

PCP 2005/5 Issued on 18 November 2005

THE PANEL ON TAKEOVERS AND MERGERS

CONSULTATION PAPER

**THE IMPLEMENTATION OF THE TAKEOVERS
DIRECTIVE**

**PROPOSALS RELATING TO AMENDMENTS TO
BE MADE TO THE TAKEOVER CODE**

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

The Panel and the Code Committee are therefore inviting comments on this Public Consultation Paper (“PCP”) by 10 February 2006. Comments may be given by any of the means below.

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

SECTION A: INTRODUCTION

1. Background

- 1.1 The European Directive on Takeover Bids (Directive 2004/25/EC, “the Directive”) was adopted on 21 April 2004 and must be implemented into national law by 20 May 2006. In January 2005, The Department of Trade and Industry (“DTI”) published a Consultative Document on its proposals for implementing the Directive in the UK and the Panel published an Explanatory Paper, which welcomed the Government’s proposals and set out in broad terms its intentions for putting into effect the necessary changes that would result from the Directive and the Government’s proposals.
- 1.2 In the period since January, the Panel has continued to work with the DTI on the preparation of draft legislation based on the Government’s proposals. The Government’s response to the DTI’s Consultative Document, together with draft clauses, was published in July and can be found on the DTI’s website at: <http://www.dti.gov.uk/cld/Takeoversgovernmentresponse.doc>. The clauses now form Chapter 1 of Part 22 of the Company Law Reform Bill (the “Bill”), which was introduced into the House of Lords on 1 November. Explanatory Notes on the clauses were published on November 17 and can be found at: <http://www.publications.parliament.uk/pa/ld200506/ldbills/034/en/06034x--.htm#end>
- 1.3 During the same period, the Panel has been working to prepare the detailed changes that will have to be made to the Code to reflect the Directive and the legislation. These changes affect the Panel, including its constitution, powers and procedures, as well as the General Principles, Definitions and Rules of the Code. As mentioned in the Explanatory Paper, the Panel has also undertaken a review of its operations which has led to some useful improvements, some of which have already been effected.
- 1.4 All the detailed changes proposed are now set out in this PCP in the form of a revised Introduction to the Code (the “Introduction”), which is attached at

Appendix A and amendments to the General Principles, Definitions and Rules, which are presented in section C. While most of these changes are required by the Directive and the legislation, the Panel is nonetheless seeking views on all of them. For ease of reference, the Directive is attached at Appendix B and Chapter 1 of Part 22 of the Bill at Appendix C.

- 1.5 The Code Committee recently published PCP/2005/4, proposing the abolition of the SARs. This PCP does not, therefore, contain any proposals for amendments to the SARs pending the outcome of that consultation exercise. If the SARs are retained, amendments will have to be made to their Introduction, which will reflect amendments made to the Introduction to the Code.

2. Overview of the legislation

- 2.1 The Panel was pleased to note that the responses to the DTI's Consultative Document demonstrated confidence in the Panel and the existing system of takeover regulation in the UK and supported the Government's approach to implementation of the Directive. This approach, which is now reflected in the Bill, will preserve the strengths and key characteristics of the existing system within the new legal framework created as a result of the Directive.

- 2.2 The Panel has always felt that, in order for it to be able to continue to provide an effective system of regulation for takeovers within the new statutory framework, it would be essential:

- to retain the ability of the Panel to be responsible for its own organisation and procedures;
- to maintain the Panel's independence;
- to maintain the existing relationship between the Panel and its regulated community;
- to minimise the risk of tactical litigation during bids;

- to preserve the Panel's power to specify the companies and transactions subject to its jurisdiction where these fall outside the minimum standards of the Directive; and
- to have all detailed provisions relating to rules and procedures set out in a unified form in the Code.

The Panel believes that the Bill contains the elements needed to meet these objectives and hence to establish a sound statutory framework for the future, establishing the Panel as the supervisory authority for the purposes of the Directive while maintaining its constitutional independence.

2.3 The Bill will place the Panel under an obligation to make statutory rules to satisfy Directive requirements and will provide it with the powers it needs in order to continue to regulate all takeovers and other transactions currently covered by the Code. It also includes measures to limit the risk of tactical litigation and to provide immunity for the Panel, its members, officers and staff in carrying out their regulatory functions. It contains new powers for the Panel to enforce the Code through the courts, if necessary, and to order the payment of compensation in certain restricted circumstances. Finally, the Bill includes provisions to assure the future funding of the Panel.

2.4 Overall, the Panel remains confident that while its status and the status of the Code will be different under the new statutory regime, there will be little material substantive change either to its procedures or to the Rules of the Code. As a result, the practical, day-to-day impact of the legislative changes will be small and the Panel's relationship with its regulated community will be largely unaffected. The Panel will continue to regulate takeover activity in the UK with a flexible approach, offering speed and certainty in decision-making and seeking to ensure compliance with the Code through consensus with the parties involved.

3. Timetable

- 3.1 In accordance with normal procedure, the Panel and the Code Committee will consider all responses to this PCP and then publish a Response Statement (“RS”) including the amendments in final form. It is possible that amendments made to the Bill during its passage through Parliament will lead to consequential amendments to the proposals put forward in this PCP. Any such amendments will, if available in time, be taken into account in preparation of the Response Statement to this PCP. It is envisaged that the RS with the final amendments will be published in Spring 2006.

SECTION B: CHANGES PROPOSED FOR THE PANEL

1. The new Introduction to the Code

1.1 In order to incorporate all the changes required by the Directive and the legislation, as well as some other refinements to existing procedures, the Panel has undertaken a thorough review of the Introduction. The proposed changes cover:

- the status of the Panel;
- the nature of its rule-making power;
- its power to grant waivers and derogations from rules;
- the scope of its jurisdiction;
- its constitution and the functions of its constituent committees;
- its procedures for review and appeal of rulings;
- its powers to require documents and information;
- its enforcement powers; and
- disclosure of information and co-operation with other regulators, both within the UK and overseas.

Other matters, such as the sanctions available for non-compliance with the Code and the role of the Executive in interpreting the Code, are largely unchanged.

1.2 This part of the PCP will go through the new Introduction section by section. Generally, the new version covers the same ground as the current one but it does so in more detail. One significant change is that certain parts of the Introduction are now classified as rules for the purposes of the legislation and they are identified as such. As required by clause 618(4) of the Bill, all statutory rules must be adopted by the Code Committee. As a result, responsibility for promulgating changes to those parts of the Introduction falls to the Code Committee. The remainder is adopted by the Panel.

2. The status of the Panel and the Code

2.1 Section 1, Overview

2.1.1 This section provides a general description of the Panel and its functions. It explains that the Panel is an independent body that has been designated as the supervisory authority for the purpose of carrying out certain regulatory functions pursuant to the Directive (as required by Article 4.1). Those functions, as well as the Panel's other statutory functions relating to the regulation of other matters to which the Code applies, are set out in Chapter 1 of Part 22 of the Bill.

2.1.2 This section also draws attention to the fact that, in issuing the Code, the Panel will be exercising rule-making powers conferred on it by the legislation. The Panel's rule-making powers are provided under clause 618 of the Bill, which obliges the Panel to make rules giving effect to specific Articles of the Directive and permits it to make rules covering all other matters to which the Code currently applies. This clause also permits the Panel to make rules in relation to other matters, similar to those currently covered by the Code, thus providing it with sufficient flexibility to take account of future market developments.

2.2 Section 2, The Code

This section provides a general description of the status of the Code and its objectives and also contains a new rule setting out the circumstances in which the Panel may derogate or grant a waiver from the application of a rule.

2.2.1 **Section 2(a), Nature and purpose of the Code**, largely replicates paragraph 1(a) of the current Introduction but with certain significant changes. The first sentence of the section includes wording to reflect parts of Article 3 of the Directive that relate to the requirements placed on the offeree company not to deny its shareholders the opportunity to decide on the merits of an offer and on the offeror to afford equivalent treatment to shareholders of the same class.

The last paragraph of this section also explains that, following the implementation of the Directive, the rules of the Code will comply with the Directive and have a statutory basis.

2.2.2 Section 2(b), ‘General Principles and Rules’

This section explains the nature of the General Principles and other rules set out in the Code. This replicates most of paragraph 3(a) of the current Introduction, including the fact that the spirit of both the General Principles and the rules must be observed. However, it also explains that the General Principles are the same as those contained in Article 3.1 of the Directive (see paragraph C2 below for more detail).

2.2.3 Section 2(c), ‘Derogations and Waivers’

- (i) Section 2(c) contains a new rule, setting out the circumstances in which the Panel may derogate or grant a waiver to a person from the application of a rule. This rule derives from Article 4.5 of the Directive and clause 619(1) of the Bill.
- (ii) The general position is that a derogation may be given or a waiver granted if it is either provided for in a rule or in other specific circumstances where the Panel considers it appropriate. In the latter case, a reasoned decision must be given. This is similar to the existing regime, which provides in paragraph 3(a) of the current Introduction that the Panel may “modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, it would operate unduly harshly or in an unnecessarily restrictive or burdensome, or otherwise inappropriate, manner”. This wording is replicated in the new rule. In addition, a number of specific derogations are already set out in the Code but there are also currently cases where it is the Panel’s practice to grant derogations for particular sets of circumstances on a fairly regular basis. In order to ensure that those derogations will continue to be generally available, the Code

Committee is proposing to write certain additional specific derogations into some Rules and these are dealt with in detail in Section C of this PCP.

- (iii) The general position described above is qualified in one respect. In order to comply with Article 4.5 of the Directive, in the case of a transaction subject to the requirements of the Directive, and if the rule in question derives from the Directive, the Panel will need to ensure, in giving any derogation or granting any waiver from the application of that rule, that the General Principles are respected.

3. The scope of the Panel’s jurisdiction

- 3.1 **Section 3, ‘Companies, Transactions and Persons subject to the Code’** covers in detail the full scope of the Panel’s jurisdiction and certain associated matters. It replaces paragraph 4 of the current Introduction, which has had to be expanded in order to set out in full the companies and transactions to which the Code will apply pursuant to the Directive, as well as those non-Directive companies and transactions to which the Code currently applies. The rules contained in this section derive from Article 4.2 of the Directive and clause 618 of the Bill. The Directive determines the scope of the jurisdiction of the competent authority in any Member State of the European Economic Area (“a Member State”) by reference to the location of the registered office of the offeree company and the regulated market on which its securities are traded. It also provides for shared jurisdiction over an offer where the offeree company has its registered office in one Member State but has its securities admitted to trading on the regulated markets of one or more other Member States.

3.2 Section 3(a), Companies

- 3.2.1 (i) *UK, Channel Island and Isle of Man registered and traded companies*

This limb of the Code’s jurisdiction covers all companies as well as Societas Europaea (and, where appropriate, statutory and chartered

companies) that have their registered office in the UK, the Channel Islands or the Isle of Man, and have any of their securities admitted to trading on a regulated market¹ in the UK or on a stock exchange in the Channel Islands or the Isle of Man². This includes the companies covered by Article 4.2(a) of the Directive (ie those that have their registered office in the UK and have any of their securities admitted to trading on a regulated market in the UK) but not those covered by the shared jurisdiction arrangements covered in sub-paragraph (iii) below. All of these companies are already covered by the Code, but only if they satisfy the residency test.³ In future, that test will not be applied in respect of any of these companies. Therefore, for example, if a company is registered in the UK and is traded on the London Stock Exchange, it will be covered by the Code even if its place of central management is overseas.⁴ Similarly, a company which is registered in Guernsey and traded on the London Stock Exchange will automatically be covered by the Code, regardless of the location of its place of central management.

3.2.2 (ii) *Other companies*

This limb of the Code's jurisdiction covers all other companies (ie not covered by sub-paragraphs (i) above or (iii) below), both public and private, and also Societas Europaea (and, where appropriate, statutory and chartered companies) that are currently covered by the Code. The residency test will continue to apply in respect of these companies. A UK registered company traded on AIM or OFEX, for example, will, therefore, continue to be covered by the Code, provided its place of central management is in the UK, the Channel Islands or the Isle of

¹ The term 'regulated market' is to be defined in the Definitions section of the Code (see para C3.1.4 below). Currently, relevant UK markets are certain markets operated by the London Stock Exchange and virt-x.

² Currently only CISX in Guernsey.

³ "The Panel will normally consider a company to be resident only if it is incorporated in the UK, the Channel Islands or the Isle of Man and has its central place of management in one of those jurisdictions."

⁴ This will reverse the position of Xstrata (Panel Statement 2002/7).

Man. The criteria that apply in considering whether private companies are subject to the Code will not change. Similarly, this paragraph makes it clear that, as at present, the Panel will apply the Code with a degree of flexibility in relation to private companies covered by this paragraph and to all statutory and chartered companies covered by both this and the previous paragraph.

3.2.3 (iii) *Shared jurisdiction – UK and other EEA registered and traded companies*

This paragraph sets out the circumstances in which, in accordance with Article 4.2(b), (c) and (e) of the Directive, the Panel will share the regulation of an offer with a relevant competent authority in another Member State. This will happen when the offeree company is:

- (a) registered in the UK but its securities are admitted to trading only on a regulated market in one or more Member States other than the UK; or
- (b) registered in another Member State but has its securities admitted to trading only on a regulated market in the UK; or
- (c) registered in another Member State and its securities are admitted to trading on regulated markets in more than one Member State including the UK if:
 - the company's securities were first admitted to trading only on a regulated market in the UK; or
 - on or after 20 May 2006, the company's securities are admitted to trading simultaneously on more than one regulated market and the company chooses to be regulated

by the Panel (and notifies the Panel and the other relevant regulatory authorities of that fact); or

- the company had its securities admitted to trading simultaneously on more than one regulated market before 20 May 2006, and either the competent authorities of the relevant Member States agree before 19 June 2006 that the Panel should be the regulator or, failing that, the company chooses on 19 June 2006 to be regulated by the Panel.

In any case falling within the last two indents of (c) above, the company must notify a Regulatory Information Service of the selection of the Panel as the relevant regulator without delay.

In shared jurisdiction cases, Article 4.2(e) of the Directive outlines a framework for determining which supervisory authority will regulate which aspects of the transaction. Broadly, if the company is registered in the UK (sub-paragraph (iii) (a) above), the Panel will be responsible for regulating matters relating to the information to be provided to employees of the offeree company and matters relating to ‘company law’ (which are described, following Article 4.2(e) of the Directive, as including the determination of the control threshold for a mandatory offer, any derogation from the obligation to launch an offer and matters relating to frustrating action). If, however, the company falls within the Panel’s jurisdiction only because its securities are admitted to trading on a regulated market in the UK (sub-paragraphs (iii) (b) and (c) above), the Panel will have responsibility for matters relating to the consideration offered, in particular the price, and matters relating to ‘bid procedure’ (for example, announcements of offers and the contents of the offer document). In each case, the supervisory authority in another Member State will be responsible for the matters not regulated by the Panel.

The Panel has begun to discuss with authorities in other Member States how these provisions for shared jurisdiction will work in practice.

3.2.4 (iv) *Open-ended investment companies*

This paragraph makes it clear that, as at present, the Code will not apply to offers for open-ended investment companies. These companies are defined in Article 1.2 of the Directive, which is referred to here.

3.3 **Section 3(b), Transactions**

3.3.1 The Directive (Article 2.1(a)) applies only to public, control-seeking “offers” (whether mandatory or voluntary). This would not capture, for example, a scheme of arrangement under section 425 of the Companies Act 1985. However, except in the shared jurisdiction cases set out in paragraph 3(a)(iii) of the Introduction (see paragraph B3.3.2 below), the Code will apply, as it does now, to takeover bids and merger transactions in relation to the relevant companies, however they may be effected, and also to other transactions which are used to obtain or consolidate control of a relevant company as well as to all partial offers. The first sub-paragraph of this section defines these transactions to which the Code will apply in detail, largely combining paragraph 4(b) of the current Introduction with the current definition of ‘offer’. It makes clear that the Code will apply to statutory mergers and Court approved schemes of arrangement, as well as to offers by a parent for shares in its subsidiary and dual holding company transactions. For the avoidance of doubt, references have been added to certain other transactions over which the Panel exercises jurisdiction when they are used to obtain or consolidate control of a relevant company. These include new share issues, share capital re-organisations and offers to minority shareholders.

3.3.2 The shared jurisdiction arrangements will apply only to offers that fall within the narrow, Directive-based definition of an offer. The second paragraph of this section makes this clear. However, it is important to note that if a

company covered by the shared jurisdiction arrangements also falls under one of the other limbs of the Panel's jurisdiction as set out in section 3(a) of the Introduction (for example, if it is a UK registered company, only traded overseas, but centrally managed in the UK) then a transaction falling within the wider, Code definition of an offer referred to in paragraph B3.3.1 above will be relevant for Code purposes. Therefore, if the transaction proposed in relation to such a company is, for example, a scheme of arrangement, it will still be subject to the Code and will not be subject to the shared jurisdiction provisions because the transaction will not fall within the narrow, Directive-based definition of an offer.

- 3.3.3 Also for the avoidance of doubt and reflecting current practice, it is now made clear that the Code applies to all relevant transactions at any stage of their implementation, including, for example, when an offer is in contemplation but has not been announced.

3.4 **Section 3(c), Related matters**

Clause 618(2)(b) and (c) of the Bill provides that the Panel may make rules in relation to other things done in connection with takeover bids and other relevant transactions. This is reflected in section 3(c) (and covers, for example, the provisions in Rule 2.4 on 'put up or shut up' and 'no intention to bid' statements under Rule 2.8).

3.5 **Section 3(d), Dual jurisdiction**

The Panel continues to advise early consultation with the Executive in cases where more than one regulator may be involved. This section replicates paragraph 4(c) of the current Introduction but includes reference to the shared jurisdiction cases, where consultation is advised in order to determine which provisions of the Code will apply.

3.6 **Section 3(e), Loss of Code protection**

Paragraph 4(a) of the current Introduction includes a sentence about the need for any public company with more than one shareholder to consult the Panel if it proposes to re-register as a private company to which the Code will not apply. The purpose of such consultation is to enable the Panel to give the company guidance on the appropriate information to be given to shareholders about the implications of the loss of Code protection. The Code Committee is proposing that this should continue to be the position and this is reflected in section 3(e), although the wording has been expanded. Guidance on this matter is provided on the Panel's website www.thetakeoverpanel.org.uk.

3.7 **Section 3(f), Code responsibilities and obligations**

This section expands on paragraph 1(b) of the current Introduction in order to spell out in greater detail the range of persons to whom the Code may apply and the nature of their responsibilities. A particular responsibility is placed on financial advisers to comply with the Code and to ensure as far as possible that their clients comply, while all entities to which the Code applies are expected to ensure that their directors (or equivalent) and employees receive appropriate training in respect of the Code. This paragraph also alerts directors to the fact that the Code will inevitably impinge upon their freedom of action. It also states that the Code will apply in relation to anything done (or not done) in connection with a takeover, even once the offer in question has completed.

4. The Panel's constitution and the functions of its constituent committees

4.1 The Bill lays down a minimum structure for the Panel's constitution. Clause 617 provides that the Panel may make arrangements for any of its functions to be carried out by a committee or sub-committee, or an officer or member of staff (or any person acting as such); clause 618 provides that the Panel's rule-making function must be carried out by a committee of the Panel; and clause 626 establishes the basis of the procedures for challenging Panel decisions through the Hearings Committee and the independent Takeover Appeal Board

(“the Board”) and provides for the separation of the rule-making and decision-reviewing functions of the Panel. The Panel retains autonomy to provide for its constitution based on this structure and thus, subject to these provisions of the Bill, will continue to have flexibility to adapt its operations to meet changing needs.

4.2 In its Explanatory Paper, the Panel described the main elements of its proposed new constitution and **Section 4, The Panel and its Committees**, sets this out in more detail, giving an overview of the membership, functions, responsibilities and general activities of the Panel and of its two principal committees, the Code Committee and the Hearings Committee (see paragraphs B4.4 and 4.5 below). The Panel is also proposing to establish a Nomination Committee to lead the process for the appointment of the Chairman, Deputy Chairmen, the independent Panel members (who will now include the members of the Code Committee) and the Director General. The Panel recently appointed a Remuneration Committee. Details of the Panel and its Committees will be available on the Panel’s website.

4.3 **Section 4(a), The Panel**

4.3.1 This section, which expands on paragraph 2(a) of the current Introduction, establishes that the Panel will have overall responsibility for matters concerning policy, financing and administration. This will continue to include, for example, approval of the Annual Report, which, under clause 638 of the Bill, will have to set out (as, indeed, it does already) how the Panel has discharged its functions during the year, include the Panel’s annual accounts and mention any other matters that the Panel considers relevant.

4.3.2 The Panel will be made up of members appointed by the Panel, on the recommendation of the Nomination Committee, and individuals appointed by the nominating bodies listed in this section (which list is unchanged). In order to ensure the separation of its decision-reviewing and rule-making functions, as required by clause 626 of the Bill, each member will then either:

- (i) be designated on appointment as a member of either the Code Committee or the Hearings Committee (see also paragraph B4.6 below); or
- (ii) will become a member of the Hearings Committee automatically.

4.3.3 Members appointed by the Panel itself will comprise the Chairman, up to two Deputy Chairmen and up to 20 other members. The Chairman, Deputy Chairmen and up to 8 of these Panel-appointed members will be designated as members of the Hearings Committee, while up to 12 will be designated as Code Committee members.

4.3.4 All of the members appointed by the nominating bodies will automatically become members of the Hearings Committee. It is made clear in this section that these members, in performing their functions on the Hearings Committee, will act independently of the body by which they have been appointed.

4.3.5 Both the Panel and the nominating bodies will be able to appoint alternates to act as Panel members in a relevant member's place.

4.4 **Section 4(b), The Code Committee**

4.4.1 The Code Committee was established in 2001, when the rule-making function of the Panel was delegated to it in order to comply with UK human rights legislation. The Code Committee will be solely responsible for carrying out the rule-making function of the Panel pursuant to clause 618(4) of the Bill. Its responsibilities, set out in this section, consist of keeping the rules of the Code under review and proposing, consulting on, making and issuing amendments to those rules. This section also makes it clear which parts of the Introduction do not set out statutory rules and so will not be the responsibility of the Code Committee. They will, therefore, as explained in paragraph B1.2 above, fall within the Panel's remit.

4.4.2 This section also contains a description of the constituency from which the Code Committee's membership will be drawn and it describes in summary the consultation procedures followed by the Code Committee in proposing any amendment to the Code, other than in certain restricted circumstances. The full consultation procedures will be included in the Code Committee's Terms of Reference, which will be available on the Panel's website.

4.5 **Section 4(c), The Hearings Committee**

This section provides a brief introduction to the Hearings Committee, which will be established pursuant to clause 626(1). Its principal function will be to review rulings of the Executive and to hear disciplinary proceedings instituted by the Executive when it considers there has been a breach of the Code. Its membership is as described above in paragraphs B4.3.3 and 4.3.4. In accordance with established policy for the appointment of the independent Panel members, the members appointed by the Panel to be members of the Hearings Committee will be representatives of industry and business and will include a person with experience of employee relations issues from the employee's perspective. The maximum possible number of Panel-appointed members is greater than the existing number of 4 independent members, thus providing flexibility for the future, although the Panel has no intention of appointing additional members at present. The membership, Terms of Reference and Rules of Procedure of the Hearings Committee will be available on the Panel's website. Its operations are also described in further detail in section 7 of the Introduction (see paragraphs B7.2 - 7.7 below). The Hearings Committee will, as at present, be assisted by a secretary, who will usually be a partner in a law firm, acting as an officer of the Panel.

4.6 **Section 4(d), Membership and representation restrictions**

This section contains rules which will implement clause 626(5) of the Bill. It provides, as required by clause 626(5)(b), that no-one who is or has been a member (or alternate of a member) of the Code Committee may at any time be a member (or alternate of a member) of the Hearings Committee or the Board.

It further provides, as required by clause 626(5)(a) and (c), that when it is appearing before the Hearings Committee or the Board, the Panel may only do so by an officer or member of staff.

5. The role of the Executive

- 5.1 The Executive will maintain its existing role under the new constitution. **Section 5, The Executive**, therefore largely replicates paragraph 2(b) of the current Introduction in describing its functions but also adds a description of the staff making up the Executive. It identifies some of the persons who will be regarded as officers of the Panel and also makes reference to the role of secondees, making it clear that, in performing their Panel functions, they act independently of the body seconding them.

6. Section 6, Interpreting the Code

- 6.1 As explained above in paragraph B4.1, clause 617 empowers the Panel to carry out any of its functions through officers or members of staff, or any person acting as such. This section makes rules relating to certain functions of the Panel that are carried out by the Executive in issuing guidance and rulings on the interpretation, application and effect of the Code. Clause 620(1) of the Bill provides a specific power to give rulings and clause 620(2) goes on to provide that, to the extent and in the circumstances specified in rules, and subject to review or appeal, rulings of the Panel (or the Executive) will have binding effect. Clause 626(1) provides that rules must be made to provide that any decision of the Panel (which includes a ruling given by the Executive) will be subject to review by the Hearings Committee at the instance of the parties affected by the decision (see paragraph B7.3 below).
- 6.2 This section therefore sets out the rules according to which the Executive will give guidance and rulings, differentiating between the two.

6.3 **Section 6(a), Interpreting the Code - guidance**

6.3.1 This section describes the current practice relating to the giving of guidance. It explains that the Executive may give general guidance on the interpretation or effect of the Code (or how it is applied in practice) or it may give more specific guidance on a “no names” basis, where the identity of the parties concerned is not disclosed to the Executive.

6.3.2 In all cases, guidance is not binding and it is therefore made clear that, as at present, guidance cannot be relied on as a basis for taking action and parties or their advisers must consult the Panel to obtain a ruling on a named basis in the circumstances of any particular case.

6.3.3 The Executive may also publish Practice Statements, giving informal guidance on the way in which the Executive interprets or applies particular provisions in certain circumstances. Guidance may also be included in statements made by the Hearings Committee or the Board.

6.4 **Section 6(b), Interpreting the Code – rulings of the Executive and the requirement for consultation**

6.4.1 This section largely replicates paragraph 3(b) of the current Introduction, which deals with the process of consulting the Executive to obtain a ruling. However, it includes some important additions.

6.4.2 First, it explains that, in addition to making rulings at the request of a party, the Executive may also make rulings on its own initiative, where it considers it necessary to do so. It also makes it clear that any unconditional ruling (made when the views of all parties have been heard) will be binding on those who are made aware of it unless and until overturned by the Hearings Committee or the Board. Furthermore, if the Executive gives a conditional ruling, for the purpose of preserving the status quo pending an unconditional ruling, persons made aware of that conditional ruling will be obliged to comply with it.

- 6.4.3 Finally, this section makes clear, as required by clause 626(1), that any ruling of the Executive, including the grant or refusal to grant a waiver or derogation from any provision of the Code, may be referred for review to the Hearings Committee.

7. Review and appeal procedures

- 7.1 Having established that any decision of the Executive may be referred to the Hearings Committee for review, clause 626 of the Bill sets down the framework in relation to the proceedings of the Hearings Committee when hearing a review and, in turn, for the Board, in the event that a ruling of the Hearings Committee is appealed. The next two sections of the Introduction provide a description of the procedures for review and appeal when a ruling of the Executive is disputed.

7.2 Section 7, Hearings Committee

This section provides an overview of the procedural rules of the Hearings Committee, which will be available in full on the Panel's website.

7.3 Section 7(a), Hearings before the Hearings Committee

This section sets out the circumstances in which the Hearings Committee can be convened. These largely reflect current practice, as set out in paragraphs 3(c) and (d) of the current Introduction.

7.4 Section 7(b), Time limits for application for review by the Hearings Committee; frivolous or vexatious applications

- 7.4.1 This section also reflects current practice, here relating to the period within which parties wishing to apply for a review of a ruling to the Hearings Committee must notify the Panel of their application. While parties must continue to notify the Panel as soon as possible, the period allowed is normally one month from the event giving rise to the application. However, this section

makes it clear that, if necessary, the Executive may shorten or extend that period.

- 7.4.2 As now, the Hearings Committee or its Chairman retains a discretion to deal summarily with frivolous or vexatious applications without a hearing.

7.5 Section 7(c), Conduct of hearings before the Hearings Committee

- 7.5.1 Hearings before the Hearings Committee will be conducted in essentially the same way as are proceedings before the Panel at present. This section therefore largely repeats paragraph 3(e) of the current Introduction, and adds some clarifications. First, it is made clear that, while proceedings will normally be conducted in accordance with its Rules of Procedure, the Hearings Committee may vary the procedure if it considers that fairness and justice would be better served by doing so. It also states that, as part of its decision, the Hearings Committee may give directions regarding the effects of the Panel ruling and/or its decision pending the outcome of any appeal to the Board. Furthermore, any decision of the Hearings Committee, when provided to the parties or when published in a Panel Statement may, following a request of one of the parties and at the chairman's discretion, be redacted, to edit out and thus protect information of a confidential or commercially sensitive nature. If there is, or may be an appeal, the Hearings Committee may suspend publication of its decision in a Panel Statement, though it may make an interim announcement where appropriate.

- 7.5.2 It is also made clear that, pursuant to clause 620(2) of the Bill, decisions of the Hearings Committee will be binding unless and until they are overturned by the Board.

7.6 Section 7(d), Procedural rulings

This section replaces paragraph 3(h) of the current Introduction, giving the chairman of a Hearings Committee review hearing the power to give procedural rulings for the conduct of the case.

7.7 Section 7(e), Right of appeal

7.7.1 Clause 626 (3) of the Bill provides that there must be a right of appeal to the Board against a decision of the Hearings Committee, in such circumstances and subject to such conditions as are specified in the rules.

7.7.2 At present, there is a right of appeal where:

- (a) the Panel finds a breach of the Code and proposes to take disciplinary action;
- (b) it is alleged that the Panel has acted outside its jurisdiction; or
- (c) the Panel refuses to recognise, or decides to cease to recognise, an exempt principal trader or exempt fund manager.

In other cases, an appeal can be made only with leave of the Panel.

7.7.3 The Panel stated in its Explanatory Paper that it intended to increase access to the Board so that all decisions might be appealed on the grant of leave either from the Hearings Committee or, failing that, the Board. The Panel is now proposing to extend this right even further, so that there will be an automatic right of appeal against decisions of the Hearings Committee (including procedural directions given by the chairman of the hearing) in all cases, with no requirement to seek leave.

7.7.4 As is currently the case, notice of appeal will have to be given within such time as is stipulated or, if there is no such stipulation, within two business days of the receipt in writing of the decision of the Hearings Committee or the chairman of the hearing in question.

8. Section 8, Takeover Appeal Board

8.1 Currently, appeals against decisions of the Panel are made to the Appeal Committee. This Committee operates independently of the Panel. Various changes will be made to the process of appointing its Chairman, Deputy

Chairman and members and to its procedures. It will also be renamed as The Takeover Appeal Board. The structure will satisfy the requirement in clause 626(3) for there to be a right of appeal to an independent tribunal. **Section 8** provides an overview of the Board and its procedures. The Board's Rules will be set out on its own website at www.thetakeoverappealboard.org.uk.

8.2 **Section 8(a), Status, purpose and membership of the Board**

8.2.1 This section establishes the status of the Board as an independent body to hear appeals against decisions of the Hearings Committee or of the chairman of the hearing in question.

8.2.2 The Chairman and Deputy Chairman of the Board will, as now, usually have held high judicial office. They will be appointed by the Master of the Rolls. Other members of the Board will be appointed by its Chairman (or Deputy Chairman). They will be persons who have relevant knowledge and experience of takeovers but may not at the same time be members (or alternates of members) of the Hearings Committee. As stated in paragraph B4.6.1 above, pursuant to clause 626(5)(b), no-one who is or has been a member (or alternate of a member) of the Code Committee will be able to be a member of the Board.

8.2.3 The Board will be assisted in any proceedings by a secretary, usually a partner in a law firm, but never the same person who acted as secretary to the Hearings Committee in the same matter.

8.3 **Section 8(b), Conduct of hearings before the Board**

8.3.1 Proceedings before the Board will be conducted in a similar way to those before the Hearings Committee. In addition, the chairman of the hearing will be able to give directions relating to the conduct and determination of the hearing as he thinks fit.

8.3.2 The Chairman will be able, on behalf of the Board, to deal with appeals against procedural directions of the Hearings Committee, or with frivolous or vexatious appeals on his own and without holding an oral hearing. Decisions of the Board will be dealt with in a similar way to decisions of the Hearings Committee.

8.4 **Section 8(c), Remedies**

8.4.1 This section sets out the remedies available to the Board, to confirm, vary, set aside, annul or replace the ruling of the Hearings Committee that has been appealed.

8.4.2 Having come to a decision, the Board will remit the matter back to the Panel for enforcement, with such directions (if any) as it considers appropriate. The Panel will be required to comply with the Board's decision. This continues, in practice, the existing decision-making and enforcement systems.

9. **Providing information and assistance to the Panel and the Panel's power to require documents and information**

9.1 In its Consultative Document, the DTI proposed, in order to comply with the Directive, to extend to the Panel a number of additional powers designed to ensure that parties to a bid complied with Panel rulings and to facilitate the Panel in the exercise of its supervisory activities. Central to these was a power for the Panel to require persons in possession of information, which was reasonably required by the Panel in the conduct of its activities, to provide that information to the Panel. The DTI also referred to the Panel's additional proposal in its Explanatory Paper to include in the Code a provision placing an obligation upon persons subject to the Code to disclose to the Panel information of which it might reasonably expect to be notified.

9.2 **Section 9, Providing information and assistance to the Panel and the Panel's power to require documents and information**, sets out the rules relating to the disclosure of information, which have been modified as a result

of the consultation exercise, and also refers to the information gathering power which is now provided for in clause 622 of the Bill.

9.3 **Section 9(a), Dealings with and assisting the Panel**

9.3.1 The Panel has always expected prompt co-operation from those with whom it deals and it will continue to do so. However, in this section, the Code Committee is proposing new rules which will set out in more detail the obligations of persons to disclose information to the Panel.

9.3.2 In its Explanatory Paper, the Panel proposed the inclusion of a provision requiring any person dealing with the Panel or to whom inquiries or requests were directed to take all reasonable care not to provide false or misleading information to the Panel. This obligation is now set out in the last sentence of the first paragraph of this section but refers to ‘incorrect, incomplete or misleading information’, instead of ‘false and misleading information’, as originally proposed.

9.3.3 As mentioned above, the Panel also proposed to add a rule obliging any person subject to the Code ‘to disclose to the Panel any information relating to him or her of which the Panel might reasonably expect to be notified’. Concerns were expressed to the Panel about the potential breadth of this proposal, both in terms of the parties to whom it would apply and its anticipatory, “whistle-blowing” nature. The DTI received similar comments, which are reported in the Government’s response to its Consultative Document. In the light of these comments, the Code Committee has reconsidered this provision and, agreeing that it should be narrower and more focussed, is proposing a revised formulation, which brings the obligation into operation only once the Panel is already considering a matter. Thus, once a dialogue has been commenced between a person and the Panel about a certain matter, that person will have to disclose to the Panel any information relevant to that matter of which they are aware and correct or update the information if it changes. The proposed rule now reads as follows:

“In dealing with the Panel, a person must disclose to the Panel any information known to them and relevant to the matter being considered by the Panel (and correct or update that information if it changes).”

9.3.4 The Code Committee is also proposing that, when a matter has been determined by the Panel and a person becomes aware that the information they supplied to the Panel in connection with that matter was incorrect, incomplete or misleading, the person will have to contact the Panel promptly in order to correct the position. Moreover, if the Panel’s determination relates to a continuing situation, such as the grant of exempt status to a fund manager or principal trader, the party or parties to that determination will have to keep the information provided to the Panel in connection with that determination up to date in all material respects. This part of the proposed rule reads as follows:

“Where a matter has been determined by the Panel and a person becomes aware that information they supplied to the Panel was incorrect, incomplete or misleading, that person must promptly contact the Panel to correct the position. In addition, where a determination of the Panel has continuing effect (such as the grant of exempt status), the party or parties to that determination must promptly notify the Panel of any change in the information they supplied to the Panel in connection with that determination and of any new information which (in either case) they reasonably consider would be likely to have been material to that determination.”

9.4 **Section 9(b), Power to require documents and information**

9.4.1 As explained above, clause 622 of the Bill contains a formal power enabling the Panel to require, by giving notice in writing, documents and information that are reasonably required in connection with the exercise of its functions. While accepting that this power is a necessary part of the implementation package, the Panel stated in its Explanatory Paper that it would expect to use it only on rare occasions, preferring to rely in the normal course on the co-operative arrangements under section 9(a).

9.4.2 This section summarises the provisions in clauses 622(1)-(4), describing the matters that may be specified in the written notice, including: the specific documents to be produced; the form and manner in which information must be provided; the time within which and place at which documents or information must be provided; and requirements relating to the authentication or verification of any information or document. It also states that the addressee of any such notice will be required to comply with it and explains that failure to do so will be a breach of the Code.

9.4.3 Both sections 9(a) and (b) refer to the fact that a person will be able to resist any request or requirement for information on the grounds of legal professional privilege. This is provided for in clause 622(10).

10. Enforcing the Code

10.1 In addition to the power to require information, the Bill contains further powers in clauses 621, 629 and 630 for the Panel to ensure compliance with the Code and to facilitate the exercise of its supervisory powers. The Government believes, and the Panel accepts, that these extra powers are needed to implement the Directive. However, the Panel has always sought to ensure compliance with the Code through a consensual approach with the parties engaged in takeover activity and, since it has been successful in doing so, it intends to continue to follow this approach. In practice, it seeks to focus on the specific consequences for shareholders of any breach of the Code and to provide appropriate remedial or compensatory action in a timely manner.

10.2 Clause 628 of the Bill introduces a new offence of “Failure to comply with rules about bid documentation”. It will not be for the Panel, but for the prosecuting authorities to bring proceedings in relation to this offence.

10.3 **Section 10, Enforcing the Code**, sets out the Panel’s general approach to enforcement, as described in paragraph B10.1 above and includes proposals for specific rules as well as reference to the new enforcement power proposed

in clause 630 of the Bill. It also sets out the “offer document rules” and “response document rules” for the purposes of clause 628.

10.4 Clause 631(2) provides that contravention of any requirement imposed by or under the rules will not render any transaction unenforceable, nor will it, subject to any provision in those rules, affect the validity of any other thing. The purpose of the last sentence of the introduction to section 10 is to make it clear that there are no provisions in rules that qualify the general provision in clause 631(2).

10.5 **Section 10(a), Requirement of promptness in dealings with the Executive**

This section contains a proposal for a new rule that expands upon the existing provision included in paragraph 3(b) of the current Introduction, which states that complaints about breaches of the Code must be made promptly and, if they are not, the Executive may decline to deal with them. The Code Committee is proposing an addition to make it clear that, in a similar way, if a person making a complaint fails to comply with a deadline set by the Executive, the Executive will have discretion to disregard the complaint.

10.6 **Section 10(b), Compliance rulings**

10.6.1 Clause 621 of the Bill provides that rules may confer on the Panel power to give directions in order to secure compliance with the Code. This section contains a proposal for a new rule made pursuant to this clause.

10.6.2 The proposed rule provides essentially that if the Panel is satisfied that:

- there is a reasonable likelihood that a person will contravene the Code or a ruling of the Panel; or
- that a person has contravened the Code or a ruling;

then the Panel may give any directions that appear to it to be necessary in order:

- to restrain that person from acting in breach of rules;
- to restrain a person from taking a particular course of action (or continuing to do so) pending a decision from the Panel as to whether such a course of action would amount to a breach of rules; or
- otherwise to secure compliance with the rules.

10.7 **Section 10(c), Compensation rulings**

10.7.1 Clause 629 of the Bill provides that the Panel may make rules requiring the payment of compensation. This section sets out the rules proposed pursuant to this clause.

10.7.2 The circumstances in which the Panel would be able to require the payment of compensation are restricted to situations where there has been a breach of any of Rules 6, 9, 11, 14, 15, 16 or 35.3. Each of these Rules relates to the level of consideration that must be paid by an offeror to shareholders in the offeree company. If such a Rule is breached, it is proposed that the Panel should be able to require the payment of compensation, within a specified period, to the holders, or former holders, of securities of an offeree company of such an amount as to ensure that they receive whatever amount they would have been entitled to receive had the relevant Rule been complied with. So, for example, if an offer were made at 10p and, after the offer closed, it were discovered that the offeror had, during the offer period, bought offeree company shares off-market at 12p, then, under Rule 6.2, accepting shareholders would be due an extra 2p per share in compensation and the Panel would be able to require payment of that amount.

10.7.3 Furthermore, it is proposed, pursuant to clause 629(2), that the Panel should be able to require the payment of simple or compound interest, at such a rate and

for such a period as it may determine. The period could be determined to begin before the ruling is made and extend until payment.

10.8 **Section 10(d), Enforcement by the Courts**

10.8.1 Clause 630 of the Bill provides that the Panel may, if necessary, apply to the court to secure compliance with the Code or a ruling of the Panel. This power has been proposed to implement Articles 4.5 and 6.5 of the Directive, which require, respectively that:

“supervisory authorities shall be vested with all the powers necessary for the purpose of ensuring that the parties to a bid comply with the rules made or introduced pursuant to [the] Directive”; and

“Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all the information in their possession concerning the bid that is necessary for the supervisory authority to discharge its functions.”

10.8.2 **Section 10(d)** outlines the Panel’s power to apply to the court for enforcement. If the court is satisfied that there is a reasonable likelihood that a person will contravene a requirement imposed by or under the rules or if a person has contravened such a requirement or a requirement to produce information or documents imposed under clause 622 (see paragraph B9.4 above), then it has a broad discretion to make an appropriate order to secure compliance with the requirement. Any failure to comply with such a court order may be a contempt of court. As stated in its Explanatory Paper, it is the Panel’s intention to exercise the power to apply to the courts only as a matter of last resort or in urgent cases. It is important to note in this context that, in its Explanatory Notes on the clauses, the Government states that,

“It is expected that, in accordance with usual practice, the court will not, in exercising its jurisdiction under this clause, rehear substantively the matter or

examine the issues giving rise to the ruling or, as the case may be, the request for documents or information.”

10.8.3 The Panel continues to believe that the consensual approach to enforcement of the Code and its rulings is the most effective way of securing the appropriate remedy or compensation and that such consensus should continue to be achievable through the application of the Panel’s processes for making, reviewing and appealing decisions.

10.9 **Section 10(e), Bid documentation rules**

Clause 628 requires compliance with rules about bid documentation. For the purposes of this clause, under clause 628(9), the Panel is required to designate “offer document rules” and “response document rules”, which are, respectively, those that “give effect to Article 6.3” of the Directive and those that “give effect to the first sentence of Article 9.5”. **Section 10(e)** provides the necessary designation. The Rules will be listed in a new Appendix 6 to the Code which is attached at Appendix D.

11. **Disciplinary powers**

11.1 There is no proposal to alter the way in which the Panel exercises its disciplinary powers and the sanctions it may impose will be largely the same. **Section 11** sets out the rules relating to these matters.

11.2 **Section 11(a), Disciplinary action**

This section replicates the first and last paragraphs of paragraph 3(d) of the current Introduction, explaining that the Executive may deal with a disciplinary matter itself if the party concerned agrees the facts and remedial action proposed or, alternatively, it may commence disciplinary proceedings before the Hearings Committee. It is also made clear that disciplinary hearings will be conducted in accordance with the Rules of Procedure of the Hearings Committee, which will be available on the Panel’s website.

11.3 Section 11(b), Sanctions or other remedies for breach of the Code

11.3.1 Clause 627 of the Bill provides that rules may confer power on the Panel to impose sanctions on anyone who has breached a rule or failed to comply with a direction given under section 10(b). The relevant rules are contained in this section.

11.3.2 The main sanctions available to the Panel at present for breach of the Code are listed in paragraph 3(d) of the current Introduction. These sanctions will be unchanged and the list is therefore replicated in this section, though with further clarificatory material.

11.3.3 In addition, the Note on Rule 38.1 currently provides for another sanction: the suspension or removal of exempt status from a principal trader in a case where an exempt principal trader connected with the offeror or an offeree company has carried out dealings in order to assist that offeror or offeree company. Furthermore, exempt principal traders and fund managers are informed, when exempt status is granted, that failure to comply with the Panel's requirements will jeopardise their exempt status. The Code Committee is therefore proposing to add this sanction to the others in this section in order to make it clear that it will be available to the Panel in the case of any breach of the Code or a ruling of the Panel by any person having exempt status (or, indeed, any other special status that the Panel may have granted). The sanction will be worded as follows:

“suspend or withdraw any exemption, approval or other special status which the Panel has granted to a person, or impose conditions on the continuing enjoyment of such exemption, approval or special status, in respect of all or part of the activities to which such exemption, approval or special status relates”.

11.3.4 The sanctions available to the Panel will therefore be:

- (i) issuing a private statement of censure; or
- (ii) issuing a public statement of censure; or
- (iii) suspension or withdrawal of exemption, approval or other special status; or
- (iv) reporting conduct to another regulatory authority or professional body, either in the UK (most notably the Financial Services Authority (“FSA”)) or overseas, so that that authority or body can consider whether to take disciplinary or enforcement action; or
- (v) publishing a Panel Statement indicating that the offender is someone who, in the opinion of the Hearings Committee, is not likely to comply with the Code, for the purpose of triggering the so called “cold-shouldering” procedures under which the rules of the FSA and certain professional bodies oblige their members, in certain circumstances, not to act for the person in question in a transaction that is subject to the Code.

Paragraph (iv) gives the example of the power that the FSA may exercise to take action against an authorised person or an approved person who fails to observe proper standards of market conduct, which includes the power to fine. Paragraph (v) explains that a transaction subject to the Code in this context would include a dealing in relevant securities requiring disclosure under Rule 8. It also explains how the FSA’s rules apply.

11.3.5 It should be noted that the Government is proposing under clause 639(2) to repeal section 143 of the Financial Services and Markets Act 2000 which provides for endorsement of the Code by the FSA and, through that, provides a mechanism for the FSA to bring disciplinary and enforcement action against authorised persons for misconduct in relation to the Code. The Panel agrees

that repeal of section 143 is appropriate given that the Bill will afford the Panel additional enforcement powers, as set out above. The consequent loss of the statutory mechanism for engaging FSA enforcement action will not prevent the Panel from continuing to report breaches of the Code by authorised persons to the FSA, which will still be able to take such breaches into account in considering, for example, the fit and proper status of any such person.

12. Co-operation and information sharing

- 12.1 This section replaces paragraph 2(c) of the current Introduction and describes the Panel's new statutory duty not to disclose information and the regime for co-operation with other regulatory authorities. It includes a rule about the service of documents and another relating to professional secrecy.
- 12.2 Article 4.4 of the Directive requires takeover supervisory authorities and other financial services regulators to co-operate with each other and with other relevant regulators in other Member States in order to apply Directive rules.
- 12.3 This requirement is implemented in clause 625 of the Bill, which is described in the second paragraph of section 12 and places the Panel under a duty to co-operate appropriately with the FSA, with any authority designated as a supervisory authority for the purposes of the Directive and with any other overseas takeover or financial services regulator. Clause 639(5), amending section 354 of the Financial Services and Markets Act 2000, will similarly place the FSA under a duty to co-operate with the Panel and overseas takeover regulators. Clause 625 also makes it clear that co-operation includes the sharing of information as permitted (see paragraph B12.5 below). It will be for the Panel to decide the appropriate steps to be taken in order to comply with its duty in any particular case. In particular, the Panel will only be able to co-operate to the extent that it has powers to do so. It will be able to use its powers under clause 622 (see section 9(b)) to require documents and information for this purpose.

- 12.4 Article 4.4 of the Directive provides specifically that co-operation includes the ability of supervisory authorities *‘to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids’*. The third paragraph of this section therefore includes a new rule stating how the Panel will comply with this obligation, which applies only to requests from relevant authorities in other Member States relating to enforcement measures taken in respect of Directive bids.
- 12.5 Under Article 4.3 of the Directive, persons employed, or formerly employed by a supervisory authority must be bound by professional secrecy. No information covered by professional secrecy may be passed on except as permitted by law. Clause 623 sets out the restrictions that will be imposed on the Panel in relation to any information provided to it in connection with the carrying out of its regulatory functions. Generally, no such information may be disclosed without the consent of the person to whom it relates. There are two exceptions to this general rule. First, information may be disclosed for the purpose of carrying out Panel functions. In addition, disclosure may be made to specific persons or for specific purposes which are set out in Schedule 2 of the Bill.
- 12.6 The fourth paragraph of Section 12 explains that Schedule 2 includes the ‘gateways’ which allow the Panel to pass information to other regulatory authorities, both in the UK and overseas, and to other persons in accordance with the conditions laid down in the Schedule. It also notes that these gateways may be used when the Panel uses its sanction under paragraph (iv) of section 11 (b) to report conduct to another regulatory authority.
- 12.7 In order to ensure full implementation of Article 4.3, the fifth paragraph of this section includes a new rule, which complements clause 623, providing that information which falls outside that clause and is created or held by the Panel in connection with the exercise of its functions (for example, information internally generated by the Panel) will not be disclosed, except as permitted by clause 623. This paragraph also explains that any person to whom such

information may be disclosed, whether directly or indirectly, will be able to pass it on in the circumstances set out in clause 623.

12.8 The last sentence of section 12 reiterates the Panel's close co-operation with the FSA. The Panel and the FSA have established joint operating guidelines which set out clear and effective procedures for handling insider dealing and market abuse that occurs during the course of a bid. They work very closely together in these matters and will continue to do so.

12.9 The operating guidelines are available on the FSA's website (www.fsa.gov.uk/pubs/other/operating_guidelines.pdf).

13. Fees and charges

13.1 Clause 632 of the Bill provides that the Panel may make rules to provide for fees and charges. The core rules proposed in relation to such fees and charges are set out in this section. The first paragraph refers to the document charges that are set out in a separate section of the Code and states that they are payable by the persons and in the circumstances set out there.

13.2 The second paragraph provides that the Panel may make reasonable charges for goods (such as the Code) and services (such as the granting and maintenance of exempt fund manager or exempt principal trader status). All charges for goods and services will be set out on the Panel's website.

Q1 Do you agree with the provisions of the new Introduction to the Code, or have any comments on these provisions?

SECTION C: CHANGES PROPOSED FOR THE CODE

1. Overview

1.1 As explained in paragraph B2.1.2, clause 618 of the Bill obliges the Panel to make rules giving effect to certain Articles of the Directive. Those Articles are:

- Article 3.1 General Principles;
- Article 4.2 Companies to which the Code applies (this has already been dealt with in section 3.2 above);
- Article 5 Protection of minority shareholders, the mandatory bid and the equitable price;
- Article 6.1- 6.3 Information concerning bids;
- Article 7 Time allowed for acceptance;
- Article 8 Disclosure;
- Article 9 Obligations of the board of the offeree company; and
- Article 13 Other rules applicable to the conduct of bids.

This Section of the PCP describes the amendments that will have to be made to the General Principles and Rules to comply with this obligation. It also includes some changes to the Definitions section of the Code. Finally, as mentioned in paragraph B2.2.3 above, further amendments are proposed to incorporate specific circumstances in which a derogation may be granted or a waiver given from certain Rules.

1.2 As explained in paragraph B4.4.1 above, the exercise of the Panel's rule-making power is the sole responsibility of the Code Committee, which is, therefore, proposing the amendments set out in this section.

1.3 In the course of the exercise of determining the necessary amendments to the Code, the Code Committee has identified a number of other minor

amendments which would be desirable to update the Code or to introduce greater clarity and it is also aware that some amendments will be required to take account of recent changes to the Listing Rules. Rather than combine these other amendments with those that arise from the Directive, the Code Committee plans to publish a further PCP in due course to follow up on the additional points.

- 1.4 The Code Committee recently also published Public Consultation Papers (“PCP 2005/3” and “PCP 2005/4”). In a small number of instances, amendments to certain provisions of the Code are proposed in both PCP 2005/3, entitled “Dealings in Derivatives and Options Part 2: Control Issues” and in this PCP. Each PCP shows how the current provisions of the Code (as last amended on 7 November) would change as a result of the amendments proposed in that PCP and does not take account of the amendments proposed in the other PCP.

2. The General Principles – Article 3.1

- 2.1 The Directive contains a set of general principles in Article 3.1. These Directive principles were based on those in the Code but differ from them in a number of respects. In the Panel’s Explanatory Paper published in January, the Code Committee analysed the differences between the two sets of general principles, with a view to deciding how to incorporate the Directive principles in the Code. Bearing in mind that the Directive provides (in Article 4.5) that any derogation or waiver granted to a person from the application of a rule must, in the case of a transaction subject to the Directive’s requirements, respect the Directive general principles (see paragraph B2.2.3 above), the Code Committee concluded that the most practical approach to implementing the Directive principles would be to adopt them in place of the existing General Principles in the Code. At the same time, some amendments would be made to certain Rules of the Code to incorporate the effect of those Code General Principles (or parts thereof) which would disappear.

- 2.2 The Code Committee has received no comment on this approach and therefore proposes that the General Principles will, in future, be as follows:

GENERAL PRINCIPLES

1. **All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.**
2. **The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.**
3. **The board of an offeree company must act in the interest of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.**
4. **False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.**
5. **An offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.**
6. **An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.**

- 2.3 The following amendments will also be made to incorporate into Rules certain elements of the existing General Principles.

2.3.1 2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

- (a) **An offeror should only announce a firm intention to make an offer after the most careful and responsible consideration. Such an ~~The announcement of a firm intention to make an offer~~ should be made onlyofferor.**

This incorporates part of existing General Principle 3.

2.3.2 19.1 STANDARDS OF CARE

Each document or advertisement issued, or statement made, during the course of an offer must, as is the case with a prospectus, satisfy be prepared with the highest standards of care and accuracy and the information given must be adequately and fairly presented. This applies whether it is issued by the company direct or by an adviser on its behalf.

This incorporates words from existing General Principle 5.

2.3.3 RULE 23. THE GENERAL OBLIGATION AS TO INFORMATION

Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information must be available to shareholders early enough to enable them to make a decision in good time. No relevant information should be withheld from them. The obligation of the offeror.....

This incorporates the last sentence of existing General Principle 4.

3. Definitions – Article 2

3.1 The Directive includes a set of definitions in Article 2. Some of the changes described below are required in order to bring existing Code definitions into conformity with the Directive definitions. Others have been included for clarity and/or are consequential on changes made to the Introduction.

3.1.1 “Acting in concert”

(i) The Directive defines “persons acting in concert” in Article 2.1(d) as:

“natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid”.

The Code definition currently reads:

“Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined[in the Code]) of that company.”

In the Explanatory Paper, the Code Committee described how the Directive definition differs from the Code definition in three key respects:

- it does not require ‘active’ co-operation between parties;
- it is not limited to parties co-operating through the acquisition of shares by any of them; and
- it includes persons who co-operate with the offeree company with a view to frustrating the successful outcome of a bid.

(ii) As stated in January, the Code Committee believes that the first two of these changes will bring the definition more into line with the Panel’s current practice. At present, the Panel may rule that parties are acting in concert even though, at the time, they are not actively engaged in the acquisition of shares. The consequences of such a ruling then bite under Rules 6, 9 and 11 when any of the relevant parties do acquire shares. This is how the Directive definition is drafted, with the mandatory bid obligation in Article 5 (see section 4 below) being triggered as a result of an acquisition of securities in a company by any member of a concert party. The third change, relating to frustrating action, is new, though again, the consequences bite only when shares are acquired.

(iii) These key changes will be reflected in the first paragraph of the definition as follows:

“Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined below) of that a company or to frustrate the successful outcome of an offer for a company.”

- (iv) Article 2.2 of the Directive adds a deeming provision to the definition stating:

“For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC⁵ shall be deemed to be persons acting in concert with that other person and with each other.”

This provision will be reflected in a new final sentence to the first paragraph of the definition and a new Note 2 which, together, introduce the concept of ‘affiliated persons’ and define them to be acting in concert one with another as follows:

“A person and each of its affiliated persons will be deemed to be acting in concert all with each other (see Note 2 below).”

NOTES ON ACTING IN CONCERT

1.

2. *Affiliated persons*

For the purposes of this definition an “affiliated person” means any undertaking in respect of which any person:

(a) has a majority of the shareholders’ or members’ voting rights;

(b) is a shareholder or member and at the same time has the right to appoint or remove a majority of the members of its board of directors;

(c) is a shareholder or member and alone controls a majority of the shareholders’ or members’ voting rights pursuant to an agreement entered into with other shareholders or members; or

(d) has the power to exercise, or actually exercises, dominant influence or control.

For these purposes, a person’s rights as regards voting, appointment or removal shall include the rights of any other affiliated person and those of any person or entity acting in his own name but on behalf of that person or of any other affiliated person.”

⁵ The Consolidated Admissions and Reporting Directive

Current Notes 2 – 7 will be renumbered 3 – 8.

(v) *Persons acting in concert with the offeree company*

As a result of including in the definition persons who co-operate to frustrate the successful outcome of a bid (ie persons acting in concert with the offeree company), a number of changes will have to be made to Rules which currently refer to persons acting in concert with the ‘directors of the offeree company’. Thus presumption 5 will be amended as follows:

“(5) a connected adviser with its client and, if its client is acting in concert with an offeror or with ~~the directors of the offeree company~~, with that offeror or with ~~those directors that offeree company~~ respectively, in each case.....”

Similar amendments will be made to the definitions of ‘Connected adviser’ and ‘Connected fund managers and principal traders’ and to Rule 4.6(f), Rule 7.2(b) and Note 2 on Rule 7.2 and Rule 25.3(a)(iv).

(vi) *Persons giving irrevocable commitments*

It has long been Panel policy to consider that the giving of a simple irrevocable commitment to accept an offer does not put the giver in concert with the offeror. Similarly, a person giving such a commitment not to accept an offer is not automatically considered to be in concert with the offeree. However, if the party giving the commitment buys more shares or if the commitment also involves the transfer of certain voting rights to the offeror or offeree company respectively, then the situation is considered again. If the commitment involves the transfer of general voting rights or general control of the shares, then the Panel has generally ruled that the person giving the commitment is acting in concert with the party to whom the commitment has been given. As explained above, the consequences of such a ruling only bite under Rules 6, 9 or 11 if the relevant party acquires more shares.

It is arguable that the giver of an irrevocable commitment, to either the offeror or the offeree company, could fall under the new definition of ‘acting in concert’. In order to ensure that the current policy may be maintained, and exercising its power to make derogations from rules under section 2(c) of the Introduction, the Code Committee is proposing to add a new Note 9 to the definition, providing a general derogation from the definition as follows:

“9. Irrevocable commitments

A person will not normally be treated as acting in concert with an offeror or the offeree company by reason only of giving an irrevocable commitment. However, the Panel will consider the position of such a person in relation to the offeror or the offeree company (as the case may be) in order to determine whether he is acting in concert if either:

(a) the terms of the irrevocable commitment give the offeror or the offeree company (as the case may be) either the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to the shares or general control of them; or

(b) the person acquires an interest in more shares.

The Panel should be consulted before the acquisition of any interest in shares in such circumstances.”

3.1.2 “Offer”

Article 2.1(a) of the Directive defines a ‘takeover bid’ or ‘bid’ as follows:

“..a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition or control of the offeree company in accordance with national law.”

As described in paragraph B3.3 above, the transactions to which the Code applies are set out in rules in section 3(b) of the Introduction. The current definition will, therefore, be deleted and a new definition of “Offer” will

cross-refer to that section. As already mentioned in paragraph B3.3.3, it is important to note that the Code applies to the defined transactions at any stage of their implementation, including, for example, when an offer is in contemplation but has not yet been announced.

The new definition reads as follows:

“Offer

Any reference to an offer includes any transaction subject to the Code as referred to in section 3(b) of the Introduction.”

3.1.3 **“Offeree company” and “Offeror”**

These terms are defined in Article 2.1(b) and (c) of the Directive as follows:

‘offeree company’ shall mean a company, the securities of which are the subject of a bid’; and

‘offeror’ shall mean any natural or legal person governed by public or private law making a bid’.

While an offeror is defined in the Code, up to now it has not been considered necessary to include a definition of the offeree company. However, in order to reflect current policy and the fact that the definition of an offer clearly includes potential or possible offers, the definition of ‘offeror’ is to be amended to make it clear that it includes a potential offeror and a definition of ‘offeree company’ is to be added, similarly to clarify the inclusion in the term of potential offeree companies. The definitions will read as follows:

“Offeree company

Any reference to an offeree company includes a potential offeree company.”

“Offeror

Offeror includes companies wherever incorporated and individuals wherever resident. Any reference to an offeror includes a potential offeror.”

3.1.4 Regulated market

As mentioned in footnote 2, a definition of regulated market is to be added. In Article 1.1, the Directive defines it by reference to the meaning in the Investment Services Directive. The new definition will read:

“Regulated market

A regulated market is a market within the meaning of Article 1(13) of Directive 93/22/EEC (the Investment Services Directive) as amended or replaced from time to time. A list of regulated markets within the EEA is maintained on the website of the EU Commission at http://europa.eu/int/comm/internal_market/securities/isd/index_en.htm. UK regulated markets are listed on the FSA’s website at http://www.fsa.gov.uk/register-res/html/prof_exchanges_fram.html.”

3.1.5 Shares or securities

The Directive definition of ‘securities’ in Article 2.1(e) is “*transferable securities carrying voting rights in a company*” and the Directive applies to public control-seeking offers made to the holders of “*securities*”. Offers covered by the Code are for the most part made for voting equity and non-equity share capital but the Code also makes provision in certain circumstances (eg Rule 15) for offers for non-voting equity and non-equity. Paragraph B3.3.2 above explains that the shared jurisdiction arrangements will apply only to offers that fall within the narrow, Directive-based definition of an offer but otherwise, the Code will apply, as it does now, to takeover bids and merger transactions of the relevant companies however effected. Throughout, the Code refers to ‘shares’ as well as to ‘securities’.

A new definition of ‘Shares or securities’ is therefore needed in order:

- (a) to ensure that the transactions referred to in section 3(b) of the Introduction are properly defined;
- (b) to ensure that the Code will apply to offers for all transferable securities carrying voting rights (and not only voting equity and non-equity); and
- (c) for purposes of interpreting references to shares and similar terms throughout the Code.

The new definition proposed is:

“Shares or securities

(1) Except as set out below or as the context otherwise requires, references to shares, including when used in other expressions such as shareholders (but excluding equity share capital), include securities, and vice versa.

(2) In paragraph 3(a)(iii) and in the second paragraph of section 3(b) of the Introduction, the securities referred to are only transferable securities carrying voting rights.

(3) In paragraphs 3(a)(i) and (ii) and in the first paragraph of section 3(b) of the Introduction, the shares/securities referred to are only those shares/securities comprised in the company’s equity share capital (whether voting or non-voting) and other transferable securities carrying voting rights.”

- 3.1.6 The definition of ‘voting rights’ has to be amended in the light of the new definition of ‘shares or securities’ as follows:

“Voting rights

Except for the purpose of Rule 11, voting rights means all the voting rights attributable to the ~~share~~ capital of a company which are currently exercisable at a general meeting.”

There are a number of other amendments that arise because the Code will have to apply to offers for all transferable securities carrying voting rights, rather

than only equity and non-equity. These are dealt with below in paragraphs C4.2 and 8.4.

3.1.7 **Other**

For clarity and ease of reference, new definitions have been added as follows:

“Official List

The list maintained by the FSA in accordance with section 74(1) of the FSMA for the purposes of Part VI of the FSMA.

Stock Exchange

London Stock Exchange plc

UKLA

The FSA acting in its capacity as the competent authority for the purposes of Part VI of the FSMA.”

4. The mandatory bid – Article 5

4.1 The requirements of the Directive relating to a mandatory bid, contained in Article 5, are generally compatible with existing Rule 9. However, there are some significant differences, relating to the securities for which the offer must be made and the price at which it must be made. In addition, Article 5.1, taken with Article 3.1(a), has consequences for some of the dispensations from Rule 9.

4.2 Securities for which the offer must be made – Rule 9.1

4.2.1 As explained above, in paragraph C3.1.5, the Directive definition of securities includes all transferable securities carrying voting rights. Article 5.1 requires that any person triggering the requirement to make a mandatory bid must make an offer to “*all the holders*” of “*securities*” within the Directive definition. Under Rule 9.1, a person triggering the mandatory bid requirement

must make an offer to “**the holders of any class of equity share capital whether voting or non-voting**” and to “**the holders of any class of voting non-equity share capital *in which such person or persons acting in concert with him hold shares***”. This latter qualification will no longer be available and therefore the Rule 9 offer will have to be made to the holders of each class of voting non-equity and, in addition, to the holders of any other class of transferable securities carrying voting rights. As a result, the existing final paragraph of Rule 9.1 will be changed to read:

“such person shall extend offers, on the basis set out in Rules 9.3, 9.4 and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any other class of ~~voting non-equity share capital transferable securities carrying voting rights in which such person or persons acting in concert with him hold shares~~. Offers for different classes of equity share capital must be comparable; the Panel should be consulted in advance in such cases.”

- 4.2.2 Consequent on these changes, Note 9 on Rule 9.1, relating to offers for preference shares with voting rights, will be deleted. Notes 10 – 18 will be renumbered as 9 – 17. The last sentence of Rule 14.1 will also be amended to read:

“Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in ~~Rules 9.1 and Rule 15~~.”

4.3 **The “equitable price” – Rule 9.5**

- 4.3.1 Article 5.1 provides that the mandatory offer must be made at “the equitable price”, which is defined in Article 5.4 as:

“The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid...”

The price as determined at present under Rule 9.5 is “**the highest price paid....during the offer period and within 12 months prior to its commencement**”. This could be longer than the reference period in Article

5.4, especially if the offer period began with the announcement of another, earlier bid. The first sentence of Rule 9.5(a) and Note 2 on Rule 9.5 will therefore have to be amended to read:

“9.5 CONSIDERATION TO BE OFFERED

(a) Offers An offer made under this Rule 9 must, in respect of each class of share capital involved, be in cash or be 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 shares of that class during the offer period ~~and within~~ 12 months prior to ~~its commencement~~ the announcement of that offer.”

“NOTES ON RULE 9.5

.....

2. *Calculation of the price*

...

(c) If shares have been acquired by the conversion or exercise (as applicable) of convertible securities, warrants, options or other subscription rights, the price will normally be established by reference to the middle market price of the shares in question at the close of business on the day on which the relevant notice was submitted. If, however, the convertible securities, warrants, options or subscription rights were acquired during the ~~offer period or within~~ 12 months prior to the announcement of the offer made under Rule 9 ~~its commencement~~, they will be treated as if they were purchases of the underlying shares at a price calculated by reference to the purchase price and the relevant conversion or exercise terms.”

Dispensations from the “equitable price”

4.3.2 Article 5.4 also provides that the equitable price may be adjusted by the supervisory authority “*in circumstances and according to criteria that are clearly determined*”. It goes on to say that the supervisory authority may draw up a list of circumstances and determine the criteria to be applied in such cases and gives examples of both. Any decision to adjust the price must be substantiated and published by the supervisory authority.

4.3.3 Rule 9.5(b) currently provides that the Panel has discretion to agree an adjusted price if the offeror considers that the highest price should not apply. It will be amended as follows:

“(b) If the offeror considers that the highest price should not apply in a particular case, the offeror should consult the Panel which has the discretion to agree an adjusted price. In certain circumstances, the Panel may determine that the highest price calculated under paragraph (a) should be adjusted. (See Note 3.)”

4.3.4 Current Note 3 lists the factors which the Panel will take into consideration in determining whether a dispensation from the highest price should be granted. It will be amended to reflect Article 5.4 and to add some circumstances in which the price may be adjusted. Two of these, (f) and (g), derive from other Rules, which, at present, provide that, in particular circumstances, even if a person comes to hold more than 30% of a company, a Rule 9 offer need not normally be made. They have been added here to provide for the possibility of an adjusted price, should an offer be required. New (e) derives from Article 5.4 and the amendment of Note 3 on the Dispensations from Rule 9, which is explained below in paragraph C4.4.2. It is proposed that the revised Note 3 will read:

“3. *Dispensation from the Adjustment of highest price*

FactorsCircumstances which the Panel might take into account when considering an ~~application for an adjusted~~ adjustment of the highest price include:-

(a)...(b)...(c)...; ~~and~~

(d)...;

(e) if an offer is required in order to enable a company in serious financial difficulty to be rescued;

(f) if an offer is required in the circumstances set out in Note 9 on Rule 5.1; and

(g) if an offer is required in the circumstances set out in Rule 37.1.

The price payable in the circumstances set out above will be the price that is fair and reasonable taking into account all the factors that are relevant to the circumstances.

In any case where the highest price is adjusted under this Rule, the Panel will publish its decision.”

4.4 Dispensations from Rule 9

4.4.1 The Directive provides for one specific dispensation from the mandatory bid requirement, when control is achieved following a voluntary bid. This will be provided for in a new sentence to be added to Rule 9.1 as follows:

“An offer will not be required under this Rule where control of the offeree company is acquired as a result of a voluntary offer made in accordance with the Code to all the holders of voting equity share capital and other transferable securities carrying voting rights.”

4.4.2 The Code Committee has reviewed the existing Notes on Dispensations from Rule 9 to check their conformity with the requirement explained in paragraph B2.2.3, that in granting any derogation or waiver of a Rule, the Panel will need to ensure that the General Principles are respected. New General Principle 1 (Article 3.1 (a)) provides that:

“if a person acquires control of a company, the other holders of securities must be protected.”

With a view, therefore, to ensuring that the dispensations from Rule 9 provide for adequate protection of shareholders, the Code Committee is proposing the amendments set out below.

(i) “Note 2 Enforcement of security for a loan

Where a shareholding in a company is charged as security for a loan and, as a result of enforcement, the lender would otherwise incur an obligation to make a general offer under this Rule, the Panel will not normally ~~waive the requirement provided that the security was not given at a time when the lender had reason to believe that enforcement was likely~~ an offer if sufficient shares are sold within a limited period to persons unconnected with the lender. The lender must consult the Panel as to its ability to exercise the voting rights attaching to its shares at any time before sufficient shares are sold, or if the

holding in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).

In any case where arrangements are to be made involving a transfer of voting rights to the lender, but which do not amount to enforcement of the security, the Panel will wish to be convinced that such arrangements are necessary to preserve the lender's security and ~~will also take into account the proviso above~~ that the security was not given at a time when the lender had reason to believe that enforcement was likely.

When, following enforcement, a lender ~~wishes to sell~~ sells all or part of a shareholding, the provisions of this Rule will apply to the purchaser. Although... such a person."

This amendment would enable a lender to enforce security without changing the balance of power in the company. Consultation with the Panel is proposed to ensure that the lender, having acquired control through the enforcement of the security, may not exercise a controlling percentage of the voting rights of the company prior to selling shares sufficient to reduce its holding to below 30%. It also provides for flexibility to avoid a sell-down if the position of control is likely to be temporary.

(ii) *Note 3 Rescue operations*

This Note will be amended to provide for shareholder approval to be given for the rescue operation after it has happened. Alternatively, the Panel will be able to grant a waiver from the Rule 9 obligation if it is satisfied that other provision is made for the protection of independent shareholders. If neither of these solutions is available, the rescuer will be required to make a Rule 9 offer but, as mentioned in paragraph C4.3.4 above, Note 3(e) on Rule 9.5 will provide specifically for the possibility of a dispensation from the highest price payable. The first paragraph of the Note will therefore read as follows:

"There are occasions when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new shares without approval by a vote of independent shareholders or the acquisition of existing shares by the rescuer which would otherwise fall within the provisions of this Rule and normally require a general offer. The Panel ~~will may~~, however, ~~consider waiving~~ waive the requirements of the Rule in such circumstances provided that either:

(a) approval for the rescue operation by a vote of independent shareholders is obtained as soon as possible after the rescue operation is carried out ; or

(b) some other protection for independent shareholders is provided which the Panel considers satisfactory in the circumstances; ~~particular attention will be paid to the views of the directors and advisers of the potential offeree company.~~

Where neither the approval of independent shareholders nor any other form of protection can be provided, a general offer under this Rule will be required. In such circumstances, however, the Panel may consider an adjustment of the highest price, pursuant to Note 3 on Rule 9.5.”

(iii) *Note 4 Inadvertent mistake*

It is the Panel’s practice to require a sell-down when a person acquires an obligation to make a Rule 9 offer as a result of an inadvertent mistake. The Code Committee is proposing to add a requirement for consultation with the Panel about the exercise of voting rights prior to sell-down as follows:

“If,.....unconnected with him. Any such person must consult the Panel as to his ability to exercise the voting rights attaching to his shares at any time before sufficient shares are sold, or if the holding in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).”

(iv) *Note 9 on Rule 5.1 Gifts*

It is very rare for a person to exceed the 30% threshold as a result of receiving a gift of shares. Note 9 on Rule 5.1 currently provides that such a person must consult the Panel but would not normally be required to make an offer under Rule 9. As explained above in paragraph C4.3.4, new paragraph (f) of Note 3 on Rule 9.5 will provide that if a Rule 9 offer should be required in the circumstances of this Note, the Panel will be able to consider an adjustment to the ‘equitable price’. To take account of this, the Code Committee is proposing to amend Note 9 on Rule 5.1 as follows:

“ 9. *Gifts*

The restrictions imposed by this Rule do not apply to the receipt of gifts. If a person receives a gift of shares which takes his holding of shares carrying voting rights to 30% or more, he must consult the Panel. ~~Such a person would not normally be required to make an offer under Rule 9 but would (after receipt of the gift) be subject to Rule 5.1 (b) and Rule 9.1(b). (See also Note 3 on Rule 9.5.)~~”

4.5 **Partial Offers**

One final consequence of Article 5.1 and Article 3.1(a) is that a small amendment is required to Rule 36.5. This will ensure that in all cases, a partial offer for 30% or more will require approval from shareholders holding over 50% of the voting rights not held by the offeror and its concert parties.

“36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL

Any offer which could result in the offeror holding shares carrying 30% or more of the voting rights of a company must ~~normally~~ be conditional, not only on the specified number of acceptances being received, but also on approval of the offer, normally signified by means of a separate box on the form of acceptance,.....”

5. **Information and disclosure provisions – Articles 6, 8 and 9.5**

5.1 These Articles set out requirements for the contents of offer documents and for matters to be included in the offeree company board’s opinion on the offer. They also provide that information and documents must be ‘made readily and promptly available’⁶ to offeree company shareholders and, by both the offeror and the offeree company, to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

5.2 **Offer announcements**

5.2.1 Article 6.1 and Article 8.2 together require that ‘the decision to make a bid’ must be ‘made readily and promptly available’ to offeree company shareholders. At present, the Code requires in Rule 2.6 that the announcement

⁶ See paragraph C5.6 below

made at the commencement of the offer period must be sent promptly by the offeree company to shareholders. Such an announcement might be made under either Rule 2.4(a) or Rule 2.5. However, only a firm announcement under Rule 2.5 can be regarded as a ‘decision to make a bid’ and currently, there is no requirement for a Rule 2.5 announcement to be sent to shareholders unless it is the one that starts the offer period. It is therefore necessary to amend Rule 2.6 to require that any announcement under Rule 2.5 is sent to shareholders, even if a Rule 2.4(a) announcement has already been sent.

- 5.2.2 Rule 2.6 also currently provides that, rather than sending the full announcement, the offeree company may send a circular summarising the terms and conditions of the offer. This will still be possible but, where such a summary is sent, the offeree company must make the full text ‘readily and promptly available’ to its shareholders.
- 5.2.3 Articles 6.1 and 8.2 together also require that the ‘decision to make a bid’ (the announcement under Rule 2.5) must be made ‘readily and promptly available’ by *both* the offeror and the offeree company to the representatives of their employees or, where there are no such representatives, to the employees themselves.
- 5.2.4 In order to reflect all these amendments, Rule 2.6 will be amended and a new Note will be added as follows:

“2.6 OBLIGATION ON THE OFFEROR AND THE OFFEREE COMPANY TO CIRCULATE ANNOUNCEMENTS

- (a) Promptly after the commencement of an offer period—When an offer period commences with an announcement made under Rule 2.4(a), a copy of the relevant that announcement, or a circular summarising the terms and conditions of the offer, must be sent promptly by the offeree company to its shareholders and to the Panel.**
- (b) Promptly after the publication of an announcement made under Rule 2.5:**

(i) the offeree company must send a copy of that announcement, or a circular summarising the terms and conditions of the offer, to its shareholders and to the Panel; and

(ii) both the offeror and the offeree company must make that announcement, or a circular summarising the terms and conditions of the offer, readily available to their employee representatives or, where there are no such representatives, to the employees themselves.

Where necessary, the offeror or the offeree company, as the case may be, should explain the implications of the announcement. Any circular published under this Rule.....thetakeoverpanel.org.uk).

NOTES ON RULE 2.6

1. Full text of announcement under Rule 2.5 to be made available

Where, following an announcement made under Rule 2.5, a circular summarising the terms and conditions of the offer is sent to shareholders, employee representatives or employees, the full text of the announcement must be made readily and promptly available to them, for example, by placing it on the website of the offeror or the offeree company (as the case may be)."

5.3 The offer document

5.3.1 Its publication and circulation

- (i) Article 6.2 contains the general requirement for an offeror to draw up an offer document and together with Article 8.2 requires, as for an announcement, that the document must be 'made readily and promptly available' to offeree company shareholders and to the employee representatives or employees of both the offeror and the offeree company.
- (ii) Rule 30.1 and the heading of Rule 30 will be amended to incorporate these requirements as follows:

“RULE 30. POSTING MAKING THE OFFER DOCUMENT AND THE OFFEREE BOARD CIRCULAR AVAILABLE”

30.1 THE OFFER DOCUMENT

(a) The offer document should normally be posted to shareholders of the offeree company within 28 days of the announcement of a firm intention to make an offer. The Panel must be consulted if the offer document is not to be posted within this period.

(b) At the same time, both the offeror and the offeree company must make the offer document readily available to their employee representatives or, where there are no such representatives, to the employees themselves.”

- (iii) Article 6.2 also states, “*Before the offer document is made public it must be communicated to the supervisory authority.*” This is reflected in an amendment to Rule 19.7 as follows:

“19.7 DISTRIBUTION AND AVAILABILITY OF DOCUMENTS AND ANNOUNCEMENTS

Before an offer document is made public, a copy must be lodged with the Panel. Copies of all other documents and announcements.....new information to it.”

5.3.2 *Contents of the offer document*

- (i) Article 6.3 lists certain matters that must be referred to in the offer document. While many of these are already contained in offer documents, there are not precise Code requirements in all cases and certain amendments will therefore have to be made to fill the gaps. However, some of the disclosures required are new. Of these, the most important to note are contained in Articles 6.3(i) and 6.3(m).
- (ii) Article 6.3(i) requires the offeror to state its:

“intentions with regard to the future business of the offeree company and... with regard to the safeguarding of the jobs of [its] employees and management, including any material change in the conditions of employment,

and, in particular, the offeror's strategic plans for the [company] and the likely repercussions on employment and the locations of the [company's] places of business".

Furthermore, where the offeror is a company and insofar as it is affected by the offer, the offeror must also include the above information in relation to its own business. These requirements are more extensive than those currently in Rule 24.1 which will be amended as follows to implement them.

"24.1 INTENTIONS REGARDING THE OFFEREE COMPANY, THE OFFEROR COMPANY AND ITS THEIR EMPLOYEES

An offeror will ~~normally be required~~ expected to cover the following points in the offer document:-

- (a) its intentions regarding the ~~continuation of the~~ future business of the offeree company;**
- (b) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company's places of business;**
- ~~(b)(c)~~ (c) its intentions regarding any ~~major changes to be introduced in the business, including any~~ redeployment of the fixed assets of the offeree company;**
- ~~(e)~~ (d) the long-term commercial justification for the proposed offer; and**
- ~~(d)~~ (e) 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.**

Where the offeror is a company and, insofar as it is affected by the offer, the offeror must also cover (a), (b) and (e) with regard to itself."

Disclosure of concert parties

- (iii) Under Article 6.3(m), the offeror is required to disclose the identity of persons acting in concert with it or with the offeree company together with information about those concert parties. The Code Committee considers that this requirement is very demanding, both by virtue of its extent and of the fact that the offeror is required to disclose information about concert parties of the offeree company.

- (iv) Given the new definition of ‘acting in concert’ and, in particular, the proposed new Note 2 on the definition and also presumption (1), relating to group companies, the Code Committee considers that compliance with this new requirement could be extremely burdensome in the case of an offeror which is part of a large group. The Code Committee is therefore proposing to make a general derogation from this requirement. Article 3.1(b) (New General Principle 2) requires that offeree company shareholders must have “*sufficient.....information to enable them to reach a properly informed decision on the bid*”. Bearing in mind this requirement, the Code Committee is proposing to restrict the disclosure of concert parties to those that need to be disclosed in order to enable shareholders to reach a properly informed decision. These concert parties will be described in a new Note 4 on Rule 24.2, which is set out below.
- (v) As far as the requirement for the offeror to disclose the identities of persons acting in concert with the offeree company is concerned, the Code Committee believes that the offeror can only comply to the extent that it is aware of those identities. It seems inevitable that in general, but particularly in the case of a unilateral offer, the offeror’s knowledge will be quite limited in this respect. The Code Committee is, therefore, proposing an appropriate qualification to the disclosure requirement in Rule 24.2(d)(iii).
- (vi) These and the other requirements in Article 6.3 for matters to be stated in the offer documents, which are not already provided for in the Code, will be reflected in the following amendments to Rules 24.2(d) and 24.6.

“24.2 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

...

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

(i)...

(ii) the date when the document is despatched, the name and address of the offeror (including, where the offeror is a company,

the type of company and the address of its registered office) and, if appropriate, of the person making the offer on behalf of the offeror; [Art 6.3(b)]

(iii) the identity of any person acting in concert with the offeror and, to the extent that it is known, the offeree company, including, in the case of a company, its type, registered office and relationship with the offeror and, where possible, with the offeree company. (See Note 4); [Art 6.3(m)]

~~(iii)~~ (iv) details of the each class of securities for which the offer is made, including whether those securities will be transferred “cum” or “ex” any dividend and the maximum and minimum percentages of those securities which the offeror undertakes to acquire; [Art 6.3(c),(f)]

~~(iv)~~ (v) the terms of the offer, including the consideration offered for each class of security, the total consideration offered and particulars of the way in which the consideration is to be paid in accordance with Rule 31.8; [(Art 6.3(a), (d)]

(vi) all conditions (including normal conditions relating to acceptances, listing and increase of capital) to which the offer is subject; [Art 6.3(h)]

~~(v)~~ (vii) particulars of all documents required, and procedures to be followed, for acceptance of the offer;

~~(vi)~~ (viii) the middle market quotations.....;

~~(vii)~~ (ix) details of any agreements.....;

~~(viii)~~ (x) details of any irrevocable commitment.....;

~~(ix)~~ (xi) in the case of a securities exchange offer, full particulars of the securities being offered, including the rights attaching to them, the first dividend or interest payment in which the new securities will participate and how the securities will rank for dividends or interest, capital and redemption; and a statement indicating the effect of acceptance on the capital and income position of the offeree company’s shareholders; and (if the new securities are not to be identical in all respects with an existing security admitted to the Official List, full particulars of the rights attaching to the securities must also be included together with a statement of whether an application for listing has been or will be made to the UKLA and whether admission to listing on any other stock exchange or the facility to deal on any other market has been or will be sought); [Art 6.3(k)]

~~(x)~~ (xii) in the case ...; ~~and~~

~~(xi)~~-(xiii) a summary ...;

(xiv) the national law which will govern contracts concluded between the offeror and holders of the offeree company's securities as a result of the offer and the competent courts; and [Art 6.3(n)]

(xv) the compensation (if any) offered for the removal of rights pursuant to Article 11 of the Directive together with particulars of the way in which the compensation is to be paid and the method employed in determining it; [Art 6.3(e)]

.....

NOTES ON RULE 24.2

.....

4. Persons acting in concert with the offeror [Art 6.3(m)]

For the purposes of Rule 24.2(d)(iii), the identity of a person acting in concert with the offeror or the offeree company need only be disclosed if the offeree company shareholders need details of that person in order to reach a properly informed decision on the offer. Disclosure will normally include: a person who holds shares in the offeree company and (in the case of a securities exchange offer only) the offeror; any person with whom the offeror or the offeree company and any person acting in concert with either of them has any arrangement of the kind referred to in Note 6(b) on Rule 8; and any connected adviser to the offeror or the offeree company. In cases of doubt, the Panel should be consulted.

5. Offers made under Rule 9 [Art 6.3(d)]

When an offer is made under Rule 9, the information required under Rule 24.2(d)(v) must include the method employed under Rule 9.5 in calculating the consideration offered."

"24.6 INCORPORATION OF OBLIGATIONS AND RIGHTS

[Art 6.3(j)]

The offer document must state the time allowed for acceptance of the offer and any alternative offer and must incorporate language....."

5.4 The offeree board circular

5.4.1 Article 9.5 requires the board of the offeree company to draw up and make public a document setting out its opinion of the bid and the reasons on which it is based and it must, *‘at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves’*. Article 9.5 also sets out specific requirements relating to the views of the offeree board that must be included in its opinion.

5.4.2 Article 9.5 further requires that, *“Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document”*.

5.4.3. The Code Committee proposes the following amendments to implement Article 9.5.

“25.1 VIEWS OF THE BOARD

(a) The board of the offeree company must circulate to the company’s shareholders its views opinion on the offer, (including any alternative offers). It must, at the same time, make known to its shareholders the substance of the advice given to it by the independent advisers appointed pursuant to Rule 3.1.

(b) If any document”

“25.2 VIEWS OF THE BOARD ON THE OFFEROR’S PLANS FOR THE COMPANY AND ITS EMPLOYEES

~~The board of the offeree company should, insofar as relevant, comment upon the statements in the offer document regarding the offeror’s intentions in respect of the offeree company and its employees made pursuant to Rule 24.1.~~

The opinion referred to in Rule 25.1(a) must include the views of the board of the offeree company on:

(a) the effects of implementation of the offer on all the company’s interests, including, specifically, employment; and

(b) the offeror’s strategic plans for the offeree company and their likely repercussions on employment and the locations of the offeree company’s places of business, as set out in the offer document pursuant to Rule 24.1;

and must state the board’s reasons for forming its opinion.”

“30.2 THE OFFEREE BOARD CIRCULAR

(a) The board of the offeree company ~~should~~ ~~must~~ ~~advise~~ ~~its~~ ~~shareholders~~ ~~of~~ ~~its~~ ~~views~~ ~~on~~ ~~the~~ ~~offer~~ ~~publish~~ ~~a~~ ~~circular~~ ~~containing~~ ~~its~~ ~~opinion~~, ~~as~~ ~~required~~ ~~by~~ ~~Rule~~ ~~25.1(a)~~, ~~as~~ ~~soon~~ ~~as~~ ~~practicable~~ ~~after~~ ~~publication~~ ~~of~~ ~~the~~ ~~offer~~ ~~document~~ ~~and~~ ~~normally~~ ~~within~~ ~~14~~ ~~days~~ ~~and~~ ~~must~~:

(i) post it to its shareholders; and

(ii) make it readily and promptly available to its employee representatives or, where there are no such representatives, to the employees themselves.

(b) The board of the offeree company must append to the circular containing its opinion a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such opinion is received in good time before publication of that circular.”

5.5 Revised offers

5.5.1 The Code Committee is advised that the correct interpretation of the requirements of Articles 6.2, 6.3, 8.2 and 9.5 is that they apply to revised offers in the same way as they apply to the initial offer. At present, when an offer is revised, the offeror sends offeree company shareholders a revised offer document and the offeree company board usually sends them a circular containing its views on the revised offer but there are no specific requirements in the Code for them to do so. Such requirements will, therefore, have to be added. In addition, the requirements to make the offer document and the offeree board’s opinion available to employee representatives or employees will also apply to the revised offer document and the offeree board’s opinion on the revised offer. Similarly, the requirement in Article 9.5 for the opinion of employee representatives to be appended to the offeree board circular if it is

received in good time applies in respect of such a circular containing the board's opinion on a revised offer.

- 5.5.2 The Code Committee proposes to implement these requirements by the following amendments and additions to Rule 32 on Revision.

“32.1 OFFER OPEN FOR 14 DAYS AFTER REVISION ~~POSTING OF~~ REVISED OFFER DOCUMENT”

If an offer is revised, a revised offer document, drawn up in accordance with Rules 24 and 27, must be posted to shareholders of the offeree company. The offer must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore....acceptances.”

“32.6 THE OFFEREE BOARD’S OPINION”

(a) The board of the offeree company must post to the company’s shareholders a circular containing its opinion on the revised offer under Rule 25.1(a), drawn up in accordance with Rules 25 and 27.

(b) The board of the offeree company must append to the circular containing its opinion on a revised offer a separate opinion from the representatives of its employees on the effects of the revised offer on employment, provided such opinion is received in good time before publication of that circular.”

“32.7 INFORMING EMPLOYEES”

(a) When any revised offer document is posted to shareholders of the offeree company, both the offeror and the offeree company must make that document readily and promptly available to their employee representatives or, where there are no such representatives, to the employees themselves.

(b) When the board of the offeree company posts to its shareholders a circular containing its opinion under Rule 25.1(a) on a revised offer, it must make that circular readily and promptly available to its employee representatives or, where there are no such representatives, to the employees themselves.”

5.6 Making documents and information available to shareholders, employee representatives and employees

- 5.6.1 As mentioned in paragraph C5.1, the terminology used in the Directive in relation to the provision of information and documents to offeree company shareholders and to employee representatives or employees of both the offeree company and the offeror is that they must be ‘made readily and promptly available’. While the Code specifically requires the announcement, offer document and offeree board circular to be sent to offeree company shareholders, the amendments set out above make no similar provision in relation to information and documents provided to employee representatives or employees. One example of how the requirements to make information ‘readily and promptly available’ to employees may be satisfied is given in new Note 1 on Rule 2.6 (placing the announcement on the company’s website – see paragraph C5.2.4 above). The Code Committee understands that companies have a wide variety of means of communicating with their employee representatives and does not consider it necessary or appropriate to specify further means of satisfying the requirements in the Code.
- 5.6.2 The Code Committee does, however, wish to make clear that, in order to satisfy the requirements of Articles 6.2, 8.2 and 9.5, the requirement to provide information to employees will apply in respect of all full and part-time employees on a group-wide basis, wherever they may be, subject to the qualification in paragraph C5.6.4 below.
- 5.6.3 As regards the provision of information and documents to offeree company shareholders, Article 8.2 states that they must be made available to the holders of securities “*at least in those Member States on the regulated markets of which the offeree company’s securities are admitted to trading*”. The Code Committee nevertheless has been advised that because Article 5.1 requires an offer to be made to “*all holders of [offeree company] securities*” and Article 3.1(a) (new General Principle 1) requires that “*all holders of the securities of an offeree company must be afforded equivalent treatment*” it is arguable that

the information provisions apply in respect of all shareholders wherever they may be.

- 5.6.4 It is, however, the Panel's longstanding practice to allow for offer documentation not to be sent into certain jurisdictions if to do so would cause disproportionate problems with local securities or other laws, provided that the percentage of voting rights represented by shareholders in the relevant jurisdiction is small. Bearing in mind the obligations of Articles 5.1 and 3.1(a), the Code Committee is proposing, in order to permit this practice to continue in respect of shareholders outside the EEA, to include a general derogation in the Code which will set out the circumstances in which the requirements in the Code to provide information or to make documents available to such shareholders need not apply. Moreover, the Code Committee is proposing that this general derogation will also apply in respect of the provision of information and documents to employee representatives or employees outside the EEA.
- 5.6.5 The derogation proposed will have two limbs: first, there must be a significant risk to the offeror or the offeree company of civil, regulatory or, particularly, criminal exposure and second, less than 3% of the offeree company shares must be held by the shareholders in the relevant non-EEA jurisdiction. Similarly, for the dispensation from providing information or making information available to employee representatives or employees to apply, less than 3% of employees must be located in that jurisdiction.
- 5.6.6 The Code Committee is therefore proposing the addition of a new Rule 30.3 to provide for the general requirement to provide information and a Note on that Rule to provide for the derogation. In cases falling outside the terms of the specific derogation, the Panel will have to be consulted.

“30.3 MAKING DOCUMENTS AND INFORMATION AVAILABLE TO SHAREHOLDERS, EMPLOYEE REPRESENTATIVES AND EMPLOYEES

The requirements under Rules 2.6, 20.1, 23, 30.1, 30.2, 32.1, 32.6(a) and 32.7 to provide information or to send or make documents available to shareholders of the offeree company or to employee representatives or employees of the offeror or the offeree company apply in respect of all such shareholders, employee representatives or employees, including those who are located outside the EEA, unless there is sufficient objective justification for their not doing so.

NOTE ON RULE 30.3

Shareholders, employee representatives and employees outside the EEA

Where local laws or regulations of a particular non-EEA jurisdiction may result in a significant risk of civil, regulatory or, particularly, criminal exposure for the offeror or the offeree company, and unless they can avoid such exposure by making minor amendments to the information being provided or documents being sent or made available, the offeror or the offeree company need not provide such information or send or make such information or documents available to shareholders of the offeree company who are located in that jurisdiction if less than 3% of the shares of the offeree company are held by shareholders located there. A similar dispensation will apply in respect of information or documents which are provided or required to be made available to employee representatives or employees of the offeror or the offeree company, if less than 3% of the employees are located in the relevant non-EEA jurisdiction.

In all other cases, the Panel should be consulted if the offeror or the offeree company does not intend to provide such information or to send or make such documents available to all shareholders of the offeree company or to all employee representatives or employees of the offeror or the offeree company (as the case may be). The Panel will not normally be able to grant any dispensation in relation to shareholders, employee representatives or employees of the offeree company who are located within the EEA.”

- 5.6.7 New Notes which will cross-refer to new Rule 30.3 will be added to Rules 2.6, 20.1 and 23, all of which include specific or general requirements relating to the provision of information or to making documents available to shareholders and/or employees.

6. Timetable of offers – Article 7

- 6.1 Article 7.1 provides that, “*the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document*”. It also provides that the 10 week period may be extended, provided the offeror gives at least two weeks’ notice of its intention to close the bid.
- 6.2 Given that the timetable for an offer under the Code is 60 days from the date when the offer document is posted, and that, under Rule 31.4, once an offer is unconditional as to acceptances, it must normally remain open for at least 14 days, it is very common for Code offers to remain open for acceptance for more than ten weeks. In order to implement the requirement in Article 7.1, the following amendment is therefore proposed for Rule 31.2.

“31.2 FURTHER CLOSING DATES TO BE SPECIFIED

In any announcement of an extension of an offer, either the next closing date must be stated or, if the offer is unconditional as to acceptances, a statement may be made that the offer will remain open until further notice. In the latter case, or if the offer will remain open for acceptances beyond the 70th day following posting of the offer document, at least 14 days’ notice in writing must be given, before the offer is closed, to those shareholders who have not accepted.”

- 6.3 Article 7.2 provides that rules may be made to change the ten week period in specific cases. The Code already provides flexibility in Rule 31.6(a) for the Panel to extend the final day in certain circumstances. In addition, the Code Committee proposes to make specific provision in this Rule for extension of the final day in the circumstances provided for in Note 2 on Rule 13.5, when the Code timetable may be amended to take account of the introduction of withdrawal rights when an offeree company is not permitted to invoke an offeree protection condition.
- 6.4 Rule 31.7 also provides flexibility for the Panel to extend the period within which all conditions of the offer (other than the acceptance condition) must be fulfilled. This flexibility is normally used only when there is an outstanding

condition involving a material official authorisation or regulatory clearance. The Code Committee proposes that this too, should be written into the Rule.

6.5 The amendments proposed for Rules 31.6 and 31.7 are set out below.

“31.6 FINAL DAY RULE.....

(a) Except with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day the initial offer document was posted. The Panel’s consent will normally only be granted:

...

(iii) as provided for in Rule 31.9; or

(iv)....Rule 10; or

(v) when withdrawal rights are introduced under Rule 13.5.

(b)

31.7 TIME FOR FULFILMENT OF ALL OTHER CONDITIONS

Except with the consent of the Panel, all conditions must be fulfilled or the offer must lapse within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later. The Panel’s consent will normally only be granted if the outstanding condition involves a material official authorisation or regulatory clearance relating to the offer and it had not been possible to obtain an extension under Rule 31.6.”

7. Frustrating action – Article 9

7.1 Article 9 contains the provisions of the Directive relating to frustrating action. Article 9.2 requires the board of the offeree company to obtain the prior authorisation of shareholders in general meeting “*before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror’s acquiring control of the offeree company.*” The obligation applies as soon as the bid is announced but Article 9.2 also provides that it may apply at an earlier stage, for example, as soon as the offeree

company board becomes aware that a bid is imminent. In addition, Article 3.1(c) (new General Principle 3) requires the board of an offeree company to act in the interests of the company as a whole and it states that the board “*must not deny the holders of securities the opportunity to decide on the merits of the bid*”.

- 7.2 The obligation to seek shareholders’ approval for “*any action....*” is wider than that currently provided for in Rule 21.1, which lists certain particular actions that are regarded as being frustrating. Current General Principle 7 has a wider scope but, since that will be deleted, the Rule has to be amended to embrace the wider obligation.
- 7.3 Although Article 9.2 refers to “*the prior authorisation of the general meeting of shareholders*”, the Code Committee considers that a meeting need not be required if shareholders holding more than 50% of the voting rights were to approve the proposed action of the board. The Code Committee therefore proposes to add a new Note 10 to Rule 21.1 to provide the Panel with flexibility to waive the requirement for a general meeting in those circumstances. Such a derogation would respect the requirement in Article 3.1(c) stated in paragraph C7.1.
- 7.4 Having established the general obligation for shareholders’ approval in Article 9.2, Article 9.3 goes on to provide an exception in respect of decisions taken before the relevant period. If such a decision has not been “*partly or fully implemented*”, shareholders must approve it if it “*does not form part of the normal course of the company’s business*” and its implementation “*may result in the frustration of the bid*”. Logically, therefore, if the decision has been “*partly or fully implemented*” or if it has not been partly or fully implemented but it is in the normal course of business for the company, shareholders’ approval need not be required in the Code.
- 7.5 Rule 21.1 currently provides an exception for action taken “**in pursuance of a contract entered into earlier**”. The Code Committee is advised that this

exception is in compliance with the Directive since performance of contractual obligations would be the partial or full implementation of a board decision.

- 7.6 Rule 21.1 also provides in the last sentence for an exception from the need to obtain shareholder approval, subject to Panel consent, “**Where it is felt that an obligation or other special circumstance exists, although a formal contract has not been entered into**”. In the Explanatory Paper in January, the Code Committee said that the flexibility provided in this last sentence would no longer be available on implementing Article 9 but it has since reconsidered that position. The Code Committee is now advised that there may be actions undertaken pursuant to certain types of binding obligation (other than contractual obligations) which would not contravene Article 9.2. A particular example would be a provision in the offeree company’s Articles of Association which has the effect of placing the directors under an obligation to take certain action during the offer period. The Code Committee considers, however, that if the company’s Articles set out a general objective but left the directors with discretion as to how that objective should be achieved, the directors, in taking action to achieve the objective, would probably fall foul of Article 9.2 and it is likely, therefore, that they would need to obtain shareholders’ approval.
- 7.7 The flexibility to cater for any “**other special circumstance**” will, however, disappear, to be replaced by the exception permitted by Article 9.3.
- 7.8 All of these amendments will be reflected in a revised Rule 21.1 as follows:

“21.1 WHEN SHAREHOLDERS’ CONSENT IS REQUIRED

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, ~~except in pursuance of a contract entered into earlier,~~ without the approval of the shareholders in general meeting:-

(a) take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits; or

~~(a)~~ **(b)** (i) – (v) as (a) – (e) now

The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within this Rule.

The notice convening ~~such a~~ any relevant meeting of shareholders must include information about the offer or anticipated offer.

Where it is felt that ~~an obligation or other special circumstance exists, although a formal contract has not been entered into, :~~

(A) the proposed action is in pursuance of a contract entered into earlier or another pre-existing obligation; or

(B) a decision to take the proposed action had been taken before the beginning of the period referred to above which: (i) has been partly or fully implemented before the beginning of that period; or (ii) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business,

the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.

NOTES ON RULE 21.1

1 – 4

5. *When there is no need to post*

The Panel may allow an offeror not to proceed with its offer if, at any time during the offer period prior to the posting of the offer document, ~~the offeree company:~~

(a) the offeree company passes a resolution.....; or

(b) announces a transaction which would require such a resolution but for the fact that it is pursuant to a contract entered into earlier or that the Panel has ruled that an obligation or other special circumstance exists. The Panel has given consent for the offeree company to proceed with an action or transaction to which Rule 21.1 applies without a shareholders' meeting.

6. – 9.

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

The Panel will normally waive the requirement for a general meeting under this Rule where the holders of shares carrying more than 50% of the voting rights state in writing that they approve the action proposed and would vote in favour of any resolution to that effect proposed at a general meeting.

7.9 A consequential amendment will be required in Rule 37.3:

“37.3 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEREE COMPANY

(a) Shareholders’ approval

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, no redemption or purchase by the offeree company of its own shares may, ~~except in pursuance of a contract entered into earlier,~~ be effected without the approval of the shareholders at a general meeting. The notice convening the meeting must include information about the offer or anticipated offer. Where it is felt that the redemption or purchase is in pursuance of a contract entered into earlier or another pre-existing obligation, an obligation or other special circumstance exists, although formal contract has not been entered into, the Panel must be consulted and its consent to proceed without a shareholders’ meeting obtained (Notes 1, ~~and 5~~ and 10 on Rule 21.1 may be relevant).”

8. Other matters

8.1 There are two other significant amendments that arise from Article 3.1, the general principles.

8.2 Offers including consideration in cash

8.2.1 Article 3.1(e) (new General Principle 5) states that, *“an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered...”*. The implication of this is that the offeror must be certain, on announcing an offer that includes cash, that there is nothing to prevent the cash ultimately being available to satisfy full acceptance of the offer. If there are conditions attached to raising the cash consideration, whether by debt or equity financing, the Code Committee is advised that the offeror can be considered as having ensured the availability of the cash only if fulfilment of those conditions is within the offeror’s control. Any condition that is not within the offeror’s control will need to be included as a condition of the offer,

since otherwise, the offeror will not have ensured that it has the cash to fund the offer on its terms.

8.2.2 In April 2005, the Executive issued Practice Statement No 10 (“PS10”) relating to Cash Offers Financed by the Issue of Offeror Securities. PS10 provides guidance on the conditions to which a cash offer, or an offer including an element of cash may at present be subject, when it is to be financed, or partially financed, by the issue of offeror securities. The only conditions to the offer relating to the issue of such securities currently permitted by the Executive are those which are considered necessary, as a matter of law or regulatory requirement, in order validly to issue the securities. PS10 states that the conditions that the Executive will consider to be necessary for such purposes include those relating to shareholder approval for the creation or allotment of the new securities and, where the new securities are to be admitted to listing on the Official List or to trading on AIM, an appropriate listing or admission to trading condition.

8.2.3 Both shareholder approval and the obtaining of listing or admission to trading are matters that are outside the control of the offeror. Therefore, as a consequence of Article 3.1(e), in future, if the offeror is proposing to finance a cash offer by the issue of new securities, it will be obliged to include conditions relating to those two matters (at least) as non-waivable conditions to the offer. If there are any other conditions to which the issue of the new securities or their admission to listing or trading is subject, as a matter of law or regulatory requirement, then the offer will also have to be made subject to those conditions.

8.2.4 This requirement will be included in an amendment to the Note on Rule 13.3 as follows:

“NOTE ON RULES 13.1 AND 13.3”

Financing conditions and pre-conditions

An offer must not normally be made subject to a condition or pre-condition relating to financing. However:

(a) where the offer is for cash, or includes an element of cash, and the offeror proposes to finance the cash consideration by an issue of new securities, the offer must be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading. Conditions which will normally be considered necessary for such purposes include:

(i) the passing of any resolution necessary to create or allot the new securities and/or to allot the new securities on a non-pre-emptive basis (if relevant); and

(ii) where the new securities are to be admitted to the Official List or to trading on AIM, an appropriate listing or admission to trading condition.

Such conditions must not be waivable and the Panel must be consulted in advance; and

~~(b) In exceptional cases.....~~

~~(i)...~~

~~(ii)..." (will replace existing (a) and (b))~~

8.2.5 A consequential amendment is also required in Note 3 on Rule 9.3 as follows:

NOTES ON RULE 9.3

.....

3. When dispensations may be granted

The Panel will not normally consider a request for a dispensation under this Rule other than in exceptional circumstances, such as:-

(a) when the necessary cash is to be provided, wholly or in part, by an issue of new securities ~~a cash underwritten alternative which is conditional on the obtaining of a listing for new shares.~~ (See the Note on Rules 13.1 and 13.3.)

The Panel will normally require in these circumstances that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the ~~listing~~ other conditions are ~~is~~ not within the time required.....

(i)...

(ii)...

When a dispensation is given, the offeror must endeavour to ~~obtain a listing for the new shares~~ fulfill the other conditions with all due diligence; or

8.2.6 If cash is raised through debt, in a similar way, as a consequence of Article 3.1(e), any conditions attaching to a loan will have to be made conditions of the offer if their fulfilment is not within the effective control of the directors. Rule 13, however, restricts the type of conditions that may be included as conditions to an offer. In practice, therefore, offerors will need to ensure that the fulfilment of conditions in loan documents is within their effective control. (Examples of such conditions would be the payment of fees or delivery of legal opinions.) An exception to this would be, for example, a condition relating to insolvency of the target company. The fulfilment of such a condition would not be within the effective control of the offeror but the loan may be subject to such a condition if it is mirrored in identical terms in a condition to the offer.

8.2.7 Two further amendments are required as a result of Article 3.1(e). First, Rule 2.5(c) currently requires that, in a Rule 9 offer, the Rule 2.5 announcement must **“include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer”**. This requirement will now have to apply in all cases where there is a cash element to the offer consideration. The first sentence of Rule 2.5 (c) will therefore be amended to read:

(c) Where the offer is for cash, or includes an element of cash, ~~the announcement of an offer under Rule 9 should~~ must include confirmation....

8.2.8 Similarly, Rule 24.7 at present provides that, where an offer is for cash or includes an element of cash, a cash confirmation statement is required in the offer document. However, the second paragraph of the Rule provides that: **“In exceptional circumstances, with the consent of the Panel, a conditional form of confirmation may be allowed.”** Given the requirement of Article 3.2(e), the Panel will no longer be able to give a dispensation for a conditional cash confirmation and this sentence will be deleted. The requirements in Rule 2.5(c), for the announcement and in Rule 24.7, for the offer document, will thus become identical.

8.2.9 A new Note 6 on Rule 2.5 will also be added as follows:

*“6. _____ Financing conditions and pre-conditions
See the Note on Rules 13.1 and 13.3.”*

8.3 **Management retaining an interest - Note 4 on Rule 16**

8.3.1 Note 4 on Rule 16 allows the Panel to permit arrangements under which members of the management of the offeree company remain financially involved in the business subject to certain procedural safeguards. Such arrangements are not uncommon, particularly in the context of management buy-outs (“MBOs”). The Note currently provides that the Panel will ‘normally’ require, as a condition of its consent, that the independent adviser to the offeree company publicly states that, in its opinion, the arrangements with the management are fair and reasonable. Further, the Panel will ‘normally’ require shareholder approval for the arrangements where the offeror and the management of the offeree company together hold more than 5% of the equity share capital of the offeree company. The Code Committee proposes that in future, to be consistent with Article 3.1(a) (new General Principle 1) these safeguards should always apply. It therefore proposes to amend the Note accordingly.

8.3.2 It is also common practice, in both MBO and non-MBO transactions, for members of the management of the offeree company, who will remain with

the company after completion of the transaction, to be offered other forms of incentive, in order to ensure their continued involvement in the management of the business. Examples of such incentives might be enhanced contractual terms, share option grants from the offeror, or a position on the board of the offeror. The Code Committee proposes that, in future, the independent adviser to the offeree company should also be required to state publicly that, in its opinion, such arrangements are fair and reasonable.

8.3.3 Reflecting these proposals, Note 4 on Rule 16 would be revised to read:

“Note 4 Management retaining an interest and other management incentivisation

Sometimes.....minimum. The Panel will ~~normally~~ require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, ~~where the offeror and the management of the offeree company together hold more than 5% of the equity share capital of the offeree company,~~ the Panel will also ~~normally~~ require such arrangements to be approved at a general meeting of the offeree company’s shareholders. At this meeting..... exercisable during an offer.

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

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

8.4 Amendments consequent on the new definition of ‘Shares or securities’

8.4.1 Rule 9.5

The Code Committee believes that, in the light of the new definition of ‘shares or securities’, and in view of the deletion of Note 9 on Rule 9.1, more prominence should be given in Rule 9.5 to the requirement for consultation with the Panel where there is more than one class of share capital. Taking account of the amendments described in paragraph C4.3 above, it therefore proposes a restructuring of Rule 9.5 as follows:

“9.5 CONSIDERATION TO BE OFFERED

(a) ~~Offers~~ An offer made under this Rule 9 must, in respect of each class of share capital involved, be in cash or be 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 shares of that class during the offer period ~~and within 12 months prior to its commencement~~ the announcement of that offer. ~~The cash offer or the cash alternative must remain open after the offer has become or been declared unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.4).~~ The Panel should be consulted where there is more than one class of share capital involved.

(b) ~~If the offeror considers that the highest price should not apply in a particular case, the offeror should consult the Panel which has the discretion to agree an adjusted price. In certain circumstances, the Panel may determine that the highest price calculated under paragraph (a) should be adjusted. (See Note 3.)~~

(c) The cash offer or the cash alternative must remain open after the offer has become or been declared unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.4).”

8.4.2 Rule 10

Rule 10 will apply to offers for voting equity share capital and also to offers for other classes of transferable securities carrying voting rights and the Code Committee therefore proposes the following amendment:

“RULE 10. THE ACCEPTANCE CONDITION

It must be a condition of any offer for voting equity share capital or for other transferable securities carrying voting rights which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting rights of the offeree company that the offer will not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights ~~attributable to:-~~

(a) ~~the equity share capital alone; and~~

~~(b) the equity share capital and the non-equity share capital combined.~~

8.4.3 Rule 15

Rule 15 will now apply when an offer is made for any shares or other transferable securities carrying voting rights and, therefore, Rule 15(a) will be amended to read:

“(a) When an offer is made for voting equity share capital or for other transferable securities carrying voting rights and the offeree company had convertible securities outstanding, the offeror must make an appropriate offer or proposal to the stockholders to ensure that their interests are safeguarded. Equality of treatment is required.”

In addition, in order to make clear the delineation between Rule 15 and Rules 9 and 14, the Code Committee proposes to add a new Note to Rule 15, as follows:

“NOTES ON RULE 15

1. _____ When conversion rights etc. are exercisable during an offer

.....

2. _____ Rules 9 and 14

If an offer for any convertible securities is required by Rule 9 or Rule 14, compliance with the relevant Rule will be regarded as satisfying the obligation in Rule 15(a) in respect of those securities.

8.4.4 Document charges

The second paragraph of Paragraph 2 of the Document charges section of the Code will be amended to read:

“When there are alternative offers, the alternative with the highest value will be used to calculate the value of the offer. Offers for all classes of equity share capital and other transferable securities carrying voting rights will be included in the calculation of the value of the offer, but offers for non-voting, non-equity share capital, convertibles, options etc will not.”

8.5 Minor amendments to clarify application of Rules

8.5.1 Given the new statutory status of the Rules, the Code Committee proposes that in a very few cases, amendments be made to make it clear to whom particular Rules apply as follows:

“ 6.2 PURCHASES AFTER A RULE 2.5 ANNOUNCEMENT

(a).....

(b) **Immediately after the purchase, ~~it must be announced~~ the offeror must announce that a revised offer will be made.....”**

“7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF THE OFFER HAS TO BE AMENDED

Purchases offered). Immediately after such a purchase, an appropriate announcement must be made by the offeror. Whenever.....”

“19.2 RESPONSIBILITY

(a) Each document issued to shareholders or advertisement published in connection with an offer by, or on behalf of, the offeror or the offeree company must state that.....”

“20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS

Information about companies involved in an offer must be made equally available to all offeree company shareholders as nearly as possible at the same time and in the same manner.”

9. Other rules applicable to bids – Article 13

9.1 Article 13 requires that rules must also be made in relation to a number of other matters governing the conduct of bids. These matters are:

(a) the lapsing of bids;

(b) the revision of bids;

(c) competing bids;

(d) the disclosure of the results of bids; and

(e) the irrevocability of bids and the conditions permitted.

These matters are all covered extensively in the Code and the Code Committee does not propose to make any new Rules to implement this Article.

Q2 Do you agree with the proposals for amendments to the General Principles, Definitions and the Rules to implement the Directive?

APPENDIX A

THE CITY CODE ON TAKEOVERS AND MERGERS

INTRODUCTION

1 OVERVIEW

The Panel on Takeovers and Mergers (the “Panel”) is an independent body, established in 1968, whose main functions are to issue and administer the City Code on Takeovers and Mergers (the “Code”) and to supervise and regulate takeovers and other matters to which the Code applies in accordance with the rules set out in the Code. It has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers pursuant to the Directive on Takeover Bids (2004/25/EC) (the “Directive”). Its statutory functions are set out in and under Chapter 1 of Part 22 of the Company Law Reform Act 2006 (the “Act”). The Panel has exercised rule-making powers conferred on it under the Act by making the rules that are set out in the Code (including this Introduction, the General Principles, the Definitions and the Rules (and the related Notes and Appendices)), [the SARs] and the Rules of Procedure of the Hearings Committee. These rules may be changed from time to time, and rules may also be set out in other documents as specified by the Panel.

Further information relating to the Panel and the Code can be found on the Panel’s website at www.thetakeoverpanel.org.uk. The Code is also available on the Panel’s website.

2 THE CODE

Save for section 2(c) (which sets out a rule), this section gives an overview of the nature and purpose of the Code.

(a) Nature and purpose of the Code

The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover. These are matters for the company and its shareholders. Nor is the Code concerned with those issues, such as competition policy, which are the responsibility of government and other bodies.

The Code has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved. Following the implementation of the Directive by means of the Act, the rules set out in the Code now have a statutory basis and comply with the relevant requirements of the Directive.

(b) General Principles and Rules

The Code is based upon a number of General Principles, which are essentially statements of standards of commercial behaviour. These General Principles are the same as the general principles set out in Article 3 of the Directive. They apply to takeovers and other matters to

which the Code applies. They are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied in accordance with their spirit in order to achieve their underlying purpose.

In addition to the General Principles, the Code contains a series of rules. Although most of the rules are expressed in less general terms than the General Principles, they are not framed in technical language and, like the General Principles, are to be interpreted to achieve their underlying purpose. Therefore, their spirit must be observed as well as their letter.

(c) Derogations and Waivers

The Panel may derogate or grant a waiver to a person from the application of a rule (provided, in the case of a transaction and rule subject to the requirements of the Directive, that the General Principles are respected) either:

- (i) in the circumstances set out in the rule; or
- (ii) in other circumstances where the Panel considers that the particular rule would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).

3 COMPANIES, TRANSACTIONS AND PERSONS SUBJECT TO THE CODE

This section (except for section 3(d)) sets out the rules as to the companies, transactions and persons to which the Code applies.

(a) Companies

- (i) UK, Channel Islands and Isle of Man registered and traded companies

The Code applies to all offers (not falling within paragraph (iii) below) for companies and Societas Europaea (and, where appropriate, statutory and chartered companies) which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man.

- (ii) Other companies

The Code also applies to all offers (not falling within paragraph (i) above or paragraph (iii) below) for public and private companies and Societas Europaea (and, where appropriate, statutory and chartered companies) which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man and which are considered by the Panel to have their place of central management and control in the United Kingdom, the Channel Islands or the Isle of Man, but in relation to private companies only when:-

- (A) any of their securities have been admitted to the Official List at any time during the 10 years prior to the relevant date; or
- (B) dealings and/or prices at which persons were willing to deal in any of their securities have been published on a regular basis for a continuous period of at least six months in the 10 years prior to the relevant date, whether via a newspaper, electronic price quotation system or otherwise; or
- (C) any of their securities have been subject to a marketing arrangement as described in section 163(2)(b) of the Companies Act 1985 at any time during the 10 years prior to the relevant date; or
- (D) they were required to file a prospectus for the issue of securities with the registrar of companies or any other relevant authority in the United Kingdom, the Channel Islands

or the Isle of Man or to have a prospectus approved by the UKLA at any time during the 10 years prior to the relevant date.

In each case, the relevant date is the date on which an announcement is made of a proposed or possible offer for the company or the date on which some other event occurs in relation to the company which has significance under the Code.

The Panel appreciates that the provisions of the Code may not be appropriate to all statutory and chartered companies referred to in paragraphs (i) and (ii) above or to all private companies falling within the categories listed in paragraph (ii) above and may accordingly apply the Code with a degree of flexibility in suitable cases.

(iii) Shared jurisdiction – UK and other EEA registered and traded companies

The Code also applies (to the extent described below) to offers for the following companies:

- (A) a company which has its registered office in the United Kingdom whose securities are admitted to trading on a regulated market in one or more member states of the European Economic Area other than the United Kingdom;
- (B) a company which has its registered office in another member state of the European Economic Area whose securities are admitted to trading only on a regulated market in the United Kingdom; and
- (C) a company which has its registered office in another member state of the European Economic Area whose securities are admitted to trading on regulated markets in more than one member state of the European Economic Area including the United Kingdom if:
 - (I) the securities of the company were first admitted to trading only in the United Kingdom; or
 - (II) the securities of the company are simultaneously admitted to trading on more than one regulated market on or after 20 May 2006, if the company notifies the Panel and the relevant regulatory authorities on the first day of trading that it has chosen the Panel to regulate it; or
 - (III) the Panel is the supervisory authority pursuant to the second paragraph of Article 4(2)(c) of the Directive.

A company referred to in paragraphs (C)(II) or (III) must notify a Regulatory Information Service of the selection of the Panel to regulate it without delay.

The provisions of the Code which will apply to such offers shall be determined by the Panel on the basis set out in Article 4(2)(e) of the Directive. In summary, this means that:

- in cases falling within paragraph (A) above, the Code will apply in respect of matters relating to the information to be provided to the employees of the offeree company and matters relating to company law (in particular the percentage of voting rights which confers control and any derogation from the obligation to launch an offer, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of an offer) (“information and company law matters”); in relation to matters relating to the consideration offered (in particular the price) and matters relating to the offer procedure (in particular the information on the offeror’s decision to make an offer, the contents of the offer document and the disclosure of the offer) (“consideration and procedural matters”), the rules of the supervisory authority of the member state determined in accordance with Article 4(2)(c) of the Directive as the relevant supervisory authority will apply; and

- in cases falling within paragraphs (B) or (C) above, the Code will apply in respect of consideration and procedural matters; in relation to information and company law matters, the rules of the supervisory authority in the member state where the offeree company has its registered office will apply.

(iv) Open-ended investment companies

The Code does not apply to offers for open-ended investment companies as defined in Article 1(2) of the Directive.

(b) Transactions

In cases falling within paragraphs (a)(i) or (ii) above, the Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of statutory merger or Court approved scheme of arrangement. The Code is also concerned with regulating other transactions (including offers by a parent company for shares in its subsidiary, dual holding company transactions, new share issues, share capital reorganisations and offers to minority shareholders) which have as their objective or potential effect (directly or indirectly) obtaining or consolidating control of the relevant companies, as well as all partial offers to shareholders for securities in the relevant companies. The Code also applies to unitisation proposals which are in competition with another transaction to which the Code applies.

In cases falling within paragraph (a)(iii) above, “offers” means only any public offer (other than by the company itself) made to the holders of the company’s securities to acquire those securities (whether mandatory or voluntary) which follows or has as its objective the acquisition of control of the company concerned.

The Code applies to all the above transactions at whatever stage of their implementation, including possible transactions which have not yet been announced.

References in the Code to “takeovers” and “offers” include all transactions subject to the Code as referred to in this section.

The Code does not apply to offers for non-voting, non-equity capital unless they are offers required by Rule 15.

(c) Related matters

In addition to regulating the transactions referred to in section 3(b) above, the Code also contains rules for the regulation of things done in consequence of, or otherwise in relation to, takeovers and about cases where any such takeover is, or has been, contemplated or apprehended or an announcement is made denying that any such takeover is intended.

(d) Dual jurisdiction

Takeovers and other matters to which the Code applies may from time to time be subject to the dual jurisdiction of the Panel and an overseas takeover regulator, including offers for those companies within paragraph (a)(iii) above. In such cases, early consultation with the Panel is advised so that guidance can be given on how any conflicts between the relevant rules may be resolved and, where relevant, which provisions of the Code apply pursuant to Article 4(2)(e) of the Directive.

(e) Loss of Code protection

A public company incorporated in the United Kingdom the Channel Islands or the Isle of Man may decide to re-register as a private company as a result of which, pursuant to section 3(a) above, the Code may no longer apply to it. If the Code would no longer apply in such circumstances and the relevant company has more than one shareholder, it must consult with

the Panel before it re-registers as a private company so that guidance can be given by the Panel on the appropriate disclosure to be made to its shareholders about the implications of the loss of Code protection.

(f) Code responsibilities and obligations

The Code applies to a range of persons who participate in, or are connected with, or who in any way seek to influence, intervene in, or benefit from, takeovers or other matters to which the Code applies.

The Code also applies to all advisers to such persons, and all advisers in so far as they advise on takeovers or other matters to which the Code applies. Financial advisers to whom the Code applies have a particular responsibility to comply with the Code and 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. Financial advisers must ensure that the Panel is consulted whenever necessary.

The Code also applies to any directors, employees or representatives through whom any body corporate, partnership or other entity to which the Code applies acts. The Panel expects all bodies corporate, partnerships and other entities to which the Code applies to ensure that their directors and employees receive appropriate training in respect of the Code and will hold any such entity responsible for its directors' and employees' acts or omissions.

While the directors of offeror and offeree companies and their advisers have a duty to act in the best interests of their respective shareholders, the Code will inevitably impinge on the freedom of action of directors and persons involved in takeovers, and there are limitations in connection with takeovers on the manner in which those interests can be pursued.

The Code applies in respect of the acts and omissions of any person in connection with a takeover or any other matter to which the Code applies, notwithstanding that the offeree company may since have ceased to be subject to the Code.

In this section 3(f), references to "directors" means, in relation to any body corporate, its directors and officers, in relation to any partnership, its partners, and, in relation to any other entity, those persons exercising equivalent functions on behalf of the entity concerned.

In cases of doubt, the Panel must be consulted as to the persons to whom the Code applies.

4 THE PANEL AND ITS COMMITTEES

Save for section 4(d) (which sets out a rule), this section gives an overview of the membership, functions, responsibilities and general activities of the Panel and certain of its Committees.

Details of various other Committees of the Panel are available on the Panel's website.

(a) The Panel

The Panel assumes overall responsibility for the policy, financing and administration of the Panel's functions and for the functioning and operation of the Code. The Panel operates through a number of Committees and is directly responsible for those matters which are not dealt with through one of its Committees.

The Panel comprises up to 34 members:

- (i) the Chairman, who is appointed by the Panel;
- (ii) up to two Deputy Chairmen, who are appointed by the Panel;

- (iii) up to twenty other members, who are appointed by the Panel; and
- (iv) individuals appointed by each of the following bodies:-

- The Association of British Insurers
- The Association of Investment Trust Companies
- The Association of Private Client Investment Managers and Stockbrokers
- The British Bankers' Association
- The Confederation of British Industry
- The Institute of Chartered Accountants in England and Wales
- Investment Management Association
- The London Investment Banking Association (with separate representation also for its Corporate Finance Committee and Securities Trading Committee)
- The National Association of Pension Funds.

The Chairman and the Deputy Chairmen are designated as members of the Hearings Committee. Each other Panel member appointed by the Panel under paragraphs (i) to (iii) above is designated upon appointment to act as a member of either the Panel's Code Committee or its Hearings Committee.

Up to twelve Panel members appointed by the Panel under paragraph (iii) above are designated as members of the Code Committee. The Panel may appoint designated alternates for such members of the Code Committee, each of whom may act as a member of the Panel (or the Code Committee) in a relevant member's place when he is unavailable.

Up to eight Panel members appointed by the Panel under paragraph (iii) above are designated as members of the Hearings Committee. The Panel may appoint designated alternates for such members of the Hearings Committee, each of whom may act as a member of the Panel (or the Hearings Committee) in a relevant member's place when he is unavailable.

The Panel members appointed by the bodies under paragraph (iv) above become members of the Panel's Hearings Committee without further designation by the Panel. Each of these bodies may appoint designated alternates for its appointees, each of whom may act as a member of the Panel (or the Hearings Committee) in the relevant member's place when he is unavailable. In performing their functions on the Hearings Committee, these members (and their alternates) act independently of the body which has appointed them (and not as that body's agent or delegate) and exercise their own judgment as to how to perform their functions and how to vote.

Details of the Panel and its Committees, and the names of members of the Panel and the designated alternates, are available on the Panel's website.

(b) The Code Committee

The Code Committee represents a spread of shareholder, corporate, practitioner and other interests within the Panel's regulated community. Up to twelve members of the Panel are designated by the Panel as members of the Code Committee. Its membership from time to time and Terms of Reference are available on the Panel's website.

The Code Committee carries out the rule-making functions of the Panel and is solely responsible for keeping the Code (other than those matters set out in sections 1, 2 (except for section 2(c)), 4 (except for section 4(d)), 7, 8 and 13 of the Introduction) under review and for proposing, consulting on, making and issuing amendments to those parts of the Code. The Code Committee's consultation procedures are set out in its Terms of Reference. Amendments to those matters set out in sections 1, 2 (except for section 2(c)), 4 (except for section 4(d)), 7 and 13 of the Introduction will usually be issued by the Panel. Amendments to those matters set out in section 8 of the Introduction will be agreed by the Takeover Appeal Board and will be issued by the Panel with immediate effect.

Matters leading to possible amendment to the Code might arise from a number of sources, including specific cases which the Panel has considered, market developments or particular concerns of those operating within the markets.

Once it has agreed that a particular matter is to be pursued, the Code Committee will prepare and publish a Public Consultation Paper (“PCP”) seeking the views of interested parties on the proposals and setting out the background to, reasons for and (where available) full text of the proposed amendment. Consultation periods in relation to PCPs vary depending on the complexity of the subject, but will usually be between one and two months.

Following the end of the consultation period, the Code Committee will publish its conclusions on the proposed amendment, taking account of the responses to the PCP received, together with the final Code amendments in a Response Statement (“RS”). It is the Code Committee’s policy to make copies of all non-confidential responses it receives to a PCP available on request.

In certain exceptional cases, the Code Committee might consider it necessary to amend the Code on an expedited basis, for example because a particular market development appears to the Code Committee to require that the proposed amendment is made more quickly than the usual public consultation process would permit. In such cases, the Code Committee will publish the amendment with immediate effect and without prior formal consultation, followed in due course by a PCP seeking views on the amendment, which might be later modified, or removed altogether, depending on the Code Committee’s conclusions following the consultation process.

Where, in the opinion of the Code Committee, any proposed amendment to the Code either do not materially alter the intended effect of the provision in question or is a consequence of changes to relevant legislation or regulatory requirements, the Code Committee may publish the text of the amendment without any formal consultation process.

PCPs and RSs are available on the Panel’s website.

(c) The Hearings Committee

The Hearings Committee of the Panel comprises the Chairman, up to two Deputy Chairmen, up to eight other members designated by the Panel and the individuals appointed by the bodies listed at paragraph (a)(iv) above. Its membership from time to time, Terms of Reference and Rules of Procedure are available on the Panel’s website.

The principal function of the Hearings Committee is to review rulings of the Executive. The Hearings Committee also hears disciplinary proceedings, instituted by the Executive, when the Executive considers that there has been a breach of the Code (see section 11 below). The operations of the Hearings Committee are described in more detail in section 7 below.

The Hearings Committee is assisted in its proceedings by a secretary to the Hearings Committee, usually a partner in a law firm, acting as an officer of the Panel.

(d) Membership and representation restrictions

No person who is or has been a member of the Code Committee (or an alternate of a member) may simultaneously or subsequently be a member (or an alternate of a member) of the Hearings Committee or the Takeover Appeal Board.

When acting in relation to any proceedings before the Hearings Committee or the Takeover Appeal Board, the Panel shall do so only by an officer or member of staff (or a person acting as such).

5 THE EXECUTIVE

This section gives an overview of the functions, responsibilities and general activities of the Executive.

The day-to-day work of takeover supervision and regulation is carried out by the Executive. In carrying out these functions, the Executive operates independently of the Panel. This includes, either on its own initiative or at the instigation of third parties, the conduct of investigations, the monitoring of relevant dealings in connection with the Code and the giving of rulings on the interpretation, application or effect of the Code. The Executive is available both for consultation and also the giving of rulings on the interpretation, application or effect of the Code before, during and, where appropriate, after takeovers or other relevant transactions.

The Executive is staffed by a mixture of employees and secondees from law firms, accountancy firms, corporate brokers, investment banks and other organisations. It is headed by the Director General, usually an investment banker on secondment, who is an officer of the Panel. The Director General is assisted by Deputy Directors General, Assistant Directors General and Secretaries, each of whom is an officer of the Panel, and the various members of the Executive's permanent and seconded staff. In performing their functions, the secondees act independently of the body which has seconded them (and not as that body's agent or delegate). Further information about the membership of the Executive is available on the Panel's website.

6 INTERPRETING THE CODE

This section sets out the rules according to which the Executive issues guidance and rulings on the interpretation, application or effect of the Code.

The Executive gives guidance on the interpretation, application and effect of the Code. In addition, it gives rulings on points of interpretation, application or effect of the Code which are based on the particular facts of a case. References to "rulings" shall include any decision, direction, determination, order or other instruction made by or under rules.

(a) Interpreting the Code - guidance

The Executive may be approached for general guidance on the interpretation or effect of the Code and how it is usually applied in practice. It may also be approached for guidance in relation to a specific issue on a "no names" basis, where the person seeking the guidance does not disclose to the Executive the names of the companies concerned. In either case, the guidance given by the Executive is not binding, and parties or their advisers cannot rely on such guidance as a basis for taking any action without first obtaining a ruling of the Executive on a named basis.

In addition, the Executive may from time to time publish Practice Statements which provide informal guidance as to how the Executive usually interprets and applies particular provisions of the Code in certain circumstances. Practice Statements do not form part of the Code and, accordingly, are not binding and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. Practice Statements are available on the Panel's website.

Panel Statements (see section 7(c) below), statements of the Takeover Appeal Board (see section 8(b) below) and publications of the Code Committee may also contain guidance on the interpretation, application or effect of the Code.

(b) Interpreting the Code - rulings of the Executive and the requirement for consultation

When a person or its advisers are in any doubt whatsoever as to whether a proposed course of conduct is in accordance with the General Principles or the rules, or whenever a waiver or

derogation from the application of the provisions of the Code is sought, that person or its advisers must consult the Executive in advance. In this way, they can obtain a conditional ruling (on an ex parte basis) or an unconditional ruling as to the basis on which they can properly proceed and thus minimise the risk of taking action which might, in the event, be a breach of the Code. To take legal or other professional advice on the interpretation, application or effect of the Code is not an appropriate alternative to obtaining a ruling from the Executive.

In addition to giving rulings at the request of a party, the Executive may, on its own initiative, give rulings on the interpretation, application or effect of the Code where it considers it necessary or appropriate to do so.

The nature of the Executive's rulings will depend on whether or not the Executive is able to hear the views of other parties involved. If the Executive is not able to hear the views of other parties involved, it may give a conditional ruling (on an ex parte basis), which may be varied or set aside when any views of the other parties have been heard; if the Executive is able to hear the views of other parties involved, it may give an unconditional ruling. An unconditional ruling is binding on those who are made aware of it unless and until overturned by the Hearings Committee or the Takeover Appeal Board. In addition, such persons must comply with any conditional ruling given by the Executive for the purpose of preserving the status quo pending the unconditional ruling.

Rulings of the Executive, including any grant or refusal to grant a waiver or derogation from the application of any rules, may be referred to the Hearings Committee for review as set out in section 7 below.

7 HEARINGS COMMITTEE

This section gives an overview of the procedural rules which apply to the commencement of proceedings before the Hearings Committee and the procedures followed by the Hearings Committee in connection with hearings before it. The full Rules of Procedure of the Hearings Committee are available on the Panel's website.

(a) Hearings before the Hearings Committee

The Hearings Committee can be convened in the following circumstances:

- (i) if a party to a takeover or any other person affected by a ruling of the Executive and with a sufficient interest in the matter, wishes to contest a ruling of the Executive, that party or person is entitled to request that the matter be reviewed by the Hearings Committee; or
- (ii) the Executive may refer a matter for review by the Hearings Committee without itself giving a ruling where it considers that there is a particularly unusual, important or difficult point at issue; or
- (iii) the Executive may institute disciplinary proceedings before the Hearings Committee when it considers that there has been a breach of the Code or of a ruling of the Executive or the Panel; or
- (iv) in other circumstances where the Executive or the Hearings Committee considers it appropriate to do so.

The Hearings Committee can be convened at short notice, where appropriate.

(b) Time limits for applications for review by the Hearings Committee; frivolous or vexatious applications

Where a party to a takeover or any other person affected by a ruling of the Executive and with sufficient interest in the matter wishes a matter to be reviewed by the Hearings Committee,

the Panel must be notified as soon as possible and, in any event (subject to the following paragraph), within one month of the event giving rise to the application for review.

Where it considers necessary, the Executive may stipulate a reasonable time within which the Panel must be notified. Such time may, depending on the facts of the case, range from a few hours to the one month period referred to above. The Executive may also extend the usual one month period within which the Panel must be notified.

The Hearings Committee or its Chairman (or, failing that, one of the Deputy Chairmen) retains a discretion to deal summarily with frivolous or vexatious applications without holding a hearing.

(c) Conduct of hearings before the Hearings Committee

The quorum for Hearings Committee proceedings is five. The Chairman or one of the Deputy Chairmen will usually preside as chairman of the proceedings in question ("chairman of the hearing"), although if they are unavailable, another member of the Hearings Committee will be appointed to act as chairman of the hearing.

The Hearings Committee usually conducts its hearings using the procedure set out in its Rules of Procedure, but may vary such procedure in such manner as it thinks fit if it considers that fairness and justice would be better served by doing so.

At hearings before the Hearings Committee, the case is usually presented in person by the parties, which include the Executive, or their advisers. Although not usual, parties may, if they so wish, be represented by legal advisers. Usually, the parties are required to set out their case briefly in writing beforehand. The parties are permitted to call such witnesses as they consider necessary, with the consent of the chairman of the hearing.

Proceedings before the Hearings Committee are usually in private, although the chairman of the hearing may, at his discretion, direct otherwise. Parties may request that the hearing be held in public. Any such request is considered and ruled upon by the chairman of the hearing (or, at the discretion of the chairman, by the Hearings Committee itself). In the event of a public hearing, the chairman of the hearing may direct that the Hearings Committee should hear part or parts of the proceedings in private and may impose such other conditions relating to the non-disclosure of information relating to the proceedings as he considers appropriate.

In general, all parties are entitled to be present throughout the hearing and to see all papers submitted to the Hearings Committee. Occasionally, however, a party may wish to present evidence to the Hearings Committee which is of a confidential or commercially sensitive nature. In such exceptional cases, the Hearings Committee or the chairman of the hearing may, if satisfied that such course is justified, direct that the evidence in question be heard in the absence of some, or all, of the other parties involved.

The parties must at the earliest opportunity raise with the chairman of the hearing issues concerning possible conflicts of interest for members of the Hearings Committee and any other objections in relation to the proceedings. Any such issues will be resolved by decision of the chairman of the hearing.

Proceedings before the Hearings Committee are informal. There are no rules of evidence. A recording is taken for the Hearings Committee's own administrative purposes, but it is not normally retained once the proceedings are at an end. In addition, a transcript of the hearing is usually made. A party to the hearing may request a copy of the transcript, which may be provided subject to conditions, including conditions as to its confidentiality and use.

The Hearings Committee provides its decision to the parties in writing as soon as practicable. As part of the decision, the Hearings Committee may give directions regarding the effects of the Panel ruling and/or its decision pending the outcome of an appeal (if any). A decision may be redacted (following a request by one of the parties to the hearing and at the discretion

of the chairman of the hearing) so as to protect information of a confidential or commercially sensitive nature.

It is the usual policy of the Hearings Committee to publish its decisions by means of a Panel Statement issued as promptly as possible, having regard to all the circumstances of the case, after the decision has been provided in writing to the parties. In certain circumstances, the Hearings Committee may issue a Panel Statement of its decision (without providing supporting reasons) in advance of the publication of its full decision. Any Panel Statement setting out a decision of the Hearings Committee (whether or not including the full decision) may be redacted for publication so as to protect confidential or commercially sensitive information. Redaction is at the discretion of the chairman of the hearing.

If there is, or may be, an appeal to the Takeover Appeal Board against a decision of the Hearings Committee (see section 8 below), the Hearings Committee may suspend publication of any Panel Statement, although an interim announcement may be made in these circumstances where appropriate. If there is an appeal, publication may, at the discretion of the chairman of the hearing, be suspended until after the decision of the Takeover Appeal Board or, in particular if the appeal is upheld, withheld altogether.

Panel Statements are available on the Panel's website.

Rulings of the Hearings Committee are binding on the parties to the proceedings and on those invited to participate in those proceedings, unless and until overturned by the Takeover Appeal Board.

(d) Procedural rulings

The chairman of the hearing may give such procedural rulings as he considers appropriate for the conduct and determination of the case. This includes, for the avoidance of doubt, the ability to extend or shorten any specified time limits.

(e) Right of appeal

In all cases, there is a right of appeal to the Takeover Appeal Board against any decision of the Hearings Committee or the chairman of the hearing (including in respect of procedural directions).

Notice of appeal, including a summary of the grounds of appeal, must be given within such time as is stipulated by the chairman of the hearing (or, at the discretion of the chairman, by the Hearings Committee itself) or, in the absence of such stipulation, within two business days of the receipt in writing of the decision of the Hearings Committee or the chairman of the hearing in question.

8 TAKEOVER APPEAL BOARD

This section gives an overview of the Takeover Appeal Board (the "Board") and the procedures followed by the Board in connection with hearings before it. The full procedures of the Board are set out in its Rules, a copy of which is available on the Board's website at www.thetakeoverappealboard.org.uk.

(a) Status, purpose and membership of the Board

The Board is an independent body which hears appeals against rulings of the Hearings Committee. The Board's procedures are described in greater detail below.

The Chairman and Deputy Chairman of the Board will usually have held high judicial office, and are appointed by the Master of the Rolls. Other members, who will usually have relevant knowledge and experience of takeovers and the Code, are appointed by the Chairman (or, failing that, the Deputy Chairman) of the Board. The names of the members of the Board are available on the Board's website.

The Board is assisted in its proceedings by a secretary to the Board (who will not be the person who acted as secretary to the Hearings Committee in the same matter), usually a partner in a law firm.

(b) Conduct of hearings before the Board

The quorum for Board proceedings is three. However, the Board hearing an appeal will usually comprise at least five members. The Chairman or Deputy Chairman will usually preside as chairman of the proceedings in question (“chairman of the hearing”), although if they are unavailable, another member of the Board will be appointed to act as chairman of the hearing.

Proceedings before the Board are generally conducted in a similar way to those before the Hearings Committee as set out in section 7(c) above. In addition, the chairman of the hearing may give such directions as he considers appropriate for the conduct and determination of the case.

The chairman of the hearing may, on behalf of the Board, deal with appeals relating to procedural directions of the Hearings Committee or frivolous or vexatious appeals without convening the Board and without holding an oral hearing.

The Board provides its decision to the parties in writing as soon as practicable. Decisions of the Board are usually published in a public statement, save for matters redacted in order to protect confidential or commercially sensitive information (redaction being allowed following a request by one of the parties to the hearing and at the discretion of the chairman of the hearing). Any public statement of the Board will usually be issued as promptly as possible, having regard to all the circumstances of the case, after the decision has been provided in writing to the parties. In certain circumstances, the Board may issue a public statement of its decision (without providing reasons at this stage) in advance of the publication of the decision.

(c) Remedies

The Board may confirm, vary, set aside, annul or replace the contested ruling of the Hearings Committee. On reaching its decision, the Board remits the matter to the Panel with such directions (if any) as the Board (or the chairman of the hearing) considers appropriate for giving effect to its (or his) decision. The Panel will give effect to the Board’s decision.

9 PROVIDING INFORMATION AND ASSISTANCE TO THE PANEL AND THE PANEL’S POWERS TO REQUIRE DOCUMENTS AND INFORMATION

This section sets out the rules according to which persons dealing with the Panel must provide information and assistance to the Panel.

(a) Dealings with and assisting the Panel

The Panel expects any person dealing with it to do so in an open and co-operative way. It also expects prompt co-operation and assistance from persons dealing with it and those to whom enquiries and other requests are directed. In dealing with the Panel, a person must disclose to the Panel any information known to them and relevant to the matter being considered by the Panel (and correct or update that information if it changes). A person dealing with the Panel or to whom enquiries or requests are directed must take all reasonable care not to provide incorrect, incomplete or misleading information to the Panel.

A person is entitled to resist providing information or documents on the grounds of legal professional privilege.

Where a matter has been determined by the Panel and a person becomes aware that information they supplied to the Panel was incorrect, incomplete or misleading, that person must promptly contact the Panel to correct the position. In addition, where a determination of

the Panel has continuing effect (such as the grant of exempt status), the party or parties to that determination must promptly notify the Panel of any change in the information they supplied to the Panel in connection with that determination and of any new information which (in either case) they reasonably consider would be likely to have been material to that determination.

(b) Power to require documents and information

Section 622 of the Act gives the Panel certain powers to require documents and information. It provides that, where documents or information are reasonably required in connection with the exercise of its functions, the Panel may by notice in writing require any person:

- (i) to produce any documents that are specified or described in the notice; or
- (ii) to provide, in the form and manner specified in the notice, such information as may be specified or described in the notice,

within such reasonable period and at such place as is specified in the notice. It may also require any information or document so provided to be verified or authenticated in such manner as it may reasonably require. Where the Panel imposes a requirement under section 622 of the Act, the addressee must comply with that requirement. Failure to comply with any requirement is a breach of the Code.

A person is entitled to resist providing information or documents on the grounds of legal professional privilege.

10 ENFORCING THE CODE

Sections 10(a) to 10(c) set out certain rules pursuant to which the Panel enforces the Code. Section 10(e) sets out the “offer document rules” and the “response document rules” for the purposes of section 628 of the Act.

It is the practice of the Panel, in discharging its functions under the Code, to focus on the specific consequences for shareholders of breaches of the Code with the aim of providing appropriate remedial or compensatory action in a timely manner. Furthermore, in respect of certain breaches of the Code disciplinary action may be appropriate (see section 11 below). For the purposes of section 631(2), no contravention of any requirement imposed by or under rules shall render any transaction void or unenforceable or affect the validity of any other thing.

(a) Requirement of promptness in dealings with the Executive

If a complaint is to be made that the Code has been breached, it must be made promptly, in default of which the Executive may, at its discretion, decide not to consider the complaint. Similarly, where a person who has made a complaint to the Executive fails to comply with a deadline set by the Executive, the Executive may decide to disregard the complaint in question.

(b) Compliance rulings

If the Panel is satisfied that:

- (i) there is a reasonable likelihood that a person will contravene a requirement imposed by or under rules; or
- (ii) a person has contravened a requirement imposed by or under rules,

the Panel may give any direction that appears to it to be necessary in order:

- (A) to restrain a person from acting (or continuing to act) in breach of rules; or
- (B) to restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of rules; or
- (C) otherwise to secure compliance with rules.

(c) Compensation rulings

Where a person has breached the requirements of any of Rules 6, 9, 11, 14, 15, 16 or 35.3 of the Code, the Panel may (in exercise of the power granted to the Panel in section 629 of the Act) make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined.

(d) Enforcement by the Courts

Under section 630 of the Act, the Panel may seek enforcement by the courts. If the court is satisfied that:

- (i) there is a reasonable likelihood that a person will contravene a requirement imposed by or under rules; or
- (ii) a person has contravened a requirement imposed by or under rules or a requirement imposed under section 622 of the Act,

the court may make any order it thinks fit to secure compliance with the requirement. Any failure to comply with a resulting court order may be a contempt of court.

(e) Bid documentation rules

For the purposes of section 628 of the Act, the "offer document rules" and the "response document rules" are those parts of Rules 24 and 25 respectively which are set out in Appendix 6 and, in each case, Rule 27 to the extent that it requires the inclusion of material changes to, or the updating of, the information in those parts of Rules 24 or 25, as the case may be, in relation to the offer documents and offeree board circulars referred to in Rules 30.1 and 30.2 respectively and the revised offer documents and subsequent offeree board circulars referred to in Rules 32.1 and 32.6(a) respectively.

11 DISCIPLINARY POWERS

This section sets out the disciplinary rules of the Panel in connection with breaches and alleged breaches of the Code.

(a) Disciplinary action

The Executive may itself deal with a disciplinary matter where the person who is to be subject to the disciplinary action agrees the facts and the action proposed by the Executive. In any other case, where it considers that there has been a breach of the Code, the Executive may commence disciplinary proceedings before the Hearings Committee. The person concerned is informed in writing of the alleged breach and of the matters which the Executive will present to the Hearings Committee. Disciplinary actions are conducted in accordance with the Rules of Procedure of the Hearings Committee, which are available on the Panel's website.

(b) Sanctions or other remedies for breach of the Code

If the Hearings Committee finds a breach of the Code or of a ruling of the Panel, it may:

- (i) issue a private statement of censure; or
- (ii) issue a public statement of censure; or
- (iii) suspend or withdraw any exemption, approval or other special status which the Panel has granted to a person, or impose conditions on the continuing enjoyment of such exemption, approval or special status, in respect of all or part of the activities to which such exemption, approval or special status relates; or
- (iv) report the offender's conduct to a United Kingdom or overseas regulatory authority or professional body (most notably the Financial Services Authority ("FSA")) so that that authority or body can consider whether to take disciplinary or enforcement action (for example, the FSA has power to take certain actions against an authorised person or an approved person who fails to observe proper standards of market conduct, including the power to fine); or
- (v) publish a Panel Statement indicating that the offender is someone who, in the Hearings Committee's opinion, is not likely to comply with the Code. The rules of the FSA and certain professional bodies oblige their members, in certain circumstances, not to act for the person in question in a transaction subject to the Code, including a dealing in relevant securities requiring disclosure under Rule 8 (so called "cold-shouldering"). For example, the FSA's rules require a person authorised under the Financial Services and Markets Act 2000 ("FSMA") not to act, or continue to act, for any person in connection with a transaction to which the Code applies if the firm has reasonable grounds for believing that the person in question, or his principal, is not complying or is not likely to comply with the Code.

12 CO-OPERATION AND INFORMATION SHARING

This section summarises the relevant provisions of the Act and sets out the rules as to the basis on which the Panel will effect service of documents under Article 4(4) of the Directive and the professional secrecy obligations applying in relation to information held by the Panel in connection with the exercise of its functions which does not fall within section 623 of the Act.

Under section 625 of the Act, the Panel must, to the extent it has power to do so, take such steps as it considers appropriate to co-operate with the FSA, other supervisory authorities designated for the purposes of the Directive and regulators outside the United Kingdom having functions similar to the FSA or to the Panel, including by the sharing of information which the Panel is permitted to disclose (see below). It may also exercise its powers to require documents and information (see section 9(b) above) for this purpose.

Where any supervisory authority designated for the purposes of the Directive by another member state or any authority responsible for the supervision of capital markets in another member state requests the Panel to serve any legal document in pursuance of its obligation of co-operation under Article 4(4) of the Directive, the Panel shall serve that document by first class post to the address specified for service in the request, and shall inform the requesting authority accordingly. No other method of service will be adopted by the Panel, even where the request specifies another method of service. In cases where:

- (a) no address for service is specified in the request; or
- (b) the request specifies an address for service outside of the United Kingdom; or
- (c) service of the document is validly refused by the party upon whom it is to be served; or

(d) the Panel has been unable to serve the document for any other reason,

the Panel shall return the document unserved to the requesting authority, along with a statement of the reasons for non-service.

Under section 623 of the Act, information received by the Panel in connection with the exercise of its statutory functions may not be disclosed without the consent of the individual (where it concerns a person's private affairs) or business to which it relates except as permitted by the Act. Schedule 2 of the Act includes gateways to allow the Panel to pass information it receives to United Kingdom and overseas regulatory authorities and other persons in accordance with the conditions laid down in that Schedule. The circumstances in which this may occur include, but are not limited to, the circumstances falling within paragraph 11(b)(iv) above.

Information (in whatever form) relating to the private affairs of an individual or to any particular business not falling within section 623 of the Act which is created or held by the Panel in connection with the exercise of its functions, will not be disclosed by the Panel except as permitted in the circumstances set out in sections 623(2), (3) and (8) of the Act. A direct or indirect recipient of such information from the Panel may disclose it in the circumstances set out in sections 623(2), (3), (6) and (8) of the Act.

The Panel works closely with the FSA in relation to insider dealing and market abuse.

13 FEES AND CHARGES

The document charges set out in the Code shall be payable by the persons and in the circumstances set out in the Code.

Third parties shall pay such charges as the Panel may reasonably require for any goods (including copies of the Code) or services (including in relation to the granting, and maintenance, of exempt principal trader or exempt fund manager status as set out in the Definitions section of the Code) it provides. These charges are set out on the Panel's website.

APPENDIX B**L 142 Official Journal of the European Union 30/04/2004****Directive 2004/25/EC of the European Parliament and of the Council of
21 April 2004 on Takeover Bids****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) In accordance with Article 44(2)(g) of the Treaty, it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State the securities of which are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the Community.

(2) It is necessary to protect the interests of holders of the securities of companies governed by the law of a Member State when those companies are the subject of takeover bids or of changes of control and at least some of their securities are admitted to trading on a regulated market in a Member State.

(3) It is necessary to create Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures.

(4) In view of the public-interest purposes served by the central banks of the Member States, it seems inconceivable that they should be the targets of takeover bids. Since, for historical reasons, the securities of some of those central banks are listed on regulated markets in Member States, it is necessary to exclude them explicitly from the scope of this Directive.

(5) Each Member State should designate an authority or authorities to supervise those aspects of bids that are governed by this Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive. All those authorities should cooperate with one another.

(6) In order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. However, in applying any rules or exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles.

(7) Self-regulatory bodies should be able to exercise supervision.

(8) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid.

(9) Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition. Member States should be free to establish further instruments for the protection of the interests of the holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.

(10) The obligation to make a bid to all the holders of securities should not apply to those controlling holdings already in existence on the date on which the national legislation transposing this Directive enters into force.

(11) The obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders. Member States should, however, be able to provide that the obligation to make a bid to all the holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights.

(12) To reduce the scope for insider dealing, an offeror should be required to announce his/her decision to launch a bid as soon as possible and to inform the supervisory authority of the bid.

(13) The holders of securities should be properly informed of the terms of a bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.

(14) The time allowed for the acceptance of a bid should be regulated.

(15) To be able to perform their functions satisfactorily, supervisory authorities should at all times be able to require the parties to a bid to provide information concerning themselves and should cooperate and supply information in an efficient and effective manner, without delay, to other authorities supervising capital markets.

(16) In order to prevent operations which could frustrate a bid, the powers of the board of an offeree company to engage in operations of an exceptional nature should be limited, without unduly hindering the offeree company in carrying on its normal business activities.

(17) The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.

(18) In order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by this Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders.

(19) Member States should take the necessary measures to afford any offeror the possibility of acquiring majority interests in other companies and of fully exercising control of them. To that end, restrictions on the transfer of securities, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed or suspended during the time allowed for the acceptance of a bid and when the general meeting of shareholders decides on defensive measures, on amendments to the articles of association or on the removal or appointment of board members at the first general meeting of shareholders following closure of the bid. Where the holders of securities have suffered losses as a result of the removal of rights, equitable compensation should be provided for in accordance with the technical arrangements laid down by Member States.

(20) All special rights held by Member States in companies should be viewed in the framework of the free movement of capital and the relevant provisions of the Treaty. Special rights held by Member States in companies which are provided for in private or public national law should be exempted from the «breakthrough» rule if they are compatible with the Treaty.

(21) Taking into account existing differences in Member States' company law mechanisms and structures, Member States should be allowed not to require companies established within their territories to apply the provisions of this Directive limiting the powers of the board of an offeree company during the time allowed for the acceptance of a bid and those rendering ineffective barriers, provided for in the articles of association or in specific agreements. In that event Member States should at least allow companies established within their territories to make the choice, which must be reversible, to apply those provisions. Without prejudice to international agreements to which the European Community is a party, Member States should be allowed not to require companies which apply those provisions in accordance with the optional arrangements to apply them when they become the subject of offers launched by companies which do not apply the same provisions, as a consequence of the use of those optional arrangements.

(22) Member States should lay down rules to cover the possibility of a bid's lapsing, the offeror's right to revise his/her bid, the possibility of competing bids for a company's securities, the disclosure of the result of a bid, the irrevocability of a bid and the conditions permitted.

(23) The disclosure of information to and the consultation of representatives of the employees of the offeror and the offeree company should be governed by the relevant national provisions, in particular those adopted pursuant to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees(4), Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies(5), Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees(6) and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation(7). The employees of the companies concerned, or their representatives, should nevertheless be given an opportunity to state their views on the foreseeable effects of the bid on employment. Without prejudice to the rules of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)(8), Member States may always apply or introduce national provisions concerning the disclosure of information to and the consultation of representatives of the employees of the offeror before an offer is launched.

(24) Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.

(25) Since the objectives of the action envisaged, namely to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the Community, cannot be sufficiently achieved by the Member States because of the need for transparency and legal certainty in the case of cross-border takeovers and acquisitions of control, and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

(26) The adoption of a Directive is the appropriate procedure for the establishment of a framework consisting of certain common principles and a limited number of general requirements which Member States are to implement through more detailed rules in accordance with their national systems and their cultural contexts.

(27) Member States should, however, provide for sanctions for any infringement of the national measures transposing this Directive.

(28) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary, to take account of new developments on financial markets. For certain provisions, the Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts in accordance with the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC(9). The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(10) and with due regard to the declaration made by the Commission in the European Parliament on 5 February 2002 concerning the implementation of financial services legislation. For the other provisions, it is important to entrust a contact committee with the task of assisting Member States and the supervisory authorities in the implementation of this Directive and of advising the Commission, if necessary, on additions or amendments

to this Directive. In so doing, the contact committee may make use of the information which Member States are to provide on the basis of this Directive concerning takeover bids that have taken place on their regulated markets.

(29) The Commission should facilitate movement towards the fair and balanced harmonisation of rules on takeovers in the European Union. To that end, the Commission should be able to submit proposals for the timely revision of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter referred to as 'rules'), relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC(11) in one or more Member States (hereinafter referred to as a 'regulated market').

2. This Directive shall not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption.

3. This Directive shall not apply to takeover bids for securities issued by the Member States' central banks.

Article 2

Definitions

1. For the purposes of this Directive:

(a) 'takeover bid' or 'bid' shall mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

- (b) 'offeree company' shall mean a company, the securities of which are the subject of a bid;
- (c) 'offeror' shall mean any natural or legal person governed by public or private law making a bid;
- (d) 'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid;
- (e) 'securities' shall mean transferable securities carrying voting rights in a company;
- (f) 'parties to the bid' shall mean the offeror, the members of the offeror's board if the offeror is a company, the offeree company, holders of securities of the offeree company and the members of the board of the offeree company, and persons acting in concert with such parties;
- (g) 'multiple-vote securities' shall mean securities included in a distinct and separate class and carrying more than one vote each.

2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC(12) shall be deemed to be persons acting in concert with that other person and with each other.

Article 3

General principles

1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:
 - (a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
 - (b) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;
 - (c) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
 - (d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that

the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

(e) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;

(f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

2. With a view to ensuring compliance with the principles laid down in paragraph 1, Member States:

(a) shall ensure that the minimum requirements set out in this Directive are observed;

(b) may lay down additional conditions and provisions more stringent than those of this Directive for the regulation of bids.

Article 4

Supervisory authority and applicable law

1. Member States shall designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of those designations, specifying any divisions of functions that may be made. They shall ensure that those authorities exercise their functions impartially and independently of all parties to a bid.

2.(a) The authority competent to supervise a bid shall be that of the Member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that Member State.

(b) If the offeree company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the company's securities are admitted to trading.

If the offeree company's securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the securities were first admitted to trading.

(c) If the offeree company's securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company shall

determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the bid by notifying those regulated markets and their supervisory authorities on the first day of trading.

If the offeree company's securities have already been admitted to trading on regulated markets in more than one Member State on the date laid down in Article 21(1) and were admitted simultaneously, the supervisory authorities of those Member States shall agree which one of them shall be the authority competent to supervise the bid within four weeks of the date laid down in Article 21(1). Otherwise, the offeree company shall determine which of those authorities shall be the competent authority on the first day of trading following that four-week period.

(d) Member States shall ensure that the decisions referred to in (c) are made public.

(e) In the cases referred to in (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by their supervisory authorities are bound by professional secrecy. No information covered by professional secrecy may be divulged to any person or authority except under provisions laid down by law.

4. The supervisory authorities of the Member States for the purposes of this Directive and other authorities supervising capital markets, in particular in accordance with Directive 93/22/EEC, Directive 2001/34/EC, Directive 2003/6/EC and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by paragraph 2(b), (c) and (e). Information thus exchanged shall be covered by the obligation of professional secrecy to which persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive.

Provided that the general principles laid down in Article 3(1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules:

(i) by including such derogations in their national rules, in order to take account of circumstances determined at national level

and/or

(ii) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (i) or in other specific circumstances, in which case a reasoned decision must be required.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5

Protection of minority shareholders, the mandatory bid and the equitable price

1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

2. Where control has been acquired following a voluntary bid made in accordance with this Directive to all the holders of securities for all their holdings, the obligation laid down in paragraph 1 to launch a bid shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. By way of consideration the offeror may offer securities, cash or a combination of both.

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, it shall include a cash alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where he/she or persons acting in concert with him/her, over a period beginning at the same time as the period determined by the Member State in accordance with paragraph 4 and ending when the offer closes for acceptance, has purchased for cash securities carrying 5 % or more of the voting rights in the offeree company.

Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases.

6. In addition to the protection provided for in paragraph 1, Member States may provide for further instruments intended to protect the interests of the holders of securities in so far as those instruments do not hinder the normal course of a bid.

Article 6

Information concerning bids

1. Member States shall ensure that a decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority must be informed before such a decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject.

3. The offer document referred to in paragraph 2 shall state at least:

- (a) the terms of the bid;
- (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
- (c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;
- (e) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;

- (f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
- (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;
- (h) all the conditions to which the bid is subject;
- (i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
- (j) the time allowed for acceptance of the bid;
- (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities;
- (l) information concerning the financing for the bid;
- (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;
- (n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.

4. The Commission shall adopt rules for the application of paragraph 3 in accordance with the procedure referred to in Article 18(2).

5. Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all the information in their possession concerning the bid that is necessary for the supervisory authority to discharge its functions.

Article 7

Time allowed for acceptance

1. Member States shall provide that the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of 10 weeks may be extended on condition that the offeror gives at least two weeks' notice of his/her intention of closing the bid.

2. Member States may provide for rules changing the period referred to in paragraph 1 in specific cases. A Member State may authorise a supervisory authority to grant a derogation from the period referred to in paragraph 1 in order to allow the offeree company to call a general meeting of shareholders to consider the bid.

Article 8

Disclosure

1. Member States shall ensure that a bid is made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.

2. Member States shall provide for the disclosure of all information and documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States on the regulated markets of which the offeree company's securities are admitted to trading and to the representatives of the employees of the offeree company and the offeror or, where there are no such representatives, to the employees themselves.

Article 9

Obligations of the board of the offeree company

1. Member States shall ensure that the rules laid down in paragraphs 2 to 5 are complied with.

2. During the period referred to in the second subparagraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company.

Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information referred to in the first sentence of Article 6(1) concerning the bid and until the result of the bid is made public or the bid lapses. Member States may require that such authorisation be obtained at an earlier stage, for example as soon as the board of the offeree company becomes aware that the bid is imminent.

3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid.

4. For the purpose of obtaining the prior authorisation, approval or confirmation of the holders of securities referred to in paragraphs 2 and 3, Member States may

adopt rules allowing a general meeting of shareholders to be called at short notice, provided that the meeting does not take place within two weeks of notification's being given.

5. The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(i). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

6. For the purposes of paragraph 2, where a company has a two-tier board structure 'board' shall mean both the management board and the supervisory board.

Article 10

Information on companies as referred to in Article 1(1)

1. Member States shall ensure that companies as referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of those rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities;

- (g) any agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC;
- (h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;
- (i) the powers of board members, and in particular the power to issue or buy back shares;
- (j) any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements;
- (k) any agreements between the company and its board members or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report as provided for in Article 46 of Directive 78/660/EEC(13) and Article 36 of Directive 83/349/EEC(14).

3. Member States shall ensure, in the case of companies the securities of which are admitted to trading on a regulated market in a Member State, that the board presents an explanatory report to the annual general meeting of shareholders on the matters referred to in paragraph 1.

Article 11

Breakthrough

1. Without prejudice to other rights and obligations provided for in Community law for the companies referred to in Article 1(1), Member States shall ensure that the provisions laid down in paragraphs 2 to 7 apply when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

3. Restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds 75 % or more of the capital carrying voting rights, no restrictions on the transfer of securities or on voting rights referred to in paragraphs 2 and 3 nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply; multiple-vote securities shall carry only one vote each at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members.

To that end, the offeror shall have the right to convene a general meeting of shareholders at short notice, provided that the meeting does not take place within two weeks of notification.

5. Where rights are removed on the basis of paragraphs 2, 3, or 4 and/or Article 12, equitable compensation shall be provided for any loss suffered by the holders of those rights. The terms for determining such compensation and the arrangements for its payment shall be set by Member States.

6. Paragraphs 3 and 4 shall not apply to securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.

7. This Article shall not apply either where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty, or to special rights provided for in national law which are compatible with the Treaty or to cooperatives.

Article 12

Optional arrangements

1. Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11.

2. Where Member States make use of the option provided for in paragraph 1, they shall nevertheless grant companies which have their registered offices within

their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11, without prejudice to Article 11(7).

The decision of the company shall be taken by the general meeting of shareholders, in accordance with the law of the Member State in which the company has its registered office in accordance with the rules applicable to amendment of the articles of association. The decision shall be communicated to the supervisory authority of the Member State in which the company has its registered office and to all the supervisory authorities of Member States in which its securities are admitted to trading on regulated markets or where such admission has been requested.

3. Member States may, under the conditions determined by national law, exempt companies which apply Article 9(2) and (3) and/or Article 11 from applying Article 9(2) and (3) and/or Article 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

4. Member States shall ensure that the provisions applicable to the respective companies are disclosed without delay.

5. Any measure applied in accordance with paragraph 3 shall be subject to the authorisation of the general meeting of shareholders of the offeree company, which must be granted no earlier than 18 months before the bid was made public in accordance with Article 6(1).

Article 13

Other rules applicable to the conduct of bids

Member States shall also lay down rules which govern the conduct of bids, at least as regards the following:

- (a) the lapsing of bids;
- (b) the revision of bids;
- (c) competing bids;
- (d) the disclosure of the results of bids;
- (e) the irrevocability of bids and the conditions permitted.

Article 14

Information for and consultation of employees' representatives

This Directive shall be without prejudice to the rules relating to information and to consultation of representatives of and, if Member States so provide, co-determination with the employees of the offeror and the offeree company governed by the relevant

national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC and 2002/14/EC.

Article 15

The right of squeeze-out

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 to 5 apply.

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:

(a) where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company,

or

(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.

In the case referred to in (a), Member States may set a higher threshold that may not, however, be higher than 95 % of the capital carrying voting rights and 95 % of the voting rights.

3. Member States shall ensure that rules are in force that make it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of securities, Member States may provide that the right of squeeze-out can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.

4. If the offeror wishes to exercise the right of squeeze-out he/she shall do so within three months of the end of the time allowed for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

Article 16

The right of sell-out

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 and 3 apply.
2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for in Article 15(2).
3. Article 15(3) to (5) shall apply *mutatis mutandis* .

Article 17

Sanctions

Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to this Directive and shall take all necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify the Commission of those measures no later than the date laid down in Article 21(1) and of any subsequent change thereto at the earliest opportunity.

Article 18

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Decision 2001/528/EC (hereinafter referred to as «the Committee»).
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof, provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Directive.

The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

3. Without prejudice to the implementing measures already adopted, four years after the entry into force of this Directive, the application of those of its provisions that require the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them before the end of the period referred to above.

Article 19

Contact committee

1. A contact committee shall be set up which has as its functions:
 - (a) to facilitate, without prejudice to Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing with practical problems arising in connection with its application;
 - (b) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. It shall not be the function of the contact committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Article 20

Revision

Five years after the date laid down in Article 21(1), the Commission shall examine this Directive in the light of the experience acquired in applying it and, if necessary, propose its revision. That examination shall include a survey of the control structures and barriers to takeover bids that are not covered by this Directive.

To that end, Member States shall provide the Commission annually with information on the takeover bids which have been launched against companies the securities of which are admitted to trading on their regulated markets. That information shall include the nationalities of the companies involved, the results of the offers and any other information relevant to the understanding of how takeover bids operate in practice.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 20 May 2006 . They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law that they adopt in the fields covered by this Directive.

Article 22**Entry into force**

This Directive shall enter into force on the 20th day after that of its publication in the Official Journal of the European Union .

Article 23**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 21 April 2004 .

For the European Parliament - The President - P. Cox

For the Council -The President - D. Roche

(1) OJ C 45 E, 25.2.2003, p. 1.

(2) OJ C 208, 3.9.2003, p. 55.

(3) Opinion of the European Parliament of 16 December 2003 (not yet published in the Official Journal) and Council decision of 30 March 2004 .

(4) OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

(5) OJ L 225, 12.8.1998, p. 16.

(6) OJ L 294, 10.11.2001, p. 22.

(7) OJ L 80, 23.3.2002, p. 29.

(8) OJ L 96, 12.4.2003, p. 16.

(9) OJ L 191, 13.7.2001, p. 45. Decision as amended by Decision 2004/8/EC (OJ L 3, 7.1.2004, p. 33).

(10) OJ L 184, 17.7.1999, p. 23.

(11) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(12) Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on

information to be published on those securities (OJ L 184, 6.7.2001, p. 1). Directive as last amended by Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64).

(13) Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

(14) Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts (OJ L 193, 18.7.1983, p.1). Directive as last amended by Directive 2003/51/EC.

APPENDIX C**Company Law Reform Bill [HL]**

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department of Trade and Industry, are published separately as HL Bill 34—EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

The Lord Sainsbury of Turville has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Company Law Reform Bill [HL] are compatible with the Convention rights.

Extract

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Company Law Reform Bill [HL]

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TAKEOVERS ETC

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CHAPTER 1

THE TAKEOVER PANEL

The Panel and its rules

617 The Panel

- (1) The body known as the Panel on Takeovers and Mergers (“the Panel”) is to have the functions conferred on it by or under this Chapter.
- (2) The Panel may do anything that it considers necessary or expedient for the purposes of, or in connection with, its functions.
- (3) The Panel may make arrangements for any of its functions to be discharged by—
 - (a) a committee or sub-committee of the Panel, or
 - (b) an officer or member of staff of the Panel, or a person acting as such.

618 Rules

- (1) The Panel must make rules giving effect to Articles 3.1, 4.2, 5, 6.1 to 6.3, 7 to 9 and 13 of the Takeovers Directive.
- (2) Rules made by the Panel may also make other provision—
 - (a) for or in connection with the regulation of—
 - (i) takeover bids,
 - (ii) merger transactions, and
 - (iii) transactions (not falling within sub-paragraph (i) or (ii)) that have or may have, directly or indirectly, an effect on the ownership or control of companies;
 - (b) for or in connection with the regulation of things done in consequence of, or otherwise in relation to, any such bid or transaction;
 - (c) about cases where—
 - (i) any such bid or transaction is, or has been, contemplated or apprehended, or
 - (ii) an announcement is made denying that any such bid or transaction is intended.
- (3) The provision that may be made under subsection (2) includes, in particular, provision for a matter that is, or is similar to, a matter provided for by the Panel in—
 - (a) the City Code on Takeovers and Mergers, or
 - (b) the Rules Governing Substantial Acquisitions of Shares,as that Code or those Rules had effect immediately before the passing of this Act.
- (4) When discharging its functions under this section the Panel must do so by a committee of the Panel.

- (5) Subsection (4) does not apply in relation to rules made by virtue of section 632 (fees and charges).
- (6) Section 1 (meaning of “company”) does not apply for the purposes of this section.
- (7) In this section “takeover bid” includes a takeover bid within the meaning of the Takeovers Directive.
- (8) In this Chapter “the Takeovers Directive” means Directive 2004/25/EC of the European Parliament and of the Council.
- (9) A reference to rules in the following provisions of this Chapter is to rules under this section.

619 Further provisions about rules

- (1) Rules may—
 - (a) make different provision for different purposes;
 - (b) make provision subject to exceptions or exemptions;
 - (c) contain incidental, supplemental, consequential or transitional provision;
 - (d) authorise the Panel to dispense with or modify the application of rules in particular cases and by reference to any circumstances.
 Rules made by virtue of paragraph (d) must require the Panel to give reasons for acting as mentioned in that paragraph.
- (2) Rules must be made by an instrument in writing.
- (3) Immediately after an instrument containing rules is made, the text must be made available to the public, with or without payment, in whatever way the Panel thinks appropriate.
- (4) A person is not to be taken to have contravened a rule if he shows that at the time of the alleged contravention the text of the rule had not been made available as required by subsection (3).
- (5) The production of a printed copy of an instrument purporting to be made by the Panel on which is endorsed a certificate signed by an officer of the Panel authorised by it for that purpose and stating—
 - (a) that the instrument was made by the Panel,
 - (b) that the copy is a true copy of the instrument, and
 - (c) that on a specified date the text of the instrument was made available to the public as required by subsection (3),
 is evidence (or in Scotland sufficient evidence) of the facts stated in the certificate.
- (6) A certificate purporting to be signed as mentioned in subsection (5) is to be treated as having been properly signed unless the contrary is shown.

- (7) A person who wishes in any legal proceedings to rely on an instrument by which rules are made may require the Panel to endorse a copy of the instrument with a certificate of the kind mentioned in subsection (5).

620 Rulings

- (1) The Panel may give rulings on the interpretation, application or effect of rules.
- (2) To the extent and in the circumstances specified in rules, and subject to any review or appeal, a ruling has binding effect.

621 Directions

Rules may contain provision conferring power on the Panel to give any direction that appears to the Panel to be necessary in order—

- (a) to restrain a person from acting (or continuing to act) in breach of rules;
- (b) to restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of rules;
- (c) otherwise to secure compliance with rules.

Information

622 Power to require documents and information

- (1) The Panel may by notice in writing require a person—
- (a) to produce any documents that are specified or described in the notice;
 - (b) to provide, in the form and manner specified in the notice, such information as may be specified or described in the notice.
- (2) A requirement under subsection (1) must be complied with—
- (a) at a place specified in the notice, and
 - (b) before the end of such reasonable period as may be so specified.
- (3) This section applies only to documents and information reasonably required in connection with the exercise by the Panel of its functions.
- (4) The Panel may require—
- (a) any document produced to be authenticated, or
 - (b) any information provided (whether in a document or otherwise) to be verified,
- in such manner as it may reasonably require.
- (5) The Panel may authorise a person to exercise any of its powers under this section.
- (6) A person exercising a power by virtue of subsection (5) must, if required to do so, produce evidence of his authority to exercise the power.

- (7) The production of a document in pursuance of this section does not affect any lien that a person has on the document.
- (8) The Panel may take copies of or extracts from a document produced in pursuance of this section.
- (9) A reference in this section to the production of a document includes a reference to the production of—
 - (a) a legible and intelligible copy of information recorded otherwise than in legible form, or
 - (b) information in a form from which it can readily be produced in legible and intelligible form.
- (10) A person is not required by this section to disclose documents or information in respect of which a claim to legal professional privilege (in Scotland, to confidentiality of communications) could be maintained in legal proceedings.

623 Restrictions on disclosure

- (1) This section applies to information (in whatever form)—
 - (a) relating to the private affairs of an individual, or
 - (b) relating to any particular business,
 that is provided to the Panel in connection with the exercise of its functions.
- (2) No such information may, during the lifetime of the individual or so long as the business continues to be carried on, be disclosed without the consent of that individual or (as the case may be) the person for the time being carrying on that business.
- (3) Subsection (2) does not apply to any disclosure of information that—
 - (a) is made for the purpose of facilitating the carrying out by the Panel of any of its functions,
 - (b) is made to a person specified in Part 1 of Schedule 2,
 - (c) is of a description specified in Part 2 of that Schedule, or
 - (d) is made in accordance with Part 3 of that Schedule.
- (4) The Secretary of State may amend Schedule 2 by order subject to negative resolution procedure.
- (5) An order under subsection (4) must not—
 - (a) amend Part 1 of Schedule 2 by specifying a person unless the person exercises functions of a public nature (whether or not he exercises any other function);
 - (b) amend Part 2 of Schedule 2 by adding or modifying a description of disclosure unless the purpose for which the disclosure is permitted is likely to facilitate the exercise of a function of a public nature;
 - (c) amend Part 3 of Schedule 2 so as to have the effect of permitting disclosures to be made to a body other than one that exercises

functions of a public nature in a country or territory outside the United Kingdom.

- (6) Subsection (2) does not apply to the disclosure, by an authority within subsection (7), of information disclosed by the Panel to that authority in reliance on subsection (3).
- (7) The authorities within this subsection are—
 - (a) the Financial Services Authority;
 - (b) an authority designated as a supervisory authority for the purposes of Article 4.1 of the Takeovers Directive;
 - (c) any other person or body that exercises functions of a public nature, under legislation in an EEA State other than the United Kingdom, that are similar to the Panel's functions or those of the Financial Services Authority.
- (8) This section does not prohibit the disclosure of information if the information is or has been available to the public from any other source.
- (9) Nothing in this section authorises the making of a disclosure in contravention of the Data Protection Act 1998 (c. 29).

624 Offence of disclosure in contravention of section 623

- (1) A person who discloses information in contravention of section 623 is guilty of an offence, unless—
 - (a) he did not know, and had no reason to suspect, that the information had been provided as mentioned in section 623(1), or
 - (b) he took all reasonable steps and exercised all due diligence to avoid the commission of the offence.
- (2) A person guilty of an offence under this section is liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both);
 - (b) on summary conviction—
 - (i) in England and Wales, to imprisonment for a term not exceeding twelve months or to a fine not exceeding the statutory maximum (or both);
 - (ii) in Scotland or Northern Ireland, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum (or both).
- (3) Where a company or other body corporate commits an offence under this section, an offence is also committed by every officer of the company or other body corporate who is in default.

*Co-operation***625 Panel's duty of co-operation**

- (1) The Panel must take such steps as it considers appropriate to co-operate with—
 - (a) the Financial Services Authority;
 - (b) an authority designated as a supervisory authority for the purposes of Article 4.1 of the Takeovers Directive;
 - (c) any other person or body that exercises functions of a public nature, under legislation in any country or territory outside the United Kingdom, that appear to the Panel to be similar to its own functions or those of the Financial Services Authority.
- (2) Co-operation may include the sharing of information that the Panel is not prevented from disclosing.

*Hearings and appeals***626 Hearings and appeals**

- (1) Hearings and appeals Rules must provide for a decision of the Panel to be subject to review by a committee of the Panel (the "Hearings Committee") at the instance of such persons affected by the decision as are specified in the rules.
- (2) Rules may also confer other functions on the Hearings Committee.
- (3) Rules must provide for there to be a right of appeal against a decision of the Hearings Committee to an independent tribunal (the "Takeover Appeal Board") in such circumstances and subject to such conditions as are specified in the rules.
- (4) Rules may contain—
 - (a) provision as to matters of procedure in relation to proceedings before the Hearings Committee (including provision imposing time limits);
 - (b) provision about evidence in such proceedings;
 - (c) provision as to the powers of the Hearings Committee dealing with a matter referred to it;
 - (d) provision about enforcement of decisions of the Hearings Committee and the Takeover Appeal Board.
- (5) Rules must contain provision—
 - (a) requiring the Panel, when acting in relation to any proceedings before the Hearings Committee or the Takeover Appeal Board, to do so by an officer or member of staff of the Panel (or a person acting as such);
 - (b) preventing a person who is or has been a member of the committee mentioned in section 618(4) from being a member of the Hearings Committee or the Takeover Appeal Board;

- (c) preventing a person who is a member of the committee mentioned in section 618(4), of the Hearings Committee or of the Takeover Appeal Board from acting as mentioned in paragraph (a).

Contravention of rules etc

627 Sanctions

Rules may contain provision conferring power on the Panel to impose sanctions on a person who has—

- (a) acted in breach of rules, or
- (b) failed to comply with a direction given by virtue of section 621.

628 Failure to comply with rules about bid documentation

- (1) This section applies where a takeover bid is made for a company that has securities carrying voting rights admitted to trading on a regulated market.
- (2) Where an offer document published in respect of the bid does not comply with offer document rules, an offence is committed by—
 - (a) the person making the bid, and
 - (b) any director, member, employee or agent of the person making the bid who caused the document to be published.
- (3) A person commits an offence under subsection (2) only if—
 - (a) he knew that the offer document did not comply, or was reckless as to whether it complied, and
 - (b) he failed to take all reasonable steps to secure that it did comply.
- (4) Where a company or other body corporate commits an offence under subsection (2), an offence is also committed by every officer of the company or other body corporate who is in default. 30
- (5) Where a response document published in respect of the bid does not comply with response document rules, an offence is committed by any director or other officer of the company referred to in subsection (1) who—
 - (a) knew that the response document did not comply, or was reckless as to whether it complied, and
 - (b) failed to take all reasonable steps to secure that it did comply.
- (6) A person guilty of an offence under this section is liable—
 - (a) on conviction on indictment, to a fine;
 - (b) on summary conviction, to a fine not exceeding the statutory maximum.
- (7) Nothing in this section affects any power of the Panel in relation to the enforcement of its rules.
- (8) Section 1 (meaning of “company”) does not apply for the purposes of this section.

- (9) In this section—
- “designated” means designated in rules;
 - “offer document” means a document required to be published by rules giving effect to Article 6.2 of the Takeovers Directive;
 - “offer document rules” means rules designated as rules that give effect to Article 6.3 of that Directive;
 - “regulated market” has the meaning given by Article 4.1(14) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments;
 - “response document” means a document required to be published by rules giving effect to Article 9.5 of the Takeovers Directive;
 - “response document rules” means rules designated as rules that give effect to the first sentence of Article 9.5 of that Directive;
 - “securities” means shares or debentures;
 - “takeover bid” includes a takeover bid within the meaning of that Directive;
 - “voting rights” means rights to vote at general meetings of the company in question, including rights that arise only in certain circumstances.

629 Compensation

- (1) Rules may confer power on the Panel to order a person to pay such compensation as it thinks just and reasonable if he is in breach of a rule the effect of which is to require the payment of money.
- (2) Rules made by virtue of this section may include provision for the payment of interest (including compound interest).

630 Enforcement by the court

- (1) If, on the application of the Panel, the court is satisfied—
 - (a) that there is a reasonable likelihood that a person will contravene a rule-based requirement, or
 - (b) that a person has contravened a rule-based requirement or a disclosure requirement,
 the court may make any order it thinks fit to secure compliance with the requirement.
- (2) In subsection (1) “the court” means the High Court or, in Scotland, the Court of Session.
- (3) Except as provided by subsection (1), no person—
 - (a) has a right to seek an injunction, or
 - (b) in Scotland, has title or interest to seek an interdict or an order for specific performance,
 to prevent a person from contravening (or continuing to contravene) a rule-based requirement or a disclosure requirement.

- (4) In this section—
 “contravene” includes fail to comply;
 “disclosure requirement” means a requirement imposed under section 622;
 “rule-based requirement” means a requirement imposed by or under rules.

631 No action for breach of statutory duty etc

- (1) Contravention of a rule-based requirement or a disclosure requirement does not give rise to any right of action for breach of statutory duty.
- (2) Contravention of a rule-based requirement does not make any transaction void or unenforceable or (subject to any provision made by rules) affect the validity of any other thing.
- (3) In this section—
 (a) “contravention” includes failure to comply;
 (b) “disclosure requirement” and “rule-based requirement” have the same meaning as in section 630.

Funding

632 Fees and charges

- (1) Rules may provide for fees or charges to be payable to the Panel for the purpose of meeting any part of its expenses.
- (2) A reference in this section or section 633 to expenses of the Panel is to any expenses that have been or are to be incurred by the Panel in, or in connection with, the discharge of its functions, including in particular—
 (a) payments in respect of the expenses of the Takeover Appeal Board;
 (b) the cost of repaying the principal of, and of paying any interest on, any money borrowed by the Panel;
 (c) the cost of maintaining adequate reserves.

633 Levy

- (1) For the purpose of meeting any part of the expenses of the Panel, the Secretary of State may by regulations provide for a levy to be payable to the Panel—
 (a) by specified persons or bodies, or persons or bodies of a specified description, or
 (b) on transactions, of a specified description, in securities on specified markets.

In this subsection “specified” means specified in the regulations.

- (2) The power to specify (or to specify descriptions of) persons or bodies must be exercised in such a way that the levy is payable only by persons or bodies that appear to the Secretary of State—

- (a) to be capable of being directly affected by the exercise of any of the functions of the Panel, or
 - (b) otherwise to have a substantial interest in the exercise of any of those functions.
- (3) Regulations under this section may in particular—
- (a) specify the rate of the levy and the period in respect of which it is payable at that rate;
 - (b) make provision as to the times when, and the manner in which, payments are to be made in respect of the levy.
- (4) In determining the rate of the levy payable in respect of a particular period, the Secretary of State—
- (a) must take into account any other income received or expected by the Panel in respect of that period;
 - (b) may take into account estimated as well as actual expenses of the Panel in respect of that period.
- (5) The Panel must—
- (a) keep proper accounts in respect of any amounts of levy received by virtue of this section;
 - (b) prepare, in relation to each period in respect of which any such amounts are received, a statement of account relating to those amounts in such form and manner as is specified in the regulations.

Those accounts must be audited, and the statement certified, by persons appointed by the Secretary of State.

- (6) Regulations under this section—
- (a) are subject to affirmative resolution procedure if subsection (7) applies to them;
 - (b) otherwise, are subject to negative resolution procedure.
- (7) This subsection applies to—
- (a) the first regulations under this section;
 - (b) any other regulations under this section that would result in a change in the persons or bodies by whom, or the transactions on which, the levy is payable.
- (8) If a draft of an instrument containing regulations under this section would, apart from this subsection, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument.

634 Recovery of fees, charges or levy

An amount payable by any person or body by virtue of section 632 or 633 is a debt due from that person or body to the Panel, and is recoverable accordingly.

*Miscellaneous and supplementary***635 Panel as party to proceedings**

The Panel is capable (despite being an unincorporated body) of—

- (a) bringing proceedings under this Chapter in its own name;
- (b) bringing or defending any other proceedings in its own name.

636 Exemption from liability in damages

- (1) Neither the Panel, nor any person within subsection (2), is to be liable in damages for anything done (or omitted to be done) in, or in connection with, the discharge or purported discharge of the Panel's functions.
- (2) A person is within this subsection if—
 - (a) he is (or is acting as) a member, officer or member of staff of the Panel, or
 - (b) he is a person authorised under section 622(5).
- (3) Subsection (1) does not apply—
 - (a) if the act or omission is shown to have been in bad faith, or
 - (b) so as to prevent an award of damages in respect of the act or omission on the ground that it was unlawful as a result of section 6(1) of the Human Rights Act 1998 (c. 42) (acts of public authorities incompatible with Convention rights).

637 Privilege against self-incrimination

- (1) A statement made by a person in response to—
 - (a) a requirement under section 622(1), or
 - (b) an order made by the court under section 630 to secure compliance with such a requirement,
 may not be used against him in criminal proceedings in which he is charged with an offence to which this subsection applies.
- (2) Subsection (1) applies to any offence other than an offence under one of the following provisions (which concern false statements made otherwise than on oath)—
 - (a) section 5 of the Perjury Act 1911 (c. 6);
 - (b) section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39);
 - (c) Article 10 of the Perjury (Northern Ireland) Order 1979 (S.I. 1979/1714 (N.I. 19)).

638 Annual reports

- (1) After the end of each financial year the Panel must publish a report.
- (2) The report must—

- (a) set out how the Panel's functions were discharged in the year in question;
- (b) include the Panel's accounts for that year;
- (c) mention any matters the Panel considers to be of relevance to the discharge of its functions.

639 Amendments to Financial Services and Markets Act 2000

- (1) The Financial Services and Markets Act 2000 (c. 8) is amended as follows.
- (2) Section 143 (power to make rules endorsing the City Code on Takeovers and Mergers etc) is repealed.
- (3) In section 144 (power to make price stabilising rules), for subsection (7) substitute—

“(7) “Consultation procedures” means procedures designed to provide an opportunity for persons likely to be affected by alterations to those provisions to make representations about proposed alterations to any of those provisions.”.

- (4) In section 349 (exceptions from restrictions on disclosure of confidential information), after subsection (3) insert—

“(3A) Section 348 does not apply to a disclosure, by a recipient to which subsection (3B) applies, of confidential information disclosed by the Authority to that recipient in reliance on subsection (1).

(3B) This subsection applies to—

- (a) the Panel on Takeovers and Mergers;
- (b) an authority designated as a supervisory authority for the purposes of Article 4.1 of the Takeovers Directive;
- (c) any other person or body that exercises public functions, under legislation in an EEA State other than the United Kingdom, that are similar to the Authority's functions or those of the Panel on Takeovers and Mergers.”.

- (5) In section 354 (Financial Services Authority's duty to co-operate with others), after subsection (1) insert—

“(1A) The Authority must take such steps as it considers appropriate to cooperate with—

- (a) the Panel on Takeovers and Mergers;
- (b) an authority designated as a supervisory authority for the purposes of Article 4.1 of the Takeovers Directive;
- (c) any other person or body that exercises functions of a public nature, under legislation in any country or territory outside the United Kingdom, that appear to the Authority to be similar to those of the Panel on Takeovers and Mergers.”.

640 Power to extend to Isle of Man and Channel Islands

Her Majesty may by Order in Council direct that any of the provisions of this Chapter extend, with such modifications as may be specified in the Order, to the Isle of Man or any of the Channel Islands.

APPENDIX D

New Appendix 6

Bid documentation rules for the purposes of section 628 of the Company Law Reform Act 2006

For the purposes of section 628 of the Company Law Reform Act 2006, “offer document rules” and “response document rules” are those giving effect, respectively, to Article 6.3 and the first sentence of Article 9.5 of the Directive (see section 10(e) of the Introduction). The relevant parts of Rules 24 and 25 are set out below.

“Offer document rules”

Article	Those parts of the Rule set out below which give effect to the Article
<i>Article 6.3(a)</i>	Rule 24.2(d)(v)
<i>Article 6.3(b)</i>	Rule 24.2(d)(ii)
<i>Article 6.3(c)</i>	Rule 24.2(d)(iv)
<i>Article 6.3(d)</i>	Rule 24.2(d)(v) and Note 5 on Rule 24.2
<i>Article 6.3(e)</i>	Rule 24.2(d)(xv)
<i>Article 6.3(f)</i>	Rule 24.2(d)(iv)
<i>Article 6.3(g)</i>	Rule 24.3(a)(i),(ii)
<i>Article 6.3(h)</i>	Rule 24.2(d)(vi)
<i>Article 6.3(i)</i>	Rule 24.1
<i>Article 6.3(j)</i>	Rule 24.6 (first phrase)
<i>Article 6.3(k)</i>	Rule 24.2(d)(xi)
<i>Article 6.3(l)</i>	Rule 24.2(f)
<i>Article 6.3(m)</i>	Rule 24.2(d)(iii) and Note 4 on Rule 24.2
<i>Article 6.3(n)</i>	Rule 24.2(d)(xiv)

“Response document rules”

<i>Article 9.5, first sentence</i>	Rule 25.1(a), 25.2
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