

**RS 2004/4 Issued on 25 April 2005**

**THE PANEL ON TAKEOVERS AND MERGERS**

**CONDITIONS AND PRE-CONDITIONS**

**STATEMENT BY THE CODE COMMITTEE OF  
THE PANEL FOLLOWING THE EXTERNAL  
CONSULTATION PROCESS ON PCP 2004/4**

## **1. Introduction**

- 1.1 On 10 August 2004, the Code Committee of the Takeover Panel (“the Code Committee”) published a Public Consultation Paper (“PCP 2004/4”) entitled “Conditions and Pre-conditions”.
- 1.2 The purpose of this paper is to provide details of the Code Committee’s response to the external consultation process on PCP 2004/4.

## **2. Number of responses received**

A total of six responses was received, mainly from professional bodies representing practitioners and institutional shareholder bodies. A list of respondents can be found at Appendix 2.

## **3. Overview of responses**

- 3.1 Respondents generally supported the Code Committee’s proposals in relation to the invocation of conditions to an offer and also those relating to the inclusion of pre-conditions in announcements of both possible and firm offers. There was some disagreement about the type of pre-condition that should be allowed in firm offer announcements under Rule 2.5 and also the application of the current Note 2 on Rule 13 to the invocation of such pre-conditions. In addition, some concern was expressed about the Code Committee’s proposals in relation to offeree protection conditions.
- 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 test in Note 2 on Rule 13 should apply as discussed in Section 4 above?**

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4.1.1 In Section 4 of the PCP, the Code Committee proposed that Note 2 on Rule 13 should apply to bespoke or negotiated conditions in the same way as it applies to more standard, widely drafted conditions.

4.1.2 Most respondents agreed with this proposition. However, one was concerned that the proposed changes would result in negotiated, bespoke conditions in a recommended offer still being subject to an element of uncertainty if there was a question as to whether they would be judged to be of material significance or not under Note 2. This respondent suggested that an offeror should be free to determine conditions which were important in terms of its own purposes.

4.1.3 As stated in the PCP, the Code Committee believes that, in striking the appropriate balance between the interests of the offeror and the offeree company shareholders, it is 'legitimate for the Code to impose a high supervening threshold for the invocation of conditions in all cases'. The Code Committee agrees that there will inevitably be uncertainty as to whether any particular condition may be invoked, since it will always have to be judged in the light of all the circumstances prevailing at the time when invocation is sought. The Code Committee does not accept, therefore, that certain conditions should be exempt from the application of Note 2 on Rule 13 as revised (new Rule 13.4).

**4.2 Q2: Do you agree that, in considering whether a matter should give rise to a right for the offeror to lapse its offer, the Panel should take account of the factors listed in paragraph 4.11 above?**

**Q3: Do you agree that these factors should be reflected in a new Note on Rule 13?**

**Q4: Do you believe that there are any other factors which should be reflected in Rule 13?**

4.2.1 In paragraph 4.11 of the PCP, the Code Committee proposed that, in considering whether a particular matter should give rise to the right to invoke a condition, the Panel should take into account all relevant factors, including:

- whether the condition was the subject of negotiation with the offeree company;
- whether the condition was expressly drawn to offeree company shareholders' attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and
- whether the condition was included to take account of the particular nature of the business of the offeree company.

The Code Committee further proposed that these particular factors should be included in a new Note to Rule 13 (the proposed Note on new Rule 13.4).

4.2.2 All but one of the respondents agreed that the Panel should take account of the factors proposed when making decisions on the invocation of conditions. The remaining respondent was concerned that differentiating between the factors listed and other matters that might lead to an offeror wishing to lapse its offer could result in greater uncertainty in the market. It therefore favoured a tough materiality provision without specific factors being mentioned.

4.2.3 Others, who agreed that the Panel should take account of the factors listed, nonetheless made the point that the factors should not override the material significance test. Another view was that inclusion of factors in the Code might lead offerors to give undue weight to the factors listed at the expense of other matters that might be more pertinent to the facts of a particular case.

4.2.4 There was also concern about the example given in the PCP (paragraph 4.12) of the 'net debt' condition as follows:

“the ‘net debt’ of the offeree company being certified as being not more than £100 million as at the date on which the offer becomes or is declared unconditional as to acceptances”.

The point made was that, taken on its own at a particular point in time, the net debt of an offeree company could be a poor measure of its value or financial health. In the example given, one respondent suggested that the fact of the offeree company’s ‘net debt’ exceeding £100 million should not of itself be sufficient reason for the offeror to lapse its offer since the offeree company might be about to receive a payment taking the ‘net debt’ position below that figure. Another respondent linked this to a more general point that the Panel should also consider whether the circumstances giving rise to an offeror wishing to invoke a condition were temporary or permanent.

- 4.2.5 Another respondent, while agreeing that the factors were relevant, queried the role of the Panel in judging the materiality of negotiated or bespoke conditions. That respondent felt that in the context of a recommended offer, such conditions should be considered material by definition or that the Panel should confirm the materiality of the conditions before they were published. In a hostile situation, the respondent suggested, the offeror should have a right to an ex parte view from the Panel on the materiality of conditions.
- 4.2.6 The inclusion of the first factor in paragraph 4.2.1 above indicates that the Code Committee believes that the fact of a condition having been negotiated should be significant in the Panel’s assessment of its materiality. However, the Code Committee does not accept that negotiated or bespoke conditions to a recommended offer should automatically be regarded as being material. Indeed, another respondent pointed out that it would be possible for a comparatively trivial condition to have been the subject of negotiation with the offeree company. The Code Committee considers that the role of the Panel in determining materiality is key to ensuring consistency of approach and to providing offeree company shareholders and the market with the necessary

comfort that a condition may not be invoked at the sole discretion of the party for whose benefit it has been written.

- 4.2.7 Moreover, the Code Committee does not accept that it would be appropriate for the Panel to make an assessment as to the materiality of any condition, whether on an ex parte or inter partes basis, before that condition is published. Note 2 on Rule 13 (proposed new Rule 13.4) makes it clear that an offeror should not invoke a condition to cause the offer to lapse unless “*the circumstances which give rise to the right to invoke the condition are of material significance in the context of the offer*”. It is, therefore, impossible for the Panel to make a fully informed assessment as to the materiality of a condition until such time as the offeror wishes to invoke it. When making that assessment, the Panel will take all relevant factors into account in the light of the circumstances of the case.
- 4.2.8 Given the comments received, the Code Committee has reconsidered the desirability of including in the Code the factors listed above. It accepts that doing so might lead companies and advisers to give undue weight to those factors and that there may be other factors of equal weight that will generally have to be taken into account. It accepts the comments made about the example of the ‘net debt’ condition in the PCP and agrees that it will, for example, be important for the Panel to consider the temporary or permanent nature of the circumstances giving rise to the offeror’s wish to invoke a condition.
- 4.2.9 Furthermore, in re-considering the factors, the Code Committee has concluded that, rather than referring to ‘the particular *nature of the business* of the offeree company’, the third factor should refer to, ‘the particular *circumstances* of the offeree company’.
- 4.2.10 In conclusion, while the Code Committee continues to believe that the factors listed above (as modified by the previous paragraph) will be of general relevance, it accepts that it may not be constructive to list them in the Code. The proposed Note on new Rule 13.4 will not, therefore, be included.

**4.3 Q6: Do you agree that the inclusion of pre-conditions in a possible offer announcement is acceptable?**

**Q7: Do you agree that such pre-conditions can be in subjective form?**

**Q8: Do you agree that a pre-conditional possible offer announcement must make clear (i) whether any pre-conditions are waivable and (ii) that there can be no certainty that any offer will be made?**

All respondents agreed with the proposals for the inclusion of pre-conditions in possible offer announcements. These will therefore be reflected in the revised Note on Rule 2.4.

**4.4 Q9: Do you agree that the Code should not prohibit pre-conditional firm offer announcements as a matter of principle?**

**Q10: Do you agree that the standard for including pre-conditions in a Rule 2.5 announcement should be the same as the standard which is applied by Rule 13 to conventional offer conditions?**

All respondents agreed that pre-conditions should be permitted in firm offer announcements made under Rule 2.5 and that the same standard as regards subjectivity should apply to such pre-conditions as applies to conventional offer conditions. This is reflected in the new Rule 13.1.

**4.5 Q11: Do you agree with the above conclusions as to when a firm offer can be announced on a pre-conditional basis?**

4.5.1 This question elicited a number of different views. The proposal in the PCP was that an offeror should normally be permitted to announce a firm offer under Rule 2.5 subject to a pre-condition only if that pre-condition:

- relates to OFT/Competition Commission or European Commission clearance; or
- involves another material official authorisation or regulatory clearance relating to the offer and either the offer is recommended by the board of the offeree company or the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the usual Code timetable.

4.5.2 While all respondents accepted that regulatory pre-conditions should be permitted, some resisted the idea that they should be the only permitted pre-conditions. One respondent, while agreeing with the proposals, nonetheless felt in general terms that the Panel should retain discretion to permit other pre-conditions, but other respondents were more specific in seeking more flexibility. As examples of permissible pre-conditions they cited: any to which the offeree board had given its consent; any pre-condition capable of being objectively and readily assessed as to whether it had been satisfied or not; and any matter that was material in the context of the offer and likely to prove incapable of satisfaction within the offer timetable. One respondent was also concerned that the permitted regulatory pre-conditions should extend to cover approvals from other overseas regulators and other, non-regulatory, consents from third parties.

4.5.3 An argument put forward in favour of more liberalisation was that the restrictive regime proposed would prevent an offeror from demonstrating its true level of commitment to the offer and that, therefore, forcing an offeror to make a possible offer announcement with pre-conditions under Rule 2.4 would lead to an artificial understatement of its commitment. The Code Committee has always recognised this as an argument but continues to believe that to widen the categories of acceptable pre-conditions could risk undermining the certainty attached to a Rule 2.5 announcement (the point at which General Principle 3 becomes operative).



- 4.5.4 However, the proposed new Rule 13.3 was always intended to give the Panel discretion to permit pre-conditions other than those dealing with regulatory clearances or material official authorisations. It was principally for this reason that the Rule provides for exceptions to be made with the consent of the Panel. In the light of the comments received, the Code Committee has been considering the circumstances in which the Panel might consider exercising that discretion, bearing in mind the importance of maintaining a clear distinction between possible announcements made under Rule 2.4 and firm announcements made under Rule 2.5.
- 4.5.5 The Code Committee believes that it is of fundamental importance that any pre-condition, to be at all acceptable, would have to be readily capable of measurement or assessment as to whether it had been satisfied. This is clear from the proposed new Rule 13.1. However, there could be some pre-conditions that might appear to be capable of objective assessment as to whether they had been satisfied and yet would still be unacceptable. The prime example would be a pre-condition relating to a recommendation from the offeree board. The Code Committee considers that such a pre-condition would be unacceptable. It believes that procuring a recommendation is a matter which either goes more to the tactics of a bid or is one that could not be said to be material in the context of the offer (by reference to the underlying business or the assets being bought). An offer subject to a recommendation would not, in fact, be a firm offer.
- 4.5.6 Other examples of pre-conditions outside the permitted categories that might be requested could be: the completion of a transaction that the offeree had commenced; or the resolution of litigation in which either party was involved. In considering such examples, the Code Committee has come to the conclusion that most will normally give rise to a view either that, if the offeror is fully committed, the matter will best be stipulated as a condition, to be dealt with within the normal offer timetable, or that the offeror is not really ready to commit to the strictures of General Principle 3 and should wait. In the latter case, the offeror would always be able to make a pre-conditional possible offer announcement under Rule 2.4.

4.5.7 As regards offeree board consent to a proposed pre-condition, while it would be a factor for the Panel to consider (witness the factors to be considered on invocation of any condition or pre-condition as listed in paragraph 4.2.1 above), the Code Committee does not believe that, of itself, it should be the determinant as to whether a pre-condition could be acceptable.

4.5.8 As regards consents from overseas regulators, the Code Committee confirms that the proposed new Rule 13.3, as drafted, is intended to cover these and, exceptionally, the Code Committee believes, the Rule could also be construed to permit pre-conditions relating to consents from third parties, if appropriate.

4.5.9 The Code Committee therefore concludes that the circumstances in which the Panel should be prepared to consider exercising its discretion to allow pre-conditions outside the permitted categories are likely to be very limited. It envisages that such circumstances might arise, exceptionally, when the requested pre-condition:

- relates to a matter concerning the offeree company that is likely to be incapable of resolution within the normal offer timetable (so that a condition would not be appropriate); and
- crucially, is a matter without which it would be unreasonable to expect the offeror to make the offer at all (and it would not, in the circumstances, be in the interests of offeree company shareholders to make the offeror wait to bid).

The Code Committee believes, however, that this is an area in which the Panel should act with circumspection and be aware of the risk of undermining the certainty provided by General Principle 3.

**4.6 Q12: Do you agree that Rule 2.7 should be amended to reflect the Panel's practice described in paragraph 7.16 above?**

In paragraph 7.16, the Code Committee proposed to amend Rule 2.7 to codify the Panel's practice of granting a dispensation from posting an offer document if one or more of the offer conditions is breached or otherwise incapable of being satisfied after the offer announcement has been made. All respondents agreed with the proposal.

**4.7 Q13: Do you agree that it is not necessary to repeat offer conditions as pre-conditions in a pre-conditional offer announcement?**

All respondents agreed with this proposal. However, in addition, one suggested that an offeror should be entitled to re-designate a pre-condition to an offer as a condition, should it so choose. The Code Committee considers that if an offeror wishes make such a re-designation, it will be free to do so.

**4.8 Q14: Do you agree that the test set out in Note 2 on Rule 13 should apply to the invocation of pre-conditions included in a Rule 2.5 announcement as it applies to conventional offer conditions?**

4.8.1 While some agreed, two respondents felt that the materiality test set out in Note 2 on Rule 13 (proposed new Rule 13.4(a)) should not be applied to the invocation of pre-conditions in Rule 2.5 announcements.

4.8.2 One argument was that pre-conditions relating to European Commission and UK Competition Commission clearances were already stated to be exempt from the materiality test (see new Rule 13.2); the other pre-conditions listed as permissible in new Rule 13.3(b) related to very similar authorisations or clearances and it therefore seemed illogical to apply the test to them. Another argument was that pre-conditions are different in character from the conditions to which Note 2 on Rule 13 applies. For example, it was said, a financing pre-condition could not lightly be required to be waived.

4.8.3 The Code Committee accepts the logic in these arguments and notes that, in paragraph 3.5 of the PCP, it stated that, in practice, Note 2 on Rule 13 does not

apply to conditions (or, by implication, pre-conditions) required to give effect to some overriding statutory or regulatory requirement necessary to implement the offer. The Code Committee also accepts that the Panel, when going through the process of approval of any pre-condition, will have to make an assessment of the materiality of the substance of the pre-condition. However, the Code Committee believes that it is desirable to retain the Panel's check on the invocation of any pre-condition so that determination of the satisfaction or otherwise of the pre-condition does not lie wholly with the offeror and consistency of approach is maintained. It does not, therefore, intend to amend the proposed new Rule 13.4 in its application to pre-conditions.

**4.9 Q15: Do you agree with the Code Committee's conclusions in relation to financing pre-conditions?**

- 4.9.1 The Code Committee proposed that a financing pre-condition could be permitted in exceptional circumstances when the expected timetable for satisfying another permitted pre-condition was expected to be unusually lengthy (and then the financing pre-condition had to be satisfied within 21 days of the satisfaction of any other pre-conditions).
- 4.9.2 While generally agreeing with the Code Committee's proposals, respondents nevertheless raised some questions as to their application. They suggested in particular that it might also be appropriate to permit financing pre-conditions in other exceptional circumstances, such as, for example, when the amount of financing required for the transaction necessitated the involvement of an unusually large number of financing parties (thus triggering an announcement under Rule 2.2(e)); or when offeror shareholder approval related to the financing of the offer was required.
- 4.9.3 The Code Committee recognises the validity of these arguments and intends, therefore, to amend the proposed Note on Rule 13.3 to provide that, while financing pre-conditions will be permitted only in exceptional circumstances, those circumstances may be wider than the specific example given of

regulatory clearance or material official authorisation. The proposed Note will therefore read as follows:

*NOTE ON RULE 13.3*

*Financing pre-conditions*

*An offer must not normally be made subject to a condition or pre-condition relating to financing. In exceptional cases, the Panel may be prepared to accept a pre-condition relating to financing either in addition to another pre-condition permitted by this Rule or otherwise: for example where, due to the likely period required to obtain any necessary material official authorisation or regulatory clearance ~~or otherwise~~, it is not reasonable for the offeror to maintain committed financing throughout the offer period, ~~and provided that~~ in which case:*

*(a) the financing pre-condition must be satisfied (or waived), or the offer must be withdrawn, within 21 days after the satisfaction (or waiver) of ~~the~~ any other pre-condition or pre-conditions permitted by this Rule; and*

*(b)*

*...*

**4.10 Q16: Do you agree with the Code Committee’s conclusions in relation to the obligation to satisfy offer conditions and pre-conditions?**

4.10.1 All respondents agreed with the proposal to codify the obligation on an offeror to use all reasonable efforts to ensure the timely satisfaction of the conditions and pre-conditions to its offer.

4.10.2 One respondent suggested that the proposed new Rule 13.4(b) should contain some flexibility to allow for exceptional circumstances to allow for the exercise of directors’ fiduciary duties. The Code Committee believes that the Rule as drafted, requiring the offeror to use ‘**all reasonable efforts**’ provides sufficient flexibility.

**4.11 Q17: Do you agree with the Code Committee's conclusions in relation to offeree protection conditions?**

4.11.1 Some respondents were concerned that the proposed measures in the PCP, particularly those relating to the possible operation of withdrawal rights, were overly complex, given that the situation covered was likely to arise only rarely. Specifically, there was concern that, at the end of the period stipulated by the Panel for withdrawal rights to run, the offeror would be permitted, but not required to declare its offer unconditional as to acceptances. There was a view that, if the offer had not been declared unconditional as to acceptances, the offeror should be required to make that declaration if, at the end of the stipulated period, the acceptance condition was satisfied. And also, if the offer had been declared unconditional as to acceptances before withdrawal rights were introduced and, at the end of the period stipulated by the Panel for withdrawal rights to run, the level of acceptances was equal to or higher than the level at which it had originally been declared unconditional, then, similarly, the offeror should be required to declare its offer unconditional once again.

4.11.2 The Code Committee notes these views. Its proposal in the PCP was that the mechanics for the operation of withdrawal rights would have to be determined on a case by case basis. On the specific point above, the Code Committee considers it likely that the Panel would require the offeror to declare its offer unconditional after the period stipulated for withdrawal rights to run in both the sets of circumstances described.

4.11.3 Another respondent suggested that some of the matters dealt with in the proposed Rule might be more suited to being in a Note. The Code Committee accepts this and, therefore, proposes to restructure the Rule as follows:

### 13.5 INVOKING OFFEREE PROTECTION CONDITIONS

An offeree company should not invoke, or cause or permit the offeror to invoke, any condition to an offer unless the circumstances which give rise to the right to invoke the condition are of material significance to the shareholders in the offeree company in the context of the offer.

#### NOTES ON RULE 13.5

##### 1. When an offeree protection condition may be invoked

~~However, this does not necessarily mean that~~ The circumstances in which the offeree company will be allowed to invoke, or cause or permit the offeror to invoke, a condition ~~only in circumstances where~~ will not necessarily be restricted to those in which the Panel would permit an offeror to invoke ~~such~~ a condition. In deciding whether an offeree company may invoke, or cause or permit the offeror to invoke, a condition, the Panel will take into account all relevant factors.

##### 2. Availability of withdrawal rights

If the offeree company is not permitted to invoke, or to cause or permit the offeror to invoke, a condition, the Panel may instead determine in the light of all relevant facts that accepting shareholders should have the right to withdraw their acceptances on such terms as the Panel considers appropriate and, if so, the effect of this on the Code timetable. The ability of the Panel to require the introduction of withdrawal rights in such circumstances and to amend the Code timetable, and also the fact that the offer may cease to be unconditional as to acceptances as a result of such withdrawal rights being introduced, should be incorporated into the terms of the offer.

**4.12 Do you agree with the proposed amendments to the Code set out in Appendix A?**

Drafting points raised have been picked up in the previous paragraphs.

**5. Amendments to the Code**

Appendix 1 to this document sets out in full the amendments to the Code to be made as a result of this consultation exercise. The amendments will take immediate effect.



## APPENDIX 1

### Amendments to the Code

*Further amendments to the Code, made pursuant to RS 2004/3, published on [14 March 2005] will take effect at the same time as those set out below.*

#### **Rule 2.4**

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

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##### *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. Any such pre-conditional possible offer announcement must:*

*(a) clearly state whether or not the pre-conditions must be satisfied before an offer can be made or whether they are waivable; and*

*(b) include a prominent warning to the effect that the announcement does not amount to a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-conditions are satisfied or waived.*

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#### **Rule 2.5**

#### **2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER**

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*NOTES ON RULE 2.5*

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6. *Pre-conditions*

*The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the posting of the offer will be subject. (See also Rule 13.)*

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**Rule 2.7****2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”**

**When there has been an announcement of a firm intention to make an offer, the offeror must normally proceed with the offer unless, in accordance with the provisions of Rule 13.4, the offeror is permitted to invoke a pre-condition to the posting of the offer or would be permitted to invoke a condition to the offer if the offer were made.**

*NOTE ON RULE 2.7**When there is no need to post*

*An announced offeror need not proceed with its offer if a competitor has already posted a higher offer or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.*

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**Rule 9.3****9.3 CONDITIONS AND CONSENTS**

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*NOTES ON RULE 9.3*

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3. *When dispensations may be granted*

*The Panel will not normally consider a request for a dispensation under this Rule other than in exceptional circumstances, such as:-*

...

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

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**Rule 13****RULE 13. PRE-CONDITIONS IN FIRM OFFER ANNOUNCEMENTS AND OFFER CONDITIONS****13.1 SUBJECTIVITY**

**An offer must not normally be subject to conditions or pre-conditions which depend solely on subjective judgements by the directors of the offeror or of the offeree company (as the case may be) or the fulfilment of which is in their hands. The Panel may be prepared to accept an element of subjectivity in certain circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition or pre-condition may depend, especially in cases involving official authorisations or regulatory clearances, the granting of which may be subject to additional material obligations for the offeror or the offeree company (as the case may be).**

## 13.2 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

A condition or pre-condition included pursuant to Rule 12.1(c) is not subject to the provisions of Rules 13.1 or 13.4(a).

## 13.3 ACCEPTABILITY OF PRE-CONDITIONS

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

Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition: —

- (a) is included pursuant to Rule 12.1(c); or
- (b) involves a material official authorisation or regulatory clearance relating to the offer and:
  - (i) the offer is publicly recommended by the board of the offeree company; or
  - (ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable.

(See Note 6 on Rule 2.5.)

### NOTE ON RULE 13.3

#### *Financing pre-conditions*

*An offer must not normally be made subject to a condition or pre-condition relating to financing. In exceptional cases, the Panel may be prepared to accept a pre-condition relating to financing either in addition to another pre-condition permitted by this Rule or otherwise: for example where, due to the likely period required to obtain any necessary material official authorisation or regulatory clearance, it is not reasonable for the offeror to maintain committed financing throughout the offer period, in which case:*

- (a) *the financing pre-condition must be satisfied (or waived), or the offer must be withdrawn, within 21 days after the satisfaction (or waiver) of any other pre-condition or pre-conditions permitted by this Rule; and*
- (b) *the offeror and its financial adviser must confirm in writing to the Panel before announcement of the offer that they are not aware of any reason why the offeror would be unable to satisfy the financing pre-condition within that 21 day period.*

### 13.4 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) An offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. The acceptance condition is not subject to this provision.

(b) Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.

### 13.5 INVOKING OFFEREE PROTECTION CONDITIONS

An offeree company should not invoke, or cause or permit the offeror to invoke, any condition to an offer unless the circumstances which give rise to the right to invoke the condition are of material significance to the shareholders in the offeree company in the context of the offer.

#### NOTES ON RULE 13.5

1. *When an offeree protection condition may be invoked*

*The circumstances in which the offeree company will be allowed to invoke, or cause or permit the offeror to invoke, a condition will not necessarily be restricted to those in which the Panel would permit an offeror to invoke a condition. In deciding whether an offeree company may invoke, or cause or permit the offeror to invoke, a condition, the Panel will take into account all relevant factors.*

2. *Availability of withdrawal rights*

*If the offeree company is not permitted to invoke, or to cause or permit the offeror to invoke, a condition, the Panel may instead determine in the light of all relevant facts that accepting shareholders should have the right to withdraw their acceptances on such terms as the Panel considers appropriate and, if so, the effect of this on the Code timetable. The ability of the Panel to require the introduction of withdrawal rights in such circumstances and to amend the Code timetable, and also the fact that the offer may cease to be unconditional as to acceptances as a result of such withdrawal rights being introduced, should be incorporated into the terms of the offer.*

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**Rule 23****RULE 23. THE GENERAL OBLIGATION AS TO INFORMATION**

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*NOTES ON RULE 23*

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2. *Offers conditional on shareholder action*

*When an offer has been announced, which is conditional on action by offeree company shareholders (eg the rejection of a proposed acquisition or disposal), the first major circular sent by the potential offeror to those shareholders must normally include the information which would be required by Rule 24 to be included in that circular if it were an offer document.*

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**Rule 24.6****24.6 INCORPORATION OF OBLIGATIONS AND RIGHTS**

**The offer document must incorporate language which appropriately reflects Notes 4-7 on Rule 10 and those parts of Rules 13.4(a), 13.5 (if applicable), 17 and 31-34 which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.**

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**Rule 34****RULE 34. RIGHT OF WITHDRAWAL**

**An acceptor must be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by such date become or been declared unconditional as to acceptances. This entitlement to withdraw must be exercisable until the earlier of (a) the time that the offer becomes or is declared unconditional as to acceptances and (b) the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6. An acceptor must also be entitled to withdraw his acceptance if so determined by the Panel in accordance with Note 2 on Rule 13.5.**

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**Rule 35.1****35.1 DELAY OF 12 MONTHS**

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*NOTE ON RULES 35.1 and 35.2**When dispensations may be granted*

(a) ...

(b) *The Panel may also grant consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material official authorisations or regulatory clearances relating to an offer within the Code timetable. ...*

(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 official authorisation or 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 official or 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.*

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**Rule 38.3****38.3 ASSENTING SECURITIES**

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*NOTE ON RULE 38.3*

*If withdrawal rights are introduced under Note 2 on Rule 13.5, the acceptances in relation to any securities assented to the offer, after it was unconditional as to acceptances, by an exempt market-maker connected with the offeror must be withdrawn and such securities may not be re-assented to the offer unless, following the period agreed by the Panel for withdrawal rights to run, the offer becomes or is declared unconditional as to acceptances.*

## APPENDIX 2

### **List of respondents**

Institute of Chartered Accountants in England and Wales

Investment Management Association

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

London Investment Banking Association

National Association of Pension Funds