of this application of Rule 35.1(b), a section describing the Panel's practice on "put up or shut up" was included in the 2000-2001 Annual Report (see Appendix A). In the light of the Panel's recent experience of requests for "put up or shut up", however, the Code Committee has been considering further this practice and its inter-action with the Rules referred to above and is now proposing that specific provisions be included in the Code detailing the approach that the Panel should adopt in the future.

Q1 Do you agree that the Panel's practice on "put up or shut up" should be reflected in specific provisions of the Code?

4. GENERAL APPROACH FOLLOWING A POSSIBLE OFFER ANNOUNCEMENT

4.1 When a takeover offer is in contemplation, it is often the case that there will be rumour and speculation about a possible offer for the offeree company or an untoward rise in the offeree company's share price, in either case suggesting that information concerning the potential offeror's intentions has leaked, notwithstanding the requirements of secrecy contained in Rule 2.1 of the Code.

4.2 In such circumstances where there has been a leak of information relating to a possible offer, it is the general approach of the Code that the party or parties concerned should be required to make an immediate announcement which has the effect of replacing the information and possible consequent rumour and speculation with an accurate, factual statement that is widely disseminated. This is aimed at ensuring that offeree company shareholders do not deal in ignorance of the possibility of an offer and that any advantage of being in possession of inside information is removed. Rule 2.2 of the Code therefore provides as follows:

"2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

An announcement is required:

…

(c) when, following an approach to the offeree company, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price;

(d) when, before an approach has been made, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror's actions (whether through inadequate security or otherwise) which have led to the situation;

…"

4.3 It is obviously rare for a potential offeror to be in a position to make a firm offer announcement in accordance with Rule 2.5 when an obligation arises under Rule 2.2(c) or (d), since it will often still be evaluating the feasibility of an offer as one of a number of options. A brief statement confirming that talks are taking place, or that the offeror is considering making an offer, is often all that can be said and is, accordingly, all that Rule 2.4 of the Code usually requires. It might also be the case that an announcement about a possible offer is made even though there is no actual requirement under Rule 2.2 to make such an announcement at that time.

4.4 Following the announcement of a possible offer, however, there is no fixed timetable in the Code by which the potential offeror must clarify its intentions with regard to making an offer for the offeree company, even though many of the elements of siege that exist following an announcement of a firm offer in accordance with Rule 2.5 will also be in point during the period following an announcement made in accordance with Rule 2.4.

4.5 Where the offeree company is receptive to the approach by the potential offeror, many months may pass before an offer is made or negotiations between the parties otherwise terminate, and the Panel will not normally seek to intervene in this process in such circumstances when the offeree company is content for the uncertainty arising from the potential offer to continue. The

Code Committee is of the view that this is the correct approach for the Panel to adopt and that it would not be in offeree company shareholders' interests to require a potential offeror to "put up or shut up" unless such a request is made by the offeree company. To seek to impose a deadline for a potential offeror to clarify its intentions where this has not been requested by the offeree company might deprive offeree company shareholders of the opportunity to receive and consider an offer.

Q2 Do you agree that the Panel should not seek to intervene following a possible offer announcement unless requested to do so by the offeree company?

4.6 Where the potential offeror is unwelcome or once negotiations between the parties otherwise terminate, on the other hand, the Code Committee believes that the Code should provide a mechanism for the offeree company to request the Panel to bring to an end the uncertainty and siege that will exist as a result of the potential offeror's interest by imposing a deadline by which the potential offeror must announce either a firm intention to make an offer for the offeree company or that it has no intention to bid for it.

4.7 One question raised in this respect is whether the offeree company should be permitted to make a request for a "put up or shut up" deadline to be imposed upon the potential offeror even though the parties are at the time in discussions, or whether such a request can only be made if the offeree company rejects the offeror's approach or has terminated any negotiations or discussions with the potential offeror.

4.8 Against allowing the offeree company to ask the Panel to intervene when the parties are in discussions, it might be argued that "put up or shut up" is founded on the siege principle, that the siege principle is generally irrelevant where the offeree company is receptive to the approach from the potential offeror and that it is, therefore, inconsistent for the offeree company to be raising arguments of siege and uncertainty while it is in discussions with the potential offeror about the possibility of agreeing a recommended transaction. The Code Committee recognises, however, that an offeree company board will

often feel obliged, on account of its fiduciary duties, to enter into a dialogue with a potential offeror with a view to seeing whether an agreed deal can be put to its shareholders and that the offeree company cannot in such circumstances be said to be "receptive" to the potential offeror's approach or the resultant siege (the damage suffered by the offeree company's business being largely the same whether it has entered into discussions or not), but is simply trying to do the best for its shareholders. Furthermore, even in a potentially recommended situation, there can be a considerable element of disruption to the business of the offeree company in view of the possible change of control.

4.9 The Code Committee is therefore of the opinion that, consistent with the Panel's current practice, an offeree company should not be prevented from seeking to have an end-date placed on the potential offeror's siege and having a "put up or shut up" deadline imposed merely because it is in discussions or negotiations with the potential offeror. This would, for example, allow the offeree company to approach the Panel at the start of an offer period with a view to establishing a maximum period for negotiations between the parties to be concluded, in the knowledge that it will not be subjected to further, unwanted siege at the end of that period if the offeror has not been able to secure a recommendation, or launch a unilateral offer, by that time. To the extent that the offeree company subsequently wants to extend the "put up or shut up" deadline because the discussions with the offeror might prove successful, but have not been finally concluded by the relevant time, it will be free to request an extension, a request that (when made by the offeree company) the Panel would normally be prepared to grant.

Q3 Do you agree that the offeree company should be able to request a "put up or shut up" deadline notwithstanding that it is at the time in discussions or negotiations with the potential offeror?

4.10 Once a request for "put up or shut up" is made, and consistent with Rule 35.1(b), the Panel endeavours to balance the interests of offeree company shareholders in not being deprived of the opportunity to consider the possibility of an offer (i.e. if too short a period is imposed for the potential

offeror to formulate its offer) against potential damage to the offeree company's business arising from the uncertainty and siege created by the offeror's interest.

4.11 In this regard, the Panel's normal approach, when the request for "put up or shut up" is made at the start of the offer period, is to seek clarification within six to eight weeks, although the precise deadline will necessarily depend on the facts of the particular case, including (inter alia) the state of preparedness of the potential offeror at the time. If the "put up or shut up" request is made once the offeree company has already been in an offer period for a number of weeks, the Panel will consider the circumstances at the time the request is made and will frequently take some account of the time that the offeree company has already been in an offer period (and, therefore, that the offeror has had in which to formulate its offer), so that the additional time the potential offeror is then given in order to clarify its intentions after the request is made will frequently be shorter than if the request had been made immediately after the announcement that commenced the offer period.

4.12 The Code Committee is of the view that the Panel should retain the flexibility to establish the precise deadline for "put up or shut up" according to the circumstances of the case under consideration and that it would potentially be detrimental to offeree company shareholders' interests for the Code to provide a fixed, or maximum, period for a potential offeror to clarify its intentions. There might be circumstances when a period for clarification longer than any fixed period is justified in balancing the interests referred to above, for example because the offeree company will be releasing key trading results towards the end of that period and it is reasonable to allow a brief additional period for the offeror to digest that information in deciding whether it wishes to proceed with an offer. A fixed period for clarification in such a case might deprive offeree company shareholders of considering an offer from the potential offeror, even though the additional siege suffered by an extended period would not be material.

4.13 Equally, there may be circumstances when a shorter period than normal for clarification is merited, for example because the potential offeror announced

its interest in making an offer for the offeree company even though it was not actually required to do so by Rule 2.2. An offeror which voluntarily announces a possible offer can be presumed to have done so at a time when it was reasonably confident of being able to proceed with its offer, and so it might well be appropriate to impose a shorter period for clarification of its intentions than in the case of an offeror which is required by Rule 2.2 to make an announcement of a possible offer when it would not otherwise choose to. Similarly, if it is clear that the potential offeror is unlikely to be in a position to formulate an offer within a reasonable period, the Panel might be justified in requiring the potential offeror to withdraw its interest sooner than would normally be the case.

Q4 Do you agree that the Panel should retain flexibility in order to establish the appropriate time period for a potential offeror to clarify its intentions?

4.14 By the expiry of a "put up or shut up" deadline, the potential offeror must either announce a firm offer for the offeree company or withdraw its interest by announcing that it has no intention to make a bid. One question which arises, however, is whether the potential offeror can "put up" by means of a pre-conditional offer announcement under Rule 2.5.

4.15 The aim of "put up or shut up" is to allow the potential offeror a reasonable period in which to formulate a firm, certain proposal to put to offeree company shareholders, failing which it must relieve the siege it has subjected the offeree company to. It would clearly be inconsistent with this aim if an offeror was able to "put up" and, therefore, continue the siege by announcing an offer subject to a number of pre-conditions of a wide and/or subjective nature, especially where the timescale for their fulfilment was uncertain.

4.16 The Code Committee recognises that there might be situations where a pre-conditional Rule 2.5 announcement should be acceptable in this context, for example when the pre-condition relates to a necessary regulatory clearance where the probable timetable for receiving the clearance is such that, if made on a non-pre-conditional basis, the offer would in all likelihood lapse.

Structuring the offer on a pre-conditional basis in these circumstances with a commitment by the offeror to proceed with the offer if the pre-condition is satisfied will, in fact, provide more certainty than if the offer is made on the usual basis where the offeror will not be committed to proceed if it lapses. However, the Code Committee considers that a potential offeror should not normally be permitted to satisfy a "put up or shut up" requirement by means of a pre-conditional offer announcement.

Q5 Do you agree that a potential offeror should not normally be permitted to satisfy a "put up or shut up" obligation by announcing a pre-conditional offer?

4.17 If the potential offeror announces that it does not intend to make an offer for the offeree company following a "put up or shut up" deadline being imposed, Rule 2.8 will normally prevent the offeror from making an offer for six months thereafter. In the 2000-2001 Annual Report, it was also envisaged that in certain cases, where the offeree company had suffered excessive siege already, the potential offeror might instead be prevented from bidding again for the full 12 months envisaged by Rule 35.1(b), rather than for six as provided for by Rule 2.8.

4.18 The "put up or shut up" regime is designed to ensure, however, that an offeree company is not subjected to excessive siege in the first place. Either the offeree company will have made a "put up or shut up" request shortly after the possible offer announcement by the potential offeror, in which case the deadline imposed will seek to end the siege within a reasonable time, or the offeree company will only approach the Panel after it has been in negotiations or discussions with the potential offeror for a period of time. In the latter case, provided the offeree company was able to request "put up or shut up" even though it was in negotiations with the potential offeror, the period of siege over and above that which the offeree company was prepared to tolerate will again be limited.

4.19 The Code Committee is of the view, therefore, that it is not necessary to retain the ability to impose a lock-out period in excess of the usual six month period

provided for in Rule 2.8 if a no intention to bid statement is made following a "put up or shut up" request and that the possible 12 month lock-out envisaged by Rule 35.1(b) is, accordingly, redundant.

Q6 Do you agree with the conclusions set out in paragraph 4.19 above?

4.20 Once a "put up or shut up" deadline has been imposed, the Panel will then normally publicly announce the position in order that offeree company shareholders and the market are properly informed of the date by which the potential offeror must clarify its intentions.

Q7 Do you agree that the Panel should normally announce any "put up or shut up" deadline imposed?

4.21 The amendments to the Code necessary to reflect the Code Committee's proposals in relation to "put up or shut up" referred to above are set out in section 1 of Appendix B to this Consultation Paper. In addition, if these amendments are made, the Code Committee believes that it is no longer necessary to retain Rule 35.1(b) in the Code and the Code Committee is, therefore, also proposing that that Rule be deleted from the Code.

Q8 Do you agree with the proposed amendments to the Code referred to in paragraph 4.21 above?

5. APPROACH WHEN A NO INTENTION TO BID STATEMENT IS MADE

5.1 Where a potential offeror that is subject to a "put up or shut up" deadline is not able to make a firm offer announcement in accordance with Rule 2.5 by the expiry of the relevant period, it must instead make a statement that it has no intention to bid for the offeree company. In accordance with Rule 2.8 of the Code, the potential offeror will then normally be prevented from making an offer for the offeree company for a period of six months from the date of the no intention to bid announcement, unless there is a material change in circumstances and subject to any specific reservations set out in the statement.

Of course, a person might also make a no intention to bid statement even though it is not subject to a "put up or shut up" deadline at the time.

5.2 A number of issues have arisen over the years in relation to Rule 2.8 when a no intention to bid statement is made, and, given the inter-relationship between Rule 2.8 and the "put up or shut up" regime, the Code Committee has therefore also been considering the approach that the Panel should adopt in this regard in the future. These issues might arise when the no intention to bid statement is made following the imposition of a "put up or shut up" deadline, but certain of them might also arise when such a statement is made by a potential offeror voluntarily, and so the issues below might be relevant whether "put up or shut up" is in point in a particular case or not.

5.3 "Downing tools" following a Rule 2.8 statement

5.3.1 As referred to in paragraph 3.3 above, the requirement that a potential offeror rule itself off-side from bidding if it does not make an offer following a "put up or shut up" deadline being set is designed to prevent an offeree company from being under siege from a potential offeror for an undue period of time without it actually announcing a firm intention to make an offer. The six month lock-out stipulated by Rule 2.8 is also designed to prevent a false market arising as a result of persons dealing on the basis of the no intention to bid statement, only to find that the offeror returns with a bid, or indicates that it has changed its mind, shortly afterwards.

5.3.2 It would be inconsistent with the respective philosophies underlying the "put up or shut up" regime and Rule 2.8 if a potential offeror making a no intention to bid statement were able to continue the state of siege, or to revive the possibility of its making an offer for the offeree company, during the six month lock-out period imposed as a result of Rule 2.8. Siege might be continued, for example, if the potential offeror announced that it intended to make an offer at the end of the lock-out period or if the potential offeror's attempts to raise financing for a future offer leaked leading to rumour and speculation about its intentions.

5.3.3 Accordingly, the Code Committee believes that, following a no intention to bid statement, the potential offeror should be required during the six month lock-out period to "down tools" so far as any public promotion of its possible offer is concerned, subject to any specific reservations or a material change of circumstances. The potential offeror should, therefore, not be permitted, either in the Rule 2.8 statement itself or during the six month lock-out period, to make any statement that raises the possibility that it might continue to be interested in making an offer for the offeree company or that might otherwise have the effect of generating speculation about the potential offeror's intentions towards the offeree company.

5.3.4 Equally, given the risk of a leak, the potential offeror should not take any other steps to promote a future offer for the offeree company to be made at the end of the lock-out period if such steps might extend knowledge of the potential offeror's intentions outside those who need to know at the company itself and its immediate advisers. The Code Committee believes that this latter restriction would preclude the potential offeror from (among other matters) seeking financing for a possible offer, canvassing the views of offeree company shareholders about the possibility of an offer, seeking to arrange a consortium to make an offer or making any regulatory filing in connection with a possible offer. The potential offeror should also not acquire offeree company shares or rights over such shares if that would lead to a Rule 9 offer obligation or lead to an aggregate holding of shares and rights over shares in excess of 30 per cent.

5.3.5 However, where the potential offeror has specifically reserved the right in its no intention to bid statement to set it aside with the recommendation of the offeree company board, these restrictions should not prevent the potential offeror from engaging in a dialogue with the offeree company with a view to agreeing a recommended transaction, provided that the offeree company is content for it to take place. In such circumstances where the parties do intend to enter into discussions during the lock-out period, the Panel must be consulted in advance. The Panel will generally permit such discussions, but will be concerned to ensure that the parties are in a position to make an

appropriate announcement in the event of a leak in order to avoid any false market concerns.

Q9 Do you agree that following a no intention to bid statement a potential offeror should be required to "down tools" as envisaged by paragraphs 5.3.3 to 5.3.5 above?

5.4 Specified reservations in a no intention to bid statement

5.4.1 A potential offeror that voluntarily withdraws its interest in making an offer for the offeree company by making a no intention to bid statement will normally be bound by such statement under Rule 2.8, unless there is a material change in circumstances or there occurs an event which the offeror specified as an event which would enable it to set the statement aside. In such a situation, the potential offeror is not normally limited in the matters that can be specifically reserved for in the statement, provided that any reservation is clear and unambiguous, and does not rely for its fulfilment on the subjective judgement of the offeror or events otherwise within its control.

5.4.2 Where the offeror makes a no intention to bid statement following the imposition of a "put up or shut up" deadline, however, the Code Committee believes that the potential offeror should not have the same freedom to specify the circumstances in which it will be permitted to set the statement aside. As the "put up or shut up" regime is based on the siege principle, the Code Committee is of the opinion that the reservations that the offeror should be permitted to specify, and therefore the circumstances in which it would be permitted to renew its interest in the offeree company, should reflect those that apply after a formal offer has lapsed or been withdrawn. Otherwise, a potential offeror might be able to frustrate the purpose of the "put up or shut up" deadline by specifying a reservation that would have the effect of continuing the siege suffered by the offeree company. For example, the offeror might reserve the right to set the Rule 2.8 statement aside following the release by the offeree company of its next set of financial results, even though this had not been considered by the Panel as sufficient to extend the "put up or shut up" deadline in the first place.

5.4.3 The matters that the Code Committee therefore considers can be specifically reserved in a no intention to bid statement following a "put up or shut up" deadline being set are broadly the same as those provided in the Note on Rule 35, being (i) the agreement or recommendation of the offeree company board, (ii) the announcement of a firm intention to make an offer for the offeree company by a third party, and (iii) the announcement by the offeree company of a whitewash proposal or a reverse takeover. In the first of these, the offeree company board would be consenting to the renewed uncertainty caused by the potential offeror's actions, and so the siege principle would not be relevant. In the second, the offeree company would already be subject to siege as a result of the third party's offer and, in the third, a potential change of control would already have been proposed by the offeree company itself. In any of these three circumstances it should not, therefore, be in shareholders' interests to deprive them of a possible offer from the potential offeror.

Q10 Do you agree with the conclusions set out in paragraph 5.4.3 above?

5.5 Concert parties of the potential offeror

5.5.1 It is frequently the case that a number of persons acting in concert will be interested in pursuing an offer for the offeree company, notwithstanding that only one of those persons is intended to be the actual offeror when the offer is made. For example, an offer might be made by a consortium of investors through a jointly-owned bidding vehicle, by an offeror with the backing and support of another person that intends to acquire offeree company assets from the offeror following the offer or by a management buy-in or buy-out team with the financial backing of a private equity investor.

5.5.2 In such a case, the Code Committee believes it would be inconsistent with the philosophy underlying the "put up or shut up" regime (i.e. that an offeree company should be relieved from siege if no offer is forthcoming within a reasonable period) if the "put up or shut up" obligation and the restrictions if a no intention to bid statement is made applied only to any offer vehicle or only to certain members of the consortium or concert party concerned.

5.5.3 The Code Committee, therefore, considers that any "put up or shut up" requirement, and the consequences of any no intention to bid statement made following the setting of a "put up or shut up" deadline, should normally apply to all members of a consortium or concert party in the same way as they would to an individual offeror. Such restrictions should not, however, apply to any financial or other professional adviser which is a member of a concert party solely by reason of presumption (5) of the definition of "acting in concert" as set out in the Code.

Q11 Do you agree that a "put up or shut up" obligation should also apply to an offeror and its concert parties as described in paragraph 5.5.3?

5.5.4 The situation is different in circumstances where a no intention to bid statement is made by a party voluntarily. In a case where "put up or shut up" is not in point, there will not be a concern about relieving the offeree company from siege and so, provided that it is made clear whether any concert party of the potential offeror continues to be interested in pursuing an offer for the offeree company, it should not be necessary to bind the offeror's concert parties to the terms of the no intention to bid statement.

5.5.5 However, it would be easy to circumvent the restrictions that would otherwise apply under Rule 2.8, and would be inconsistent with a requirement to "down tools", if a party subject to a six month lock-out following a no intention to bid statement (whether made voluntarily or following a "put up or shut up" deadline) was able during that period to join up with, or become a concert party of, another person with a view to that other person making an offer for the offeree company. The Code Committee is, therefore, of the view that the restrictions that apply during a Rule 2.8 lock-out period should include subsequently coming into concert with a third party which is itself interested in making an offer.

Q12 Do you agree that a party making a no intention to bid statement should not be permitted to act in concert with another offeror during the six month lock-out period?

5.6 Code amendments

5.6.1 The amendments to the Code necessary to reflect the Code Committee's proposals in relation to Rule 2.8 referred to above are set out in section 2 of Appendix B to this Consultation Paper.

5.6.2 In addition, the Code Committee recognises that similar issues to those mentioned in section 5.3 above relating to an offeror "downing tools" might also arise in relation to Rule 35 where a firm offer has subsequently been withdrawn or lapsed and the failed offeror is prevented from bidding again for 12 months. The Code Committee is, therefore, proposing that Rule 35.1 be amended (as set out in section 3 of Appendix B to this Consultation Paper) to reflect equivalent restrictions in this regard to those provided for in the revised Rule 2.8. The amendments will make clear, however, that the additional restrictions will not apply to the extent that the offer lapsed as a result of a delay in obtaining necessary regulatory clearances and the offeror intends to continue to seek clearance from the relevant regulatory authorities with a view subsequently to making a new offer in accordance with Note (a)(iii) or Note (b) on Rule 35.1.

Q13 Do you agree with the proposed amendments to the Code referred to in section 5.6 above?

6. COSTS/BENEFITS

Given that the amendments proposed in this Consultation Paper serve to a large extent to codify existing practice, the Code Committee believes that the cost implications for offerors and offeree companies will be minimal.

APPENDIX A

Extract from the Panel's 2000-2001 Annual Report and full text of Rules considered in this Consultation Paper

THE EXECUTIVE'S GENERAL APPROACH TO "PUT UP OR SHUT UP"

An announcement obligation may arise under Rule 2.2 of the Code (for example, as a result of rumour and speculation) at a time when a potential offeror is contemplating making an offer for a company but is not in a position to be committed to making a firm offer. In such circumstances, the potential offeror is normally permitted under Rule 2.4 of the Code to announce merely that he is considering making an offer for the company.

Following such an announcement there is no fixed deadline in the Code by which a potential offeror must clarify his intentions. The timing of any subsequent announcements will depend, inter alia, on the reaction of the offeree board to the potential offeror and the state of preparedness of the potential offeror.

Where the offeree board is prepared to enter into a dialogue with the potential offeror, many months may pass before an offer is finally made. Provided the target company is content for the uncertainty to continue, the Executive would not normally seek to intervene in the process. However, in certain circumstances, usually where the potential offeror is unwelcome, the target company may request the Executive to intervene by imposing a deadline by which the potential offeror must clarify his intentions, i.e. "put up or shut up".

In this regard, "put up" is communicated by way of a Rule 2.5 firm offer announcement and "shut up" by way of a no intention to bid statement.

Requests by the target company for the offeror to be required to "put up or shut up" are generally made at the early stages of an offer period. In such cases, the Executive endeavours to balance the interests of shareholders in not being deprived of the opportunity to consider the possibility of an offer against potential damage to the

target company's business arising from the uncertainty surrounding the company and the distraction for management. In this regard, the Executive's normal approach is to seek clarification by the potential offeror within six to eight weeks from the original announcement of the possible offer. If a request is made at a later stage, the Executive will consider the circumstances at that time.

If the potential offeror clarifies his intentions by way of a no intention to bid statement, this statement will be governed by Rule 2.8 and the potential offeror will normally be prevented from making an offer for the company for a period of six months (unless there is a material change of circumstances and subject to any specific reservations set out in the statement). However, if the Executive considers that the offeree company has suffered excessive siege as a result of the potential offeror's actions, it may impose the restrictions contained within Rule 35.1(b) and prevent the potential offeror from making an offer for a period of 12 months.

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

Except in the case of a mandatory offer under Rule 9, until a firm intention to make an offer has been notified a brief announcement that talks are taking place (there is no requirement to name the potential offeror in such an announcement) or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule. In most cases where such an announcement is made to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3 should be given.

NOTE ON RULE 2.4

Pre-conditions

The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to the making of an offer.

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

A person making a statement that he does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. Such a person will normally be bound by that statement for a period of six months

unless there is a material change of circumstances or there has occurred an event which the person specified in his statement as an event which would enable it to be set aside.

NOTE ON RULE 2.8

Prior consultation

Any person considering issuing such a statement should consult the Panel in advance, particularly if it is intended to include specific reservations to set aside the statement.

RULE 35

35.1 DELAY OF 12 MONTHS

(a) Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:—

- **(i) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company); or**

- **(ii) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer.**

(b) The restrictions in this Rule may also apply where a person, having made an announcement which, although not amounting to the announcement of an offer, raises or confirms the possibility that an offer might be made, does not announce a firm intention either to make, or not to make, an offer within a reasonable time thereafter.

This applies irrespective of the precise wording of the announcement and the reason it was made. For example, it is relevant in the case of an announcement that a person is "considering his options" if, in all the circumstances, those options may reasonably be understood to include the making of an offer. However, the Panel envisages that this provision will only be applied occasionally and usually only if the Panel is persuaded by the potential offeree company that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the prospect of an offer.

The question as to what is "a reasonable time" has to be determined by reference to all the circumstances of the case: the stage which the offeror's preparations had reached at the time the announcement was made is likely to be relevant.

35.2 PARTIAL OFFERS

The restrictions in Rule 35.1 will also apply following a partial offer:—

(a) for not less than 30% and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared wholly unconditional. When such an offer has become or been declared wholly unconditional, the period of 12 months runs from that date; and

(b) for more than 50% of the voting rights of the offeree company which has not become or been declared wholly unconditional.

The restrictions in Rule 35.1 will not normally apply following a partial offer which could only result in a holding of less than 30% of the voting rights of the offeree company.

NOTE ON RULES 35.1 and 35.2

When dispensations may be granted

(a) The Panel will normally grant consent under this Rule when:—

(i) the new offer is recommended by the board of the offeree company. Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror either was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement or was one of two or more competing offerors whose offers lapsed with combined acceptances of less than 50% of the voting rights of the offeree company; or

(ii) the new offer follows the announcement of an offer by a third party for the offeree company; or

(iii) the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation (EEC) 4064/89. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or

(iv) the new offer follows the announcement by the offeree company of a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse takeover (see Note 2 on Rule 3.2) which has not failed or lapsed or been withdrawn.

(b) The Panel may also grant consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material regulatory clearances relating to an offer within the Code timetable. The Panel should be consulted by an offeror or potential offeror as soon as it has reason to believe that this may become the position.

APPENDIX B

Possible Code amendments to reflect the proposals in this Consultation Paper

1. Rule 2.4

Renumber the existing Rule 2.4 as Rule 2.4(a).

Add a new Rule 2.4(b) as follows:

> "**(b) At any time following the announcement of a possible offer (whether or not the potential offeror was named in such announcement), the offeree company may request that the Panel impose a time limit for the potential offeror to clarify its intentions with regard to the offeree company. If a time limit for clarification is imposed by the Panel, the potential offeror must, before the expiry of the time limit, announce either a firm intention to make an offer for the offeree company in accordance with Rule 2.5 or that it does not intend to make an offer for the offeree company, in which case the announcement will be treated as a statement to which Rule 2.8 applies.**"

Number the existing Note on Rule 2.4 as Note 1 and amend the Note as follows:

> "*NOTES ON RULE 2.4*
>
> *1. Pre-conditions*
>
> *(a) The Panel must be consulted in advance if a person proposes to include in any announcement of a possible offer any pre-condition to the making of the offer.*
>
> *(b) The announcement of a firm intention to make an offer the posting of which is subject to the satisfaction of a pre-condition will not normally satisfy an obligation arising under Rule 2.4(b) for the potential offeror to clarify its intentions with regard to the offeree company.*
> *See also Note 6 on Rule 2.5."*

Add new Notes on Rule 2.4 as follows:

> "*2. Possible offer announcements*
>
> *The provisions of Rule 2.4(b) will not apply where an offer has already been announced by a third party and the potential offeror makes a statement that it is considering making a competing offer.*

3. Period for clarification

The precise time limit imposed in any particular case under Rule 2.4(b) will be determined by reference to all the circumstances of the case and the Panel will endeavour to balance the potential damage to the business of the offeree company arising from the uncertainty caused by the potential offeror's interest against the disadvantage to its shareholders of losing the prospect of an offer.

4. Extension of time limit

A time limit for a potential offeror to clarify its intentions imposed under Rule 2.4(b) may be extended only with the consent of the Panel. The Panel's consent will normally be granted if the board of the offeree company consents to the extension."

2. Rule 2.8

Amend existing Rule 2.8 as follows:

"**A person making a statement that he does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. Except with the consent of the Panel, ~~Such a person will normally be bound by that statement for a period of six months~~ unless there is a material change of circumstances or there has occurred an event which the person specified in his statement as an event which would enable it to be set aside, neither the person making the statement, nor any person who acted in concert with him, nor any person who is subsequently acting in concert with either of them, may within six months from the date of the statement:**

(a) announce an offer or possible offer for the offeree company (including a partial offer which would result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company);

(b) acquire any shares of the offeree company if any such person would thereby become obliged under Rule 9 to make an offer;

(c) acquire any shares of the offeree company or any rights over such shares if the shares and rights over shares held by any such person, together with persons acting in concert with him, would in aggregate carry 30% or more of the voting rights of the offeree company;

(d) make any announcement or statement which raises or confirms the possibility that an offer might be made for the offeree company; or

(e) take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the potential offeror and its immediate advisers."

Number the existing Note on Rule 2.8 as Note 1 and add new Notes on Rule 2.8 as follows:

> *"2. Rule 2.4(b)*
>
> *Where a statement to which Rule 2.8 applies is made following a time limit being imposed under Rule 2.4(b), the only matters that a person will normally be permitted to specify in the statement as matters which would enable it to be set aside are:*
>
> *(a) the agreement or recommendation of the board of the offeree company;*
>
> *(b) the announcement of an offer by a third party for the offeree company; and*
>
> *(c) the announcement by the offeree company of a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse takeover (see Note 2 on Rule 3.2).*
>
> *3. Concert parties*
>
> *Where a statement to which Rule 2.8 applies is made otherwise than following a time limit being imposed under Rule 2.4(b), the restrictions imposed by Rule 2.8 will normally apply also to any person acting in concert with the person making the statement unless it is made clear in the statement, or at the time the statement is made, that any such person is continuing to consider making an offer for the offeree company."*

3. Rule 35

Delete the existing Rule 35.1(b), renumber the existing Rule 35.1(a) as Rule 35.1 and renumber the existing Rules 35.1(a)(i) and 35.1(a)(ii) as Rules 35.1(a) and 35.1(b) respectively.

Delete the word "**either**" at the end of the opening paragraph of the new Rule 35.1 and the word "**or**" at the end of the new Rule 35.1(a) and add the following after the new Rule 35.1(b):

> **"(c) acquire any shares of the offeree company or any rights over such shares if the shares and rights over shares held by any such person, together with persons acting in concert with him, would in aggregate carry 30% or more of the voting rights of the offeree company;**
>
> **(d) make any announcement or statement which raises or confirms the possibility that an offer might be made for the offeree company; or**

(e) take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the offeror and its immediate advisers."

Add a new Note (c) on Rule 35.1 as follows:

"*(c) The restrictions in Rules 35.1(d) and (e) will not normally apply to the extent that the offer lapsed as a result of being referred to the Competition Commission or the European Commission initiating proceedings, or as a result of the offeror failing to obtain another material regulatory clearance relating to the offer within the usual Code timetable, but the offeror is continuing to seek clearance or a decision from the relevant regulatory authorities with a view subsequently to making a new offer with the consent of the Panel in accordance with Note (a)(iii) or Note (b) on Rule 35.1.*"

APPENDIX C

Questions for Consultation

Q1 **Do you agree that the Panel's practice on "put up or shut up" should be reflected in specific provisions of the Code?**

Q2 **Do you agree that the Panel should not seek to intervene following a possible offer announcement unless requested to do so by the offeree company?**

Q3 **Do you agree that the offeree company should be able to request a "put up or shut up" deadline notwithstanding that it is at the time in discussions or negotiations with the potential offeror?**

Q4 **Do you agree that the Panel should retain flexibility in order to establish the appropriate time period for a potential offeror to clarify its intentions?**

Q5 **Do you agree that a potential offeror should not normally be permitted to satisfy a "put up or shut up" obligation by announcing a pre-conditional offer?**

Q6 **Do you agree with the conclusions set out in paragraph 4.19 above?**

Q7 **Do you agree that the Panel should normally announce any "put up or shut up" deadline imposed?**

Q8 **Do you agree with the proposed amendments to the Code referred to in paragraph 4.21 above?**

Q9 **Do you agree that following a no intention to bid statement a potential offeror should be required to "down tools" as envisaged by paragraphs 5.3.3 to 5.3.5 above?**

Q10 Do you agree with the conclusions set out in paragraph 5.4.3 above?

Q11 Do you agree that a "put up or shut up" obligation should also apply to an offeror and its concert parties as described in paragraph 5.5.3?

Q12 Do you agree that a party making a no intention to bid statement should not be permitted to act in concert with another offeror during the six month lock-out period?

Q13 Do you agree with the proposed amendments to the Code referred to in section 5.6 above?