

RS 2004/2 Issued on 6 August 2004

THE PANEL ON TAKEOVERS AND MERGERS

POSSIBLE OFFER ANNOUNCEMENTS

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2004/2**

1. Introduction

1.1 On 25 February, the Code Committee of the Takeover Panel (“the Code Committee”) published a Public Consultation Paper (“PCP 2004/2”) entitled “Possible Offer Announcements”.

1.2 The purpose of this paper is to provide details of the Code Committee’s response to the external consultation process on PCP 2004/2.

2. Number of responses received

A total of 8 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 general support for the Code Committee’s proposals for dealing with an announcement about a possible offer that includes detailed or specific information about the terms on which an offer might be made. The one area of disagreement related to the ability of a party making an unqualified statement about the value of its possible offer subsequently to make an offer at a lower price.

3.2 The Code 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 Code should not generally seek to restrict the information that can be included in a possible offer announcement?

There was general support for this proposition.

4.2 Q2: Do you agree that an offeror which makes an unqualified statement about the value of its possible offer should not normally be permitted subsequently to make a lower offer (even if that lower offer would be recommended by the company board)?

Q3: Do you agree that an offeror should be permitted to make an offer at below a previously stated price provided that at the time it reserved the right to do so in circumstances which subsequently arise?

Q4: Do you agree that offeree board recommendation or a firm offer announcement by a third party should always be allowed as reservations?

Q5: Do you agree that subjective matters, such as due diligence, should not be allowed as reservations in this context?

- 4.2.1 Several respondents felt that the offeror should not be prevented from making a subsequent lower offer, particularly if that offer were recommended by the offeree company board. One felt that the Rule should provide that a lower offer would be permitted *only* if the offeree board were prepared to accept it, provided always that the Panel had no reason for thinking that there had been any bad faith on the part of the offeror in making its original announcement.
- 4.2.2 The Code Committee has considered these views but believes that it is right that if a potential offeror makes an unqualified statement about the possible price of an offer, then, other than in wholly exceptional circumstances, it should not be able to reduce that price when it comes to announce the offer formally. It is important that shareholders and market practitioners should be able to understand from the face of the possible offer announcement what the potential offeror's intentions are.
- 4.2.3 It is for that reason that the Code Committee proposed that an offeror should be able to make an offer at a price below one it had previously stated provided that, at that time, it had specifically reserved the right to do so in clear and unambiguous terms. This proposal was universally supported.
- 4.2.4 As regards the nature of any specific reservations, there was general agreement that a firm announcement of an offer by a third party should be permitted, as should a recommendation from the board of the offeree. All but one of the respondents also generally considered subjective matters in

reservations to be undesirable. The one dissenter on this point felt that the vast majority of shareholders should be able to understand the implications of a clearly stated reservation and, therefore, that subjective matters, if stated clearly, should be allowed. The Code Committee accepts that certain shareholders may have a relatively good understanding of the offeror's meaning but fears that a subjective matter would be open to different interpretations. It therefore continues to believe that any matter reserved must be capable of objective determination in order to avoid market uncertainty.

4.3 Q6: Do you agree that any restrictions imposed on a potential offeror should apply throughout the offer period and for the three months thereafter?

All but one respondent, who would have preferred the restrictions to apply for six months, agreed.

4.4 Q7: Do you agree that concert parties should also be restricted as set out in paragraph 4.1.11?

4.4.1 Paragraph 4.1.11 proposed that when a number of persons acting in concert are interested in pursuing the offer, the restrictions should apply to each of the members of the concert party and should extend to future concert parties as well. Advisers, who are concert parties solely by reason of presumption (5) of the definition of 'acting in concert', will not be caught by this provision.

4.4.2 Most respondents agreed with this proposal, although some concern was expressed that the provision might preclude the restricted persons from joining with other shareholders solely for the purpose of the effective exercise of corporate governance. The Code Committee never intended that the provision should be used in this way; its purpose is to prevent a restricted potential offeror and its concert parties from tying up with another potential offeror, to make a new offer, which would not otherwise be permitted. It will, therefore, be possible for the restricted parties to engage in shareholder action, provided that in doing so, they do not trigger an obligation under Rule 9 to make an

offer on terms which would infringe the restrictions imposed. Any party subject to the restrictions should consult the Panel at the earliest opportunity if they are in doubt about the consequences of any proposed collective shareholder action.

4.5 Q8: Do you agree that, subject to Rule 32.2, a potential offeror should not be restricted from making an offer at above a price stated in an earlier possible offer announcement?

This proposition was accepted.

4.6 Q9: Do you agree that the Panel must be consulted in any case where a statement indicates an approximate, rather than a fixed possible future offer price?

4.6.1 This proposal was unanimously accepted, though several respondents qualified their acceptance by saying that the Panel should exercise its discretion in this area in a flexible manner on a case by case basis. They felt that the Panel should not prohibit statements indicating an approximate price provided they do not create a false impression or excessive uncertainty. In particular, there was some support for statements indicating the possibility of an offer at a substantial premium to an objective benchmark. On the other hand, one respondent felt that statements indicating approximate terms should be discouraged.

4.6.2 The Code Committee believes that, in line with its usual practice, the Panel will judge each case on its merits, always bearing in mind the need to maintain an orderly framework for the conduct of the possible offer. However, the Code Committee continues to believe that an announcement by a potential offeror that an offer may be made “at a substantial premium” to any benchmark, however objective, is unlikely to be acceptable since such an announcement will not give a clear indication of the price to which the offeror should be held in the event that a firm offer is made.

4.6.3 The Code Committee also wishes to make it clear that the requirement in the new Rule for a person to consult the Panel if it is considering including a statement relating to the terms on which an offer might be made should not delay any possible offer announcement that may be required under Rule 2.2. Any such requirement may still be satisfied by a brief ‘talks’ announcement.

4.7 Q10: Do you agree with the conclusions set out in section 5 (statements re terms other than offer price)?

Section 5 stated that if a potential offeror made a statement about the possible nature of the terms (eg cash or securities) on which it might make an offer, it should be held to that statement unless, at the time, it made a general but clear reservation to make an offer on different terms. This proposal was accepted.

4.8 Q11: Do you agree with the proposals set out in Paragraph 6.4 when a possible offer announcement including details of the terms on which an offer might be made is issued by the offeree company?

Paragraph 6.4 proposed that, when a possible offer announcement including possible terms is made by an offeree company, that company must consult the Panel and state whether or not the potential offeror has consented to or approved the announcement. All respondents agreed with the proposal.

4.9 Q12: Do you agree with the proposed amendments in Appendix A?

4.9.1 The amendments were accepted although some respondents felt that Rule 2.4(c) should include a reference to the circumstances in which the Panel would exercise its discretionary power. In PCP 2004/2, the Code Committee explained that, because of the need for certainty and the maintenance of orderly markets, a potential offeror making an unqualified statement about the terms in which it is considering making an offer, should, in the absence of wholly exceptional circumstances, be bound by that statement. The Code Committee does not believe that this needs to be written into the Rule.

4.9.2 In response to a view that the new Rule 2.4(c) was a little unwieldy, the Code Committee has slightly reformulated the Rule.

5. Amendments to the Code

Appendix 1 to this document sets out in full the text of the new provisions which have been added to the Code as a result of this consultation exercise. The amendments will take immediate effect.

APPENDIX 1

The Code Committee has today also published RS 2004/1 on 'Put up or Shut up' and No Intention to Bid Statements. That RS also contains amendments to Rule 2.4. The following amendments complete the revision of that Rule.

Rule 2.4

(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.

(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.

(d) Except with the consent of the Panel, the consequences of a statement to which Rule 2.4(c) applies will normally apply also to any person acting in concert with the potential offeror and to any person who is subsequently acting in concert with the potential offeror or such person.

NOTES ON RULE 2.4

1. *Pre-conditions*

...

2. *Announcement of a potential competing offer*

...

3. *Period for clarification*

...

4. *Extension of time limit*

...

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.

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.

7. *Statements by the offeree company*

Any statement made by the offeree company in relation to the terms on which an offer might be made must also make clear whether or not it is being made with the agreement or approval of the potential offeror. Where the statement is made with the agreement or approval of the potential offeror, the statement will be treated as one to which Rule 2.4(c) applies in the same way as if it had been made by the potential offeror itself. Where it is not so made, the statement must also include a prominent warning to the effect that there can be no certainty that an offer will be made nor as to the terms on which any offer might be made.

APPENDIX 2**List of respondents**

Association of British Insurers

Guy Norman, Clifford Chance

Antony Hichens

Institute of Chartered Accountants in England and Wales

The Joint Takeovers Working Party of the City of London Law Society's
Company Law Sub-Committee and the Law Society's Company Law
Committee

London Investment Banking Association

National Association of Pension Funds

Alexander Thomson, Taconic Capital Advisors UK Limited