RS 2004/1 Issued on 6 August 2004

THE PANEL ON TAKEOVERS AND MERGERS

"PUT UP OR SHUT UP" AND NO INTENTION TO BID STATEMENTS

STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE EXTERNAL CONSULTATION PROCESS ON PCP 2004/1

1. Introduction

1.1 On 25 February, the Code Committee of the Takeover Panel ("the Code Committee") published a Public Consultation Paper ("PCP2004/1") entitled "'Put Up or Shut Up' and No Intention to Bid Statements".

1.2 The purpose of this paper is to provide details of the Code Committee's response to the external consultation process on PCP 2004/1.

2. Number of responses received

A total of 9 responses were received from a range of parties, including institutional shareholder bodies, professional bodies representing practitioners and individuals. A list of respondents can be found at Appendix 2.

3. Overview of responses

3.1 There was broad support from the respondents for the general approach towards imposing on potential offerors deadlines by which they must clarify their intentions in relation to an offeree company by either a "put up" (firm offer announcement under Rule 2.5) or "shut up" (no intention to bid under Rule 2.8) statement. Respondents also generally supported the proposals relating to the making of a 'no intention to bid' statement under Rule 2.8 and the consequences of doing so.

3.2 However, a number of respondents disagreed with the specific proposal that a potential offeror should not be able to satisfy a 'put up or shut up' obligation by announcing a pre-conditional offer. Some also felt that the lock-out period for a potential offeror, following an announcement under Rule 2.8, should be longer than six months or at least that the Panel should have the discretion to determine a longer lock-out. There was in addition some disagreement over the matters to be reserved in a no intention to bid statement following a 'put up or shut up' deadline being set.

3.3 The Committee's conclusions on all the responses are set out below.

4. The Code Committee's conclusions

4.1 Q1: Do you agree that the Panel's practice on "put up or shut up" should be reflected in specific provisions in the Code?

All respondents agreed that the Panel's practice should be codified.

4.2 Q2: Do you agree that the Panel should not seek to intervene following a possible offer announcement unless requested to do so by the offeree company?

4.2.1 A majority of the respondents generally accepted this proposition. Two of those did, however, suggest that the Panel should have flexibility to intervene at the request of other interested parties, most notably a major shareholder. The Code Committee does not believe such flexibility would be appropriate. The point at issue here is the problem of siege for the offeree company, caused by a prolonged period of uncertainty about the intentions of a potential offeror. It can therefore only be the offeree company that is in the position to know whether it wants to put an end to the situation. If shareholders were able to make representations to the Panel on this point, the Panel would be put in the invidious position of referee between the offeree company and those shareholders. The correct recourse for offeree shareholders seeking clarification of a Rule 2.4 announcement is to make representations to the company's board.

4.2.2 Another respondent felt that the Panel should undertake an automatic review of the situation six months after the Rule 2.4 announcement with a view to setting a put up or shut up deadline. The Code Committee rejects this proposal for the same reasons as given above but it notes that, as a matter of course, the Panel does make enquiries of the parties concerned in such a situation to ensure that they are aware of their responsibilities under General Principle 6 to keep shareholders and the market informed.

4.3 Q3: Do you agree that the offeree company should be able to request a "put up or shut up" deadline notwithstanding that it is in discussions or negotiations with the potential offeror?

All but one of the respondents generally agreed with this proposition, though some were concerned that if the offeree is in discussions with the potential offeror, then the Panel should take account of the views of the offeror in setting the 'put up or shut up' deadline and perhaps set a longer lead time for announcement by the offeror of its intentions. The Code Committee agrees that it is essential in such circumstances that the views of all parties be taken into consideration with a view to seeking the best outcome for offeree shareholders. It believes that this is provided for in the drafting of new Note 3 on Rule 2.4.

4.4 Q4: Do you agree that the Panel should retain flexibility in order to establish the appropriate time period for a potential offeror to clarify its intentions?

All respondents agreed that the Panel should have flexibility to fix the appropriate time period. One disagreed with the view expressed in the PCP that where a potential offeror has made an announcement of a possible offer voluntarily, a shorter period than normal might be imposed. As stated in the PCP, the Panel's normal approach is to seek clarification within six to eight weeks when the request is made at the start of the offer period. The Committee believes it is valid for the Panel to regard as a relevant factor in determining the period the voluntary or involuntary nature of the potential offeror's announcement but emphasises that the Panel will establish any deadline according to all the circumstances of the particular case under consideration.

4.5 Q5: Do you agree that a potential offeror should not normally be permitted to satisfy a "put up or shut up" obligation by announcing a pre-conditional offer?

4.5.1 Most respondents believed that an offeror should be permitted to satisfy a 'put up or shut up' obligation by announcing a pre-conditional offer. They felt that the important factor was the nature of the pre-condition and that the existing requirements under the Note on Rule 2.4 (proposed new Note 1(a)) and Note 6 on Rule 2.5 for anyone planning to announce a pre-conditional offer to consult the Panel provided sufficient safeguard.

4.5.2 The Code Committee accepts this argument and therefore proposes to delete the proposed new Note 1(b) on Rule 2.4. It will therefore be the case that any pre-condition considered by the Panel to be acceptable in an announcement made in normal circumstances will be acceptable when an announcement has to be made pursuant to a 'put up or shut up' ruling. The Code Committee will be consulting shortly on the nature of acceptable conditions and pre-conditions.

4.6 Q6: Do you agree with the conclusions set out in paragraph 4.19?

4.6.1 In paragraph 4.19 of the PCP the Code Committee concluded that the period of lock-out for an offeror who has made a no intention to bid statement under Rule 2.8 need be no longer than six months and that the Panel did not therefore need the facility to impose a longer period. Most respondents agreed with this proposal but two wanted the lock-out to be twelve months in all cases and others felt that the Panel should be able to impose a longer period in exceptional circumstances.

4.6.2 The Annual Report of 2000-2001 envisaged that the facility for extending the lock-out period, provided under Rule 35.1(b), might be used when the offeree had already suffered from an extended siege. The 'put up or shut up' regime will, however, limit the initial siege to which the offeree company will be subject and, moreover, will enable the offeree company to choose the moment at which it may request the Panel to consider a halt to that siege. The Code Committee does not, therefore, believe that a lock-out period of more than six months is necessary.

4.7 Q7: Do you agree that the Panel should normally announce any "put up or shut up" deadline imposed?

4.7.1 All the respondents agreed that the Panel should announce 'put up or shut up' deadlines. However, one respondent proposed that if, at the time of the announcement, the potential offeror has not been named, then its identity should not be revealed in the announcement. This respondent went on to say that if the potential offeror was still unnamed when the 'put up or shut up' deadline was reached and did not intend to make an offer, then the announcement made pursuant to Rule 2.8 should be made either by the offeree company or by the Panel.

4.7.2 Offer periods in which the potential offeror is unnamed can arise when an announcement of a possible offer is made by the offeree company, for example, when there has been an inadvertent leak following an approach from a potential offeror. While in principle the Code Committee agrees that it would be inappropriate for an unnamed potential offeror to be identified in the announcement of a 'put up or shut up' deadline, such a deadline is designed to avoid a prolonged siege. In the circumstances described, the offeree company would be able to end the siege itself by announcing that it had terminated talks or that the potential offeror had gone away. It therefore would not need to request the imposition by the Panel of a 'put up or shut up' deadline. If the potential offeror wished to continue to pursue the offeree company, it would then have to make its interest known publicly. At that point, the offeree would be entitled to make a request under Rule 2.4(b).

4.7.3 The Code Committee has therefore concluded that Rule 2.4(b) should apply only in situations where the potential offeror is named in any public announcement. The first sentence of Rule 2.4(b) will therefore now read as follows:

(b) At any time following the announcement of a possible offer (provided the potential offeror has been publicly named), the offeree company may request that the Panel impose a time limit for the potential offeror to clarify its intentions with regard to the offeree company. …

4.7.4 Another respondent suggested that the announcement by the Panel should be delayed until two weeks before the deadline to prevent its putting extra pressure on the negotiating parties. The Code Committee believes, however, that any delay in announcement of the deadline would lead to a risk of its leaking and therefore, that once a deadline has been agreed, it should be announced forthwith.

4.8 Q8: Do you agree with the proposed amendments in paragraph 4.21?

4.8.1 Subject to the comments made under the individual questions above, there was general support for the amendments proposed in relation to 'put up or shut up'.

4.8.2 The Code Committee has accepted some amendments as follows:

(i) as a result of the comments made in response to Question 5, as stated in paragraph 4.5.2 above, the Code Committee has accepted the deletion of Note 1(b) on Rule 2.4;

(ii) the amendment of the first sentence of Rule 2.4(b) as described above in Paragraph 4.7.4; and

(iii) it was suggested that new Note 2 on Rule 2.4 should make reference to Note 1 on Rule 19.3, as being the Code provision applicable when a potential offeror announces that it is considering making an offer to compete with one already announced by a third party. The Code Committee agrees that this would be useful and therefore has added a cross reference at the end of the new Note 2 to read, *"See Note 1 on Rule 19.3."*.

4.9 Q9: Do you agree that following a no intention to bid statement a potential offeror should be required to "down tools" as envisaged by paragraphs 5.3.3 and 5.3.5?

4.9.1 While respondents generally accepted that potential offerors should be required to 'down tools' following a no intention to bid statement, some felt

the requirement should be tougher than proposed and others that it should be more relaxed. It was suggested, for example, that during the lock-out period, the potential offeror might be required to make an announcement as a result of Listing Rules' obligations and should be able to do so. The Code Committee accepts that exceptional situations may arise, which is why new Rule 2.8 gives the Panel the power to grant dispensations from the strict requirements of the Rule. Anyone considering seeking such a dispensation should consult the Panel at the earliest opportunity.

4.9.2 Another view was that the locked-out potential offeror should not be able to approach the offeree company to seek a recommendation, even if it had reserved the right to set aside its no intention to bid statement in the event of such a recommendation. The Code Committee believes that where the reservation for a recommendation has been specifically made in the Rule 2.8 statement, the potential offeror has to be able to make some approach to the offeree. It emphasises, however, that any potential offeror planning to make such an approach will have to consult the Panel in advance. If the initial approach is rebuffed, the potential offeror will not be able to make further approaches to the offeree during the lock-out period.

4.9.3 Several respondents were concerned to know what sanction the Panel would impose if the locked-out potential offeror breached Rule 2.8. They suggested that the lock-out period should be re-started as from the date of the breach. The Code Committee believes that such an automatic sanction might not always be appropriate but accepts that it would be useful for the Rule to enable an extension of the lock-out period in a case of breach. It has therefore added a final sentence to the Rule as follows:

"**Failure to comply with this Rule may lead to the period of six months referred to above being extended.**"

4.10 Q10: Do you agree with the conclusions set out in paragraph 5.4.3?

4.10.1 Paragraph 5.4.3 set out the matters that might be specifically reserved in a no intention to bid statement following a 'put up or shut up' ruling as: (i) the agreement or recommendation of the offeree company board, (ii) the announcement of a firm intention to make an offer for the offeree company by a third party, and (iii) the announcement by the offeree company of a whitewash proposal or a reverse takeover.

4.10.2 Two points came out of the responses to this question. First, there was a view that the making of an announcement of a possible offer under Rule 2.4 by a third party should also be permitted as a matter capable of reservation in Note 2 on Rule 2.8. The Code Committee does not believe that this would be appropriate. While the announcement of a possible offer under Rule 2.4 does start an offer period and put the offeree company under siege again, it provides no certainty that the third party offer will be made.

4.10.3 The second point raised was that potential offerors who make a voluntary no intention to bid statement should be subject to the same regime as those who are forced to do so following a 'put up or shut up' ruling. Some felt that the strict regime in Note 2 on Rule 2.8 should apply universally, while another respondent felt that those required to make a no intention to bid statement under Rule 2.4(b) should be able to specify any particular event provided it was clear and unambiguous. The Code Committee does not agree with either viewpoint.

4.10.4 A voluntary Rule 2.8 statement can arise, for example, when there is speculation about the position of a major shareholder in a company as a potential offeror, perhaps as a result of a leak for which the shareholder is not responsible. That shareholder may not be contemplating an offer but may then wish, or be asked by the Panel, to clarify his position. The Code Committee believes that in such circumstances, since that shareholder has not been responsible for putting the offeree company under any prolonged siege, he should be able to specify a wider range of reservations than the potential offeror who is forced into making a no intention to bid statement following a 'put up or shut up' ruling. The Panel must be consulted about specific

reservations and judges them on the facts of the particular case. It will only permit reservations relating to specific events which do not rely on the subjective judgement of the potential offeror alone.

4.10.5 Conversely, while the Code Committee believes that, as a rule, a potential offeror who is forced into making a Rule 2.8 statement under Rule 2.4(b) should be restricted to reserving only the matters specified in Note 2 on Rule 2.8, it accepts that there may be circumstances in which a different reservation may be appropriate. Note 2 on Rule 2.8 gives the Panel flexibility to allow other reservations as described above.

4.11 Q11: Do you agree that a "put up or shut up" obligation should also apply to an offeror and its concert parties as described in paragraph 5.5.3?

4.11.1 There was general support for this proposition, subject to the exception, set out in the PCP, that it should not apply to any financial or other professional adviser which is a member of a concert party solely by reason of presumption (5) of the definition of "acting in concert" as set out in the Code. The Code Committee does not believe it necessary to include this exception in the Rule but understands that this is the Executive's practice.

4.11.2 One respondent felt that it should be possible for the Panel to give its consent to a minor concert party member (one who would not ultimately be a controller of the offeree or its successor) joining a different concert party in a similarly minor role. The Rule provides the flexibility to permit this, though the Code Committee understands that it is not the Panel's normal practice to exercise it. The consequences of being in a concert party with a potential offeror should be very clear and anyone contemplating entering such a concert party will need to bear those consequences in mind.

4.11.3 However, to answer the concerns of another respondent, expressed in relation to this and the next question, the Code Committee wishes to make it clear that Rule 2.8 is not intended to prevent either the locked-out potential offeror or any of its concert parties from joining with other shareholders for the purposes

of corporate governance activity, such as requisitioning a general meeting to change the board. Such activity is covered by Note 2 on Rule 9.1 on 'Collective shareholder action'.

4.12 Q12: Do you agree that a party making a no intention to bid statement should not be permitted to act in concert with another offeror during the six month lock-out period?

4.12.1 This proposal also received general support but with concerns similar to those expressed in responses to the previous question. In particular, one respondent felt that a locked-out offeror should be able to collaborate with an unconnected third party to make an offer. The Code Committee does not believe this should be possible, unless one of the events specified in Note 2 on Rule 2.8 occurs (always provided, of course, that the locked-out offeror has made the relevant reservation in its no intention to bid statement).

4.13 Q13: Do you agree with the proposed amendments referred to in section 5.6?

4.13.1 In addition to the comments mentioned above, one respondent felt it was not appropriate to apply the 'down tools' regime in Rule 2.8 equally to failed or lapsed offerors in Rule 35.1. The Code Committee believes that it is appropriate to apply the same restrictions to these cases but notes that, as in Rule 2.8, the Panel has flexibility in Rule 35.1 to give dispensations if appropriate.

4.13.2 On reflection, the Code Committee has changed the heading of Note 2 on Rule 2.4 to *"Announcement of a potential competing offer"* in order to avoid confusion with the main heading of the Rule.

4.13.3 In order to avoid any overlap between paragraphs (a) and (d) of Rules 2.8 and 35.1, the Code Committee has decided to delete the words 'announcement or' in paragraph (d) of both Rules.

4.13.4 Also by way of clarification, the Code Committee has added a reference at the end of new Note (c) on Rules 35.1 and 35.2 to the continued application of Rule 2.2(e) to an offeror whose offer has lapsed for regulatory reasons but who is continuing to seek clearance or a decision from the relevant regulatory authorities with a view subsequently to making a new offer with the consent of the Panel. The new Note (c) disapplies the restriction in Rule 35.1(e) in relation to such offerors, so that they are able to extend knowledge of any possible offer to persons outside those who need to know in the offeror and its immediate advisers. However they may only do this subject to the provisions of Rule 2.2(e), which requires consultation with the Panel. The Code Committee believes the reference to Rule 2.2(e) acts as a useful reminder.

4.13.5 Finally, the Code Committee has added a new Note 4 to Rule 2.8. This makes it clear that the way in which a 'no intention to bid statement' is reported can be as important as the statement itself. The Panel is likely to hold any person making such a statement also to any publicly reported interpretations of it and the Note therefore highlights the importance of advisers' responsibility to alert their clients to the implications under the new Rule 2.8 of making statements of intention not to make an offer.

5. Amendment of the Code

Appendix 1 to this document sets out in full the text of the relevant provisions of the Code which have been added or amended as a result of this consultation exercise, taking account of the further changes discussed above. The amendments will take immediate effect.

APPENDIX 1

NB The Code Committee has today also published Response Statement 2004/2 on Possible Offer Announcements, which sets out further amendments to Rule 2.4 in addition to those given below.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

(a) Except in the case of a mandatory offer under Rule 9, until a firm intention to make an offer has been notified, a brief announcement that talks are taking place (there is no requirement to name the potential offeror in such an announcement) or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule. In most cases where such an announcement is made to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3 should be given.

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

NOTES ON RULE 2.4

1. Pre-conditions

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

2. Announcement of a potential competing offer

The provisions of Rule 2.4(b) will not apply where an offer has already been announced by a third party and the potential offeror makes a statement that it is considering making a competing offer.

See Note 1 on Rule 19.3.

3. Period for clarification

The precise time limit imposed in any particular case under Rule 2.4(b) will be determined by reference to all the circumstances of the case and the Panel will endeavour to balance the potential damage to the business of the offeree company arising from the uncertainty caused by the potential offeror's interest against the disadvantage to its shareholders of losing the prospect of an offer.

4. Extension of time limit

A time limit for a potential offeror to clarify its intentions imposed under Rule 2.4(b) may be extended only with the consent of the Panel. The Panel's consent will normally be granted if the board of the offeree company consents to the extension.

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

A person making a statement that he does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. Except with the consent of the Panel, unless there is a material change of circumstances or there has occurred an event which the person specified in his statement as an event which would enable it to be set aside, neither the person making the statement, nor any person who acted in concert with him, nor any person who is subsequently acting in concert with either of them, may within six months from the date of the statement:

(a) announce an offer or possible offer for the offeree company (including a partial offer which would result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company);

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

(c) acquire any shares of the offeree company or any rights over such shares if the shares and rights over shares held by any such person, together with any persons acting in concert with him, would in aggregate carry 30% or more of the voting rights of the offeree company;

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

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

Failure to comply with this Rule may lead to the period of six months referred to above being extended.

NOTES ON RULE 2.8

1. Prior consultation

Any person considering issuing such a statement should consult the Panel in advance, particularly if it is intended to include specific reservations to set aside the statement.

2. Rule 2.4(b)

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

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

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

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

3. Concert parties

Where a statement to which Rule 2.8 applies is made otherwise than following a time limit being imposed under Rule 2.4(b), the restrictions imposed by Rule 2.8 will normally apply also to any person acting in concert with the person making the statement unless it is made clear in the statement, or at the time the statement is made, that any such person acting in concert is continuing to consider making an offer for the offeree company.

4. Media reports

When considering the application of this Rule, the Panel will take into account not only the statement itself but the manner of any subsequent public reporting of it.

Advisers must therefore ensure that directors and officials of companies are warned that they must consider carefully the implications of Rule 2.8, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. In appropriate circumstances, the Panel will require a statement of retraction or clarification.

Rule 35.1

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in

concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:—

(a) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company);

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

(c) acquire any shares of the offeree company or any rights over such shares if the shares and rights over shares held by any such person, together with persons acting in concert with him, would in aggregate carry 30% or more of the voting rights of the offeree company;

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

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

NOTE ON RULES 35.1 and 35.2

(a)…

(b)…

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

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

APPENDIX 2

List of respondents

Association of British Insurers

Guy Norman, Clifford Chance

Giles Distin, Hammonds

Institute of Chartered Accountants in England and Wales

The Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England & Wales' Standing Committee on Company Law

London Investment Banking Association

National Association of Pension Funds

John von Spreckelsen, Executive Chairman, Somerfield plc

Alexander Thomson, Taconic Capital Advisers UK Limited