

THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 25

DEBT SYNDICATION DURING OFFER PERIODS

1. Introduction

- 1.1 This Practice Statement describes the way in which the Executive normally interprets and applies certain provisions of the Takeover Code (the “Code”) in the context of the syndication of debt financing during offer periods. The Practice Statement is intended to assist offerors and their advisers who are seeking to establish procedures that will enable debt financing to be syndicated during offer periods without breaching the provisions of the Code. The same principles will also apply to the raising of other forms of financing during offer periods although the application of the provisions of the Code will vary according to the specific circumstances.
- 1.2 This Practice Statement has been developed at the request of, and with assistance from, the Loan Market Association (the “LMA”) and the London Investment Banking Association. As a result of this exercise, the LMA has today published a revised “Recommended Form of Confidentiality and Front Running Letter for Primary Syndication” (the “LMA confidentiality letter”), together with a memorandum explaining the background to the relevant provisions (“Note for LMA Members on discussions with the Takeover Panel and LMA Confidentiality Letter”). A copy of the LMA confidentiality letter and the related explanatory memorandum are available in the “Documents” section of the LMA’s website (www.lma.eu.com).
- 1.3 References in the remainder of this Practice Statement to the following expressions have the following meanings:

- (a) “debt syndication” refers to the primary syndication of debt financing in the context of transactions that are subject to the provisions of the Code; and
- (b) “syndicatees” includes potential debt finance providers approached to take part in a proposed debt syndication in addition to those debt finance providers who are allocated a debt participation following the completion of the syndication process.

2. Debt syndication

- 2.1 The Executive understands that an offeror seeking to raise debt finance for a cash offer (or an offer involving a cash component) would normally appoint one or more primary lenders to act as Mandated Lead Arranger for the transaction (an “MLA”). MLAs are generally responsible for advising an offeror in relation to the type of debt facilities that it would require to effect a transaction. In addition, MLAs will identify potential members of a syndicate to provide the facilities.
- 2.2 The Executive is aware that a debt syndication is often conducted in two separate stages:
 - (a) before the announcement of a firm intention to make an offer, when the MLAs themselves commit to providing the debt facilities required to implement the offer; and
 - (b) following the announcement of a firm intention to make an offer, when the MLAs seek further lenders to participate in the facilities and take a share of the MLA’s financing commitment.

While this Practice Statement describes the application of the Code to the syndication of debt financing following the announcement of a firm intention to make an offer, the same considerations will apply prior to that time when

primary financing commitments are sought from MLAs in relation to the debt facilities required to implement an offer.

2.3 The Executive understands that, as part of the process of seeking further lenders to take a share of the financing commitment, MLAs produce and distribute marketing information in relation to:

- (a) the debt facilities required; and
- (b) the offeror and offeree company.

This information would generally be more detailed than that normally provided to shareholders in the context of an offer and normally includes a detailed term sheet for the required debt facilities, a description of the offer, financial information (comprising forecasts and projections in relation to both the offeror and the offeree company) and a business plan for the enlarged group (generally over a period of three to five years).

2.4 The Executive understands that, when MLAs seek further lenders to participate in the facilities and take a share of the MLAs' financing commitment, a confidentiality agreement would be entered into between an MLA and each syndicatee pursuant to which the syndicatee would undertake, among other things, to keep the information confidential and not to use it for unlawful purposes. The Executive understands that the form of confidentiality agreement entered into between MLAs and syndicatees has generally been the LMA confidentiality letter.

3. Application of the Code to debt syndication

3.1 General Principle 1 of the Code provides that all holders of the securities of an offeree company of the same class must be afforded equivalent treatment. This principle underpins the following provisions of the Code that are potentially relevant to the debt syndication process:

- (a) Rule 20.1 (“Equality of information to shareholders and persons with information rights”), which provides that information about parties to an offer must be made equally available to all offeree company shareholders and persons with information rights as nearly as possible at the same time and in the same manner; and
- (b) Rule 16 (“Special deals with favourable conditions”), which provides that, except with the consent of the Panel, an offeror or persons acting in concert with it may not make any arrangements with shareholders, and may not deal or enter into arrangements to deal in shares of the offeree company, or enter into arrangements which involve acceptance of an offer, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all shareholders.

3.2 Details of how these provisions are applied by the Executive in the context of debt syndication during an offer period are set out below.

4. Rule 20.1 (“Equality of information to shareholders and persons with information rights”)

4.1 In order to satisfy Rule 20.1, any non-public information about the offeror or the offeree company provided to a syndicatee which holds shares in the offeree company must also be made equally available to all offeree company shareholders and persons with information rights as nearly as possible at the same time and in the same manner. As noted above, the level of information provided to syndicatees normally goes beyond that which is provided to shareholders in the context of offers and the information is normally provided at an earlier stage. In addition, some of this information may not actually be capable of being provided to shareholders generally (for example, because it includes financial projections that comprise profit forecasts for the purposes of the Code which would not be capable of being reported on to the appropriate standard).

(a) *Syndicatees which hold (or may hold) shares in the offeree company*

4.2 The Executive considers that there will be no breach of Rule 20.1 as a result of the provision of non-public information about the offeror or the offeree company to a syndicatee which holds (or may hold) shares in the offeree company provided effective information barriers have been established by the syndicatee between the department involved in making decisions in relation to the debt syndication (the “debt department”) and any department responsible for trading, or making investment decisions in relation to, equity investments (together, the “equity department”). The Executive considers that, provided effective information barriers have been established, no further enquiries would need to be made as to whether or not a syndicatee’s equity department does in fact hold shares in the offeree company.

4.3 Paragraph 6 below sets out the minimum standards which the Executive considers information barriers would normally need to satisfy in order to be considered effective. The LMA confidentiality letter includes a suggested confirmation to be provided to MLAs by syndicatees that effective information barriers have been established that comply with the minimum standards referred to above.

4.4 If an offeror or any of its advisers intends to provide non-public information about the offeror or offeree company to a syndicatee which holds (or may hold) shares in the offeree company but which does not have effective information barriers in place between its equity and debt departments, the Executive should be consulted. This situation could arise where, for example, the same individuals are involved in making decisions in relation to both equity and debt investments or there is otherwise an insufficient degree of separation between the two functions.

(b) *Syndicatees which do not hold shares in the offeree company*

4.5 If a syndicatee does not hold shares in the offeree company, the provision of non-public information about the offeror or the offeree company to that

syndicatee would not give rise to any issues under Rule 20.1. However, the Executive considers that a breach of Rule 20.1 is capable of occurring in the future if a syndicatee acquires shares in the offeree company during the offer period. Such a breach could be avoided if an MLA were to require a syndicatee to:

- (a) establish effective information barriers between the syndicatee's equity and debt departments; or
- (b) provide a confirmation and undertaking to the MLA that neither the syndicatee nor any other member of its group holds shares in the offeree company or, save as expressly permitted by the Panel, will acquire any such shares prior to the end of the offer period.

The undertaking referred to in paragraph (b) above would not prevent the acquisition of shares in the offeree company:

- (i) carried out in a client-serving capacity by any part of the trading operations of a syndicatee that has recognised intermediary status; or
- (ii) with the consent of the Panel, by a syndicatee as security for a loan in the normal course of business.

Suggested wording for the confirmation and undertaking that would be considered by the Executive to be appropriate in these circumstances is set out in the LMA confidentiality letter.

5. Rule 16 (“Special deals with favourable conditions”)

- 5.1 If a syndicatee holds shares in the offeree company, or acquires such shares during the offer period, then Rule 16 may be in point. The Executive's concern in this context is primarily based on the possibility that favourable debt terms might be used as a means of providing additional value to a syndicatee in its capacity as an offeree company shareholder. This would be

the case if, for example, a syndicatee's equity department agreed that it would accept a lower offer for its shares in the offeree company than would otherwise have been the case because the syndicatee's debt department was allocated a participation in the syndicate, perhaps on attractive terms. In addition, the Executive is concerned to ensure that the decision of a syndicatee's equity department as to whether or not it should accept the offer should not otherwise be influenced by the participation of the syndicatee's debt department in the syndicate.

(a) ***Information barriers between a syndicatee's equity and debt departments***

- 5.2 The Executive believes that the knowledge that a syndicatee's equity department has about the participation of its debt department in a debt syndication, and the terms of that participation, is critical in determining the application of Rule 16. This is because the Executive considers that, without this knowledge, it would be unlikely that value would be transferred between the equity and debt components of the transaction or that the decision of the equity department as to whether or not it should accept an offer would be influenced.
- 5.3 In view of this, the Executive normally takes the view that, in relation to a syndicatee which holds shares in the offeree company or which acquires shares during the offer period, no problems would arise under Rule 16 provided effective information barriers are in place between its equity and debt departments. Further details in relation to the nature of the information barriers that would be considered by the Executive to be effective in preventing issues arising under Rule 16 in this context are set out in paragraph 6 below.
- 5.4 If effective information barriers have not been established, the Executive will normally require further information to be provided to the Executive in relation to the terms of the debt that is being syndicated as set out in paragraphs 5.5 and 5.6 below.

(b) *Debt being syndicated is on ‘market terms’*

- 5.5 If the offeror is able to demonstrate to the Executive’s satisfaction that the debt being syndicated is on ‘market terms’, the Executive would not normally consider there to be a problem under Rule 16. This is on the basis that, if an offeror is able to prove that a syndicatee has been allocated ‘plain vanilla’ debt with no special features which is on similar terms to debt issued in comparable transactions, the Executive would consider the scope for a transfer of value to occur as between the equity and debt components of the transaction, or for the decision of the syndicatee’s equity department to be influenced, would be minimised.
- 5.6 If, on the other hand, the debt that is being syndicated is not on ‘market terms’, the Executive will normally require further information in order to determine whether there is an issue under Rule 16. For example, the Executive would seek to gain an understanding of the identity of the syndicatees, the reasons why the syndicatees were invited to participate in the syndicate, the basis and terms on which the debt was allocated to syndicatees, and the extent to which syndicatees hold shares in the offeree company.

6. Information barriers

- 6.1 The Executive believes that establishing an effective information barrier between a syndicatee’s equity and debt departments would be essential in preventing issues that may otherwise arise under Rule 20.1 and would also be capable of addressing issues that would otherwise arise under Rule 16.
- 6.2 The Executive does not believe that it is appropriate for it to specify detailed requirements for effective information barriers. However, the Executive has identified the following minimum standards without which it would not normally consider an information barrier to be effective:

(a) ***Personnel***

- (i) A syndicatee's equity and debt departments should comprise separate personnel. The Executive will normally be prepared to disregard members of senior management and compliance staff for these purposes provided they do not participate in investment decisions relating to the proposed transaction and do not share non-public information about the transaction with persons who are involved in making those investment decisions.
- (ii) Members of a syndicatee's equity and debt departments must be made aware that an information barrier exists between the two departments.
- (iii) Members of a syndicatee's equity and debt departments should not share offices. If possible, each department should be physically separated from, and should not be capable of being accessed by, the other department.

(b) ***Technology and systems***

- (i) Members of a syndicatee's equity and debt departments must not be able to access non-public documents created, edited or received by the other department.
- (ii) Computers and other electronic equipment used by a syndicatee's equity and debt departments must not be used by, or accessible to, the other department.

(c) ***Ring-fencing of information***

Internal files, records and other non-public deal information prepared by a syndicatee's equity or debt department should not be shared with, or be capable of being accessed by, the other department.

- 6.3 The Executive believes that an information barrier between a syndicatee's equity and debt departments would be more likely to be effective if established on a permanent rather than *ad hoc* basis. If it is proposed to establish an *ad*

hoc information barrier, the Executive should be consulted. In such circumstances, the Executive will seek assurances that the minimum standards for effective information barriers described in paragraph 6.2 above will be complied with.

6.4 Confirmation should be obtained from each syndicatee, to the reasonable satisfaction of the MLA and the offeror's financial adviser, that an effective information barrier has been established. Where an MLA and/or financial adviser considers that a syndicatee lacks experience in dealing with transactions that are subject to the Code, enquiries should be made to confirm that information barriers have been established which comply with the minimum standards referred to above, as a written confirmation alone will not necessarily be sufficient in such cases.

6.5 The Executive recognises that syndicatees may participate regularly in transactions that are subject to the Code. If confirmation has been provided to the reasonable satisfaction of the MLA and the financial adviser that a particular syndicatee has established adequate information barriers, the Executive will not expect further enquiries, beyond a written confirmation, to be undertaken on every occasion in relation to that syndicatee.

7. Relationship between financial advisers and MLAs

7.1 Paragraph 3(f) of the Introduction to the Code provides that:

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

The Code also applies to all advisers to such persons, and all advisers in so far as they advise on takeovers or other matters to which the Code applies. Financial advisers to whom the Code applies have a particular responsibility to comply with the Code and to ensure, so far as they are reasonably able, that their client and its directors are aware of their responsibilities under the Code and will comply with them and that the Panel is consulted whenever appropriate.”.

7.2 The Executive regards a financial adviser to an offeror as being principally responsible for ensuring that the offeror complies with the Code in the context of a debt syndication. In view of this, the Executive will expect the financial adviser to an offeror to be the principal point of contact with the Executive for resolving issues arising under the Code during the debt syndication process. In particular, the Executive will expect the financial adviser to an offeror to ensure that:

- (a) MLAs are aware of the relevant provisions of the Code and the responsibilities that an MLA has in ensuring that the provisions of the Code are complied with; and
- (b) appropriate confirmations and, where appropriate, undertakings are obtained from syndicatees (by an MLA or by the financial adviser itself) on the basis described in this Practice Statement.

7.3 Notwithstanding paragraph 7.2 above, the Executive also regards MLAs as being responsible for ensuring that the provisions of the Code are complied with and for addressing issues arising under the Code during the debt syndication process. In view of this, the Executive recognises that MLAs may prefer to contact the Executive directly rather than communicate through the offeror's financial adviser in relation to how they are best able to discharge their responsibilities. The Executive expects MLAs to raise issues arising under the Code of which they become aware during the debt syndication process with the offeror's financial adviser and the Executive in a timely manner.

Practice Statements are issued by the Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued

by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

17 June 2009