

RS 2006/1 Issued on 21 April 2006

THE TAKEOVER PANEL

MISCELLANEOUS CODE AMENDMENTS

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2006/1**

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1. Introduction

1.1 On 10 February, the Code Committee of the Takeover Panel (the “Code Committee”) published a Public Consultation Paper (“PCP 2006/1” or the “PCP”) entitled “Miscellaneous Code Amendments”. The purpose of this Response Statement is to provide the Code Committee’s response to the external consultation process on PCP 2006/1 and to provide details of some additional minor amendments that the Code Committee has made to the Takeover Code (the “Code”).

(a) Number of responses received

1.2 5 responses were received from a range of parties. A list of respondents can be found at Appendix B.

(b) Overview of responses

1.3 As stated in the PCP, most of the proposed changes did not affect the substance of the Rules and in almost all cases respondents were either in favour of the amendments proposed or expressed no view on them. The issues that were raised by respondents are addressed below.

(c) Additional minor amendments to the Code

1.4 In addition to the amendments proposed in PCP 2006/1, the Code Committee has made some further minor amendments to the Code which, in the opinion of the Code Committee, in each case either do not materially alter the intended effect of the provision in question or are consequential on changes to relevant legislation or regulatory requirements, and thus do not require consultation. The amendments, which are included in Appendix A, are explained in paragraph 9 below.

(d) *Code amendments and transitional arrangements*

(i) *Code amendments*

1.5 In addition to this Response Statement, the Code Committee is also publishing today three other Response Statements, namely RS 2005/3, RS 2005/4 and RS 2005/5. The amendments adopted by the four Response Statements will come into force on 20 May. Owing to the volume of changes, the Panel intends to publish a new edition of the Code which will be despatched to subscribers shortly before 20 May.

1.6 In some cases the Code Committee has adopted amendments in different Response Statements which affect the same provision of the Code. In order to assist readers in understanding not only all the amendments, but also their origins, the Code Committee has, for the most part, included in the appropriate Appendix to each Response Statement only those amendments that arise out of the Code Committee's conclusions in relation to that particular Response Statement. However, in certain cases, where the same part of a provision of the Code has been changed by more than one Response Statement, that provision has been included in the Appendix marked to show all changes from the current Code, i.e. incorporating the amendments made in the other Response Statement(s). The consolidated amendments, being the adopted amendments marked to show changes from the current Code, taking account of the amendments made by all the Response Statements, have today been made available on the Panel's website (www.thetakeoverpanel.org.uk). Where the numbering of a Rule or Note has been changed by any of the amendments, relevant cross references in other Rules or Notes have been changed in the new edition of the Code. For the most part, changes to cross references have not been included in the consolidated amendments available on the Panel's website.

(ii) *Transitional arrangements*

1.7 The Code, as revised, will come into effect on 20 May and will be applied from that date to all companies and transactions to which it then relates,

including those on-going transactions which straddle that date, except where to do so would give the amendments retroactive effect. **Where parties have doubts as to the consequences of any of the rule changes, in particular the impact on any transaction which is in existence or contemplation (including a transaction involving a company to which the Code does not currently relate but to which it will relate on or after 20 May), they should consult the Panel prior to 20 May to obtain a ruling or guidance.**

2. Amendments consequential upon changes to the Listing Rules and other minor amendments

Q.1 Do you agree with the proposed new definition of the “UKLA Rules”?

Q.2 Do you agree with the proposed amendments in relation to responsibility statements?

Q.3 Do you agree with the proposed amendment to Rule 19.1?

Q.4 Do you agree with the proposed minor amendments in relation to the Listing Rules described in paragraph 2.14?

Q.5 Do you agree with the proposed amendments in relation to admission to listing and admission to trading described in paragraph 2.18?

Q.6 Do you agree with the proposed amendments in relation to traded securities described in paragraph 2.19?

Q.7 Do you agree with the proposed amendments to Note 1 on Rule 14.1?

Q.8 Do you agree with the proposed amendments in relation to securities admitted to trading described in paragraph 2.21?

2.1 Paragraph 2 of the PCP considered the references in the Code to the Listing Rules and to “listing particulars” which required amendment to bring them in

line with the changes to the Listing Rules introduced with effect from 1 July 2005.

- 2.2 In respect of all the questions listed above, all respondents were in favour of the proposed amendments. The Code Committee has, however, been advised that the inclusion of the words “and any such rules as may replace or succeed the Listing Rules, the Disclosure Rules, or the Prospectus Rules of the FSA” at the end of the proposed definition of “UKLA Rules” might amount to a sub-delegation by the Panel of its rule-making power. The definition will, therefore, be adopted without the inclusion of these words. The Code Committee will adopt all the other amendments as proposed in the PCP.

3. Suspensions

Q.9 Do you agree with the proposed amendments to Rule 2.3 and the proposed deletion of the Note on Rule 2.3 and Rule 17.2(a)?

- 3.1 In paragraph 3 of the PCP, the Code Committee proposed amendments to Rules 2.3 and 17.2 as it believed that a suspension would be unlikely to be granted in the circumstances described in those Rules as currently drafted.
- 3.2 All respondents were in favour of the proposed amendments which the Code Committee will, therefore, adopt as proposed in the PCP.

4. Definition of “dealings”

(a) *Acquisition and disposal of control of securities*

Q.10 Do you agree with the proposed amendment to paragraph (a) of the definition of “dealings”?

- 4.1 The Code Committee proposed, in part (a) of paragraph 4 of the PCP, to amend the definition of “dealings” to make it clear that the acquisition or disposal of voting or general control over securities constitutes a dealing. The

definition, as proposed to be amended, is consistent with paragraph (2) of the definition of “interests in securities” which has been in use since November 2005. The relevant extract of the definition of “dealings”, as proposed to be amended, is drafted as follows:

“(a) the acquisition or disposal of securities, of the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to securities, or of general control of securities;”.

- 4.2 One respondent sought clarification of the position where, in respect of the same holding, one organisation is responsible for the investment dealing decisions and a separate organisation is responsible for the corporate governance and voting decisions.
- 4.3 The Code Committee considers that the transfer of voting control over securities from one person to another should be regarded as a dealing and should be disclosed by both persons, where they are subject to Rule 8. Following a transfer such that one person handles the investment dealing decisions and one the voting decisions, both persons will be interested in these securities for the purposes of the Code.
- 4.4 In addition, two respondents (one of whom specifically supported the codification of a requirement to disclose the acquisition or disposal of voting control) expressed concerns regarding the proposed drafting of the definition of “dealings” in that it refers to the conditional acquisition and disposal of voting rights. These respondents were concerned that the amended definition would result in a requirement to make a disclosure in situations where the nature of the conditions was such that a transfer of actual control was unlikely to crystallise.
- 4.5 Subject to paragraphs 4.6 and 4.7 below, the Code Committee considers, as the amended definition states, that all transfers of voting control should be disclosed (regardless of conditionality) so as to give a full picture of where voting control of a company lies.

4.6 However, the Code Committee appreciates that there may be situations where a right to exercise the voting rights attaching to securities may have been acquired but that the discretion regarding the exercise of the voting rights is limited or qualified in some significant way. For example, the exercise of voting control might be subject to ratification or variation by the beneficial owner or be restricted to certain categories of resolution. If, in a particular set of circumstances, any person acquiring or disposing of a voting right (restricted or otherwise) considers that disclosure of that transfer is not appropriate, they should consult the Panel.

4.7 Where a transfer relates to the purely administrative exercise of voting rights such that the transferee has no discretion as to the way in which the securities are voted and the Panel is consulted as envisaged in paragraph 4.6, the Code Committee understands the Panel would normally be prepared to grant a dispensation from disclosure of the relevant transfer.

4.8 Having considered the points raised by respondents, the Code Committee has decided to adopt paragraph (a) of the definition of “dealings”, as proposed to be amended in the PCP.

(b) Securities borrowing and lending

Q.11 Do you agree with the proposed new Note on the definition of “dealings” relating to the borrowing or lending of securities?

4.9 In paragraphs 4.9 to 4.11 of the PCP, the Code Committee reiterated what it had said in RS 2004/3, namely that it was the Panel’s normal practice not to regard the borrowing or lending of securities as a dealing in securities and that it would be appropriate to await the outcome of various third-party reviews which were then underway relating to securities borrowing and lending before conducting its own review as to whether the Code should require the disclosure of borrowing and lending transactions. In PCP 2006/1 the Code Committee concluded that this practice should continue for the time being and

to make this clear, proposed to include a new Note on the definition of “dealings” as follows:

“NOTE ON DEALINGS

The borrowing or lending of securities will not normally be regarded as a dealing in securities.”

- 4.10 The proposed Note on “dealings” is consistent with Note 4 on the definition of “interests in securities” which states that where a person has borrowed or lent securities, he will normally be treated as interested in any securities he has lent but will not normally be treated as interested in any securities which he has borrowed.
- 4.11 The three respondents to Question 11 expressed concerns relating to the proposed new Note. One felt that the Panel’s practice in relation to securities borrowing and lending was generally well understood and that, therefore, there was no need to introduce such a Note.
- 4.12 In addition, this, and one other, respondent were concerned that the inclusion of such a Note might suggest conclusions had been reached prior to the Code Committee’s review referred to in paragraph 4.9 above, being completed. The Code Committee confirms that no conclusions have been reached.
- 4.13 The third respondent considered that if a securities borrowing transaction were entered into for the purpose of acquiring the voting rights attaching to the borrowed securities (as opposed, say, to borrowing for the purpose of settling a short position), this should be disclosed and the respondent was concerned that the inclusion of the Note would result in such disclosures not being made. The Code Committee is of the opinion that the inclusion of the word “normally” in the proposed Note provided the Panel with the discretion to require disclosure of securities borrowing and lending transactions entered into for the purpose of acquiring the voting rights attaching thereto.

4.14 Taking into consideration the comments made by respondents, the Code Committee has concluded that the proposed amendment should not be adopted. For the avoidance of doubt, the Code Committee does not expect, pending the outcome of the reviews referred to in paragraph 4.9 above, that there will be any change in the Panel's current practice of not normally requiring the disclosure of securities borrowing and lending transactions.

5. Note 3(a)(ii) on Rule 9.3

Q.12 Do you agree with the proposed amendments to Note 3(a)(ii) on Rule 9.3?

5.1 In paragraph 5 of PCP 2006/1, the Code Committee proposed certain amendments to Note 3(a)(ii) on Rule 9.3 on the basis that, as worded, the method of calculating the number of shares to be disenfranchised in the circumstances envisaged by Note 3 was not strictly correct.

5.2 All respondents were in favour of the proposed amendments which the Code Committee will, therefore, adopt as proposed.

6. Amendments relating to Rule 25

(a) Offeree company directors' service contracts

Q.13 Do you agree that the penultimate paragraph of Note 1 on Rule 25.4 should be deleted?

6.1 In part (a) of paragraph 6 of the PCP, the Code Committee proposed to delete the penultimate paragraph of Note 1 on Rule 25.4 because it considered that the first major circular from the board of the offeree company should contain full details of each director's remuneration (including salary and other benefits) on an individual basis rather than on an aggregated basis as is currently the case.

6.2 All respondents were in favour of the proposed amendment which the Code Committee will, therefore, adopt as proposed.

(b) *Financial information relating to offeree companies*

Q.14 Do you agree with the introduction of proposed new Rule 25.7 and the Notes thereon?

6.3 In part (b) of paragraph 6 of the PCP, the Code Committee explained that there is currently no specific requirement in Rule 25 of the Code for the offeree company board to include in its first major circular to shareholders any details relating to the financial or trading position of the offeree company. The Code Committee therefore proposed to introduce an explicit requirement in Rule 25 for the offeree company directors to make a statement regarding any known material changes in the offeree company's financial or trading position since the date of its last published audited accounts.

6.4 All respondents were in favour of the inclusion of the new Rule in the Code. One respondent, however, queried the value of retaining the requirement for a unilateral offeror to make a statement regarding the financial or trading position of the offeree company in its offer document, given that such a statement would be unlikely to be perceived as objective and, in any case, would in future be superseded by a statement from the offeree company in its circular. In making its proposal, the Code Committee considered it would still be appropriate to retain the obligation, in the case of a unilateral offer, because it would mean that publicly available information would be disseminated to offeree company shareholders in as timely a manner as possible. The Code Committee still considers that this is the case.

6.5 The new Rule will, therefore, be adopted as proposed, save that, in order to give it sufficient prominence in Rule 25 it will become Rule 25.2 (as opposed to Rule 25.7 as was proposed in the PCP). Consequential amendments to Rules 25.1 and 25.2 are announced in RS 2005/5 which is also published today.

6.6 In addition, the Code Committee has introduced in paragraph (h) of Section 4 of Appendix 1 to the Code (Whitewash Guidance Note) a reference to new Rule 25.2 so that the relevant circular to shareholders will include the information now required by Rule 25.2. The amendment is set out in Appendix A.

7. Rule 36

Q.15 Do you agree with the proposed amendments to Rule 36?

7.1 Rules 36.1 to 36.8 set out a number of provisions in relation to the making of partial offers. In paragraph 7 of the PCP, the Code Committee proposed a number of amendments to Rule 36, principally to make it clear in the Rule that the interests of persons acting in concert with an offeror should be taken into account in the context of certain outcomes of a partial offer.

7.2 As explained in paragraphs 7.7 and 7.8 of the PCP, the Code Committee proposed to introduce a Note on Rule 36.6 to the effect that Note 4 on Rule 9.1 (which refers to the circumstances in which transfers of interests in shares from one member of a concert party to another may give rise to the obligation to make an offer) would not apply following a partial offer if the offeror held shares carrying more than 50% of the offeree company's voting rights.

7.3 Whilst all respondents were in favour of the proposed amendments to Rule 36, the Code Committee has decided not to adopt the proposed Note on Rule 36.6 as it considers that there may be occasions, albeit probably rare, on which it would be appropriate for the Panel to apply Note 4 on Rule 9.1 to a person who held shares (whether acquired pursuant to a partial offer or otherwise) carrying over 50% of the voting rights of the offeree company. This might be the case, for example, where the holder of a 51% stake in a company was a member of a concert party and, following the completion of a partial offer, transferred all or part of his interest to another member of the concert party

who was interested in less than 30% of the voting rights prior to the transfer and became interested in more than 30% as a result of that transfer.

7.4 As a result of (i) the above, (ii) a drafting suggestion made by one respondent and (iii) other changes that are being adopted in RS 2005/3 and RS 2005/5, the amendments to Rule 36 will be adopted as set out in Appendix A, where the Rule is shown incorporating each of the amendments to it that have been adopted by RS 2005/3, RS 2005/5 and RS 2006/1.

7.5 In PCP 2005/3 the Code Committee proposed amendments to Rules 2.8, 35.1 and 35.2. These Rules refer to partial offers and include references to “the offeror”. For the same reasons as stated in paragraph 7 of PCP 2006/1, the Code Committee has decided to make additional amendments to Rules 2.8, 35.1 and 35.2 by replacing the references to “the offeror” with “the offeror and persons acting in concert with it”. The amended Rules are set out in Appendix A.

8. Appendix 4 and borrowed shares

Q.16 Do you agree with the proposed amendments to Section 7 of Appendix 4?

8.1 Following the introduction of Note 8 on Rule 10 (in RS 2004/3) and related amendments to other Notes on Rule 10 (in RS 2005/2), it was agreed between the Panel and the Registrars’ Group of the Institute of Chartered Secretaries and Administrators that the form of the certificate issued by the offeror’s receiving agent should be amended so as to be clear that any shares in the offeree company referred to in the certificate as being held or purchased by the offeror did not include any shares in the offeree company which had been borrowed by the offeror. It was also agreed that the certificate could refer to the fact that the receiving agent had relied on the offeror’s confirmation that any shares in the offeree company certified as being held or purchased by the offeror had not in fact been borrowed by the offeror. The Code Committee therefore proposed, in paragraph 8 of the PCP, to amend Section 7 of Appendix 4 of the Code so as to reflect this.

- 8.2 All respondents were in favour of the proposed amendments which the Code Committee will, therefore, adopt as proposed.
- 8.3 One respondent suggested that Note 8 on Rule 10 be amended to state that securities borrowed by persons acting in concert with an offeror should not, without the Panel's consent, be counted towards fulfilling an acceptance condition if they are assented to the bid. The Code Committee notes that Rule 2.5(b)(v) requires the announcement of an offer to include details of any relevant securities that have been borrowed or lent by any person acting in concert with an offeror. As a result, the Panel will have knowledge of any securities borrowed by the offeror and persons acting in concert with it and will be in a position to consider whether it would be appropriate for those securities to be counted towards the satisfaction of the acceptance condition, if subsequently assented to the offer. In addition, Rule 4.6 prohibits, inter alia, the offeror and persons acting in concert with it, from entering into a securities borrowing or lending transaction without the Panel's consent during an offer period. In the event that the Panel consents, pursuant to Rule 4.6, to a person acting in concert with the offeror entering into a borrowing transaction it will consider at that time whether such securities could be counted towards the acceptance condition, if assented to the offer. In the light of the above, the Code Committee has decided that it is not necessary to amend Note 8 on Rule 10 in the manner suggested.

9. Additional minor amendments to the Code

- 9.1 As referred to in paragraph 1.4 above the Code Committee has decided to make certain additional minor amendments to the Code, as set out below. In the opinion of the Code Committee, in each case these amendments either do not materially alter the intended effect of the provision in question or are consequential on changes to relevant legislation or regulatory requirements and thus do not require consultation. The amendments are as follows:

- (a) the introduction into the first paragraph of Rule 4.4 of a cross-reference to the Note at the end of the Definitions Section;
- (b) the amendment of the Note on Rule 37.2 as follows:

“Calculation of ~~limits~~ percentage thresholds”

The ~~limits~~ percentage thresholds referred to in ~~this~~ Rule 9.1 will be calculated by reference to the outstanding voting capital subsequent to the redemption or purchase by the company of its own shares.”;

- (c) the clarification of Rules 25.3(c) and 37.4(b) as set out below:

Rule 25.3

“(c) If any person referred to in Rule 25.3(a)(i) has dealt in any relevant securities of the offeree company or the offeror during between the start of the offer period and ending with the latest practicable date prior to the posting of the circular ...”

Rule 37.4(b)

“The offer document must state (in the case of a securities exchange offer only) the amount-number of relevant securities of the offeror which the offeror has redeemed or purchased during between the start of the offer period and ending with the latest practicable date prior to the posting of the offer document ...”;

- (d) the introduction into Rules 2.5(b) and 24.2(d) of a reference to the requirement under Rule 21.2 to disclose, in the Rule 2.5 announcement and the offer document respectively, details of any inducement fee or similar arrangement referred to in Rule 21.2; and
- (e) the amendment of the definition of “competition reference period”, Rules 5.2(c) and 12.1(b) and Note (a)(iii) on Rules 35.1 and 35.2 to take account of the replacement of the European Community Regulation (Council Regulation 4064/89) by Council Regulation 139/2004/EC and of changes made by the Enterprise Act 2002 to the role of the Secretary of State in UK merger proceedings.

APPENDIX A

Amendments to the Code

DEFINITIONS

Competition reference period

... Article 6(1)(c) of Council Regulation ~~(EEC) 4064/89~~ 139/2004/EC...

...

Dealings

A dealing includes the following:-

(a) the acquisition or disposal of securities, of the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to securities, or of general control of securities;

...

Regulatory Information Service

A Regulatory Information Service (“RIS”) is any of the services set out in ~~Schedule 12 of Appendix 3~~ Appendix 3 to the FSA-Listing Rules.

...

UKLA Rules

UKLA Rules include the Listing Rules, the Disclosure Rules and the Prospectus Rules of the FSA (or any of them as the context may require).

Rule 2.3

2.3 RESPONSIBILITIES OF OFFERORS AND THE OFFEREE COMPANY

...

Following an approach to the board of the offeree company which may or may not lead to an offer, the primary responsibility for making an announcement will normally rest with the board of the offeree company which must, therefore, keep a close watch on its share price. ~~Where the offer is to be recommended and the UKLA, the Stock Exchange or OFEX, as appropriate, is likely to grant a temporary suspension, a possible~~

~~alternative to an immediate announcement may be to obtain a suspension to be followed shortly by an announcement.~~

A potential offeror must not attempt to prevent the board of an offeree company from making an announcement ~~or requesting the UKLA, the Stock Exchange or OFEX to grant a temporary suspension of listing at any time the board thinks appropriate.~~

NOTE ON RULE 2.3

Suspensions

It should be noted that the primary obligation is to make the appropriate announcement as quickly as possible and the Panel will not be sympathetic to delay which is occasioned by an unsuccessful application for suspension.

Rule 2.5

2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

...

(b) When a firm intention to make an offer is announced, the announcement must state:—

...

(vi) all conditions (including normal conditions relating to acceptances, admission to listing, admission to trading and increase of capital) to which the offer or the posting of it is subject;

...

(viii) details of any arrangement of the kind referred to in Note 6(b) on Rule 8; ~~and~~

(ix) a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk); ~~and~~

(x) details of any arrangement for the payment of an inducement fee or similar arrangement referred to in Rule 21.2.

Rule 2.8**2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER**

...

(a) announce an offer or possible offer for the offeree company (including a partial offer which would result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights of the offeree company);

...

Rule 4.4**4.4 DEALINGS IN OFFEREE SECURITIES BY CERTAIN OFFEEREE COMPANY ASSOCIATES**

During the offer period, except for exempt principal traders and exempt fund managers, no financial adviser or corporate broker (or any person controlling, controlled by or under the same control# as any such adviser or corporate broker) to an offeree company (or any of its parents, subsidiaries or fellow subsidiaries, or their associated companies or companies of which such companies are associated companies) shall, except with the consent of the Panel:—

...

#See Note at end of Definitions Section.

Rule 5.2**5.2 EXCEPTIONS TO RESTRICTIONS**

...

(c) ...

(iii) either:

(1) the first closing date of that offer has passed and ~~the Secretary of State~~ it has been announced that such offer ... no action by the European Commission will any longer be taken in respect of such offer pursuant to Council Regulation ~~(EEC) 4064/89~~ 139/2004/EC ...

(2) the first closing date of any competing offer has passed and the Secretary of State it has been announced ... Council Regulation (~~EEC~~) ~~4064/89~~ 139/2004/EC ...

...

Rule 6

RULE 6. ~~ACQUISITIONS PURCHASES~~ RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

...

NOTES ON RULE 6

...

3. *No less favourable terms*

...

If there is a restricted market in the securities of an offeror, or if the amount of securities to be issued of a class already ~~listed~~ admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

...

7. *Unlisted securities*

An offer where the consideration consists of securities for which ~~an~~ immediate listing-admission to trading on a regulated market in the United Kingdom is not to be sought will not normally be regarded as satisfying any obligation incurred under this Rule. In such cases the Panel should be consulted.

Rule 8

RULE 8. DISCLOSURE OF DEALINGS DURING THE OFFER PERIOD; ALSO INDEMNITY AND OTHER ARRANGEMENTS

...

NOTES ON RULE 8

...

11. ~~Unlisted~~ Unquoted public companies and relevant private companies

The requirements to disclose dealings apply also to dealings in relevant securities of ~~unlisted~~ public companies whose securities are not admitted to trading and of relevant private companies.

Rule 9.3

9.3 CONDITIONS AND CONSENTS

...

NOTES ON RULE 9.3

...

3. *When dispensations may be granted*

...

(a) ...

(ii) until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it ~~will not~~ must consult the Panel as to their ability to exercise, ... more than 29.9% of the voting rights of the offeree company attaching to the shares in which they have an interest.

...

Rule 9.5

9.5 CONSIDERATION TO BE OFFERED

...

NOTES ON RULE 9.5

...

2. *Calculation of the price*

...

(b) ... in exchange for ~~listed~~ securities which are admitted to trading, the price will normally be established by reference to the middle market price of the ~~listed~~ securities at the time of the acquisition.

...

Rule 12.1

12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER

...

(b) ... Council Regulation (~~EEC~~ 4064/89) 139/2004/EC ...

...

Rule 14.1

14.1 COMPARABLE OFFERS

...

NOTES ON RULE 14.1

1. Comparability

A comparable offer need not necessarily be an identical offer.

In the case of offers involving two or more classes of ~~listed~~ equity share capital which are admitted to the Official List or to trading on AIM, the ratio of the offer values should normally be equal to the average of the ratios of the middle market quotations taken from the Stock Exchange Daily Official List over the course of the six months preceding the commencement of the offer period. The Panel will not normally permit the use of any other ratio unless the advisers to the offeror and offeree company are jointly able to justify it.

In the case of offers involving two or more classes of equity share capital, one or more of which is not ~~listed~~ admitted to the Official List or to trading on AIM, the ratio of the offer values must be justified to the Panel in advance.

Rule 17.1

17.1 TIMING AND CONTENTS

...

NOTES ON RULE 17.1

...

4. *Publication of announcements*

An announcement under this Rule must be published in accordance with the requirements of Rule 2.9. However, in the case of companies whose securities are not ~~dealt in~~ admitted to listing or admitted to trading on the Stock Exchange, AIM or OFEX, it would normally be permissible to write to all shareholders instead of making an announcement.

Rule 17.2

17.2 CONSEQUENCES OF FAILURE TO ANNOUNCE

~~(a) — If an offeror fails within the time limit to comply with any of the requirements of Rule 17.1, the UKLA, the Stock Exchange or OFEX, as appropriate, will consider a temporary suspension of listing of the offeree company's shares and, where appropriate, the offeror's shares until the relevant information is given.~~

~~(ba) ...~~

~~(eb) ...~~

Rule 19.1

19.1 STANDARDS OF CARE

Each document or advertisement issued, or statement made, during the course of an offer must, as is the case with a prospectus, ...

Rule 19.2

19.2 RESPONSIBILITY

...

NOTES ON RULE 19.2

1. *Delegation of responsibility*

...

... This does not, however, override the requirements of "The Listing Rules" the UKLA Rules relating to the acceptance of responsibility for ~~listing particulars~~ a prospectus or equivalent document where applicable.

...

3. *Quoting information about another company*

... ~~and~~ ~~The~~ responsibility statement may be amended accordingly, ~~but where it relates to listing particulars the provisions of “The Listing Rules” may affect the position.~~ Where statements of opinion or conclusions concerning another company or unpublished information originating from another company are included, these must normally be covered by a responsibility statement by the directors of the company issuing the document or advertisement or by the directors of the other company; the qualified form of responsibility statement provided for in this Note is not acceptable in such instances. However, where a responsibility statement relates to a prospectus or an equivalent document, the provisions of the UKLA Rules may affect the form of responsibility statement required.

~~4. — Responsibility for part of listing particulars~~

~~Where, for the purpose of obtaining listing for new securities, persons other than the directors accept responsibility for part of a document which comprises or includes listing particulars, the Panel should be consulted. The adapted form of responsibility statement required by “The Listing Rules” will normally be acceptable in such cases.~~

~~54. Exclusion of directors~~

~~Although the Panel may be willing to consider the exclusion of a director from the responsibility statement in appropriate circumstances, where that statement relates to listing particulars a prospectus or an equivalent document the provisions of “~~The Listing Rules~~” the UKLA Rules may affect the position.~~

~~65. ...~~

Rule 19.4

19.4 ADVERTISEMENTS

...

(v) advertisements giving information, the publication of which by advertisement is required or specifically permitted by the ~~FSA Listing~~ UKLA Rules;

...

Rule 24.2

24.2 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

Except with the consent of the Panel:—

(a) where the consideration includes securities and the offeror is a company incorporated under the Companies Act 1985 (or its predecessors) and its shares are admitted to the Official List or ~~dealt in to trading~~ on AIM, the offer document must contain:

...

(b) where the consideration is cash only and the offeror is a company incorporated under the Companies Act 1985 (or its predecessors) and its shares are admitted to the Official List or ~~dealt in to trading~~ on AIM, the offer document must contain:

...

(d) the offer document (including, where relevant, any revised offer document) must include:

...

~~(viii)~~ ... (quotations stated in respect of securities admitted either to the Official List or to trading on AIM should be taken from the Stock Exchange Daily Official List and, if any of the securities are not so admitted listed, any information available as to the number and price of transactions which have taken place during the preceding six months should be stated together with the source, or an appropriate negative statement);

...

~~(ix)~~ ... ~~a statement of whether an~~ details of any applications for admission to listing or admission to trading that have has been or will be made in any jurisdiction in respect of the securities to the UKLA and whether admission to listing on any other stock exchange or the facility to deal on any other market has been or will be sought);

...

(xvi) details of any arrangement for the payment of an inducement fee or similar arrangement as referred to in Rule 21.2;

(e) the offer document must contain information on the offeree company ... ~~, whether or not the offeree company is admitted to the Official List;~~

...

NOTES ON RULE 24.2

1. *Where the offeror is a subsidiary company*

The Panel will normally look through ~~unlisted~~ subsidiaries whose securities are not admitted to trading in interpreting this Rule unless, with the agreement of the Panel, the subsidiary in question is regarded as being of sufficient substance in relation to the group and the offer. Accordingly if the offeror is part of a group, information will normally be required on the ultimate holding company in the form of group accounts.

Rule 24.9

24.9 ADMISSION TO LISTING AND ADMISSION TO TRADING CONDITIONS

Where securities are offered as consideration and it is intended that they should be admitted to listing on the Official List or to trading on AIM, the relevant admission to listing or admission to trading condition should, except with the consent of the Panel, be in terms which ensure that it is capable of being satisfied only when the decision to admit the securities to ~~official~~ listing or trading has been announced by the UKLA ~~and~~ or the Stock Exchange, as applicable. Where securities are offered as consideration and it is intended that they should be admitted to listing or to trading on any other investment exchange or market, the Panel should be consulted.

Rule 24.10

24.10 ESTIMATED VALUE OF UNLISTED UNQUOTED PAPER CONSIDERATION

When the offer involves the issue of ~~unlisted~~ securities of a class which is not admitted to trading, the offer document and any subsequent circular from the offeror must contain an estimate of the value of such securities by an appropriate adviser ~~(see Note 7 on Rule 6).~~

Rule 25.1

25.1 VIEWS OF THE BOARD ...

...

NOTES ON RULE 25.1

...

3. *Conflicts of interest*

Where a director has a conflict of interest, he should not normally be joined with the remainder of the board in the expression of its views on the offer and the nature of the conflict should be clearly explained to shareholders. Depending on the circumstances, such a director may have to make the responsibility statement required by Rule 19.2, appropriately amended to make it clear that he does not accept responsibility for the views of the board on the offer. Where the statement relates to a prospectus or an equivalent document listing particulars, the provisions of “The Listing Rules” the UKLA Rules may affect the position.

Rule 25.2

25.2 FINANCIAL AND OTHER INFORMATION

The first major circular from the offeree board advising shareholders on an offer (whether recommending acceptance or rejection of the offer) must contain all known material changes in the financial or trading position of the offeree company subsequent to the last published audited accounts or a statement that there are no known material changes.

NOTES ON RULE 25.2

1. Offeree board circular combined with offer document

Where the first major circular from the offeree board is combined with the offer document, it will be the responsibility of the offeree board to include the information required by this Rule. Accordingly, the offeror will not be required to comply with Rule 24.2(e) insofar as it applies to Rule 24.2(a)(iv).

2. Offeree board circular posted after offer document

Where the offeror has included in the offer document information on the offeree company as required by Rule 24.2(e) insofar as it applies to Rules 24.2(a)(iv) and (v), such information does not need to be repeated in the first major circular from the offeree board provided that the statement made in accordance with this Rule makes specific reference to the relevant information disclosed by the offeror in the offer document.

[NB Previous Rule 25.2 is being incorporated (as amended) in Rule 25.1 as detailed in RS 2005/5.]

Rule 25.3**25.3 INTERESTS AND DEALINGS**

...

(c) If any person referred to in Rule 25.3(a)(i) has dealt in any relevant securities of the offeree company or the offeror ~~during~~ between the start of the offer period and ending with the latest practicable date prior to the posting of the circular ...

Rule 25.4**25.4 DIRECTORS' SERVICE CONTRACTS**

...

NOTES ON RULE 25.4

1. *Particulars to be disclosed*

...

~~Where there is more than one contract, a statement of the aggregate remuneration payable is normally regarded as fulfilling the requirements under (c) above, except to the extent that this method would conceal material anomalies which ought to be disclosed (eg because one director is remunerated at a very much higher rate than the others). In cases where contracts have been replaced or amended, however, the particulars of remuneration payable under both the existing and the earlier contracts must relate to each individual separately.~~

...

Rule 28.6**28.6 STATEMENTS WHICH WILL BE TREATED AS PROFIT FORECASTS**

...

(c) **Interim and preliminary figures**

Except with the consent of the Panel, any unaudited profit figures published during an offer period must be reported on. This provision does not, however, apply to:—

...

(ii) unaudited statements of annual results which comply with the requirements for preliminary ~~profits~~ statements of annual results as set out in ~~“The Listing~~ the UKLA Rules”;

(iii) unaudited statements of interim results which comply with the requirements for half-yearly reports as set out in ~~“The Listing~~ the UKLA Rules” in cases where the offer has been publicly recommended by the board of the offeree company; or

(iv) unaudited statements of interim results by offerors which comply with the requirements for half-yearly reports as set out in ~~“The Listing~~ the UKLA Rules”, whether or not the offer has been publicly recommended by the board of the offeree company but provided the offer could not result in the issue of securities which would represent 10% or more of the enlarged voting share capital of the offeror.

...

Rule 32.4

32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED OFFERS

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increased or improved offer, the offeror may introduce new conditions (eg obtaining shareholders’ approval or the admission to listing or admission to trading of new securities~~shares~~).

Rule 35.1

35.1 DELAY OF 12 MONTHS

...

(a) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in holding ~~shares~~ carrying 30% or more of the voting rights of the offeree company);

...

Rule 35.2

35.2 PARTIAL OFFERS

The restrictions in Rule 35.1 will also apply following a partial offer:-

(a) ~~for~~ which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared wholly unconditional. When such an offer has become or been declared wholly unconditional, the period of 12 months runs from that date; and

...

The restrictions in Rule 35.1 will not normally apply following a partial offer which could only result in the offeror and persons acting in concert with it being interested in shares carrying a holding of less than 30% of the voting rights of the offeree company.

...

NOTE ON RULES 35.1 and 35.2

...

(a) ...

(iii) ... *Article 8(2) of Council Regulation ~~(EEC) 4064/89~~ 139/2004/EC ...*

Rule 36

RULE 36

36.1 PANEL'S CONSENT REQUIRED

The Panel's consent is required for any partial offer. In the case of an offer which could not result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights of a company, consent will normally be granted.

36.2 ~~BUYING ACQUISITIONS~~ BEFORE THE OFFER

In the case of an offer which could result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more but holding less than 100% of the voting rights of a company, such consent will not normally be granted if the offeror or persons acting in concert with it have acquired, selectively or in significant numbers,

interests in shares in the offeree company during the 12 months preceding the application for consent or if interests in shares have been acquired purchased—at any time after the partial offer was reasonably in contemplation.

36.3 ~~BUYING~~ ACQUISITIONS DURING AND AFTER THE OFFER

...

NOTES ON RULE 36.3

...

2. *Partial offer resulting in an interest of less than 30%*

The consent of the Panel will normally be granted for acquisitions of interests in shares ~~share purchases~~ within 12 months of the end of the offer period when a partial offer has resulted in the offeror and persons acting in concert with it being interested in shares ~~a holding~~ carrying less than 30% of the voting rights of a company.

...

36.4 OFFER FOR BETWEEN 30% AND 50%

When an offer is made which could result in the offeror and persons acting in concert with it being interested in ~~holding~~ shares carrying not less than 30% but not holding shares carrying and not more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional as to acceptances unless acceptances are received for not less than that number.

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL

Any offer which could result in the offeror and persons acting in concert with it being interested in ~~holding~~ shares carrying 30% or more of the voting rights of a company must ~~normally~~ be conditional, not only on the specified number of acceptances being received, but also on approval of the offer, normally signified by means of a separate box on the form of acceptance, being given in respect of over 50% of the voting rights held by shareholders who are independent of ~~holding over 50% of the voting rights not held by~~ the offeror and persons acting in concert with it. This requirement may on occasion be waived if over 50% of the voting rights of the offeree company are held by one shareholder.

36.6 WARNING ABOUT CONTROL POSITION

In the case of a partial offer which could result in the offeror, either alone or with persons acting in concert with it, holding shares carrying over

50% of the voting rights of the offeree company, the offer document must contain specific and prominent reference to this and to the fact that, if the offer succeeds, the offeror or, where appropriate, the offeror and persons acting in concert with it, will be free, subject to Rule 36.3 and, where relevant, to Note 4 on Rule 9.1, to acquire further interests in shares without incurring any obligation under Rule 9 to make a general offer.

...

36.8 COMPARABLE OFFER

When an offer is made for a company with more than one class of equity share capital which could result in the offeror and persons acting in concert with it being interested in holding shares carrying 30% or more of the voting rights, a comparable offer must be made for each class.

...

Rule 37.2

37.2 LIMITATION ON SUBSEQUENT ACQUISITIONS ~~OF SHARES~~

...

NOTE ON RULE 37.2

Calculation of ~~limits~~ percentage thresholds

The ~~limits~~ percentage thresholds referred to in ~~this~~ Rule 9.1 will be calculated by reference to the outstanding voting capital subsequent to the redemption or purchase by the company of its own shares.

Rule 37.4

37.4 REDEMPTION OR PURCHASE OF SECURITIES BY THE OFFEROR COMPANY

...

(b) Disclosure in the offer document

The offer document must state (in the case of a securities exchange offer only) the ~~amount~~ number of relevant securities of the offeror which the offeror has redeemed or purchased ~~during~~ between the start of the offer period and ending with the latest practicable date prior to the posting of the offer document ...

Appendix 1

APPENDIX 1

WHITEWASH GUIDANCE NOTE

...

2 SPECIFIC GRANT OF WAIVER REQUIRED

...

NOTES ON SECTION 2

...

2. ~~Listing Rules~~ Other legal or regulatory requirements

It must be noted that, in the case of listed companies, clearance of the circular in accordance with any other legal or regulatory requirement (for example, under the ~~Listing~~ UKLA Rules) does not constitute approval of the circular by the Panel.

...

4 CIRCULAR TO SHAREHOLDERS

...

(h) Rules 23, 24.1, ~~and 24.2~~ and 25.2 ...

Appendix 4

APPENDIX 4

RECEIVING AGENTS' CODE OF PRACTICE

...

2 QUALIFICATIONS FOR ACTING AS A RECEIVING AGENT

A receiving agent to an offer must either:—

...

(b) ...**(i) ...**

(2) be responsible for the share registers of not less than 25 public companies which have a full listing are admitted to the Official List or are dealt in to trading on AIM; and

...

7 DISCLAIMERS IN RECEIVING AGENTS' CERTIFICATES

...

“In issuing this certificate we have, where necessary, relied on the following matters:

(i) ... ;

(ii) ... ;

(iii) confirmation from the offeror of the validity of shares recorded as registered holdings and purchases in the context of Note 8 on Rule 10.

...”

APPENDIX B**List of respondents**

Hermes Pensions Management Limited

Investment Management Association

London Investment Bankers Association

Mr Robert Ogilvy Watson

Mr James Palmer