

PCP 2008/1 Issued on 4 March 2008

THE TAKEOVER PANEL

**CONSULTATION PAPER ISSUED BY
THE CODE COMMITTEE OF THE PANEL**

COMPETITION REFERENCE PERIODS

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

The Code Committee is therefore inviting comments on this Public Consultation Paper (“PCP”). Comments should reach the Code Committee by 6 May 2008.

Comments may be sent by email to:

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Alternatively, please send comments in writing to:

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It is the Code Committee’s policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

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EXECUTIVE SUMMARY

In this PCP the Code Committee is proposing certain amendments to clarify the application of the Rules which relate to competition reference periods and to codify existing practice in relation to the application of those Rules.

Specific proposals are summarised below.

Section 1 describes the background to Rule 12.2.

Section 2 describes certain inconsistencies that have arisen in the interaction of Rules 12.2 and 35.1, explains how those Rules are applied in practice and proposes certain amendments to clarify what happens when a referred offeror or potential offeror is cleared by the competition authorities. The effect of the proposed amendments would be that, following clearance by the competition authorities, any offeror or potential offeror would, normally within 21 days, have to decide whether to proceed with its offer or not and to make an announcement accordingly.

Section 3 proposes amending Rule 12.2 to make it clear that the Rule will not apply when an offer which is announced subject to a pre-condition relating to clearance from the competition authorities following a reference is, in fact, referred. Reflecting current practice, it is therefore proposed that, in any such case, the offer period should normally continue throughout the competition reference period, though with scope for dispensations from certain Rules, where continued compliance during a lengthy reference period might prove burdensome. This section also proposes amendments to Rule 13.3 to clarify what pre-conditions relating to competition clearance are acceptable.

Section 4 describes some technical amendments that need to be made to the definition of “competition reference period” and to Rule 12.2 in order to bring them more closely into line with UK and European competition law.

Section 5 sets out the proposed amendments described in the previous three sections.

Section 6 proposes an amendment to Rule 2.4(b) to reflect current practice and make it clear that an offeree company will not be able to ask the Panel under Rule 2.4(b) to impose a “put up or shut up” deadline on a potential offeror once the offer period has ended in accordance with Rule 12.2 following referral of a possible offer to the competition authorities.

Section 7 gives the Code Committee’s view on the impact of the proposed amendments.

1. Introduction

Background to Rule 12.2

1.1 In 2000, a number of amendments were made to the Code with the combined objective of:

(a) putting on the same footing all offerors or potential offerors who were referred to the Competition Commission or were the subject of proceedings initiated by the European Commission under Article 6(1)(c) of Council Regulation (EEC) 4064/89 (the predecessor of Council Regulation 139/2004/EC); and

(b) establishing an appropriate framework of regulation for the period in which the offer or possible offer was being considered by such competition authorities.

Prior to this, an offer which had been firmly announced under Rule 2.5 would lapse (and thus the offer period would end) in accordance with Rule 12.1 (then Rule 12) if the offer were referred or proceedings initiated, in the same way as it would now (except as regards the Rule's recently amended application to schemes of arrangement). However, there was no provision for the offer period to end if there were a referral of a possible offer¹ or of an offer which was announced under Rule 2.5 subject to the pre-condition of clearance from the competition authorities.

1.2 The package of amendments made in 2000 achieved the objectives described above by introducing Rule 12.2, which provided that for all offers or possible offers, the "offer period" would cease during a competition reference period. A

¹ A possible offer will normally be one that is announced under Rule 2.4(a) but a potential offer which is automatically referred to the Competition Commission before any announcement is made (e.g. an offer for a newspaper) is also treated as a possible offer in this context.

“competition reference period” was defined to begin with the announcement of a referral of an offer to the Competition Commission or the initiation of proceedings by the European Commission and to end with an announcement of clearance by the Competition Commission or a decision of the European Commission under Article 8(2) of the Council Regulation. Various amendments were also made to certain other Rules at this time to indicate how they would continue to apply during a competition reference period, despite the offer period’s ending.

- 1.3 The definition of a competition reference period reads as follows:

“Competition reference period

Competition reference period means the period from the time when an announcement is made of the referral of an offer to the Competition Commission or of the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC, until the time of an announcement of clearance by the Competition Commission or of the issuance of a decision under Article 8(2) of the said Council Regulation.”

Rule 12.2 reads as follows:

**“12.2 OFFER PERIOD CEASES DURING COMPETITION
REFERENCE PERIOD**

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end. A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.

NOTES ON RULE 12.2

1. Schemes of arrangement

In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.2(a) or (b) or upon a condition included pursuant to Rule 12.2(c) being invoked.

2. After a reference or initiation of proceedings

Following the ending of an offer period on a reference or initiation of proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.8 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 20.2, 35.1 and 35.2 and 38.2)."

Purpose of this PCP

1.4 In the light of the Executive's experience in applying these provisions since 2000, the Code Committee in this PCP addresses certain issues that it considers worthy of clarification and in relation to which it is proposing rule amendments. These issues concern:

- what happens when a referred offeror or potential offeror is cleared by the competition authorities;
- the application of Rule 12.2 in the case of an offer which is announced subject to a pre-condition relating to clearance from the competition authorities; and
- the application of the "put up or shut up" regime under Rule 2.4(b) during a competition reference period.

1.5 The PCP also proposes certain technical amendments designed to bring the relevant provisions more closely into line with current UK and European competition law.

Terminology

1.5 In this PCP, the following terms are used as defined below:

“clearance” – the announcement of clearance of an offer or possible offer by the UK competition authorities or the offer or possible offer’s being considered by the European Commission to be compatible with the common market pursuant to Council Regulation 139/2004/EC²;

“competition authorities” – the UK competition authorities and/or the European Commission;

“reference/referral” – either the referral of an offer or possible offer to the Competition Commission or the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC; and

“referred offer/offerrer” – an offer (or possible offer) which has been referred to the Competition Commission or in respect of which the European Commission has initiated proceedings under Article 6(1)(c) of Council Regulation 139/2004/EC and the related offeror (or potential offeror).

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2. **What happens when a referred offeror or potential offeror is cleared by the competition authorities?**

2.1 The events arising when a referred offeror or potential offeror is cleared by the competition authorities are currently regulated in the Code by the interaction of:

- (a) Rule 12.2;
- (b) the definition of a competition reference period; and
- (c) Rule 35.1.

² See also Section 4 below.

Recent experience of the Executive has highlighted certain inconsistencies which have arisen in the interaction of these provisions and the Code Committee believes that these should be addressed with a view to clarification of their effect.

Rule 35.1

- 2.2 Rule 35.1 places restrictions for 12 months on an offeror and any person acting in concert with that offeror in circumstances where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed. The restrictions prevent the offeror and its concert parties from taking action which will further prolong the siege that the offeree company may have been experiencing during the period of the failed offer, in particular by preventing them, during the 12 month period following the withdrawal or lapse of that offer, from: announcing another offer; triggering a Rule 9 offer; or making any statement that raises or confirms the possibility that a further offer might be made for the offeree company.
- 2.3 However, the Notes on Rule 35.1 provide for dispensations from these restrictions to be given, at the Panel's discretion, in certain circumstances. In particular, Note (a)(iii) states that the Panel will normally grant a dispensation and allow a new offer to be announced if the previous offer period ended in accordance with Rule 12.2 on a reference and the new offer follows clearance. In such circumstances, the new offer must normally be announced within 21 days of clearance being given. The full text of Rule 35.1 and its Note reads as follows:

**“SECTION N. RESTRICTIONS FOLLOWING OFFERS AND
POSSIBLE OFFERS**

RULE 35

35.1 DELAY OF 12 MONTHS

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

(a) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);

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

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

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

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

.....

NOTE ON RULES 35.1 and 35.2

When dispensations may be granted

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

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

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

(iii) the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation 139/2004/EC. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or

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

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

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

NB Rule 2.2(e) will continue to apply in these circumstances.”

Rule 12.2

- 2.4 To tie in with Note (a)(iii) on Rule 35.1, Rule 12.2 provides that when the offer period has ended on a reference, a new offer period will start when the

competition reference period ends (i.e. on clearance) and that unless a new offer is announced in accordance with the Note (i.e. within 21 days of clearance), that new offer period will end either at the end of the 21 day period or when all cleared offerors have announced that they will not be making an offer, whichever is the earlier.

How the Rules apply

- 2.5 The main issue which arises in considering the interaction of Rules 12.2 and 35.1 is that, while Rule 12.2 applies following referral of either an offer (i.e. one that has been the subject of a firm announcement under Rule 2.5) or a possible offer (i.e. one that has been the subject of a Rule 2.4 announcement³), Rule 35.1 is expressed to apply only when an offer has been announced (i.e. by means of a firm announcement under Rule 2.5) or posted. It does not, therefore, apply following an announcement of a possible offer under Rule 2.4. Therefore, although Rule 12.2 envisages the application of Note (a)(iii) on Rule 35.1 at the end of a competition reference period, whether following clearance of a firm offer or a possible offer, strictly the Note applies only following the referral and clearance of a firm offer.
- 2.6 This was not the case when Rule 12.2 was introduced. It will be noted that Section N of the Code, which comprises Rules 35.1 to 35.4, is headed, “Restrictions following offers or possible offers”. At the time of the introduction of Rule 12.2, Rule 35.1 did apply to possible offers under what was then Rule 35.1(b) but this provision was deleted and substantially replaced by Rule 2.4(b) in 2004 by RS 2004/1 on “Put up or Shut up and No Intention to Bid Statements”. In the process, an inconsistency has arisen between Rule 12.2 and Rule 35.1.
- 2.7 The Code Committee understands, however, that the Executive has continued in practice to apply Note (a)(iii) on Rule 35.1 to potential offerors who are cleared

³ See footnote 1.

by the competition authorities. In effect, it treats a referred possible offer as having lapsed, even though, in fact, it has not (because no offer has actually been made). The Code Committee therefore considers that the Code should be amended to eliminate the technical inconsistency that has arisen between Rules 12.2 and 35.1 and thus to restore the position that was originally provided for in 2000, and which is applied in practice, ensuring that both firm offerors and potential offerors which are referred to the competition authorities are placed on the same footing and therefore subjected to the restrictions in Rule 35.1, but able to benefit from the dispensation in Note (a)(iii), if appropriate.

If no new offer is announced on clearance

- 2.8 In considering the amendments described above, the Code Committee has identified another related matter which it considers worthy of clarification. This concerns what happens to an offeror or potential offeror which is cleared by the competition authorities but then chooses not to announce an offer. Such a person may make his position clear by stating that he has no intention to make a new offer for the offeree company but there is currently no obligation on him to do so and he may therefore choose to stay silent.
- 2.9 Clearance from the competition authorities could come at any time in the 12 month “lock-out” period provided for under Rule 35.1. For example, clearance could be given after only 3 months or might not be given until much later, for example, when 9 or more months have passed. On occasion, clearance may take longer than 12 months. If a cleared offeror or potential offeror makes a statement that he has no intention of making an offer for the offeree company, the Code Committee considers that such a statement should fall to be treated as an announcement to which Rule 2.8 applies. As a result, that offeror or potential offeror would then be locked out for a period of 6 months from the date of the statement, rather than for the remainder of the initial 12 month lock-out period

- (regardless of how much of that period remained, whether more or less than 6 months), subject to the possible dispensations under Rule 2.8.
- 2.10 If, however, the cleared offeror or potential offeror makes no statement at all during the 21 day window provided in Note (a)(iii), it would appear that at present, pursuant to Rule 35.1, that offeror or potential offeror will continue to be locked out for the remainder of the original 12 month period (if any), regardless of how much of that period remains, subject to the dispensations available under Notes (a)(i), (ii) and (iv) on the Rule.
- 2.11 The Code Committee considers that this produces a confusing and inequitable result. It believes that, as already stated, all cleared offerors and potential offerors should be placed on the same footing and it also believes that, in accordance with General Principle 6 (which provides that an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities), following a competition reference period, the offeree company should be given a period of respite from siege (albeit that the level of siege is reduced during a competition reference period). The Code Committee does not consider it satisfactory that the period of respite should be determined by the length of the competition reference period – and may, as a result, in some cases be so short as to give no effective respite at all or may even be non-existent. Nor does the Code Committee believe that a cleared offeror or potential offeror who states an intention not to bid should be treated differently from one who chooses to stay silent.
- 2.12 With a view to achieving the objectives described above and also to providing transparency and certainty to the market, the Code Committee therefore proposes that, on clearance, an offeror or potential offeror should, normally within the 21 day window, make its intentions towards the offeree company clear, either by announcing an offer under Rule 2.5 or by stating that it has no intention of making

an offer. A statement of the latter kind would then be treated as being subject to Rule 2.8 and the option of staying silent would be removed.

- 2.13 If such a proposal is accepted, in the Code Committee's view the 12 month lock-out period provided for referred offerors and potential offerors under Rule 35.1 will become irrelevant. The restrictions in Rule 35.1 should continue to apply to referred offerors and potential offerors during the competition reference period but what happens on clearance will be determined by the cleared offeror's or potential offeror's actions – either in announcing an offer under Rule 2.5, or stating that it does not intend to make an offer, which statement will be treated as an announcement under Rule 2.8.

Proposed new Rule 12.2

- 2.14 In the light of the arguments in section 2 above, the Code Committee therefore proposes that Rule 35.1 should no longer apply to offers or possible offers that are referred to the competition authorities, and that Rule 12.2 should be restructured in order to deal completely, in one place, with the events that occur when an offer or possible offer is referred and subsequently cleared. The key elements of the Rule would be as follows:

- the offer period ends on a reference to the competition authorities (except in certain circumstances - see Note 1 on the current Rule 12.2 (when the offer is a scheme of arrangement) and also section 3 below);
- the restrictions currently set out in Rule 35.1 will apply during the competition reference period, provided the offer period has ended;
- on clearance, a new offer period will begin and a cleared offeror or potential offeror will have 21 days within which to clarify its intentions, either by announcing an offer under Rule 2.5 or by stating that it has no intention of

doing so, such a statement being treated as an announcement to which Rule 2.8 applies; and

- the new offer period will end if all cleared offerors or potential offerors announce that they do not intend to bid.

Q1 Do you agree with the proposals for clarifying the application of Rules 35.1 and Rule 12.2 and for amending them as described in paragraphs 2.1 to 2.14?

2.15 Proposals for a new Rule 12.2 and a revised Rule 35.1, as well as necessary consequential amendments, are set out below in paragraphs 5.3 to 5.6 and 5.8. These proposals also include amendments proposed in sections 3 and 4 below.

3. The application of Rule 12.2 in the case of an offer which is announced subject to a pre-condition of clearance from the competition authorities

3.1 The current Rule 12.2 is drafted so as to apply in the case of any offer or possible offer that is referred (other than some schemes of arrangement). This includes an offer that is announced under Rule 2.5 subject to a pre-condition of clearance from the UK or EU competition authorities following a reference (a “competition pre-condition”).

3.2 In practice, the Code Committee understands that, in recent years, the Executive has normally ruled that, in any case in which an offer has been announced subject to a competition pre-condition and then referred, the offer period should continue throughout the competition reference period. It has, however, given dispensations from the application of certain rules where it has been clear that the competition reference period was likely to be long and the application of those rules might prove to be unduly burdensome (for example, Notes 3 and 4 on Rule 20.1). The Code Committee understands that the Executive has nonetheless ruled that

dealing disclosures under Rule 8 and Rule 38.5 should continue throughout the entire period. The Code Committee has been considering whether this is the right approach or whether Rule 12.2 should be applied to offers announced subject to a competition pre-condition.

- 3.3 As mentioned in paragraph 1.1, the Code Committee understands that the Panel's intention in 2000, when Rule 12.2 was introduced, was to create a rule which put all referred offerors and potential offerors on the same footing, so that, say, if there were three competing offers, one of which was announced under Rule 2.5 subject to a competition pre-condition, one of which was announced under Rule 2.5 with no pre-condition and one of which was only a possible offer, all the offerors or potential offerors, if referred, would be subject to the same regulatory regime during the competition reference period.
- 3.4 Reconsidering this matter now in the light of recent practice, the Code Committee questions this rationale. It can understand why a referred potential offeror and an offeror whose offer has lapsed on referral should be treated in the same way. Each is pursuing its case with the competition authorities but there is no certainty whether either of them, on clearance, will make an offer or on what terms because there is no obligation on them to do so. However, in the case of an offer that is announced under Rule 2.5 subject to a competition pre-condition, if the offer is cleared (and the pre-condition therefore satisfied), the offeror is committed to continuing with the offer on the terms announced and is normally required to post its offer document within 28 days of clearance. Unlike the other referred offeror and potential offeror, it does not have the 21 day window following clearance within which to decide whether to proceed with an offer or not. The Code Committee therefore considers that there is justification for treating the pre-conditional offeror differently. An offeror can choose the form in which it announces an offer and, if it chooses to make a firm announcement pre-conditional upon clearance, the Code Committee considers that it is not unreasonable for it to expect that an offer period will continue while it waits to

learn whether the pre-condition will be satisfied or not. The Code Committee therefore considers that it is not appropriate to apply Rule 12.2 to an offer which is announced subject to a competition pre-condition.

- 3.5 However, the Code Committee is aware that a competition reference period may last for many months. In some cases, continued compliance with some of the Rules during this period may prove to be unduly burdensome for the parties concerned and the Code Committee understands that the Executive would be prepared to consider granting dispensations from individual rules on a case by case basis. For example, continued policing of meetings with shareholders of the offeror or offeree company by the financial adviser to the relevant party under Note 3 on Rule 20.1 may serve little purpose in the extended period when, in practice, it is unlikely that any new material information will be revealed. Similarly, continued application of Note 4 on Rule 20.1, requiring approval by the Panel of brokers' circulars, may also be unnecessarily burdensome during a period of many months and it may be appropriate for a dispensation from its continued application to be given so that that Note would have effect, in accordance with its last paragraph, as if the offer period had ended in accordance with Rule 12.2. The Code Committee understands, however, that the Executive would not normally be prepared to grant a dispensation from the requirement for dealing disclosures under Rule 8 and Rule 38.5 during the competition reference period. Since the offeror is committed to proceed with the offer if cleared, it is important for shareholders and other market participants to continue to be informed about interests and dealings in relevant securities of the offeree company (and, if relevant, the offeror) throughout the extended offer period. Note 4 on Rule 21.1 will, however, be relevant and the Code Committee understands that the Executive will normally apply both that Rule and General Principle 3 on the more flexible basis set out in Note 4.
- 3.6 In the light of these considerations, the Code Committee proposes that the amended Rule 12.2 should not be applied when an offer that is announced subject

to a competition pre-condition is referred. The offer period will therefore, in any such case, continue during the competition reference period, and the relevant Rules will continue to apply, subject to any specific dispensations that might be given as described above.

3.7 For the avoidance of doubt, the Code Committee wishes to make it clear that a competition pre-condition as referred to above is one which relates to clearance being given by the UK competition authorities or the European Commission following a reference or the initiation of proceedings as the case may be.

3.8 In practice, relevant pre-conditions tend to consist of two limbs, as follows:

“...that there will be no reference to [the relevant competition authority] or, if there is such a reference, clearance being given...”

The pre-condition is also likely to say that the decision not to make a reference and the decision of clearance following a reference (as appropriate) must be on terms satisfactory to the offeror.

3.9 A pre-condition may, however, relate only to a decision being made by the relevant competition authorities that there will be no reference (on terms satisfactory to the offeror). In such a case, if the offer is referred, the offeror will be under no obligation to pursue its offer and the offer period will end when the reference is made.. Nonetheless, if the referred offeror chooses to pursue its case before the competition authorities, the Code Committee considers that Rule 12.2 will apply to the referred offeror in the normal way and a competition reference period will begin when the reference is made.

Q2 Do you agree that Rule 12.2 should not apply when an offer that is announced subject to a competition pre-condition as described above is

referred but that the Panel should be able to grant dispensations from individual Rules during the competition reference period?

3.10 The Rule which determines what pre-conditions may be acceptable is Rule 13.3. That Rule was introduced in April 2004 in RS 2004/4 on “Conditions and pre-conditions”. In particular, Rule 13.3(a) was included with the intention, as stated in the RS, of permitting a pre-condition which related to “OFT/Competition Commission or European Commission clearance”.

3.11 However, Rule 13.3(a), as drafted, refers to a pre-condition which is included “pursuant to Rule 12.1(c)”. That Rule refers only to “a decision being made that there will be no reference, initiation of proceedings or referral”. The Code Committee always intended that the permitted pre-conditions would be able in addition to relate to clearance following a reference, as is clear from paragraph 7.13 of PCP 2004/4, which stated that:

“where a conventional offer would lapse because of a reference to the Competition Commission or the initiation of proceedings by the European Commission, adopting a pre-conditional structure (i.e. with a pre-condition relating to the relevant competition clearance) will provide greater certainty for the parties, shareholders and the market because the offeror will be committed to proceed on the terms announced if clearance is obtained.”

3.12 While Rule 13.3(a) has been interpreted by practitioners and the Executive to permit pre-conditions relating to decisions not to refer and to clearance decisions following referral, as was intended, the Code Committee considers that Rule 13.3 should be recast to state the original intention clearly and is proposing amendments accordingly. The proposed amendments and a proposed consequential amendment to Rule 13.2 are set out in paragraphs 5.7 and 5.8 below.

4. Technical amendments to the definition of competition reference period and Rule 12.2

- 4.1 In the course of considering the amendments proposed above, the Code Committee has become aware of certain technical amendments that it believes should be made to both the definition of “competition reference period” and Rule 12.2 in order to make these provisions reflect more accurately both UK and EU competition law, as set out in the Enterprise Act 2002 and European Council Regulation 139/2004/EC respectively. The purpose of the amendments would be to reflect all the relevant outcomes of a reference to the Competition Commission or the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC.
- 4.2 Currently, as defined, a competition reference period ends either on announcement of clearance by the Competition Commission or on the issuance of a decision under Article 8(2) of Council Regulation 139/2004/EC. When clearance is given, by either the UK or European competition authorities, it may be conditional or unconditional. Currently, the definition makes no distinction between conditional and unconditional clearance from the UK authorities and the word “clearance” has been interpreted to embrace both. A decision issued under Article 8(2) is, however, a decision only of conditional clearance from the European competition authorities. Council Regulation 139/2004/EC also provides, in Article 8(1), for a decision of unconditional clearance to be given and the Code Committee considers that the definition should refer to this as well. It therefore proposes that the definition should be amended to make it plain that clearance, whether from UK or European competition authorities may be conditional or unconditional.
- 4.3 Council Regulation 139/2004/EC also provides, in Article 10(3), that if the European Commission fails to make a decision within a specified timeframe, the offer is deemed to be compatible with the common market and, therefore, cleared

to go ahead. The Code Committee considers that provision should therefore be made for a competition reference period to end in these circumstances.

4.4 Furthermore, UK competition law provides that, in certain circumstances, the Secretary of State may intervene in a reference and the final decision may be given by him rather than the Competition Commission. The Code Committee considers that this eventuality should also be provided for.

4.5 Finally, under both UK and European competition law, the relevant authorities may decide to prohibit the referred offer. The Code Committee proposes that the definition of a competition reference period should be amended so that the period may end on such a decision being given. This would make it clear that in these circumstances, the competition reference period would not continue indefinitely, along with the obligations which apply during this time (such as the restrictions on dealing in Rule 38.2 and the requirement that statements must be capable of substantiation under Rule 19.8). In addition, the Code Committee proposes that Rule 12.2 should also incorporate a provision to make it clear that when a prohibition decision is given, by either UK or (under Article 8(3) of Council Regulation 139/2004/EC) EU competition authorities, no new offer period will begin.

Q3 Do you agree that the Code should be amended in order to reflect more accurately both UK and EU competition law?

5. Proposed amendments

5.1 In the light of the proposals made in sections 2, 3 and 4 above, the Code Committee proposes the amendments set out below.

Definition of “competition reference period”

- 5.2 The Code Committee proposes to amend the definition of “competition reference period” as follows:

“Competition reference period

Competition reference period means the period from the time when an announcement is made of the referral of an offer or possible offer to the Competition Commission or of the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC, until the time of:

(a) an announcement of clearance (including clearance subject to conditions) or prohibition by the Competition Commission or the Secretary of State, as appropriate;

(b) of the issuance of a decision under Article 8(1), Article 8(2) or Article 8(3) of the said Council Regulation; or

(c) the expiry of the time limits set out in Article 10(3) of the said Council Regulation with no decision having been issued by the European Commission and the offer being deemed compatible with the common market under Article 10(6).”

Rule 12.2

- 5.3 The Code Committee proposes to restructure and amend Rule 12.2 as follows:

Rule 12.2

“12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIODS

(a) When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end, except in the following circumstances:-

(i) when the offer was announced subject to a pre-condition as permitted under Rule 13.3(b); or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, where the reference or initiation of proceedings in

relation to the offer does not cause it to lapse as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.⁴

(b) If the offer period ends in accordance with Rule 12.2(a):-

(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:-

(A) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);

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

(C) acquire an interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

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

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

(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):-

(A) any offeror must, normally within 21 days of the offer's being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in

⁴ Proposed Rule 12.2 (a)(ii) replaces existing Note 1, but with the same effect.

accordance with Rule 2.5 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies; and

(B) a new offer period will begin and, if no announcement of a new offer is made within the 21 day period referred to above, will end when each cleared offeror or potential offeror has announced that it does not intend to make an offer; and

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin.

~~A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.~~

NOTES ON RULE 12.2

1. — Schemes of arrangement

In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

1. Certain restrictions disapplied while clearance is being sought

The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).

2. After a reference or initiation of proceedings

Following the ending of an offer period on a reference or initiation of proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.8 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 20.2, ~~35.1 and 35.2~~ and 38.2).

3. Offers announced subject to a pre-condition as permitted under Rule 13.3(b)

When an offer which was announced subject to a pre-condition as permitted under Rule 13.3(b) is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will not end. However, during the competition reference period, the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so.

Rule 2.8

- 5.4 The Code Committee also proposes that Rule 2.8 should be amended to reflect its proposed application to announcements made by offerors and potential offerors which are given clearance to bid by the competition authorities but decide not to do so. Currently, under Rule 35.1, even if a cleared offeror decides not to announce a new offer within the 21 day window, it may be given a dispensation to bid in the circumstances in Note (a)(i),(ii) and (iv), i.e.: if the new offer is recommended by the board of the offeree company; if the new offer follows the announcement of an offer by a third party for the offeree company; or if the offeree company announces a proposal for a “whitewash”. Under Rule 2.8, a person making a statement that he does not intend to make an offer may, with the consent of the Panel, be permitted to announce a new offer if there is a material change of circumstances. Such a person may also specify certain events, the occurrence of which would enable the announcement to be set aside.
- 5.5 The Code Committee proposes that the only events that a cleared offeror should be permitted to specify when making an announcement under proposed Rule 12.2(b)(ii)(A) that it does not intend to make an offer should be those currently permitted under Rule 35.1, as described above. Since these are the same as those permitted when a person makes an announcement under Rule 2.4(b), following a request to “put up or shut up”, the Code Committee proposes to amend Note 2 on Rule 2.8 as follows:

Rule 2.8

NOTES ON RULE 2.8

1. Prior consultation

.....

2. Rules 2.4(b) and 12.2(b)

Where a statement to which Rule 2.8 applies is made following a time limit being imposed under Rule 2.4(b) or pursuant to Rule 12.2(b)(ii)(A), the only matters that a person will normally be permitted to specify in the statement as matters which would enable it to be set aside are:

(a) *the agreement or recommendation of the board of the offeree company;*

(b) *the announcement of an offer by a third party for the offeree company; and*

(c) *the announcement by the offeree company of a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse takeover (see Note 2 on Rule 3.2).*

Rule 35.1

- 5.6 As a result of the proposed restructuring and amendment of Rule 12.2, Rule 35.1 will no longer apply to offerors and potential offerors that are referred to the competition authorities and the Code Committee therefore proposes the following amendments:

Rule 35.1

“SECTION N: RESTRICTIONS FOLLOWING OFFERS AND ~~POSSIBLE OFFERS~~”

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed otherwise than pursuant to Rule 12.1, neither the offeror....

NOTES ON RULES 35.1 and 2

(a) (i).....

(ii).....

(iii) the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation 139/2004/EC. Any such offer must normally be

~~announced within 21 days after the announcement of such clearance or decision; or~~

~~(iv) (iii) the new offer follows.....withdrawn.~~

(b)

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

Rule 13.3

- 5.7 As explained in paragraphs 3.7 to 3.9 above, the Code Committee proposes that Rule 13.3 should be amended to reflect accurately its original purpose as set out in PCP 2004/4 and RS 2004/4. The revised Rule would read:

Rule 13.3

“13.3 ACCEPTABILITY OF PRE-CONDITIONS

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

Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition:-

(a) is included pursuant to Rule 12.2(c) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission; or

(b) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission or, if there is such a reference or initiation of proceedings, a decision by the

relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror); or

~~(b)~~ (c) involves another material official authorisation....”

Consequential amendments

5.8 The Code Committee also proposes the following consequential amendments.

(i) *Note 4 on Rule 20.1*

The last paragraph should be amended to include a reference to a possible offer as follows:

“When an offer or possible offer is referred to the Competition Commission.....”

Similar amendments should also be made in the first line of Note 5 on Rule 20.2 and the first line of Note 4 on Rule 21.1. (See Appendix A.)

(ii) **Rule 13.2**

In the light of the amendment to Rule 13.3(a), the Code Committee proposes that Rule 13.2 should be amended as follows:

“13.2 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

Neither A a condition ~~or pre-condition~~ included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) is will be not subject to the provisions of Rules 13.1 or 13.4(a).”

Q4 Do you agree with the proposed amendments?

6. The application of the “Put up or shut up” regime under Rule 2.4(b) during a competition reference period

6.1 As mentioned in paragraph 2.6 above, the provisions in Rule 2.4(b) relating to “put up or shut up” were introduced following consultation in 2004 (PCP 2004/1). Rule 2.4(b) reads as follows:

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

6.2 The Code Committee understands that, since the Rule applies “at any time following the announcement of a possible offer”, there have been cases in which the Executive has had to rule on the question as to whether an offeree company can request that the Panel impose a “put up or shut up” deadline on a potential offeror which is in a competition reference period. As described in paragraph 2.7 above, despite the current technical inconsistency between Rules 12.2 and 35.1, the Executive’s practice has been, in effect, to apply Rule 35.1 when a possible offer has been referred and the offer period has ended in accordance with Rule 12.2, so that Note (a)(iii) on Rule 35.1 has been applied when the competition reference period has ended on clearance of the possible offer. As already explained, this Note itself sets a deadline of 21 days from the date of announcement of clearance within which the cleared potential offeror must decide whether to make an offer or not. The Executive’s practice has therefore been to rule that once a possible offer has been referred, the offeree company may not request the imposition of a separate “put up or shut up” deadline under Rule 2.4(b).

- 6.3 The Code Committee considers that this is the correct approach. It believes that it would be inappropriate to permit the “put up or shut up” procedure to be invoked during a competition reference period. The purpose of permitting the offeree company to invoke “put up or shut up” is to enable it to limit the period during which it is under siege while the potential offeror decides whether it will proceed with a firm offer or not. Pending a decision from the competition authorities, the potential offeror is, however, in no position to determine whether it will or will not make a firm offer or, if it intends to make an offer, at what price. The level of siege for the offeree company is lowered during the competition reference period because the offer period has ended and a timetable for the end of uncertainty (once the competition authorities have made their determination) is currently provided by the application of Note (a)(iii) on Rule 35.1.
- 6.4 If the amendments proposed above in Section 2 are adopted, it will be clear that, following clearance of a referred possible offer, the potential offeror will be obliged to clarify its position, either by announcing an offer under Rule 2.5 or by stating that it does not intend to make an offer, in which case, pursuant to Rule 2.8, it will, except with the consent of the Panel, be locked out for a period of 6 months. In order to avoid any future conflict between Rule 2.4(b) and the new Rule 12.2, the Code Committee proposes that Rule 2.4(b) should be amended to make it clear that the offeree company has a right to request the imposition of a “put up or shut up” deadline on a potential offeror only while the offeree company is in an offer period and only in the period following the announcement of a possible offer (provided the potential offeror has been named) and before the announcement of a firm intention to make an offer. If, therefore, the offer period ends in accordance with Rule 12.2, no request for “put up or shut up” may be made.
- 6.5 The Code Committee therefore proposes to amend the first sentence of Rule 2.4(b) as follows:

“(b) At any time during an offer period following the announcement of a possible offer (provided the potential offeror has been named) and before the notification of a firm intention to make an offer, the offeree company may request.....”

Q5 Do you agree with the proposed amendment to Rule 2.4(b)?

6.6 The Code Committee would like to make it clear that, in a competitive situation in which two or more potential offerors have been named in respect of an offeree company and when one or more, but not all of those potential offerors have been referred, the offeree company will be able to request the imposition of a “put up or shut up deadline” on any potential offeror which has not been referred.

7. Impact of the proposed amendments

7.1 The amendments proposed above are designed to codify existing practice, to remove possible ambiguity in the application of the Rules and generally to provide a clearer exposition in the Rules of what happens during a competition reference period and on clearance following a reference. In the interests of maintaining an orderly framework for the conduct of takeover bids, the Code Committee considers that it is advantageous both to practitioners and the Executive for ambiguity in the Rules to be removed. Insofar as the amendments reflect existing practice the Committee does not believe that they will place any new burdens on companies or practitioners.

7.2 The only new requirement proposed is that described in paragraphs 2.8 to 2.13 above, for the cleared offeror or potential offeror to state its intentions towards the offeree company one way or the other on clearance from the competition authorities, within the 21 day window. Any such offeror or potential offeror must, already, under Note (a)(iii) make a decision as to its intentions and the offeror who decides to bid will make an announcement accordingly. The Code Committee does not consider that placing the offeror who decides not to bid under

an obligation to announce that intention will be burdensome; many do so now as a matter of course. The consequent lock-out period of 6 months proposed will, in some cases, be longer than currently provided for but it may also be shorter and the Code Committee considers that standardisation of the period will be beneficial both to the offeree company and to the markets. Taking all these considerations together, the Code Committee considers that the new requirement proposed is proportional.

APPENDIX A

Proposed amendments to the Code

DEFINITIONS

Competition reference period

Competition reference period means the period from the time when an announcement is made of the referral of an offer to the Competition Commission or of the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC, until the time of:

(a) an announcement of clearance (including clearance subject to conditions) or prohibition by the Competition Commission or the Secretary of State, as appropriate; or

(b) of the issuance of a decision under Article 8(1), Article 8(2) or Article 8(3) of the said Council Regulation; or

(c) the expiry of the time limits set out in Article 10(3) of the said Council Regulation with no decision having been issued by the European Commission and the offer being deemed compatible with the common market under Article 10(6).”

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

(a)

(b) **At any time during an offer period following the announcement of a possible offer (provided the potential offeror has been named) and before the notification of a firm intention to make an offer, the offeree company may request.....**

Rule 2.8

NOTES ON RULE 2.8

1. *Prior consultation*

.....

2. Rules 2.4(b) and 12.2(b)

Where a statement to which Rule 2.8 applies is made following a time limit being imposed under Rule 2.4(b) or pursuant to Rule 12.2(b)(ii)(A), the only matters that a person will normally be permitted to specify in the statement as matters which would enable it to be set aside are:

- (a) the agreement or recommendation of the board of the offeree company;*
- (b) the announcement of an offer by a third party for the offeree company; and*
- (c) the announcement by the offeree company of a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse takeover (see Note 2 on Rule 3.2).*

Rule 12.2

12.2 ~~OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIODS~~

(a) When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end, except in the following circumstances:-

(i) when the offer was announced subject to a pre-condition as permitted under Rule 13.3(b); or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, where the reference or initiation of proceedings in relation to the offer does not cause it to lapse as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

(b) If the offer period ends in accordance with Rule 12.2(a):-

(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:-

(A) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in

shares carrying 30% or more of the voting rights of the offeree company);

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

(C) acquire an interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

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

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

(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):-

(A) any offeror must, normally within 21 days of the offer's being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in accordance with Rule 2.5 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies; and

(B) a new offer period will begin and, if no announcement of a new offer is made within the 21 day period referred to above, will end when each cleared offeror or potential offeror has announced that it does not intend to make an offer; and

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin.

~~A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.~~

NOTES ON RULE 12.2

~~1. Schemes of arrangement~~

~~In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.~~

1. Certain restrictions disappplied while clearance is being sought

The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).

2. After a reference or initiation of proceedings

Following the ending of an offer period on a reference or initiation of proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.8 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 20.2, ~~35.1 and 35.2~~ and 38.2).

3. Offers announced subject to a pre-condition as permitted under Rule 13.3(b)

When an offer which was announced subject to a pre-condition as permitted under Rule 13.3(b) is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will not end. However, during the competition reference period, the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so.

Rule 13.2

13.2 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

Neither A a condition or pre-condition included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) is will be not subject to the provisions of Rules 13.1 or 13.4(a).

Rule 13.3**13.3 ACCEPTABILITY OF PRE-CONDITIONS**

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

Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition: -

(a) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission; ~~or~~

(b) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission or, if there is such a reference or initiation of proceedings, a decision by the relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror); or

~~(b)~~(c) involves another material official authorisation....

Rule 20.1**20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS**

.....

NOTES ON RULE 20.1

4. *Information issued by associates (e.g. brokers)*

.....

When an offer or possible offer is referred to the Competition Commission.....

Rule 20.2**20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS**

.....

NOTES ON RULE 20.2

.....

5. *The Competition Commission and the European Commission*

When an offer or possible offer is referred to the Competition Commission.....

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

.....

NOTES ON RULE 21.1

.....

4. *The Competition Commission and the European Commission*

When an offer or possible offer is referred to the Competition Commission.....

Rule 35.1

SECTION N: RESTRICTIONS FOLLOWING OFFERS AND POSSIBLE OFFERS

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed otherwise than pursuant to Rule 12.1, neither the offeror....

NOTES ON RULES 35.1 and 2

(a) (i).....

(ii).....

~~(iii) the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation 139/2004/EC. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or~~

~~(iv) (iii) the new offer follows..... withdrawn.~~

(b)

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

APPENDIX B**List of Questions**

- Q1 Do you agree with the proposals for clarifying the application of Rules 35.1 and Rule 12.2 and for amending them as described in paragraphs 2.1 to 2.14?**
- Q2 Do you agree that Rule 12.2 should not normally apply when an offer that is announced subject to a competition pre-condition as described above is referred but that the Panel should be able to grant dispensations from individual Rules during the competition reference period?**
- Q3 Do you agree that the Code should be amended in order to reflect more accurately both UK and EU competition law?**
- Q4 Do you agree with the proposed amendments?**
- Q5 Do you agree with the proposed amendment to Rule 2.4(b)?**