PCP 2008/2 Issued on 18 July 2008

THE TAKEOVER PANEL

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

MISCELLANEOUS CODE AMENDMENTS

REVISION PROPOSALS RELATING TO RULES 2, 8, 9, 35 and 38 OF THE TAKEOVER CODE

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 17 October 2008.

Comments may be sent by email to:
supportgroup@thetakeoverpanel.org.uk

Alternatively, please send comments in writing to:

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

Telephone: 020 7382 9026
Fax: 020 7236 7005

All responses to formal consultation will be made 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.

Unless the context otherwise requires, words and expressions defined in the Code shall have the same meanings when used in this PCP.

CONTENTS

APPENDICES

Summary

In this PCP, the Code Committee is proposing certain miscellaneous amendments to various rules of the Code. The purpose of the proposed amendments is either to clarify the application of existing provisions within the Code or to codify existing practice in relation to matters which are not currently covered by the Code.

Specific proposals are summarised below.

Part A sets out proposals relating to Rule 2, namely:

- to codify the requirement for consultation with the Panel when an offeror or the offeree company wishes to approach more than a very restricted number of people in relation to a possible offer or when an offeree company or the seller of a controlling stake is seeking potential purchasers or offerors; and
- to clarify the implications of making possible offer statements which refer to price and the period for which such statements have effect.

Part B sets out proposals relating to Rule 9, namely:

- the deletion of Rule 9.7, part of which requires the Panel's consent to appointments to the board of the offeree company of nominees of a mandatory offeror, and its replacement with a new Rule which reflects the policy of the Panel Executive (the "Executive") in relation to the application of voting restrictions and its requirements relating to the disposal of interests where Rule 9 is relevant; and
- a minor amendment to Note 11 on Rule 9.1.

Part C proposes minor amendments to Rules 8, 35 and 38.

Part D gives the Code Committee's view on the impact of the proposed amendments.

1. Introduction

1.1 The Code Committee considers that it is desirable to make a number of amendments to the Code. The purpose of the proposed amendments is either to clarify the application of existing provisions within the Code or to codify existing practice in relation to matters which are not currently covered by the Code and as a result most of the proposed amendments are not substantive.

1.2 The full text of the proposed amendments is set out in Appendix A to this PCP. All references to the Code in this PCP are based on the Code as it will be on 29 July 2008 when the amendments referred to in RS 2008/1 and Instrument 2008/2 (*Competition Reference Periods*) and Instrument 2008/3 (*Minor and consequential Code amendments*) will be incorporated in the Code. The Code Committee has today also published PCP 2008/3 (*Electronic communications, websites and information rights*). To the extent that this PCP proposes amendments to Rules that are also the subject of amendments proposed in PCP 2008/3, the relevant Rules may be amended in a different form to that proposed in this PCP to reflect amendments adopted as a result of the Code Committee's consideration of responses to PCP 2008/3.

1.3 For ease of reference, a list of the questions that are put for consultation is set out in Appendix B to this PCP.

PART A: Amendments relating to Rule 2

2. Rule 2.2: consultation requirement when parties wish to approach a wider group or when potential purchasers or offerors are sought

2.1 Rule 2.2 specifies certain circumstances in which an announcement is required to be made by an offeror or offeree company or when a purchaser is being sought for certain interests in the shares of a company. In particular:

(a) Rules 2.2(c), (d) and (f)(i) require an announcement to be made in certain circumstances where the potential offeree company is either the subject of rumour and speculation or there is an untoward movement in its share price;

(b) Rule 2.2(e) requires an announcement to be made when negotiations or discussions regarding a possible offer are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers); and

(c) Rule 2.2(f)(ii) requires an announcement to be made when:

(i) a purchaser is being sought for an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company; or

(ii) the board of a company is seeking one or more potential offerors,

and the number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.

2.2 In addition, Note 1 on Rule 2.2 requires that the Panel should be consulted by the relevant party at the latest when the potential offeree company becomes the subject of any rumour and speculation or where there is a material or abrupt movement in its share price.

2.3 On 7 March 2008, the Panel Executive issued Practice Statement No. 20, entitled "Rule 2 – secrecy, possible offer announcements and pre-announcement responsibilities". Paragraph 7.6 of Practice Statement No. 20 stated that, in cases falling within Rule 2.2(f)(ii), the Executive considered that best practice was for it to be consulted by the potential seller or potential offeree company prior to more than one potential purchaser or offeror being sought. The Code Committee understands that this statement was based on the Executive's concerns as to the risk of leaks in circumstances where each party approached by the potential seller or potential offeree company would be likely to wish to discuss the matter with other parties, thereby quickly increasing the number of people who would be made aware of the transaction.

2.4 The Code Committee agrees with the need for such early consultation and considers that this best practice should be codified in Note 1 on Rule 2.2. However, the Code Committee does not propose to amend the circumstances in which an announcement (as opposed to consultation) is required under Rule 2.2(f)(ii), which it considers should continue to be the time at which the number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.

2.5 In addition, the Code Committee considers that certain other amendments should be made to Rule 2.2(e) and Note 1 on Rule 2.2, as follows:

(a) in relation to Rule 2.2(e), there may be circumstances in which it is the offeree company, rather than the offeror, that wishes to extend discussions to include more than the very restricted number of people referred to in the

Rule. The Code Committee therefore believes that it should be made clear that the requirement to consult with the Panel before widening the group of persons approached beyond a very restricted number of people applies to both the offeror and the offeree company. Since Note 1 on Rule 2.2 already deals with other situations in which consultation with the Panel is required, the Code Committee considers that it would be appropriate to move the requirement for consultation, which is currently in Rule 2.2(e) itself, to Note 1, thus placing all the circumstances in which the Panel is to be consulted in relation to Rule 2.2 within one provision. Certain other minor clarifying amendments to Rule 2.2(e) are also proposed;

(b) in relation to Note 1 on Rule 2.2, the Code Committee believes that it should be made explicit in the third paragraph of the Note that the Panel should be consulted "at the latest" when the potential offeree company becomes the subject of any rumour and speculation or where there is a material or abrupt movement in its share price after the time when:

(i) in the case of Rules 2.2(d), an offer is first actively considered; or

(ii) in the case of Rules 2.2(f)(i), the potential seller or the board of the company starts to seek one or more potential purchasers or offerors.

This would be consistent with the current provision in the second paragraph of Note 1 on Rule 2.2, relating to Rule 2.2(c), which requires the Panel to be consulted "at the latest" where there is rumour and speculation, or a material or abrupt movement in the offeree company's share price, after the time of the approach to the offeree company; and

(c) the Code Committee believes that the reference to Rule 2.2(f)(ii) in the third paragraph of Note 1 on Rule 2.2 is incorrect and should be amended to refer to Rule 2.2(f)(i).

2.6 The Code Committee therefore proposes to amend Rule 2.2(e) and Note 1 on Rule 2 as follows:

"**2.2 WHEN AN ANNOUNCEMENT IS REQUIRED**

An announcement is required:-

…

(e) when negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people (outside those who need to know in the ~~companies~~ parties concerned and their immediate advisers)~~. An offeror wishing to approach a wider group, for example in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitments or to organise a consortium to make the offer should consult the Panel~~; or

…

NOTES ON RULE 2.2

1. Panel to be consulted

…

Similarly, in the case of Rules 2.2(d) and (f)(i), the Panel should be consulted at the latest when the potential offeree company becomes the subject of any rumour and speculation or where there is a material or abrupt movement in its share price after the time when, in the case of Rule 2.2(d), an offer is first actively considered or, in the case of Rule 2.2(f)~~(ii)~~(i), either the potential seller or the board starts to seek one or more potential purchasers or offerors.

In the case of Rule 2.2(e), the Panel should be consulted if the offeror and/or the offeree company wish to approach a wider group than the very restricted number of people referred to in the Rule without making an announcement. In the case of Rule 2.2(f)(ii), the Panel should be consulted prior to more than one potential purchaser or offeror being sought.".

Q.1 Do you agree with the proposed amendments to Rule 2.2(e) and Note 1 on Rule 2.2?

3. Rule 2.4(c)

(a) Possible offer statements which have the effect of fixing a level of consideration

(i) Rule 2.4(c)(iii)

3.1 The intention of Rule 2.4(c)(iii) is to ensure that, if a potential offeror makes a statement relating to the price of a possible offer, then it is bound by the content of any such statement. Accordingly, where a potential offeror has made a statement regarding a possible offer which refers to price (or where an offeree company makes such a reference with the agreement or approval of the potential offeror), the Executive requires that any subsequent offer is made on the same (or improved) terms.

3.2 Rule 2.4(c)(iii) states as follows:

> "**(iii) Where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), except with the consent of the Panel, the potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower value (taking the value of any securities concerned at the date of announcement of the firm intention to make the offer), unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to be set aside.**".

3.3 The Code Committee is aware that, whilst in practice the intention of Rule 2.4(c)(iii) is generally understood, the drafting (in particular the way in which the word "value" is used) might be interpreted as permitting an offeror who has expressed the consideration of the possible offer in terms of a securities exchange

offer to make the actual offer on a lower securities exchange ratio if the value of the offered securities increases between the time of the making of the relevant statement and the time of the announcement of the firm intention to make an offer. Equally, the current drafting might be read as requiring an improved securities exchange ratio to be offered if the value of the offered securities decreases between the making of the relevant statement and the announcement of the firm intention to make an offer.

3.4 The Code Committee understands that the Executive's policy (save as referred to in paragraph 3.6 below) is to require that:

(a) where the relevant statement has expressed the consideration in terms of a monetary value, the offeror must make the actual offer either at the same or a higher price;

(b) where the relevant statement has expressed the consideration in terms of a securities exchange ratio, the same or an improved securities exchange ratio must be offered; and

(c) where the consideration for a possible offer has been expressed in terms of a mixture of a cash amount and securities, any offer must be made on terms that include the same or an improved level for each element of the consideration.

3.5 In relation to statements that express the consideration in terms of a securities exchange ratio, and unless the circumstances referred to in paragraph 3.6 below apply, the Executive disregards any change in the value of the securities offered between the date of the relevant statement and the date of the announcement of the firm intention to make an offer.

3.6 Rule 2.4(c)(iii) does, however, permit a potential offeror not to be bound by the content of a statement which refers to price where the relevant statement has specifically provided for the price to be set aside in certain circumstances and those circumstances have arisen. The Code Committee understands that the Executive will also permit an offeror who remains bound to a minimum level of consideration to offer a different form and/or mix of the consideration from that referred to in a statement subject to Rule 2.4(c) if that statement reserved the right for it to do so. However, if the potential offeror does change the form and/or mix of the consideration, the Executive will require the value of the new consideration, as at the date of the announcement of the firm intention to make an offer, to be the same as or more than the value referred to in the earlier statement. In such circumstances, the Executive will also have regard to whether the value of any securities which form part of the new consideration is maintained following the announcement of the firm intention to make the offer. By analogy with Note 3 on Rule 6, if, during the period ending when the market closes on the first business day after the announcement, the value is not maintained, the Executive will wish to establish whether the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Executive may require justification of prices used to determine the value of the offer.

3.7 The Code Committee agrees with the Executive's approach and is therefore proposing to amend Rule 2.4(c) and Note 5 thereon to reflect this, as set out in paragraph 3.14 below.

(ii) "No increase statements" made by potential offerors

3.8 On occasion, a potential offeror may make a statement in relation to the terms on which any offer by it might be made, for example, by stating that the terms of any possible offer are "final". These statements are commonly referred to as "no

increase statements". The Code Committee understands that the Executive's practice is that a potential offeror making such a statement is not allowed to make a firm offer at a higher level unless there occurs an event which the potential offeror specified in such statement as an event that would enable the level of consideration to be set aside.

3.9 The Code Committee considers that the approach taken by the Executive is correct and is consistent with paragraph 4.2.4 of PCP 2004/2 which stated 'the Code Committee does not … believe that an offeror should be prevented from making a firm offer at a value higher than previously indicated in a possible offer announcement or other statement, unless the offeror has also made a "no increase statement".' The Code Committee considers this approach to be consistent with the principle of certainty and with: (i) Rule 2.4(c)(ii), which provides that, where persons make statements about the terms of possible offers, they should be bound by such statements; and (ii) Rule 32.2, which seeks to ensure that market participants can rely on the accuracy of statements which relate to the highest price at which an offer might be made.

3.10 For the purposes of clarity, in relation to "no increase statements" made by potential offerors, the Code Committee considers that the Code should be amended to reflect the approach of the Executive and is, therefore, proposing the adoption of new Rule 2.4(c)(ii), as set out in paragraph 3.14 below.

3.11 The Code Committee also understands that, where a potential offeror makes a "no increase statement" in respect of a possible offer but does not then proceed to make that offer, so that that offer period ends, it is the policy of the Executive to treat that former potential offeror as being bound by the terms of the "no increase" statement in relation to any subsequent offer it may make. This restriction is applied in the period of three months after the end of the initial offer period.

3.12 The Code Committee understands that the reason for applying the restriction is to maintain market certainty, in the same way as Rule 32.2 binds an offeror which has made a "no increase statement" to the terms of that statement. The Code Committee also understands that the restriction is applied in the three month period after the initial offer period ends, by way of analogy with the provisions of Note (a)(i) on Rules 35.1 and 35.2, in order to prevent potential offerors from returning with a recommended offer at a higher price immediately after the ending of the initial offer period. The Code Committee agrees with the Executive's approach.

3.13 The Code Committee acknowledges that, where a potential offeror makes a "no increase statement" in respect of a possible offer, but then does not proceed to make that offer, the Code is not explicit as to the effect of the potential offeror's statement on the level at which it might make any subsequent offer, following the ending of the offer period in relation to the earlier possible offer. However, if the amendment proposed to be inserted as new Rule 2.4(c)(ii) is made, Note 6 on Rule 2.4 will apply to "no increase statements" by potential offerors in the same way as it currently applies to other statements under Rule 2.4(c), thus making it clear that the restriction on making a higher offer will apply for 3 months after the initial offer period ends.

3.14 In order to codify the Executive's policy on the various issues referred to above, the Code Committee is proposing (i) to amend Rule 2.4(c) such that it will cover all the situations in which a potential offeror may be bound by statements made in relation to the terms on which an offer may be made, and (ii) to expand Note 5 on Rule 2.4, as follows:

"**2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER**

…

(c) ~~(i)~~ Until a firm intention to make an offer has been notified, the Panel must be consulted in advance if any person proposes to make a

statement in relation to the terms on which an offer might be made for the offeree company. ~~(ii)~~Except with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials or advisers and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made. In particular:

> **~~(iii)~~(i) ~~W~~where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), ~~except with the consent of the Panel,~~ any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms. Where, or to the extent that, the consideration is expressed in terms of a monetary value the offer must be made at the same or a higher monetary value. Where, or to the extent that, the consideration has been expressed in terms of a securities exchange ratio, the offer must be made on the same (or an improved) securities exchange ratio; and**
>
> **(ii) where the statement concerned includes reference to the fact that the possible offer "will not be increased" or is "final" or a similar expression (a "no increase statement"), the potential offeror will not be allowed subsequently to make an offer on better terms.**

~~the potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower value (taking the value of any securities concerned at the date of announcement of the firm intention to make the offer), unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to be set aside.~~

See also Note 5.

…

NOTES ON RULE 2.4

…

5. Reservation of right to set statements aside

The first announcement in which a statement subject to Rule 2.4(c) is made must also contain prominent reference to any reservation (precise

details of which must also be included in the announcement). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation.

Except with the consent of the Panel, where a potential offeror has referred in a statement subject to Rule 2.4(c) to the level of consideration to be paid if an offer is made, that potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower level of consideration unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to set aside the level of consideration referred to.

Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement subject to Rule 2.4(c) (but remains bound to a specified minimum level of consideration), the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

Where a potential offeror has made a "no increase statement" it will not be permitted to make a firm offer at a higher level of consideration unless there has occurred an event which the potential offeror specified in the possible offer statement as an event would enable the level of consideration to be set aside.".

Q.2 Do you agree with the amendments to Rule 2.4(c) and the amendment to Note 5 on Rule 2.4?

Q.3 Do you agree that Note 6 on Rule 2.4 should apply to "no increase" statements made by potential offerors as referred to above?

(b) Clarifying the three month period set out in Note 6 on Rule 2.4

3.15 Rule 2.4(c)(i) (as currently drafted) provides that the Panel must be consulted in advance if a person proposes to make a statement in relation to the terms on which an offer might be made for an offeree company. Rules 2.4(c)(ii) and (iii) (as currently drafted) then set out the extent to which potential offerors will be bound by any statements made in connection with the terms of any possible offers. Specifically, under the current Rule 2.4(c)(iii) and as stated above, where a statement relates to the price of a possible offer, except with the consent of the Panel, a potential offeror will not be allowed to make a lower offer for the offeree company unless there has occurred an event which such potential offeror specified as an event which would enable the statement as to price to be set aside (and therefore allow the making of a lower offer).

3.16 Rule 2.4(c), and the related Notes 6 and 7 on Rule 2.4, were introduced into Rule 2.4 by the Code Committee in 2004 following the consultation on PCP 2004/2. In that PCP, the Code Committee considered in detail the nature of possible offer announcements, the implications under the Code of statements made in such announcements and the extent to which potential offerors should be bound by such statements.

3.17 Specifically, the Code Committee considered that, to the extent that a person made any statement as to the price at which it would be prepared to make an offer, the restrictions imposed by Rule 2.4(c) in connection with any such statement should continue to apply at least for the duration of the offer period. In addition, consistent with the anti-avoidance provisions relating to "no increase" and "no extension" statements in Note (a)(i) on Rules 35.1 and 35.2, the Code Committee proposed that the restrictions imposed on a potential offeror should also apply for the three month period following the end of the offer period. Accordingly, Note 6 on Rule 2.4 provides as follows:

> "*6. Duration of restriction*
>
> *The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.*".

3.18 A reason given by the Code Committee in PCP 2004/2 for the inclusion of the three month period set out in Note 6 on Rule 2.4 was that, absent such a provision, there might be circumstances in which a potential offeror would be in a position to make a lower offer shortly after the end of the offer period. Note 6 on Rule 2.4 therefore serves to increase market certainty by holding the potential offeror to its earlier statement and preventing such an offeror from returning within three months of the end of the offer period at a price lower than that by which it would be otherwise bound by Rule 2.4(c)(iii), even if it has the recommendation of the board of the offeree company.

3.19 The Code Committee has been considering how the three month period referred to in Note 6 on Rule 2.4 should be construed when an offeree company remains in an offer period following the making by a potential offeror of any statement to which Rule 2.8 applies, for example where there is also a second potential offeror. Such an offer period might not end for some considerable time.

3.20 Under Note 6 on Rule 2.4, as currently drafted, the restrictions imposed by Rule 2.4(c) could be interpreted as applying throughout the whole time the offeree company is in an offer period and for three months thereafter. The Code Committee does not consider it appropriate that a potential offeror which has made a statement to which Rule 2.8 applies should be restricted for such a potentially lengthy period. It considers rather that it would be more appropriate to impose the restriction only in the period up to the making by the potential offeror of the statement to which Rule 2.8 applies and for the three month period thereafter.

3.21 The Code Committee considers that this should be made clear in Note 6 on Rule 2.4 and is accordingly proposing that Note 6 be amended to reflect this as follows:

> "*6. Duration of restriction*
>
> *The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.*
>
> *However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.4(c) will normally apply for three months following the making of the statement to which Rule 2.8 applies.*".

Q.4 Do you agree that Note 6 on Rule 2.4 should be amended as proposed?

PART B: Amendments relating to Rule 9

4. Proposed removal of the requirement to seek the consent of the Panel to board appointments of nominees of Rule 9 offerors and clarification of both the application of voting restrictions and the requirements relating to the disposal of interests

(a) Introduction

4.1 Rule 9.1 imposes an obligation on a person to make an offer where that person is deemed to have acquired or consolidated control of a company. The Code deems this to occur when a person acquires interests in shares which, when taken together with any existing interests and those of any persons acting in concert with him, carry not less than 30% of the voting rights of a company (Rule 9.1(a)) or, where a person is already interested in 30% or more but does not hold shares carrying 50% of such voting rights, when that person or persons acting in concert with him acquire interests in any more shares (Rule 9.1(b)).

4.2 Various parts of Rule 9 and its Notes detail circumstances where, although a prima facie obligation to make a mandatory offer has arisen, the Panel may not require an offer to be made, often because the person concerned agrees to dispose of sufficient interests in shares to bring his and his concert party's aggregate interest to below 30%, or to the original level before the obligation to offer was incurred if that was 30% or more.

4.3 Other parts of Rule 9 impose various obligations and restrictions relating to the mandatory offer process. One of these is Rule 9.7, which, first, imposes a restriction, except with the consent of the Panel, on appointments to the board of an offeree company of nominees of the offeror or persons acting in concert with it until the offer document in relation to the Rule 9 offer has been posted. Secondly, it prohibits, for the same time period, the offeror and persons acting in concert

with it from exercising, or procuring the exercise of, the votes attaching to the shares in which they are interested.

4.4 The Code Committee has reviewed these aspects of Rule 9 and, for the reasons detailed below, has concluded that it should propose the removal from the Code of the requirement to seek the consent of the Panel to board appointments of nominees of Rule 9 offerors and members of their concert parties. The Code Committee is also proposing to clarify both the requirements relating to the disposal, if applicable, of interests in shares by persons who have triggered a Rule 9 obligation and members of their concert parties and, again if applicable, the application of restrictions on the exercise of (or the procurement of the exercise of) voting rights attaching to shares in which such persons are interested.

(b) Rule 9.7

(i) Requirement to seek the consent of the Panel to board appointments of nominees of Rule 9 offerors and persons acting in concert

4.5 The Code Committee understands that, when Rule 9.7 was introduced, it was envisaged that preventing nominees of a person who had triggered a mandatory offer obligation from being appointed to the board of the offeree company would have the effect of encouraging the person with the Rule 9 obligation to satisfy its obligation without undue delay.

4.6 The Executive has informed the Code Committee that, in practice, it does not, nor does it need to, use the Rule to encourage compliance with Rule 9 obligations and that the Executive's policy, for some time, has been generally to give its consent to requests for appointments to the board prior to the posting of the mandatory offer document.

4.7 The Code Committee considers that it is a matter for the board of an offeree company to decide when and if to make board appointments and that it is not appropriate to require such appointments to be subject to the Panel's consent pending the posting of the mandatory offer document.

(ii) Prohibition on voting

4.8 The second limb of Rule 9.7 prohibits mandatory offerors and any person acting in concert with them from exercising, or procuring the exercise of, the votes attaching to any shares in which they are interested pending the posting of the offer document. As referred to in more detail below, the Code Committee has reviewed the way in which restrictions on the exercise of voting rights are applied to mandatory offerors and persons with whom they are acting in concert throughout Rule 9 and is proposing a new Rule 9.7 which, it believes, will provide a more consistent and conformed approach in this area. If the new Rule 9.7 is adopted, it will supersede the second limb of the existing Rule 9.7.

(c) Voting restrictions

4.9 In certain places within Rule 9 and its Notes, mandatory offerors and persons acting in concert with them are instructed to consult the Panel regarding the exercise of (or the procurement of the exercise of) voting rights attaching to the shares in which they are interested. Following a review of the way in which the Code imposes voting restrictions in Rule 9, the Code Committee has been made aware by the Executive that there are inconsistencies in the way in which voting restrictions are applied by the Code both in terms of the situations in which they are applied and also in terms of the number of shares to which they are applied.

4.10 The Code Committee has examined the application of voting restrictions in situations to which Rule 9 applies and the purpose for the application of such restrictions. It has concluded that, in general, it is not necessary or appropriate to

restrict Rule 9 offerors and persons with whom they are acting in concert from exercising, or procuring the exercise of, the votes attaching to all the shares in which they are interested. However, the Code Committee does consider that there are certain circumstances which merit the application of voting restrictions. These are principally pending the completion of any disposals of interests in shares which the Executive has required a person who has triggered a Rule 9 obligation (or any persons with whom it is acting in concert) to make as an alternative to making an offer pursuant to Rule 9.1. In addition the Code Committee considers that it is appropriate to apply voting restrictions in the following circumstances:

(a) where an offer has lapsed for a reason other than the acceptance condition not being satisfied;

(b) where the second paragraph of Note 2 on Rule 9.3 is in point, i.e. where a purchase made by either the offeror or persons acting in concert with it cannot be counted towards fulfilling the acceptance condition and as a result the offer lapses; and

(c) where an offer lapses pursuant to Rule 12.1(a) or (b) (following a reference to the Competition Commission or the European Commission).

In these circumstances, the appropriate period in respect of which voting restrictions will be applied will be determined by the Panel.

4.11 Accordingly, the Code Committee is proposing to adopt a new Rule (which, if existing Rule 9.7 is deleted as proposed, would be adopted as new Rule 9.7) to set out the circumstances in which the Panel must be consulted regarding the interests in shares to be disposed of and the application of voting restrictions in relevant cases. In addition the Code Committee is proposing to amend Rule 9 in a number of places (as detailed below) by the inclusion of cross references to the new Rule 9.7.

(d) Calculation of the number of shares in relation to which voting restrictions will be applied and calculation of number of interests to be disposed of

4.12 The Code Committee is proposing that there should also be a Note on the proposed new Rule 9.7 which will refer to the calculation of the number of shares to which voting restrictions will be applied and explain the approach to the interests in shares which will be required to be disposed of if "selling down" is to be permitted as an alternative to making an offer. If adopted, the effect of this amendment will be to conform and codify the Executive's practice of imposing voting restrictions and "sell down" requirements either to just below 30% where an obligation under Rule 9.1(a) has been triggered (i.e. the relevant interests amounted to less than 30% before the obligation arose) or to the original percentage level where an obligation under Rule 9.1(b) has been triggered (i.e. the relevant interests amounted to 30% or more before the obligation arose). The proposed Note also refers to the fact that, in applying restrictions to the exercise of (or procurement of the exercise of) the voting rights attaching to the shares in the offeree company in which the offeror and persons with whom it is acting in concert are interested, it is necessary to take into account the reduced maximum number of shares that will be entitled to be voted.

(i) Where the interests of a person and persons acting in concert with it in the shares of the offeree company were less than 30% prior to triggering a Rule 9 obligation

4.13 As explained in greater detail in paragraph 5.2 of PCP 2006/1, where a person's interests, together with those of any persons acting in concert with it, in the shares of the offeree company prior to triggering a Rule 9 obligation were less than 30%, the Executive will restrict those persons to voting (or procuring the exercise of the votes in relation to) a total of 30% less one share (commonly referred to as 29.9%). The calculation of this figure will take into account the fact that the

maximum number of shares in the offeree company that can be voted will be reduced by the number of shares to which the voting restrictions are attached.

(ii) Where the interests of a person and persons acting in concert with it in the shares of the offeree company were 30% or more prior to triggering a Rule 9 obligation

4.14 Where Rule 9.1(b) applies (i.e. where a person and persons acting in concert with it were already interested in 30% or more but did not hold shares carrying more than 50% when the triggering acquisition was made) the calculation will be made on the same basis, but it is the Executive's practice to apply the restriction only to such interests in shares that result in the person and persons acting in concert with it being able to vote (or procure the exercise of the votes in relation to) the number of shares that represents the same percentage in which the person and the persons acting in concert with it were interested prior to triggering the mandatory bid obligation under Rule 9.1(b), again calculated on a basis which takes account of the reduced maximum number of shares that will be entitled to be voted.

(e) Amendments to the Code

4.15 The Code Committee considers that the various matters addressed above should be reflected in the Code and so proposes to delete the current Rule 9.7 in its entirety and to adopt a new Rule 9.7, together with a Note thereon, as set out below:

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

Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to the interests required to be disposed of and the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested. Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the

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

NOTE ON RULE 9.7

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

Where an obligation under Rule 9.1 has arisen by virtue of:

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

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote such number of shares as represents the percentage of interests in the offeree company held by those persons prior to the triggering acquisition being made.

In each case the calculation will be made by reference to the reduced maximum number of shares entitled to be voted.

Where a disposal of interests in shares is made as an alternative to making an offer, the interests in shares required to be disposed of will be sufficient to take the total interests in shares either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage level of the total interests in shares in the offeree company held by the offeror and persons acting in concert with it prior to the triggering acquisition being made.".

4.16 In addition to proposing the adoption of the new Rule 9.7 and its Note as set out above, the Code Committee is also proposing to amend a number of other parts of Rule 9, principally by the insertion, where appropriate, of cross-references to Rule 9.7. It is also proposing to amend Note 1 on Section 2 of Appendix 7 (Schemes of Arrangement). Appendix A below sets out the amendments in detail and set out below is a list of the parts of Rule 9 that it is proposed to amend and a summary of the amendments proposed:

Note 7 on Rule 9.1 – insertion of cross reference to proposed new Rule 9.7;

Note 10 on Rule 9.1 – insertion of cross reference to proposed new Rule 9.7;

Note 2 on Rule 9.3 – insertion of cross reference to proposed new Rule 9.7;

Note 3 (a) and (b) on Rule 9.3 – various amendments and deletions to clarify the meaning of the Note and conform it with the other amendments being proposed and insertion of cross reference to proposed new Rule 9.7;

Note 1 on Rule 9.4 – insertion of cross reference to proposed new Rule 9.7;

Note 2 of the Notes on Dispensations from Rule 9 - deletion of reference to need to consult the Panel regarding voting restrictions and insertion of cross reference to proposed new Rule 9.7;

Note 4 of the Notes on Dispensations from Rule 9 - deletion of reference to need to consult the Panel regarding voting restrictions and insertion of cross reference to proposed new Rule 9.7; and

Note 1 on Section 2 of Appendix 7 – deletion of the last sentence and inclusion of a statement that Rule 9.7 will apply.

Q.5 Do you agree with the proposed deletion of existing Rule 9.7?

Q.6 Do you agree with the proposed adoption of new Rule 9.7 together with its Note in the form outlined in paragraph 4.15 above and the other amendments to Rule 9 referred to in paragraph 4.16 above?

5. Note 11 on Rule 9.1

5.1 Rule 9 sets out the circumstances in which a mandatory offer is required and who is primarily responsible for it. In particular, Rule 9.1 provides as follows:

> "**9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**
>
> **Except with the consent of the Panel, when:-**

(a) …; or

(b) any person, together with persons acting in concert with him, is interested in shares which in the aggregate carry not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of such voting rights and such person, or any person acting in concert with him, acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which he is interested,

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 transferable securities carrying voting rights. …".

5.2 Note 11 on Rule 9.1 (The reduction or dilution of a shareholding) provides that where a person (or group of persons acting in concert) interested in shares carrying more than 30% of the voting rights of a company reduces its interest, but not to less than 30%, it may subsequently acquire an interest in further shares without triggering a mandatory offer obligation, subject to certain limitations set out within the Note.

5.3 The Code Committee understands that from time to time the Executive is asked whether participation in a placing by an existing shareholder will involve a reduction in that shareholder's percentage interest in shares (reflecting the issue of the new shares) followed by a subsequent increase in its percentage interest (reflecting the level of its participation in the placing). The Code Committee understands that where a person who is interested in shares carrying more than 30% of the voting rights of a company agrees to participate in a placing the Executive is concerned with that person's percentage interest following completion of the placing. Therefore, where as a result of the placing that person either maintains the existing percentage of shares carrying voting rights in which he is interested or reduces that percentage, no mandatory offer will be required pursuant to Rule 9.1 as a result of his participation in the placing.

5.4 Note 1 of the Notes on Dispensations from Rule 9 describes the "whitewash" procedure pursuant to which independent shareholders can approve the issue of new securities which would otherwise result in an obligation to make a general offer under Rule 9 and agree that such an offer does not need to be made. This procedure is normally only available on the issue of new securities and not on the acquisition of existing securities. This is to ensure that all existing shareholders are treated equally: if an existing shareholder has been provided with an "exit" on an acquisition of its shares, then other shareholders should also be provided with the same opportunity and the "whitewash" procedure should not normally be available.

5.5 However, the final sentence of the final paragraph of Note 11 on Rule 9.1 states:

> "*11. The reduction or dilution of a shareholding*
>
> …
>
> *… Additionally, in the case of dilution following the issue of new shares, the Panel will also consider waiving the requirements of the Rule if an arrangement can be made whereby shareholders approve, in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9, the restoration of a diluted percentage interest by acquisitions from those to whom new shares are issued.*".

5.6 The Code Committee understands that this sentence was introduced into the Code to enable companies to put a "whitewash" resolution to shareholders where a placing had technically been structured as a vendor placing and one or more shareholders holding over 30% participated in that placing. Under this structure the shares to be acquired by a controlling shareholder would technically be an acquisition of existing securities rather than an issue of new securities and therefore, without this sentence, the "whitewash" procedure would not normally be allowed. The Code Committee understands that the rationale behind the sentence was that the mischief of allowing a "whitewash" where an existing shareholder has been given an exit was not relevant in the context of an

acquisition of shares by a controlling shareholder in order to prevent dilution pursuant to a vendor placing and that such an acquisition should therefore be capable of being "whitewashed".

5.7 The Executive has advised the Code Committee that it would interpret Rule 9.1 in the same way for a vendor placing as it does for any other placing and that, therefore, if an existing shareholder participates in a vendor placing as an initial placee of shares so that it maintains or reduces its existing percentage interests (but not, for example, if it does so by participating in any secondary market in the placed shares), the Executive would not require a mandatory offer to be made. Similarly, where a person (or a group of persons acting in concert) would otherwise trigger a mandatory offer obligation as a result of increasing its percentage interest in shares pursuant to a vendor placing, the Code Committee understands that the Executive would normally allow a "whitewash" resolution to be put to shareholders prior to the vendor placing. The Executive has also advised the Code Committee that it is not aware of any cases in which the final sentence of Note 11 has been in point and that in the light of its approach to placings, it considers that the final sentence of the final paragraph of Note 11 is therefore redundant and could be deleted.

5.8 The Code Committee agrees with the Executive's approach to placings described above. The Code Committee therefore proposes to delete the final sentence of the final paragraph of Note 11 on Rule 9.1 (and to amend the heading to the Note), as follows:

> "*11. The reduction or dilution of* *interests in shares* ~~*a shareholding*~~
>
> …
>
> … ~~*Additionally, in the case of dilution following the issue of new shares, the Panel will also consider waiving the requirements of the Rule if an arrangement can be made whereby shareholders approve, in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9, the*~~

~~*restoration of a diluted percentage interest by acquisitions from those to whom new shares are issued.*~~".

Q.7 Do you agree that Note 11 on Rule 9.1 should be amended as proposed?

PART C: Amendments to Rules 8, 35, and 38

6. Rules 8 and 38.5: amendments to dealing disclosures

6.1 On occasion, incorrect details are included in a dealing disclosure made pursuant to Rule 8 or Rule 38.5, whether due to an administrative error or for some other reason. The Code Committee understands that, in such circumstances, the Executive will normally require the incorrect details to be corrected as soon as practicable in a subsequent disclosure and that it is the Executive's practice to require that the subsequent disclosure should:

(a) state clearly that it corrects details disclosed previously;

(b) identify the disclosure or disclosures being corrected; and

(c) provide sufficient detail for the reader to understand the nature of the corrections being made.

The Code Committee understands that, on occasion, an amending disclosure is made without prior consultation with the Executive. In such cases, the amending disclosure may not necessarily include all the details specified above.

6.2 The Code Committee considers that, in order to provide consistency of approach to the amendment of incorrect details in dealing disclosures, the Panel's requirements in this area should be formalised in the Code. If these requirements are observed, the Code Committee does not consider that it would be necessary for the Panel to be consulted prior to the making of a disclosure which amends a previous incorrect disclosure. However, the Code Committee believes that the Executive should be consulted in the case of any doubt.

6.3 The Code Committee understands that the Executive considers it best practice for incorrect details to be corrected in a separate disclosure, rather than in a disclosure containing details of previously undisclosed dealings. However, where incorrect details in an earlier disclosure have resulted in details in subsequent disclosures also being incorrect, the Code Committee does not consider that it should be necessary for an amended version of each incorrect disclosure to be issued. Provided that the amending disclosure complies with the requirements described in paragraph 6.1 above in relation to all previous incorrect disclosures, the Code Committee considers that one such disclosure should suffice. In addition, the Code Committee understands that the Executive may be prepared to waive the need for an amended disclosure to be issued where the incorrect details are insignificant.

6.4 In the light of the above, the Code Committee proposes to introduce a new Note 15 on Rule 8 and a new Note 5 on Rule 38.5 into the Code, in the same form, as follows:

> "*[15./5.] Amendments*
>
> *If details included in a dealing disclosure are incorrect, they should be corrected as soon as practicable in a subsequent disclosure. Such disclosure should state clearly that it corrects details disclosed previously, identify the disclosure or disclosures being corrected, and provide sufficient detail for the reader to understand the nature of the corrections. In the case of any doubt, the Panel should be consulted.*".

Q.8 Do you agree with the proposed new Note 15 on Rule 8 and the proposed new Note 5 on Rule 38.5?

7. Rules 35.1 and 35.2: dispensations from restrictions on re-bidding

7.1 Rule 35.1 provides that, 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 announce an offer or possible offer for the offeree company or take certain other steps in connection with an offer or possible offer. Rule 35.2 explains the application of Rule 35.1 to partial offers.

7.2 The Note on Rules 35.1 and 35.2 is headed "When dispensations may be granted". Note (a)(i) provides as follows:

> "*(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***". [emphasis added]

7.3 The words highlighted in bold were introduced into Note (a)(i) by the Code Committee in 2002 following the consultation on PCP 7, which set out revision proposals relating to Rules 31.6, 32 and 35 regarding the resolution of competitive situations. In addition to the amendment of Note (a)(i), the other principal amendments which resulted from PCP 7 were the introduction of:

(a) Rule 32.5, which states that the Panel will normally require a competitive situation to be resolved by means of an auction procedure; and

(b) Rule 35.4, which imposes a restriction on a lapsed offeror from acquiring any interest in shares in the offeree company on more favourable terms

than those made available under its lapsed offer until all competing offers have either been declared unconditional in all respects or have lapsed.

7.4 Paragraph 3 of PCP 7 stated that two of the key issues which the PCP sought to address were:

(a) the importance of achieving finality and an orderly resolution of a competitive situation; and

(b) the removal of "tactical opportunities" in competitive situations which might otherwise be available to competing offerors under the Code.

7.5 In relation to the latter, paragraph 6.1(b) of PCP 7 identified that one course of action which would arguably be open to an offeror in a competing situation would be as follows:

> "not to revise its offer on Day 46 [i.e. the last day on which a revised offer may be posted, assuming the application of the usual 60 day offer timetable] but then to allow that offer to lapse on a closing date prior to Day 60 and, subject to Panel consent pursuant to Note (a)(i) on Rule 35.1, to come back immediately (assuming a no increase or no extension statement has not been made) with a recommended offer at a higher price".

7.6 Paragraph 6.2 of PCP 7 expressed the view that such action would not only compromise the desire for finality at the end of an offer but would also jeopardise the broader objective of an orderly resolution of a competitive situation. Paragraph 7.2.1 of PCP 7 went on to suggest that the courses of action identified in paragraph 6.1 of the PCP could be denied to offerors by amending the Code so as to restrict the availability of dispensations from the restrictions imposed by Rule 35.1, for example, by providing that the Panel would not permit a new bid

after the lapsing of an offer in a competitive situation within three months of the lapsing of all the competing offers, unless acceptances received by one offeror, or combined acceptances receiving by competing offerors, on Day 60 exceeded 50%.

7.7 In other words, the intention behind the amendment of Note (a)(i) on Rules 35.1 and 35.2 was to deter offerors from not offering their highest offer price to offeree shareholders on "Day 46", or in any auction procedure which followed "Day 46", in order to maximise the chances of achieving finality and an orderly resolution of the competitive situation. The nature of the deterrent was that, in the event that all of the competing offers lapsed with combined acceptances of less than 50%, such that it appeared that an insufficient number of offeree company shareholders had been persuaded to accept one or other of the competing offers, the competing offerors would each normally be restricted from making a new offer for a minimum of three months after the lapsing of the original offer, even if that new offer were to be recommended by the offeree company board.

7.8 The Executive has advised the Code Committee that there have been no particular difficulties in relation to the resolution of competitive situations since the introduction of the amendments to the Code following PCP 7 and, in particular, that the auction procedures which the Executive has conducted pursuant to Rule 32.5 have worked well. The Executive has also advised the Code Committee that there have been no cases in which the words introduced into Note (a)(i) on Rules 35.1 and 35.2 have been in point. It is possible, of course, that this is because the deterrent provided by these words is operating as envisaged. However, in the light of experience since the introduction of Rule 32.5, the Executive has advised the Code Committee that it considers there to be a sufficient degree of natural competitive tension in a competitive situation that it should normally be possible for it to be resolved with a sufficient degree of finality and orderliness without the need for any such deterrent and that the words introduced in Note (a)(i) are therefore redundant and could be deleted.

7.9 The Code Committee has accepted the Executive's advice and therefore proposes to delete the relevant part of Note (a)(i) on Rules 35.1 and 35.2, so that the Note would read as follows:

> *"(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*".

Q.9 Do you agree that Note (a)(i) on Rules 35.1 and 35.2 should be amended as proposed?

8. Rule 38.2: application to corporate brokers

8.1 As explained in paragraph 3.2 of PCP 2004/3 ("Market-Related Issues"), Rule 38 imposes certain restrictions on an exempt principal trader (an "EPT") connected with an offeror or the offeree company, including prohibiting the principal trader from carrying out dealings with the purpose of assisting the offeror or the offeree company, as the case may be. In particular, Rule 38.2 prohibits dealings in relevant securities of the offeree company between an offeror, or members of its concert party, and an EPT connected with the offeror.

8.2 Rule 38.2 provides as follows:

> "**38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS**
>
> **An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror**

in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule rather than the principal trader. (See also Rule 4.2(b).)".

The purpose of Rule 38.2 is to ensure that there is no risk of an EPT connected with an offeror abusing its exempt status by, for example, purchasing shares at above the offer price for delivery to the offeror in exchange for an enhanced corporate finance or broking fee.

8.3 The Code Committee understands that, on occasion, it has been put to the Executive that the words "the advisers to the offeror" in the second sentence of Rule 38.2 should be interpreted so as to include only financial advisers to the offeror and to exclude, for example, a corporate broker, even if that corporate broker is advising the offeror in relation to the offer. In the view of the Code Committee, such an interpretation is incorrect. There is a strong likelihood that an offeror's corporate broker will be involved in any purchase of offeree company relevant securities by its offeror client and the Code Committee considers that for Rule 38.2 not to be applied to corporate brokers would seriously weaken the rule.

8.4 In order to clarify the Code Committee's view and to codify the Executive's practice, the Code Committee proposes to amend Rule 38.2 as follows:

"**38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS**

An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror <u>(including a corporate broker)</u> to ensure compliance with this Rule rather than the principal trader. (See also Rule 4.2(b).)".

Q.10 Do you agree that Rule 38.2 should be amended as proposed?

PART D: Assessment of the impact of the proposals

9. Proportionality of the proposed amendments

9.1 The amendments proposed relate to various different areas covered by the Code but are designed either to codify existing practice or to remove possible ambiguity in the application of the Rules. 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 to the Executive for ambiguity in the Rules to be removed. The Code Committee also considers that it is desirable to remove from the Code provisions that have become obsolete. Insofar as the amendments reflect existing practice the Code Committee does not believe that they will place any new burdens on parties to offers, other market participants or practitioners. Taking all these considerations together, the Code Committee considers that the proposed amendments are proportionate.

APPENDIX A

Proposed amendments to the Code

Rule 2.2

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

An announcement is required:-

…

(e) when negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people (outside those who need to know in the ~~companies~~ parties concerned and their immediate advisers)~~. An offeror wishing to approach a wider group, for example in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitments or to organise a consortium to make the offer should consult the Panel~~; or

…

NOTES ON RULE 2.2

1. Panel to be consulted

…

Similarly, in the case of Rules 2.2(d) and (f)(i), the Panel should be consulted at the latest when the potential offeree company becomes the subject of any rumour and speculation or where there is a material or abrupt movement in its share price after the time when, in the case of Rule 2.2(d), an offer is first actively considered or, in the case of Rule 2.2(f)~~(ii)~~(i), either the potential seller or the board starts to seek one or more potential purchasers or offerors.

In the case of Rule 2.2(e), the Panel should be consulted if the offeror and/or the offeree company wish to approach a wider group than the very restricted number of people referred to in the Rule without making an announcement. In the case of Rule 2.2(f)(ii), the Panel should be consulted prior to more than one potential purchaser or offeror being sought.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

…

(c) ~~(i)~~ Until a firm intention to make an offer has been notified, the Panel must be consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. ~~(ii)~~Except with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials or advisers and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made. In particular:

> **~~(iii)~~(i) ~~W~~where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), ~~except with the consent of the Panel,~~ any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms. Where, or to the extent that, the consideration is expressed in terms of a monetary value the offer must be made at the same or a higher monetary value. Where, or to the extent that, the consideration has been expressed in terms of a securities exchange ratio, the offer must be made on the same (or an improved) securities exchange ratio; and**
>
> **(ii) where the statement concerned includes reference to the fact that the possible offer "will not be increased" or is "final" or a similar expression (a "no increase statement"), the potential offeror will not be allowed subsequently to make an offer on better terms.**

~~the potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower value (taking the value of any securities concerned at the date of announcement of the firm intention to make the offer), unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to be set aside.~~

See also Note 5.

…

NOTES ON RULE 2.4

…

5. Reservation of right to set statements aside

The first announcement in which a statement subject to Rule 2.4(c) is made must also contain prominent reference to any reservation (precise details of which must also be included in the announcement). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation.

Except with the consent of the Panel, where a potential offeror has referred in a statement subject to Rule 2.4(c) to the level of consideration to be paid if an offer is made, that potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower level of consideration unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to set aside the level of consideration referred to.

Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement subject to Rule 2.4(c) (but remains bound to a specified minimum level of consideration), the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

Where a potential offeror has made a "no increase statement" it will not be permitted to make a firm offer at a higher level of consideration unless there has occurred an event which the potential offeror specified in the possible offer statement as an event would enable the level of consideration to be set aside.

6. Duration of restriction

The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.

However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.4(c) will normally apply for three months following the making of the statement to which Rule 2.8 applies.

Rule 8

RULE 8. DISCLOSURE OF DEALINGS DURING THE OFFER PERIOD; ALSO

INDEMNITY AND OTHER ARRANGEMENTS

…

NOTES ON RULE 8

…

15. Amendments

If details included in a dealing disclosure are incorrect, they should be corrected as soon as practicable in a subsequent disclosure. Such disclosure should state clearly that it corrects details disclosed previously, identify the disclosure or disclosures being corrected, and provide sufficient detail for the reader to understand the nature of the corrections. In the case of any doubt, the Panel should be consulted.

Rule 9

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

NOTES ON RULE 9.1

…

7. Placings and other arrangements

When a person is to acquire an interest in shares which will result in his being interested in shares carrying 30% or more of the voting rights of a company, the Panel will consider waiving the requirements of this Rule if firm arrangements are made for the number of shares carrying voting rights in which he is interested to be reduced to below 30% prior to the acquisition (for example, by a placing of shares) or, in certain exceptional circumstances, if an undertaking is given to make such a reduction within a very short period after the acquisition. In all such cases, the Panel must be consulted in advance. The Panel will be concerned to ensure that none of the persons with whom the acquirer enters into transactions in order to reduce his interests is acting in concert with the acquirer; for example, an obligation under this Rule will not be avoided by placing shares with a number of persons having a common link, such as the discretionary clients of a fund manager who would be connected with the acquirer if he were an offeror (unless, in such circumstances, the fund manager would have exempt status). (See also Rule 9.7.)

…

10. Convertible securities, warrants and options

…

Where securities with conversion or subscription rights were issued at a time when no offer obligation on exercise of such rights would arise and no independent shareholders' approval was obtained, the Panel will consider the case on its merits and will have regard, inter alia, to the votes cast on any relevant resolution, the number of shares concerned and the attitude of the board of the company. It is always open to the holder of such rights to dispose of sufficient rights so that, on exercise, the shares in which he would be interested would together carry less than 30% of the voting rights in the company. In circumstances where such rights could not be transferred prior to exercise, the Panel would consider waiving the offer obligation arising upon an exercise of rights provided there was an undertaking to reduce the number of shares carrying voting rights in which he would be interested to below 30% within a reasonable time. (See also Rule 9.7.)

…

11. The reduction or dilution of interests in shares ~~a shareholding~~

…

… ~~*Additionally, in the case of dilution following the issue of new shares, the Panel will also consider waiving the requirements of the Rule if an arrangement can be made whereby shareholders approve, in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9, the restoration of a diluted percentage interest by acquisitions from those to whom new shares are issued.*~~

…

9.3 CONDITIONS AND CONSENTS

…

NOTES ON RULE 9.3

…

2. Acceptance condition

Notes 2-7 on Rule 10 also apply to offers under this Rule.

In the event that an offer under Rule 9 lapses because a purchase may not be counted as a result of Note 5 on Rule 10 and subsequently the purchase is completed, the Panel should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the percentage of shares in which the offeror and persons acting in concert with it are interested. (See also Rule 9.7.)

…

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. The Panel will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the other conditions required by the Note on Rules 13.1 and 13.3 are not satisfied within the time required by Rule 31.7, and as a result the offer lapses,~~: (i)~~ the offeror will immediately make a new cash offer in compliance with this Rule at the price required by Rule 9.5 (or, if greater, at the cash price offered under the lapsed offer); and

> *~~(ii) until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it must consult the Panel as to their ability to exercise, or procure the exercise of, the voting rights of the offeree company attaching to the shares in which they have an interest.~~*

~~When a dispensation is given, the offeror must endeavour to fulfil the other conditions with all due diligence; or.~~

(b) when any official authorisation or regulatory clearance is required before the offer document is posted. ~~The person who has incurred the obligation under Rule 9 must endeavour to obtain authorisation or clearance with all due diligence.~~ If authorisation or clearance is obtained, the offer document must be posted immediately. If authorisation or clearance is not obtained, the same consequences will follow as if the merger were prohibited following a reference to the Competition Commission or the initiation of proceedings by the European Commission (see Rule 9.4).

When a dispensation is given, the offeror must endeavour to fulfil all the other conditions with all due diligence.

(See also Rule 9.7.)

9.4 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

…

NOTES ON RULE 9.4

1. If an offer lapses pursuant to Rule 12.1(a) or (b)

If an offer under Rule 9 lapses pursuant to Rule 12.1(a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30% or to its original level before the obligation to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12.1(a) or (b) to proceed with all due diligence before the Competition Commission or the European Commission. (See also Rule 9.7.)

…

~~**9.7 RESTRICTIONS ON EXERCISE OF CONTROL BY AN OFFEROR**~~

~~**Except with the consent of the Panel, no nominee of an offeror or persons acting in concert with it may be appointed to the board of the offeree company, nor may an offeror and persons acting in concert with it exercise, or procure the exercise of, the votes attaching to any shares in the offeree company until the offer document has been posted.**~~

9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS

Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to the interests required to be disposed of and the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested. Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting

rights attaching to the shares of the offeree company in which they are interested.

NOTE ON RULE 9.7

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

Where an obligation under Rule 9.1 has arisen by virtue of:

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

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote such number of shares as represents the percentage of interests in the offeree company held by those persons prior to the triggering acquisition being made.

In each case the calculation will be made by reference to the reduced maximum number of shares entitled to be voted.

Where a disposal of interests in shares is made as an alternative to making an offer, the interests in shares required to be disposed of will be sufficient to take the total interests in shares either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage level of the total interests in shares in the offeree company held by the offeror and persons acting in concert with it prior to the triggering acquisition being made.

NOTES ON DISPENSATIONS FROM RULE 9

…

2. Enforcement of security for a loan

Where shares or other securities are 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 require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with the lender, so that the percentage of shares carrying voting rights in which the lender, together with persons acting in concert with it, is interested is reduced to below 30% in a manner satisfactory to the Panel. ~~The~~

~~*lender must consult the Panel as to its ability to exercise or procure the exercise of the voting rights attaching to the shares in which it is interested at any time before sufficient interests are disposed of, or if the interest in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).*~~ *(See also Rule 9.7.)*

…

4. Inadvertent mistake

If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule, the Panel will not normally require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with him, so that the percentage of shares carrying voting rights in which the person, together with persons acting in concert with him, is interested is reduced to below 30% in a manner satisfactory to the Panel. ~~*Any such person must consult the Panel as to his ability to exercise or procure the exercise of the voting rights attaching to the shares in which he is interested at any time before sufficient interests are disposed of, or if the interest in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares).*~~ *(See also Rule 9.7.)*

Rule 35

35.1 DELAY OF 12 MONTHS

…

35.2 PARTIAL OFFERS

…

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*

…

Rule 38.2

38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror (including a corporate broker) to ensure compliance with this Rule rather than the principal trader. (See also Rule 4.2(b).)

Rule 38.5

38.5 DISCLOSURE OF DEALINGS

…

NOTES ON RULE 38.5

…

5. Amendments

If details included in a dealing disclosure are incorrect, they should be corrected as soon as practicable in a subsequent disclosure. Such disclosure should state clearly that it corrects details disclosed previously, identify the disclosure or disclosures being corrected, and provide sufficient detail for the reader to understand the nature of the corrections. In the case of any doubt, the Panel should be consulted.

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

…

2 MANDATORY OFFERS

An obligation to make a mandatory offer under Rule 9 may not be satisfied by way of a scheme of arrangement except with the prior consent of the Panel.

NOTES ON SECTION 2

1. When the Panel's consent may be granted

Factors which the Panel will take into account when considering an application to satisfy a mandatory offer obligation by way of a scheme include the views of the offeree board and its independent adviser and the likely timetable of the scheme.

If the Panel permits the mandatory offer obligation to be so satisfied and the scheme lapses for a reason which would not have caused a contractual offer to lapse, the Panel will require the offeror to make a new contractual offer immediately in compliance with Rule 9. The scheme circular must include a statement by the offeror that, if the scheme lapses for such a reason, the offeror will make a new contractual offer as required by the Panel. ~~Until the posting of the offer document in respect of a new contractual offer, the Panel may impose restrictions on the ability of the offeror and persons acting in concert with it to exercise, or procure the exercise of, voting rights of the offeree company attaching to the shares in which they have an interest.~~ In such circumstances Rule 9.7 will apply.

APPENDIX B

List of questions

Q.1 **Do you agree with the proposed amendments to Rule 2.2(e) and Note 1 on Rule 2.2?**

Q.2 **Do you agree with the amendments to Rule 2.4(c) and the amendment to Note 5 on Rule 2.4?**

Q.3 **Do you agree that Note 6 on Rule 2.4 should apply to "no increase" statements made by potential offerors as referred to above?**

Q.4 **Do you agree that Note 6 on Rule 2.4 should be amended as proposed?**

Q.5 **Do you agree with the proposed deletion of existing Rule 9.7?**

Q.6 **Do you agree with the proposed adoption of new Rule 9.7 together with its Note in the form outlined in paragraph 4.15 above and the other amendments to Rule 9 referred to in paragraph 4.16 above?**

Q.7 **Do you agree that Note 11 on Rule 9.1 should be amended as proposed?**

Q.8 **Do you agree with the proposed new Note 15 on Rule 8 and the proposed new Note 5 on Rule 38.5?**

Q.9 **Do you agree that Note (a)(i) on Rules 35.1 and 35.2 should be amended as proposed?**

Q.10 **Do you agree that Rule 38.2 should be amended as proposed?**