



PCP6 Issued on 16 October 2001

THE PANEL ON TAKEOVERS AND MERGERS

CONSULTATION PAPER ISSUED BY THE CODE

COMMITTEE OF THE PANEL

PURCHASES BY THE OFFEROR OF SHARES IN

THE OFFEREE IN EXCHANGE FOR

SECURITIES

REVISION PROPOSALS RELATING TO RULE 11

OF THE TAKEOVER CODE

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

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by **27 November 2001**.

Comments may be sent by email to:

consultation@disclosure.org.uk

Alternatively, please send comments in writing to:

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

1. Introduction

1.1 The Code Committee has considered three issues relating to the purchase of offeree shares by offerors in exchange for securities as opposed to cash. First, whether there are any circumstances in which the offeror should be required to make a securities offer to all shareholders. Secondly, whether the circumstances in which purchases for securities are deemed to be purchases for cash for the purposes of

Rule 11.1 should be extended. Thirdly, the Code Committee has considered the way in which the Code should treat purchases for a mix of securities and cash.

1.2 The purpose of this Consultation Paper is to seek views on the proposals which have resulted from the Code Committee's review of these issues.

2. In what circumstances, if any, should a share offer be required?

2.1 New Rule 11.2

2.1.1 General Principle 1 states that "*All shareholders of the same class of an offeree company must be treated similarly by an offeror.*" However, other than in Note 1 on Rule 9.5 which is only relevant to mandatory offers, the Code does not specifically envisage any requirement for an offeror who has purchased offeree shares in exchange for securities to make a share offer.

2.1.2 The Code Committee has therefore considered purchases in exchange for securities by offerors both before and during an offer in order to establish whether there are circumstances in which such securities should be required to be offered to all

shareholders or whether cash alone is sufficient to satisfy General Principle 1 of the Code in all cases.

2.1.3 Although not a common issue, the Panel has had to consider this point on a number of occasions. The size and timing of the relevant purchases have been the key factors which have influenced the Panel's thinking, with a consistent view that the larger the percentage of offeree shares purchased for securities and the closer the purchase to the bid, the more likely the Panel would be to require any subsequent offer to include a full share alternative in order for General Principle 1 to be satisfied.

2.1.4 *Size:*

In the context of purchases of offeree shares for cash prior to an offer it has long been recognised that there is an apparent inconsistency between General Principle 1 and Rule 11.1(a) in that up to 10% of the voting rights of any class of the offeree can be purchased for cash prior to an offer before a full cash offer is required to be available. It is, however, generally accepted that an offeror should be permitted limited buying freedom prior to an offer and the concept that aggregate purchases for cash below 10% do not lead to a requirement for a full cash offer has not, in practice, given rise to General Principle 1 concerns. Having regard to this limited

buying freedom under Rule 11.1, the Panel would not normally have considered that purchases for securities below 10% would have triggered a requirement for shares to be available under any subsequent offer.

2.1.5 *Timing:*

The Panel has not felt it necessary or appropriate to mirror the provisions of Rule 11.1(a) as regards timing and therefore a purchase which had taken place well before the commencement of an offer period would not have triggered a requirement for a full share offer. There are two main reasons behind this thinking. First, because cash is frequently regarded as a more attractive consideration than securities, the Panel has, in most cases where the relevant purchases have preceded the offer by a significant period, felt that the offeror's obligations would be satisfied by the provision of cash. Secondly, the possible volatility of the offeror's share price (which is obviously not a factor where the relevant purchases have been made for cash) can give rise to further inequalities between the treatment of vendors and accepting shareholders if securities are the only form of consideration available. The scope for this problem to arise is obviously increased in proportion

to the length of time over which purchases are considered relevant. Accordingly, where the relevant purchases have taken place some time before the offer, the Panel has tended to regard cash as the more equitable form of consideration.

2.1.6 The Code Committee is not, however, convinced that cash can always satisfy the requirements of General Principle 1 where there have been purchases for securities. In particular, there may be cases where offeror securities are issued at a level which is or appears to be advantageous to the vendor of the offeree shares. In addition, offeree shareholders accepting cash are not always able to purchase offeror securities on the same terms as those received by a vendor. The market in the offeror securities may be illiquid and, in any event, the market impact of significant buy orders is likely to cause an increase in the price of the offeror securities.

2.1.7 The Code Committee, therefore, believes that, in the circumstances outlined below, where purchases of offeree shares have been made in exchange for securities, a full share offer must normally be made available to accepting shareholders. The Code Committee believes that 10% is the correct size threshold and that only purchases taking place in the three month period prior to the commencement of and during an offer period should be taken into account. This provision is similar to the current practice of the Panel, but the Code Committee believes that wording to this effect should included in the Code. In choosing the time period over which purchases in exchange for securities should be deemed relevant for the purposes of the proposed Rule, consideration was given to the relevant time period being "immediately preceding the commencement of and during the offer period". This was, however, rejected on the basis that it was neither sufficiently precise not covered a long enough period prior to the commencement of the offer period.

2.1.8 The proposed wording for the new Rule (Rule 11.2) is set out below.

"11.2 WHEN A SECURITIES OFFER IS REQUIRED

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

Unless the vendor is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, an obligation to make an offer in cash or to provide a cash alternative will also arise under Rule 11.1."

Q.1 Do you agree that, in certain circumstances, where purchases of offeree shares have been made in exchange for securities, there should be a requirement for the offeror to provide a share offer? If so, do you agree that (a) as regards size, the requirement should not be triggered (save as envisaged by Note 2*) by a purchase of offeree securities of less than 10% and (b) as regards timing (save as envisaged by Note 2*) only purchases made in the three months prior to the commencement of and during the offer period should trigger the requirement?

* Please see paragraph 2.3.1 below

2.2 Note 1 on New Rule 11.2

2.2.1 The basis on which any securities to be offered to shareholders pursuant to this proposed rule was also considered by the Code Committee.

The two possible bases are:

- (a) Same Number - where the number of securities offered to accepting offeree shareholders for each offeree share held by them is equal to the number of securities issued to the vendor of the triggering stake for each of his offeree shares (the "same number basis"); or
- (b) Maintaining Value - where the number of securities offered to accepting offeree shareholders is calculated by reference to the cash value of the securities issued to the vendor at the time the purchase took place.

2.2.2 The Code Committee believes that, if a securities offer is required under the new Rule 11.2, the consideration securities should be offered on the same number basis. The Code Committee believes that opting for the same number basis is consistent with the thinking that a cash offer, i.e. an offer at a fixed value, cannot always satisfy the similar treatment requirement of General Principle 1 where there have been purchases of offeree shares in exchange for securities. Where securities have to be offered, it is the nature of the consideration, and therefore the exchange ratio, which is more important than the cash value of the securities received by the vendor at a single point in time. Furthermore, the adoption of the same number basis ensures that where securities have been issued at a level which may be advantageous to the vendor as referred to in paragraph 2.1.6 above, accepting shareholders are not put at a disadvantage to pre-bid vendors.

2.2.3 The proposed wording for Note 1 on the new Rule 11.2 which addresses this point is as follows:

"1. Basis on which securities are to be offered

Any securities required to be offered pursuant to this Rule must be offered on the basis of the same number of consideration securities received by the vendor for each offeree company share rather than on the basis of securities equivalent to the value of the securities received by the vendor at the time of the relevant purchase. Where there has been more than one relevant purchase, offeror securities must be offered on the basis of the greater or greatest number of consideration securities received for each offeree company share."

Q.2 Do you agree that any shares required to be offered pursuant to the proposed new Rule 11.2 should be offered on the basis of the same number of securities received by the vendor rather than on the basis of securities equivalent to the value of the securities received by the vendor at the time of the relevant purchase?

2.3 Note 2 on Rule 11.2

2.3.1 Rule 11.1(c) requires a cash offer to be provided where, in the view of the Panel, there are circumstances which render such a course necessary in order to give effect to General Principle 1. Note 4 on Rule 11.1, normally, limits the exercise of this discretion to situations where the recipients of cash are directors of, or other persons closely connected with, the offeror or offeree. In order to provide a similar discretion to the Panel in respect of the new Rule, it is also proposed to include the

following note (as Note 2) on the new Rule 11.2.

"2. Equality of Treatment

Where the vendors of the relevant shares are directors of, or other persons closely connected with, the offeror or the offeree company, the Panel may require securities to be offered on the same basis to all other holders of shares of that class even though the amount purchased is less than 10% or the purchase took place some time prior to the commencement of the offer period."

Q.3 Do you think that the Panel should have the discretion to require a share offer in circumstances wider than those envisaged by the proposed new Rule 11.2 and, if so, should this discretion be restricted to situations where the vendors are directors of, or other persons closely connected with, the offeror or offeree?

2.4 Note 3 on New Rule 11.2

2.4.1 The Code Committee has also considered how vendor placings should be treated by the Panel in the context of the new Rule. The Code Committee believes that where consideration securities are placed immediately for cash on the vendor's behalf by the offeror or its associates, no obligation under this proposed Rule to provide a securities offer to all shareholders should arise. Such vendors will not normally take delivery of the consideration securities and, in such circumstances, it would not be appropriate to treat the transaction, for Code purposes, other than as a cash transaction. It is, therefore, proposed to include the following wording as Note 3 on the new Rule.

"3. Vendor placings

Shares acquired in exchange for securities will normally be deemed to be purchases for cash for the purposes of this Rule if an offeror or any of its associates arranges the immediate placing of such consideration securities for cash, in which case no obligation to make a securities offer under this Rule will arise."

Q.4 Do you agree that, where an offeror has purchased offeree company shares in exchange for securities and the offeror or its associates has arranged for the consideration securities to be placed immediately for cash on the vendor's behalf, there should be no obligation on the offeror to provide a securities

offer to all shareholders?

2.5 Note 4 on New Rule 11.2

2.5.1 The Code Committee has also considered how the proposed new Rule and its Notes should be applied in relation to management buyouts and other circumstances where management retains an interest in the business. The Panel's policy, where possible, is to avoid discouraging arrangements which are genuinely designed to incentivise management through equity shareholdings in their business. To that end the Panel usually permits arrangements which result in management shareholders (even if they hold more than 10% of the equity of an offeree company) receiving equity in the offeror (often a vehicle company formed for the purpose of making the offer) without requiring all offeree shareholders to be offered that equity.

2.5.2 At the same time the Panel usually requires securities in a newly formed vehicle company to be offered to all offeree shareholders if it is proposed to offer such securities to any non-management shareholders, regardless of the percentage involved. Whilst the Panel considers that arrangements of this type are appropriate in respect of management shareholders (subject to the safeguards set out in Note 4 on Rule 16), it does not believe it is proper for some shareholders to be given an opportunity to participate in the equity of the offeror vehicle and at what might be perceived to be an enhanced value for their shares when no equivalent opportunity is extended to all other shareholders. The Code Committee is in agreement with the Panel's current practice and does not believe it should be amended as a result of the proposed introduction of new Rule 11.2. It is therefore proposed to include the following Note (as Note 4) on proposed Rule 11.2, to take account of the above points.

"4. Management retaining an interest

In a management buyout or similar transaction, if the only offeree shareholders who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of Note 4 on Rule 16 are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree hold more than 10% of the offeree's shares.

If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree shares), the Panel will normally require such securities to be made available to all shareholders on the same terms."

- Q.5 (i) Do you think it is acceptable for the offeror in a management buyout or similar transaction not to offer all offeree shareholders equity in the management buyout vehicle even if the management of the offeree will receive equity in respect of their holdings and those holdings amount to more than 10% of the offeree's shares?**
- (ii) Do you think a full securities offer should be required if any such securities are made available to any non-management shareholders regardless of the size of the holding of offeree shares?**
- 3. Should the circumstances in which purchases for securities are deemed to be purchases for cash for the purposes of Rule 11.1 be extended?**

3.1 Rule 11.1 of the Code states that where purchases of 10% or more of the shares of any class of shares in the offeree company are made for cash during or in the 12 months preceding the commencement of the offer period, a full cash offer for that class will be required. Note 5 on Rule 11.1 currently states that where purchases have been made for securities but the consideration shares have been placed on the vendor's behalf by the offeror or its associates, for the purpose of Rule 11.1, the purchase is treated as if it had been made for cash. Any purchases for securities made immediately preceding the commencement of or during an offer period (whether placed on the vendor's behalf or not) are also normally deemed to have been made for cash. The final sentence of Note 5 makes it clear, however, that if there is an undertaking by the vendor not to sell the consideration paper at least until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, this provision does not apply and any purchases will not be deemed to have been made for cash. This is because the vendor will not be able to convert the consideration securities into cash and accepting shareholders and the vendor will be in a similar position.

3.2 The Code Committee believes that distinguishing between purchases made in exchange for securities immediately preceding the commencement of or during an offer period and those made in the 12 months prior to the offer period has no particular rationale. The purpose of Rule 11.1 is effectively side-stepped whenever relevant purchases are made in exchange for securities which are then exchanged for cash. This is true regardless of the timing of the purchase within the relevant period and the Code Committee, therefore, believes it is appropriate to extend the scope of Note 5 on Rule 11.1. The Code Committee is aware that not all recipients of securities as a result of sales of offeree shares prior to or during an offer period choose to sell those securities, but the Code Committee believes that where securities are not subject to selling restrictions, the availability of the option to sell should be the significant factor determining the Panel's policy. Accordingly, it is proposed to amend Note 5 so that all purchases of offeree shares made in exchange for securities during the relevant period will be treated as if they had been made for cash unless they are subject to selling restrictions. The amended note would read as follows:

"5. Acquisitions for securities

For the purpose of this Rule, shares acquired by an offeror and any person acting in concert with it in exchange for securities, either during or in the 12 months preceding the commencement of the offer period, will normally be deemed to be purchases for cash on the basis of the value of the securities at the time of the purchase. However, if the vendor of the offeree company shares is required to hold the securities received in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under Rule 11.1 will be incurred.

See also Note 6 on Rule 11.2"

Q.6 Do you agree that, where purchases are made by an offeror and any person acting in concert with it in exchange for securities either during or in the 12 months preceding the commencement of an offer period and the vendor is not restricted from selling those consideration securities until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, such purchases should be deemed to have been made for cash?

4. The treatment of purchases for a mix of securities and cash.

4.1 Rule 11.1(c) requires a cash offer to be made if the Panel believes it is necessary to do so in order to give effect to General Principle 1. The second paragraph of Note 4 on Rule 11.1 states that Rule 11.1(c) may be relevant where 10% or more has been acquired in the previous 12 months for a mix of securities and cash. The Code does not further address the issue of purchases for a mix of cash and securities, which can give rise to problems in the context of satisfying the requirements of General Principle 1 and Rule 11.

4.2 This area is one which easily becomes complex, given the number of possible permutations relating to the size and timing of a transaction and the make-up of its mix. Transactions of this nature are also infrequent. In view of these factors, the Code Committee is of the opinion that it is neither sensible nor practicable to codify all the possible consequences (in terms of the type of offer that might be required) of making a purchase of offeree shares for a mix of cash and securities. The Code Committee therefore proposes to amend the Code simply to require the Panel to be consulted where shares are acquired for a mix of both cash and securities.

4.3 The Code Committee, therefore, proposes that a note (Note 5) on new Rule 11.2 be added as follows:

"5. Acquisitions for a mix of cash and securities

If a purchase of offeree company shares is made for a mix of cash and securities, the Panel should be consulted."

4.4 In addition it is proposed to add, after the last sentence in Note 4 on Rule 11.1, the words *"The Panel should be consulted in all relevant cases."*

Q.7 Do you agree with the proposal that the Code should require the Panel to be consulted regarding purchases of offeree shares for a mix of cash and securities?

5. The Notes on the New Rule 11.2

5.1 Notes 1, 2, 3, 4 and 5 on the new Rule 11.2 will be as set out above.

5.2 Note 6 on New Rule 11.2

Where 10% or more of the voting rights of any class of the offeree company is purchased in the 12 months prior to the commencement of the offer period and the consideration received by the vendor includes shares to which selling restrictions are attached, it is possible, depending on the timing and the percentages involved, that the Code will not specifically require a minimum level of consideration in any subsequent offer. Such cases are not likely to occur frequently, but the Code Committee believes that the Panel should be in a position to ensure that the spirit of General Principle 1 is observed. It is therefore proposed to include a note, Note 6 on Rule 11.2, which will require the Panel to be consulted in such cases. This Note will also be cross-referred to at the end of Note 5 on Rule 11.1. It is proposed to word the Note as follows:

"6. Purchases in exchange for securities to which selling restrictions are attached

Where an offeror and any person acting in concert with it has purchased 10% or more of the voting rights of any class of shares in the offeree company during the 12 months preceding the commencement of the offer period and the consideration received by the vendor includes shares to which selling restrictions of the kind set out in the second sentence of Rule 11.2 are attached, the Panel should be consulted."

5.3 A further note, Note 7, which addresses relevant issues from the Notes on Rule 11.1, is proposed and would read as follows:

"7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 5, 6, 7, 8, 10 and 11 on Rule 11.1 which may be relevant.

In addition, if an offer is announced in accordance with Note (a)(iii) on Rule 35.1, any purchases of offeree company shares for securities during the competition reference period will be deemed to be purchases during the new offer period for the purposes of this Rule."

Q.8 Do you agree with the inclusion of Notes 6 and 7 on Rule 11.2?

6. Consequential Changes

6.1 The existing Rule 11.2 will become Rule 11.3. Its wording will remain the same, save for the inclusion of a reference to the new Rule 11.2 in addition to the existing reference to Rule 11.1.

6.2 Rule 7.1, which requires an immediate announcement to be made if an offer has to be amended, refers to Rule 11. It is proposed to amend the wording in parenthesis following the reference from "(requirement to make a cash offer)" to "(nature of consideration to be offered)".

6.3 Note 2 on Rule 32.1 which addresses when revision of an offer is required refers to the introduction of a cash offer under Rule 11. This wording will be amended to read "*...becomes obliged to make an offer in accordance with Rule 11...*"

Q.9 Do you agree with the consequential amendments to the new Rule 11.3, Rule 7.1 and Note 2 on Rule 32.1?

7.1 The proposal to extend the circumstances in which purchases for securities are deemed to be purchases for cash under Rule 11.1 may have cost implications for offerors, but the Code Committee believes that the implementation of these proposals would result in a more logical treatment of purchases for securities and would, therefore, be in the interest of shareholders as a whole. The Code Committee believes that any cost implications arising out of the other proposals made in this Consultation Paper should be minimal.

8.1 For convenience, the text of Rule 11.1, together with its Notes as currently included in the Code, and the proposed revisions to the Notes are set out in Appendix I, as are the new Rules 11.2, 11.3 and the Notes on Rule 11.2. Rule 7.1 and Note 2 on Rule 32.1 are also included. Appendix II repeats the nine questions contained in this document.

Appendix I

RULE 7. CONSEQUENCES OF CERTAIN DEALINGS

7.1 IMMEDIATE ANNOUNCEMENT REQUIRED IF THE OFFER HAS TO BE AMENDED

Purchases of offeree company shares by an offeror or any person acting in concert with it may give rise to obligations under Rule 6 (requirement to increase offer), Rule 9 (mandatory offer) or Rule 11 (~~requirement for cash offer~~ nature of consideration to be offered). Immediately after such a purchase, an appropriate announcement must be made. Whenever practicable, the announcement should also state the number of shares purchased and the price paid.

RULE 11. NATURE OF CONSIDERATION TO BE OFFERED

11.1 WHEN A CASH OFFER IS REQUIRED

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

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

- (b) subject to paragraph (a) above, shares of any class under offer in the offeree company are purchased for cash (but see Note 5) by an offeror or any person acting in concert with it during the offer period, in which case the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for shares of that class during the offer period; or

- (c) in the view of the Panel there are circumstances which render such a course necessary in order to give effect to General Principle 1.

NOTES ON RULE 11.1

1. *Price*

In calculating the price paid, stamp duty and broker's commission should be excluded.

2. *Gross purchases*

The Panel would normally regard Rule 11.1(a) as applying to gross purchases of shares over the relevant period and would not allow the deduction of any shares sold over that period. However, in exceptional circumstances and with the consent of the Panel, shares sold some considerable time before the beginning of the offer period may be deducted.

3. *When the obligation is satisfied*

The obligation to make cash available under this Rule will be considered to have been met if, at the time the purchase was made, a cash offer or cash alternative at a price per share not less than that required by this Rule was open for acceptance, even if that offer or alternative closes for acceptance immediately thereafter.

4. *Equality of treatment*

The discretion given to the Panel in Rule 11.1(c) to require cash to be made available in certain cases where less than 10% has been purchased in the previous 12 months will not normally be exercised unless the vendors are directors of, or other persons closely connected with, the offeror or the offeree company. In such cases, relatively small purchases could be relevant.

Rule 11.1(c) may also be relevant when 10% or more has been acquired in the previous 12 months for a mixture of securities and cash. The Panel should be consulted in all relevant cases.

5. *Acquisition for securities, including placings*

Shares acquired in exchange for securities will be deemed to be purchases for

~~cash for the purpose of this Rule if an offeror or its associates arrange, or in any way facilitate, the placing of such consideration securities. Also, even where there is no such placing, if an offeror or any person acting in concert with it acquires in exchange for securities any relevant shares, either during or immediately preceding an offer period, the shares will normally be deemed to have been purchased for cash on the basis of the value of the securities at the time of the transaction. However, if the vendor of the offeree company shares is required to hold the offeror's securities received in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under Rule 11 is incurred.~~

5. Acquisitions for securities

For the purpose of this Rule, shares acquired by an offeror and any person acting in concert with it in exchange for securities, either during or in the 12 months preceding the commencement of the offer period, will normally be deemed to be purchases for cash on the basis of the value of the securities at the time of the purchase. However, if the vendor of the offeree company shares is required to hold the securities received in exchange until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, no obligation under Rule 11.1 will be incurred.

See also Note 6 on Rule 11.2.

6. *Revision*

If an obligation under this Rule arises during the course of an offer period and a revision of the offer is necessary, an immediate announcement must be made (but see Rule 32).

7. *Discretionary clients*

Dealings for discretionary clients by fund managers connected with the offeror, unless they are exempt fund managers, may be relevant (see Rule 7.2).

8. *Allotted but unissued shares*

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

9. *Cum dividend*

When accepting shareholders are entitled under the offer to retain a dividend declared or forecast by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled.

10. *Convertible securities, warrants and options*

Purchases of convertible securities, warrants, options or other subscription rights will normally only be relevant to this Rule if they are converted or exercised (as applicable). Such purchases will then be treated as if they were purchases of the underlying shares at a price calculated by reference to the purchase price and the relevant conversion or exercise terms. In any case of doubt, the Panel should be consulted.

11. *Offer period*

References to the offer period in this Rule are to the time during which the offeree company is in an offer period, irrespective of whether the offeror was

contemplating an offer when the offer period commenced.

12. Competition reference periods

If an offer is announced in accordance with Note (a)(iii) on Rule 35.1, any purchases of offeree company shares for cash during the competition reference period will be deemed to be purchases during the new offer period for the purposes of Rule 11.1(b).

11.2 WHEN A SECURITIES OFFER IS REQUIRED

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

Unless the vendor is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, an obligation to make an offer in cash or to provide a cash alternative will also arise

under Rule 11.1.

1. Basis on which securities are to be offered

Any securities required to be offered pursuant to this Rule must be offered on the basis of the same number of consideration securities received by the vendor for each offeree company share rather than on the basis of securities equivalent to the value of the securities received by the vendor at the time of the relevant purchase. Where there has been more than one relevant purchase, offeror securities must be offered on the basis of the greater or greatest number of consideration securities received for each offeree company share.

2. Equality of treatment

Where the vendors of the relevant shares are directors of, or other persons closely connected with, the offeror or the offeree company, the Panel may require securities to be offered on the same basis to all other holders of shares of that class even though the amount purchased is less than 10% or the purchase took place some time prior to the commencement of the offer period.

3. Vendor placings

Shares acquired in exchange for securities will normally be deemed to be purchases for cash for the purposes of this Rule if an offeror or any of its associates arranges the immediate placing of such consideration securities for cash, in which case no obligation to make a securities offer under this Rule will arise.

4. Management retaining an interest

In a management buyout or similar transaction, if the only offeree shareholders who receive offeror securities are members of the management of the offeree company, the Panel will not, so long as the requirements of Note 4 on Rule 16 are complied with, require all offeree shareholders to be offered offeror securities pursuant to Rule 11.2, even though such members of the management of the offeree hold more than 10% of the offeree's shares.

If, however, offeror securities are made available to any non-management shareholders (regardless of the size of their holding of offeree shares), the Panel will normally require such securities to be made available to all shareholders on the same terms.

5. Acquisitions for a mix of cash and securities

If a purchase of offeree company shares is made for a mix of cash and securities, the Panel should be consulted.

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

Where an offeror and any person acting in concert with it has purchased 10% or more of the voting rights of any class of shares in the offeree company during the 12 months preceding the commencement of the offer period and the consideration received by the vendor includes shares to which selling restrictions of the kind set out in the second sentence of Rule 11.2 are attached, the Panel should be consulted.

7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See also Notes 5, 6, 7, 8, 10 and 11 on Rule 11.1 which may be relevant.

In addition, if an offer is announced in accordance with Note (a)(iii) on Rule 35.1, any purchases of offeree company shares for securities during the competition reference period will be deemed to be purchases during the new offer period for the purposes of this Rule.

11.23 DISPENSATION FROM HIGHEST PRICE

If the offeror considers that the highest price (for the purpose of Rules 11.1 and 11.2) should not apply in a particular case, the offeror should consult the Panel, which has discretion to agree an adjusted price.

NOTES ON RULE 32.1

2. *When revision is required*

An offeror will normally be required to revise its offer if it, or any person acting in concert with it, purchases shares at above the offer price (see Rule 6) or it becomes obliged to ~~introduce a cash offer under~~ make an offer in accordance with Rule 11 or to make a cash offer, or to increase an existing cash offer, under Rule 9.

Appendix II

Questions

Q.1 Do you agree that, in certain circumstances, where purchases of offeree shares have been made in exchange for securities, there should be a requirement for the offeror to provide a share offer? If so, do you agree that (a) as regards size, the requirement should not be triggered (save as envisaged by Note 2) by a purchase of offeree securities of less than 10% and (b) as regards timing (save as envisaged by Note 2) only purchases made in the three months prior to the commencement of and during the offer period should trigger the requirement? (See paragraph 2.1 above.)

- Q.2 Do you agree that any shares required to be offered pursuant to the proposed new Rule 11.2 should be offered on the basis of the same number of securities received by the vendor rather than on the basis of securities equivalent to the value of the securities received by the vendor at the time of the relevant purchase? (See paragraph 2.2 above.)**
- Q.3 Do you think that the Panel should have the discretion to require a share offer in circumstances wider than those envisaged by the proposed new Rule 11.2 and, if so, should this discretion be restricted to situations where the vendors are directors of, or other persons closely connected with, the offeror or offeree? (See paragraph 2.3 above.)**
- Q.4 Do you agree that, where the offeror has purchased offeree company shares in exchange for securities and the offeror or its associates has arranged for the consideration securities to be placed immediately for cash on the vendor's behalf, there should be no obligation on the offeror to provide a securities offer to all shareholders? (See paragraph 2.4 above.)**
- Q.5 (i) Do you think it is acceptable for the offeror in a management buyout or similar transaction not to offer all offeree shareholders equity in the management buyout vehicle even if the management of the offeree will receive equity in respect of their holdings and those holdings amount to more than 10% of the offeree's shares?**
- (ii) Do you think a full securities offer should be required if any such securities are made available to any non-management shareholders regardless of the size of the holding of offeree shares? (See paragraph 2.5 above.)**
- Q.6 Do you agree that, where purchases are made by an offeror and any person**

acting in concert with it in exchange for securities either during or in the 12 months preceding the commencement of an offer period and the vendor is not restricted from selling those consideration securities until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, such purchases should be deemed to have been made for cash? (See paragraph 3 above.)

Q.7 Do you agree with the proposal that the Code should require the Panel to be consulted regarding purchases of offeree shares for a mix of cash and securities? (See paragraph 4 above.)

Q.8 Do you agree with the inclusion of Notes 6 and 7 on Rule 11.2? (See paragraph 5 above.)

Q.9 Do you agree with the consequential amendments to new Rule 11.3, Rule 7.1 and Note 2 on Rule 32.1? (See paragraph 6 above.)