

RS 2007/1 Issued on 29 November 2007

THE TAKEOVER PANEL

SCHEMES OF ARRANGEMENT

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2007/1**

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1. Introduction and overview

(a) The consultation in relation to schemes of arrangement

1.1 This Response Statement provides details of the response of the Code Committee of the Takeover Panel (the “Code Committee”) to the external consultation process on the proposals in PCP 2007/1 (the “PCP”) issued by the Code Committee on 11 June 2007.

1.2 In summary, the PCP proposed a number of amendments to the Takeover Code (the “Code”) as it applies to a transaction regulated by the Code which is implemented by way of a scheme of arrangement. The aim of the proposals in the PCP was to codify the practices developed by the Panel Executive in relation to the application of certain provisions of the Code to such schemes. Having considered a number of possible ways of making the application of the Code to such schemes more transparent and certain, the Code Committee concluded that the best approach would be to amend the Code in the following ways:

- (a) by introducing a new Appendix into the Code in relation to schemes (the “Schemes Appendix”);
- (b) where necessary, by amending the existing provisions of the Code; and
- (c) by introducing into the Schemes Appendix a list of provisions of the Code which should be disapplied in the context of a scheme of arrangement (the “List of Disapplied Provisions”).

(b) Responses to the consultation

1.3 Fifteen responses to the PCP were received. Seven respondents made only general comments or responded only to a very limited number of questions whilst the remaining eight made more detailed comments and/or responded to most or all of the questions. The Code Committee thanks all of the respondents for their comments.

- 1.4 Eleven of the respondents submitted their comments on a non-confidential basis. A list of non-confidential respondents can be found at Appendix B to this Response Statement.
- 1.5 Generally, the respondents welcomed the codification of the Panel Executive's existing practices in relation to the application of the Code to schemes of arrangement, which they hoped would provide increased certainty of approach in this area. The respondents also welcomed the proposed approach to amending the Code, which they considered would provide an appropriate balance between transparency and maintaining the current structure of the Code.
- 1.6 Respondents had significant conflicts of view in relation to:
- (a) the timetable which should apply to a scheme of arrangement;
 - (b) whether a person should be permitted to satisfy a mandatory offer obligation under Rule 9 of the Code by way of a scheme of arrangement; and
 - (c) the circumstances in which an exempt principal trader connected with an offeror or the offeree company should be permitted to vote on a resolution to approve or give effect to a scheme of arrangement.

The respondents' views on these issues, and the Code Committee's response to them, are addressed in sections 3, 11 and 13 respectively of this Response Statement.

- 1.7 Respondents also raised issues in relation to three areas which were not addressed in detail in the PCP, namely: (i) schemes which do not have the support of the offeree board; (ii) the granting by the Panel of derogations and waivers; and (iii) the lapsing and withdrawal of schemes and the ending of offer periods. The Code Committee considers these issues in paragraphs 1.10 to 1.26.

(c) *The Code Committee's conclusions*

1.8 In the light of the responses received, the Code Committee has largely adopted the proposals made in the PCP. However, the Code Committee has made a number of modifications and improvements to certain of the proposals as a result of respondents' comments and suggestions, as described in this Response Statement.

1.9 The Code Committee believes that the amendments set out in this Response Statement constitute proportionate measures for improving transparency and certainty regarding the application of the Code to schemes of arrangement. The Code Committee considers that the amendments will be of benefit to practitioners, parties to schemes and other market participants and that they will not have significant cost implications.

(d) *Schemes which do not have the support of the offeree board*

1.10 Two respondents noted that the amendments proposed in the PCP were based on the assumption that a scheme of arrangement would be recommended by the offeree board. The Code Committee acknowledges this. The respondents considered that, as a matter of law, it would be incorrect to say that a scheme could not be used to effect a "hostile" takeover and suggested that the Code should include a requirement for a person that is considering implementing a "hostile" offer by way of a scheme to consult the Panel.

1.11 It would not be appropriate for the Code Committee to take a view on whether, as a matter of law, it would be possible for an offer to be implemented by way of a scheme of arrangement without the support of the offeree board. However, the Code Committee recognises that, if it were proposed to implement such a scheme, a number of issues might arise which would not arise in relation to a scheme which does have the support of the offeree board. The Code Committee has therefore concluded that, if an offeror is considering announcing an offer (or possible offer) which it is proposed will be implemented by means of a scheme of arrangement without, prior to such announcement, obtaining the support of the offeree board, the Panel should be consulted as to the basis on which the offeror

might proceed with such an offer. The Code Committee has therefore adopted the following as section 13 of the Schemes Appendix:

**“13 SCHEMES WHICH DO NOT HAVE THE SUPPORT OF
THE OFFEREE BOARD”**

The Panel should be consulted if an offeror is considering announcing an offer or possible offer which it is proposed will be implemented by means of a scheme of arrangement without, prior to such announcement, obtaining the support of the offeree board.”.

(e) Derogations and waivers

- 1.12 One respondent enquired as to the Panel’s approach to the granting of derogations or waivers in relation to a scheme of arrangement and whether a stricter approach was applied to contractual offers than to schemes. The respondent considered that this issue was of particular importance where an offeror proceeding by way of a contractual offer was competing with an offeror who proposed to implement its offer by way of a scheme, or where an offeror initially proceeding by way of a scheme switched to a contractual offer structure (or vice versa).
- 1.13 Section 2(c) of the Introduction to the Code provides that the Panel may derogate or grant a waiver to a person from the application of a rule of the Code in certain circumstances provided, in the case of a transaction and rule subject to the requirements of the Takeovers Directive, that the General Principles of the Code are respected. As noted in paragraph 3.3.1 of Section A of PCP 2005/5 (which related to the implementation of the Takeovers Directive), a scheme of arrangement is not subject to the requirements of the Takeovers Directive. This is because the Takeovers Directive applies only to a transaction which is a takeover bid, which is defined in Article 2.1(a) of the Directive as follows:

“... a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law”.

1.14 Nonetheless, the Code Committee understands that the Panel Executive's normal policy is to seek to ensure that the General Principles will be respected in all cases in which a derogation or waiver from the application of a rule is granted, irrespective of whether the transaction is subject to the requirements of the Takeovers Directive.

(f) The lapsing and withdrawal of schemes and the ending of offer periods

1.15 During the consultation process, a number questions arose as to when:

- (a) an offer being implemented by way of a scheme of arrangement would be treated as having lapsed or been withdrawn;
- (b) an offer period in relation to an offer being implemented by way of a scheme would end; and
- (c) an offeror's obligation to proceed with an offer being implemented by way of a scheme would be treated as having terminated.

These questions were not discussed in detail in the PCP. The question of when an offer period in relation to a scheme would end was discussed in paragraphs 2.21 to 2.28 of the PCP but this discussion focussed on schemes which had become effective, rather than schemes which had lapsed or been withdrawn.

(i) The position in respect of a contractual offer

1.16 Once an offeror has made an announcement under Rule 2.5 of a firm intention to make a contractual offer, it will normally be obliged to proceed with that offer. The offeror will normally be released from its obligation to proceed with its offer in the following circumstances:

- (a) where the offer document has not been posted and the offer has therefore not been made:

- (i) pursuant to Rule 2.7, if the offeror invokes a pre-condition to the posting of the offer with the permission of the Panel;
 - (ii) pursuant to Rule 2.7, if the offeror would be permitted to invoke a condition to the offer if the offer were made. The Code Committee understands that the offeror would also be released from its obligation to proceed with its offer if the offeree company would be permitted to invoke, or cause the offeror to invoke, an offeree protection condition if the offer were made (and the offeree company confirmed its intention to do so);
 - (iii) pursuant to Rule 2.7, if a competing offeror posts a higher offer;
 - (iv) with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1 (as referred to in Rule 2.7), which provides, broadly, that the Panel may allow an offeror not to proceed with its offer if the offeree company undertakes an action that constitutes “frustrating action”;
 - (v) if there is a “competition reference” which would have resulted in the offer lapsing pursuant to a term required by Rule 12.1(a) or (b) if the offer document had been posted and the offer had been made. However, the Code Committee understands that, if an offer has been announced under Rule 2.5 pre-conditional upon competition clearance, the offeror will continue to be required to proceed with its offer, and the offer period will continue, notwithstanding that a competition reference has occurred; or
 - (vi) if a competing contractual offer becomes or is declared wholly unconditional or where a competing scheme becomes effective; and
- (b) where the offer document has been posted and the offer has therefore been made:

- (i) if the offeror invokes a condition to the offer pursuant to Rule 13, including the invocation of the acceptance condition on any closing date, or the offeree company invokes, or causes the offeror to invoke, an offeree protection condition with the permission of the Panel which results in the lapsing of the offer;
- (ii) if there is a “competition reference” before the later of the first closing date and the date on which the offer becomes or is declared unconditional as to acceptances which results in the lapsing of the offer pursuant to a term required by Rule 12.1(a) or (b); or
- (iii) if a competing contractual offer becomes or is declared wholly unconditional or where a competing scheme becomes effective.

In such circumstances, the offer period will end upon an appropriate announcement being made.

1.17 In addition, if, with the consent of the Panel, an offeror switches the structure of its offer from a contractual offer to a scheme of arrangement, the offeror will then be required to proceed with the scheme and the Code Committee understands that the Panel Executive will not normally require the offeror to proceed with the contractual offer, which will normally lapse on its next closing date. The offer period originally commenced will, however, continue.

(ii) *The position in respect of a scheme of arrangement*

1.18 The Code Committee considers that a scheme of arrangement should be treated consistently with a contractual offer. As such, once an offeror has made an announcement under Rule 2.5 of a firm intention to make an offer to be implemented by way of a scheme of arrangement, it will normally be obliged to proceed with that offer. The offeror will normally be released from its obligation to proceed with its offer in the following circumstances:

- (a) where the scheme circular has not been posted, if any of the circumstances described in paragraph 1.16(a) above in relation to a contractual offer occur; and
- (b) where the scheme circular has been posted:
 - (i) if the offeror invokes a condition to the offer pursuant to Rule 13 or if the offeree company invokes, or causes the offeror to invoke, an offeree protection condition with the permission of the Panel which results in the lapsing of the offer that is being implemented by the scheme. For example, a scheme circular will contain conditions in relation to the approvals required to implement the scheme, and the scheme will therefore lapse if either the shareholder meetings convened to approve and give effect to the scheme are held but the required resolutions are not passed, or the court sanction hearing is held but the court does not sanction the scheme;
 - (ii) if there is a “competition reference” before the shareholder meetings which results in the lapsing of the scheme pursuant to a term required by Rule 12.1(a) or (b) (as amended in section 5 below);
 - (iii) if the longstop date of the scheme is reached without the scheme’s having become effective and, as a result, the scheme lapses; or
 - (iv) if a competing contractual offer becomes or is declared wholly unconditional or where a competing scheme becomes effective.

In such circumstances, the offer period will end upon an appropriate announcement being made.

1.19 In addition, if, with the consent of the Panel, an offeror switches the structure of its offer from a scheme of arrangement to a contractual offer, the offeror will then

be required to proceed with the contractual offer and the Code Committee understands that the Panel Executive will not normally require the offeror to proceed with the scheme. The offer period originally commenced will, however, continue.

1.20 Further, the Code Committee considers that, even absent a switch, there may be circumstances in which the Panel might consent to the offeror, with the consent of the offeree board, being released from its obligation under the Code to proceed with an offer proposed to be implemented by way of a scheme, notwithstanding that, as a matter of law, the scheme process has not yet terminated. For example, if the offeree board withdraws its support from a scheme, it may need to take steps to terminate the scheme process but it may not be possible to take those steps immediately because of the requirements of the court. In such circumstances, subject to the agreement of the offeror and the offeree board, and to the provision of undertakings from the parties to terminate the scheme process as soon as practicable, the Panel might agree to treat the scheme as having lapsed for the purposes of the Code and the offeror as having no further obligation to proceed with the scheme. The offer period will end once an appropriate announcement has been made.

(iii) *Competitive situations*

1.21 The Code Committee understands that, in a competitive situation, the Panel Executive is likely to bring the offer period to an end in relation to all of the offerors once one of the competing offers has either, in the case of a scheme, become effective (see paragraph 2.19) or, in the case of a contractual offer, become or been declared unconditional as to acceptances.

1.22 When a scheme becomes effective, ownership of the offeree company will pass to the successful offeror, with the result that the obligation for any competing offeror to proceed with its offer will fall away. However, when a contractual offer becomes or is declared unconditional as to acceptances, it may nevertheless be possible for that offer subsequently to lapse on account of an outstanding condition not being satisfied. Accordingly, even though the offer period will have

ended following that offer's becoming or being declared unconditional as to acceptances, any competing offeror's obligation to proceed with its offer will not fall away unless one of the circumstances described in paragraphs 1.16 to 1.20 occurs. Therefore, such a competing offeror should not put itself into a position in which it is unable to proceed with its offer unless and until such a circumstance occurs.

(iv) *Withdrawal of the offeree board's recommendation not sufficient*

1.23 It follows from the above that the Code Committee does not consider that the withdrawal by the offeree board of its recommendation of an offer that is to be implemented by way of a scheme will normally, of itself, be sufficient to terminate the offeror's obligation to proceed with the offer or to end the offer period. (The Code Committee considers this to be the case notwithstanding that the withdrawal of the offeree board's recommendation may result, for example, in an implementation agreement between the offeror and the offeree company being terminated and/or an inducement fee becoming payable.) This is because the Code Committee understands that the withdrawal of the offeree board's recommendation will not, of itself, necessarily prevent the scheme from becoming effective at a later date. The Code Committee is aware of schemes which have become effective despite the temporary loss of the offeree board's recommendation at some stage of the scheme process. This has usually arisen where, in the context of a competitive situation, the first offeror, having lost the offeree board's recommendation, has increased its offer and then regained the recommendation. However, it could equally be the case that the offeree board might seek to return to the first offeror's scheme if the competing offeror's offer does not proceed for any reason.

(v) *"Frustrating action" by the offeree board*

1.24 In circumstances where the offeree board proposes to take a course of action which might lead to a scheme's lapsing without the offeror having had, by the time the scheme lapses, the opportunity to switch the structure of the transaction to a contractual offer, the Code Committee would expect the Panel to be consulted

in order to determine whether such action might be restricted by General Principle 3 and/or Rule 21.1.

(vi) *Switching*

1.25 For the avoidance of doubt, where an offeror switches the structure of its transaction from a contractual offer to a scheme of arrangement (or vice versa) and the transaction which the offeror has switched out of lapses (but the transaction which the offeror has switched into has not lapsed), the provisions of Rule 35.1 will not apply, despite the original offer having lapsed.

1.26 As indicated in paragraph 9.15 of the PCP, whilst there might be circumstances in which an offeror considers that, in effect, it would have no option but to switch the structure of its transaction if it wished to proceed with its offer, the Code Committee does not believe that the Code would oblige any such offeror to effect a switch in such circumstances.

(g) *Code amendments*

1.27 Appendix A to this Response Statement sets out in full the provisions of the Code which are being introduced or amended as a result of the consultation exercise. As indicated above, the changes comprise:

- (a) amendments to certain of the existing provisions of the Code; and
- (b) the introduction of the Schemes Appendix as a new Appendix 7 to the Code which includes, at section 14, the List of Disapplied Provisions.

In Appendix A, underlining indicates new text and striking through indicates deleted text, as compared to the current provisions of the Code. Where new or amended provisions of the Code are set out in the main body of the Response Statement, however, they are marked up so as to show changes from the provisions proposed in the PCP.

(h) *Implementation and transitional arrangements*

- 1.28 The amendments to the Code introduced as a result of this Response Statement will take effect on Monday, 14 January 2008. Amended pages of the Code will be published prior to that date.
- 1.29 The Code as revised will be applied to all transactions which are announced under Rule 2.5 on or after Monday, 14 January 2008. The Panel Executive should be consulted as to the application of the Code in respect of those transactions which will, or might, straddle that date.

(i) *Executive Practice Statements*

- 1.30 The Code Committee understands that, as a result of the amendments adopted in paragraphs 2.20, 3.19, 3.20, 6.5 and 9.13, the Panel Executive intends to withdraw Practice Statement No. 7 (“Possible improvement statements”), Practice Statement No. 13 (“Timetable extensions – alterations to a predicted date”) and Practice Statement No. 14 (“Schemes of arrangement”) in due course.

2. Definitions and interpretation

(a) *“Scheme of arrangement or scheme”*

Q.1 Do you agree with the proposed definition of “scheme of arrangement or scheme”?

- 2.1 Paragraph 2.3 of the PCP proposed that a new definition of a “scheme of arrangement or scheme” should be introduced into the Definitions Section of the Code, as follows:

“Scheme of arrangement or scheme

A transaction effected by means of a scheme of arrangement under section 425 in the Companies Act 1985.”.

- 2.2 One respondent considered that the proposed definition was too wide, in that it included all types of schemes of arrangement and was not limited to takeover offers effected by means of a scheme. The Code Committee recognises that the transactions which may be effected by way of a scheme of arrangement are not limited to takeover offers. However, by virtue of section 3(b) of the Introduction to the Code, the Code applies to schemes of arrangement only to the extent that they are used to effect “takeover bids” or “merger transactions” or are otherwise used as part of transactions which have as their objective or potential effect (directly or indirectly) obtaining or consolidating control of companies to which the Code applies. The Code Committee does not, therefore, consider the proposed definition of “scheme of arrangement or scheme” to be too wide in this regard.
- 2.3 Two further respondents considered that the proposed definition was too narrow. One suggested that the definition should extend to similar procedures outside the UK, such as a scheme of arrangement under Jersey law. The other suggested that the definition should refer to a “statutory scheme of arrangement”, particularly given that, as noted at paragraph 1.1 of the PCP, the relevant sections of the Companies Act 1985 are shortly due to be repealed and replaced by provisions in the Companies Act 2006. The Code Committee accepts the substance of these suggestions and has therefore adopted a revised definition of a “scheme of arrangement or scheme”, as follows:

“Scheme of arrangement or scheme

A transaction effected by means of a scheme of arrangement under ~~section 425 of the Companies Act 1985, the Companies Act 2006 or similar~~ statutory provisions of the Channel Islands or the Isle of Man.”.

In addition, the Code Committee has adopted the minor amendments to section 3(b) of the Introduction to the Code and Rule 19.4(viii) as proposed in paragraph 2.4 of the PCP.

2.4 The Code Committee considers that the Panel Executive should be consulted at an early stage if a scheme of arrangement under statutory provisions in the Channel Islands or the Isle of Man is being contemplated.

(b) *“Offer”*

Q.2 Do you agree with the proposed new second paragraph of the definition of “offer”?

2.5 Paragraph 2.8 of the PCP proposed the introduction a new second paragraph into the definition of “offer” in the Definitions Section of the Code, as follows:

“Offer

...

In the case of a scheme of arrangement, the offeror shall be treated as if it were making a contractual offer to those shareholders of the offeree company who are parties to the scheme in respect of the shares subject to the scheme and references to an “offer” shall be construed accordingly.”.

In proposing this amendment, the Code Committee’s intention was to make clear that, in general, the Code applies to a scheme of arrangement in the same way as it applies to a contractual offer, notwithstanding the fact that certain provisions use terminology specific to a contractual offer which needs to be construed purposively when applying the Code to a scheme. Paragraph 1.15 of the PCP had similarly proposed that the application of the Code to a scheme should be made clear in section 1 of the Schemes Appendix, as follows:

“1 APPLICATION OF THE CODE TO SCHEMES OF ARRANGEMENT

The provisions of the Code apply to a scheme of arrangement, except as set out in this Appendix 7.”.

2.6 Of the eight respondents to Question 2, three considered that the new second paragraph proposed to be introduced into the definition of an “offer” was unnecessary and that it might confuse rather than clarify the position. One of those respondents suggested that the application of the Code to schemes would be

more appropriately addressed solely in section 1 of the Schemes Appendix. The Code Committee accepts this suggestion. Accordingly, the Code Committee has:

- (a) adopted section 1 of the Schemes Appendix in a revised form from that proposed in paragraph 1.15 of the PCP, as follows:

“1 APPLICATION OF THE CODE TO SCHEMES OF ARRANGEMENT

The provisions of the Code apply to an offer effected by means of a scheme of arrangement in the same way as they apply to an offer effected by means of a contractual offer, except as set out in this Appendix 7.”; and

- (b) decided not to introduce the second paragraph of the definition of “offer” proposed in paragraph 2.8 of the PCP.

(c) *“Offeree company” and “Offeror”*

Q.3 Do you agree with the proposed new second paragraphs of the definitions of “offeree company” and “offeror”?

2.7 Paragraph 2.11 of the PCP proposed to introduce a new second paragraph into each of the definitions of “offeree company” and “offeror” in the Definitions Section of the Code.

2.8 All respondents to Question 3 agreed with the introduction of the proposed new paragraphs. Three respondents made technical points and suggested minor drafting changes to reflect these points. The Code Committee accepts the substance of these points and has therefore adopted the new second paragraphs of the definitions of “offeree company” and “offeror” in a slightly revised form, as follows:

“Offeree company

...

In the case of a scheme of arrangement, a reference to the offeree company should normally be construed as a reference to the company whose shares are proposed to be acquired under which is proposing the scheme.”; and

“Offeror

...

In the case of a scheme of arrangement, a reference to an offeror should normally be construed as a reference to the person who it is proposed will acquire all or part of the issued share capital shares of the offeree company under the scheme.”.

(d) “Offer documents and offeree board circulars”

Q.4 Do you agree with the proposed definition of “offer documents and offeree board circulars”?

2.9 All respondents to this question agreed with the definition of “offer documents and offeree board circulars” in the Schemes Appendix proposed in paragraph 2.14 of the PCP, which the Code Committee has therefore adopted.

(e) “Shareholder meetings” and “Court sanction hearing”

Q.5 Do you agree with the proposed definitions of “shareholder meetings” and “court sanction hearing”?

(i) “Shareholder meetings”

2.10 Three respondents suggested that the definition of “shareholder meetings” proposed to be included in the Schemes Appendix should refer to a “general meeting” of the offeree company, rather than to an “extraordinary general meeting”, on the bases that (i) there is no concept of an “extraordinary” general meeting in the Companies Act 2006, and (ii) it would be possible for a scheme to be approved at an annual general meeting. The Code Committee accepts this suggestion and has therefore adopted the definition of “shareholder meetings” in the Schemes Appendix in a slightly revised form from that proposed in paragraph 2.17 of the PCP, as follows:

“Shareholder meetings

The meeting of shareholders in the offeree company (or meetings of relevant classes of shareholders) convened by the court to consider a resolution to approve a scheme of arrangement and any ~~extraordinary~~ general meeting of the offeree company (and related class meetings) convened to consider any resolution to approve or give effect to a scheme.”.

(ii) *“Court sanction hearing”*

2.11 Four respondents noted that it is increasingly common for a scheme involving a reduction of capital to involve two court hearings, namely (i) an application for an order sanctioning the scheme, and (ii) an application for an order confirming the reduction of capital required to implement the scheme. Respondents sought clarification as to which of these hearings the definition was intended to refer to and suggested that the definition should be amended so as to refer to both hearings.

2.12 The Code Committee notes the increasing frequency with which schemes of arrangement involving a reduction of capital have separate court hearings. The Code Committee also considered this issue in the context of the definition of “offer period” and the proposed new definition of the “effective date” of a scheme as more fully described in paragraphs 2.17 to 2.20 below.

2.13 In relation to the proposed definition of “court sanction hearing”, five of the draft provisions set out in the PCP referred to the “court sanction hearing”, namely sections 4(b), 5(b), 6(a) and 9(b) of the Schemes Appendix and section 3 of Appendix 2 (the Formula Offers Guidance Note). In each case, it was the Code Committee’s intention to refer to the hearing at which the court considered the application to sanction the scheme rather than the hearing (if any) to consider the capital reduction because the former is the hearing at which the court considers the more substantive issues in connection with the approval of the scheme. Whilst the capital reduction hearing may be considered something of a formality, it is at the sanction hearing that the court considers whether (i) the statutory

provisions have been complied with, (ii) the class was fairly represented and the statutory majority acting bona fide, and (iii) the arrangement is one of which a reasonable person might approve. It is also the hearing at which dissenting shareholders may appear in order to present objections to the scheme proceeding. The Code Committee has not, therefore, made any amendment to the proposed definition in this regard.

- 2.14 In addition, two respondents drew the Code Committee's attention to the fact that the Practice Direction which took effect on 1 October 2007 dispensed with the requirement to petition the court in relation to the sanctioning of a scheme. The Code Committee notes this and has therefore adopted the definition of "court sanction hearing" in the Schemes Appendix in a slightly revised form from that proposed in paragraph 2.17 of the PCP, as follows:

"Court sanction hearing

The hearing of the court ~~at which a petition to sanction a scheme of arrangement is presented.~~"

- (f) ***"Irrevocable commitments and letters of intent"***

Q.6 Do you agree with the proposed amendments to the definition of "irrevocable commitments and letters of intent"?

- 2.15 Six of the seven respondents to this question agreed with the proposed amendments. The seventh respondent suggested that the amended definition of "irrevocable commitments and letters of intent" should make explicit reference to the fact that there might be more than one resolution to approve or give effect to a scheme.
- 2.16 The Code Committee considers that the definition of "irrevocable commitments and letters of intent", as proposed to be amended in paragraph 2.20 of the PCP, is broad enough to extend to circumstances where there is more than one resolution to approve or give effect to a scheme and has therefore adopted the amendments as proposed.

(g) *“Offer period” and “Effective date”*

Q.7 Do you agree with the introduction of the proposed new second paragraph into the definition of “offer period”?

2.17 Paragraph 2.28 of the PCP proposed the introduction of the following new second paragraph into the definition of “offer period” in the Definitions Section of the Code:

“Offer period

...

In the case of a scheme of arrangement, the offer period will continue until it is announced that the scheme has finally become effective or that it has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.”.

2.18 All respondents who specifically addressed Question 7 agreed with the proposed introduction of the new second paragraph into the definition of “offer period”, although three respondents sought clarification of the reference in the proposed new paragraph to the scheme “finally becoming effective”. The PCP had also proposed that similar wording be included in section 5(c) of the Schemes Appendix, in relation to announcements following the key events in the scheme process, and in section 10 of the Schemes Appendix, in relation to the settlement of consideration.

2.19 As noted in paragraph 2.12, the Code Committee understands that some schemes involving a reduction of capital now have “split” court hearings: a first hearing to sanction the scheme and a second hearing to effect the reduction of capital that forms part of the scheme. The Code Committee therefore understands that a scheme may become effective upon the order of the court sanctioning the scheme being delivered to the registrar of companies for registration or, if the scheme involves a reduction of capital, upon the order of the court confirming the reduction of capital (and the minute of the reduction of capital) being delivered to the registrar of companies and registered by him (if later).

2.20 In view of the above, the Code Committee has concluded that it would be clearer if (i) a new definition of the “effective date” of a scheme were to be introduced into the Definitions and Interpretation Section of the Schemes Appendix, and (ii) sections 5(c) and 10 of the Schemes Appendix referred to the “effective date” of the scheme, rather than to the scheme “finally becoming effective” (see paragraphs 4.7 and 3.33 respectively). The Code Committee has therefore:

- (a) included a new definition of “effective date” in the Definitions and Interpretation Section of the Schemes Appendix, as follows:

“Effective date

Effective date means the date on which the order of the court sanctioning the scheme is delivered to the registrar of companies for registration or, if later, the date on which the order of the court confirming the reduction of capital and minute of the reduction of capital are delivered to the registrar of companies and registered by him.”; and

- (b) introduced a new second paragraph into the definition of “offer period” in the Definitions Section of the Code in a slightly revised form from that proposed in paragraph 2.28 of the PCP, as follows:

“Offer period

...

In the case of a scheme of arrangement, the offer period will continue until it is announced in accordance with Section 5(c) of Appendix 7 that the scheme has ~~finally~~ become effective or that ~~it~~ the scheme has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.”.

2.21 As indicated in paragraph 1.30, the Code Committee understands that, as a result of the amendments adopted in paragraphs 2.20 and 6.5, the Panel Executive intends to withdraw Practice Statement No. 14 in due course.

2.22 In response to Question 7, one respondent noted that it was usual for an implementation agreement to govern the relationship between an offeror and the offeree company in the context of a scheme and sought clarification as to how the Panel would regard the situation where complying with that agreement might cause a party to be in breach of the Code. The Code Committee considers it to be a matter of fundamental importance that neither an offeror nor the offeree board should enter into an implementation agreement, or any other commitment or obligation, which would require the offeror or the offeree company (as the case may be) to take any action that would constitute a breach of any provision of the Code.

3. Timing issues (Rules 30 and 31)

(a) Introduction

3.1 Section 3 of the PCP considered the extent to which a scheme of arrangement should, or should not, be subject to a timetable similar to that which applies under Rules 30 and 31 in the case of a contractual offer.

(b) The period between announcement and posting (Rules 30.1 and 30.2)

Q.8 Do you agree that Rule 30.1 should apply in a scheme in the same way as in a contractual offer?

Q.9 Do you agree with the proposed new Note on Rule 30.2?

3.2 Five of the seven respondents to Question 8 agreed that Rule 30.1 should apply in a scheme in the same way as in a contractual offer. The two respondents who disagreed, and one of the respondents who agreed, noted that, owing to the court process, it is not always possible to post the scheme circular within 28 days of the firm intention announcement. One of the respondents suggested that Rule 30.1 should be amended accordingly.

3.3 The Code Committee notes that Rule 30.1(a) does not set out an absolute requirement but rather provides that the offer document should “normally” be

posted within 28 days of the announcement of a firm intention to make an offer. Indeed, the rule specifically contemplates that there may be circumstances in which it is not possible to adhere to this timetable, in that it provides that the Panel must be consulted if the offer document is not to be posted within this period. The Code Committee acknowledges that aligning the offer timetable with the court timetable may, on occasion, lead to such circumstances arising. The Code Committee understands that the Panel Executive will therefore usually agree to an extension of the 28 day period for the posting of an offer document or a scheme circular where this is consented to by the offeree board (as would typically be the case in relation to the posting of a circular relating to a recommended scheme). The Code Committee has not, therefore, adopted the suggested amendment to Rule 30.1(a).

- 3.4 All of the respondents who expressed a view on Question 9 agreed with the proposed new Note on Rule 30.2, although one suggested that the references to a scheme of arrangement and a recommended contractual offer were unnecessary. The Code Committee accepts this suggestion and has therefore adopted the new Note on Rule 30.2 in a slightly revised form from that proposed in paragraph 3.9 of the PCP, as follows:

“NOTE ON RULE 30.2

Where there is no separate offeree board circular

~~In the case of a scheme of arrangement, or in the case of a recommended contractual offer w~~Where the offeree board’s circular is combined with the offer document, there will be only a single document and the references to the offeree board’s circular being posted and made readily and promptly available after publication of the offer document ~~is therefore will be inapplicable~~. Other than this, the requirements of Rule 30.2 will apply as usual to the single document.”

(c) Making documents and information available (Rule 30.3)

- 3.5 In paragraph 3.10 of the PCP, the Code Committee concluded that Rule 30.3 should apply in the context of an offer made by way of a scheme of arrangement in the same way as it applies in relation to a contractual offer. One respondent

noted that Rule 30.3 had been introduced in the context of the implementation of the Takeovers Directive and that the Code Committee was therefore proposing to apply the standards of the Takeovers Directive to schemes of arrangement, notwithstanding that schemes are not transactions which are subject to the Directive.

3.6 The Code Committee recognises that the Takeovers Directive does not apply to schemes of arrangement. However, the application of Rule 30.3 to schemes is consistent with the principle that there should be a single Code that applies to all companies and transactions, irrespective of whether they are subject to the Takeovers Directive.

(d) The period between posting and the shareholder meetings (Rule 31.1)

Q.10 Do you agree that Rule 31.1 should be disapplied in a scheme?

3.7 Paragraph 3.12 of the PCP stated the Code Committee's belief that Rule 31.1 was inapplicable in a scheme of arrangement and should be included in the List of Disapplied Provisions in the Schemes Appendix. All respondents to Question 10 agreed and the Code Committee has therefore adopted this proposal.

Q.11 Do you agree that, in a scheme, the shareholder meetings should normally be convened for a date which is at least 21 days after the date of the scheme circular?

3.8 Of the eight respondents to Question 11, five agreed and three disagreed.

3.9 Of the five respondents who agreed, one strongly endorsed the proposed approach and considered that a notice period of less than 21 days would be unwelcome. A second respondent suggested the deletion of the word "normally" from the proposed section 3 of the Schemes Appendix, so as to be more consistent with Rule 31.1, which requires a contractual offer to be kept open for at least 21 days following the date on which the offer document is posted. The three respondents who disagreed considered that, if company law and the courts permit an offeree

company to convene a shareholder meeting on less than 21 days' notice, then a longer notice period should not be imposed by the Code.

3.10 The Code Committee notes that, since 1 October 2007, section 307 of the Companies Act 2006 has provided that any general meeting of a public company (other than an annual general meeting) must be called by notice of at least 14 clear days and the Code Committee therefore acknowledges that it is arguable that the Code should not require a longer notice period. However, the Code Committee also notes that General Principle 2 requires offeree shareholders to be given sufficient time to enable them to reach a properly informed decision on an offer. Rule 31.1 provides, in effect, that the minimum time required for offeree shareholders to reach a decision in relation to a contractual offer (whether or not recommended by the offeree board) is 21 calendar days and the Code Committee considers that a consistent approach should be adopted in relation to a scheme of arrangement.

3.11 Nevertheless, circumstances might arise in which it would be appropriate to grant a derogation from the strict application of a 21 day notice period. The Code Committee therefore believes that, in order to maintain the Panel's flexibility in this regard, it would be appropriate for the Code to provide that the notice period for the shareholder meetings in relation to a scheme should "normally" be at least 21 days from the date of the scheme circular.

3.12 The Code Committee has therefore adopted section 3 of the Schemes Appendix as proposed in paragraph 3.16 of the PCP.

(e) The announcement of changes to the expected scheme timetable (Rule 31.2)

Q.12 Do you agree that details relating to the adjournment of a shareholder meeting or court sanction hearing and any other change to the expected timetable of events should be required to be announced as proposed?

3.13 All seven respondents to this question agreed that details relating to the adjournment of a shareholder meeting or court sanction hearing should be required to be announced as set out in the proposed section 6(a) of the Schemes

Appendix. However, one respondent suggested that it was going too far to extend the requirement to a decision by the offeree board to propose such an adjournment. The Code Committee does not agree with this suggestion. The Code Committee continues to consider that a decision by the offeree board to propose the adjournment of a shareholder meeting or court sanction hearing is a significant event which will result in a change to the expected timetable of a scheme and that such a decision should be announced promptly to offeree shareholders and other market participants.

3.14 Two respondents considered that an absolute requirement to announce “any” other change to the expected timetable of events would be unduly onerous. The Code Committee acknowledges that it is possible that certain changes to the scheme timetable might not be sufficiently material as to merit a separate announcement and has reflected this in section 6(b) of the Schemes Appendix by providing that the Panel may consent to an announcement not being made in respect of a particular change in the scheme timetable.

3.15 In the light of the above, the Code Committee has adopted section 6(a) of the Schemes Appendix in the form proposed in paragraph 3.21 of the PCP and has adopted section 6(b) in a slightly revised form from that proposed in the PCP, as follows:

“(b) Similarly, except with the consent of the Panel, any other change to the expected timetable of events set out in the scheme circular must be announced promptly by the offeror or offeree company (as appropriate) in accordance with the requirements of Rule 2.9.”.

3.16 In addition, the Code Committee has:

- (a) included Rule 31.2, which relates to the extension of a contractual offer, in the List of Disapplied Provisions in the Schemes Appendix; and
- (b) amended Note 2 on Rule 2.9, as proposed in footnote 5 on page 29 of the PCP, so as to refer to a number of provisions which, as a result of certain

other amendments introduced by this Response Statement, will require an announcement to be published in accordance with Rule 2.9.

(f) Notifying offeree shareholders of a change to a scheme timetable

Q.13 Do you agree that the Panel should be consulted as to whether notice of an adjournment or other change to the expected scheme timetable should be posted to shareholders?

3.17 All seven respondents to this question agreed that the Panel should be consulted as to whether notice of a change to the expected scheme timetable should be posted to offeree shareholders, as set out in the proposed section 6(c) of the Schemes Appendix (paragraph 3.24 of the PCP). One respondent suggested that section 6(c) should make it clear that it would not normally be necessary for such notice to be posted. Another respondent considered that notice of a change to the scheme timetable should be posted to offeree shareholders in circumstances where they might not be expected to look out for announcements on a Regulatory Information Service (“RIS”), such as where the offeree company was either unlisted or had been de-listed.

3.18 As indicated in paragraph 3.23 of the PCP, the Code Committee considers that the announcement of changes to the expected timetable of principal events to a RIS will normally be sufficient to communicate the relevant changes to shareholders and that the posting of a notice to offeree shareholders should not normally be required. However, the Code Committee believes that the Panel should make its determination on a case-by-case basis, taking into account all relevant factors, including, if appropriate, whether or not securities in the offeree company are admitted to trading at that time.

3.19 The Code Committee has therefore adopted section 6(c) of the Schemes Appendix as proposed in paragraph 3.24 of the PCP, subject to the following minor amendments:

“(c) In all cases, the Panel should be consulted as to whether notice of an adjournment of any meeting or hearing or any other delay in, or

~~other~~ change to, the expected timetable should, in addition, be posted to offeree company shareholders.”.

(g) *Notifying offeree shareholders of an extension of a contractual offer timetable*

Q.14 Do you agree that new Notes on Rules 31.6, 31.7 and 31.8 in relation to the announcement of an extension of a contractual offer should be introduced as proposed?

3.20 Paragraph 3.26 proposed that a new Note on each of Rules 31.6, 31.7 and 31.8 should be introduced in relation to the extension of a contractual offer, setting out an approach similar to that proposed to be taken in section 6(c) of the Schemes Appendix. The responses to Question 14 were consistent with those to Question 13. The Code Committee has therefore adopted the new Notes as proposed.

3.21 As indicated in paragraph 1.30, the Code Committee understands that, as a result of the amendments adopted in paragraphs 3.19 and 3.20, the Panel Executive intends to withdraw Practice Statement No. 13 in due course.

(h) *No obligation to extend (Rule 31.3) and “No extension statements” (Rule 31.5)*

Q.15 Do you agree that Rule 31.3 should be disapplied in a scheme?

3.22 Of the seven respondents to this question, six agreed that, since a scheme of arrangement does not have a “closing date” which may be extended in the same way as in a contractual offer, Rule 31.3, which provides that an offeror has no obligation to extend an offer the conditions of which are not met by a closing date, should be disapplied in a scheme. The seventh respondent suggested that an offeror should not be obliged to continue with a scheme if the shareholder meetings are adjourned by the shareholders of the offeree company. The Code Committee does not believe that it is correct to draw an analogy in this context between a closing date of a contractual offer and the date for which shareholder meetings in relation to a scheme are convened, and understands that an adjournment of the shareholder meetings would, of itself, be unlikely to bring the scheme process to an end.

3.23 The Code Committee has therefore included Rule 31.3 in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 3.29 of the PCP. Similarly, the Code Committee has also included Rule 31.5, which relates to “no extension statements”, in the List of Disapplied Provisions in the Schemes Appendix, as set out in Appendix A to the PCP. However, the Code Committee understands that the Panel Executive may hold an offeror or the offeree company to any statements which they may make in relation to not extending the scheme timetable, including any “no adjournment statements”, if the Executive believes that shareholders or others may have relied on such statements.

(i) *Offer to remain open for 14 days after unconditional as to acceptances (Rule 31.4)*

Q.16 Do you agree that Rule 31.4 should be disapplied in a scheme?

3.24 All seven respondents to this question agreed that Rule 31.4, which provides that a contractual offer which has become or been declared unconditional as to acceptances must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired, should be disapplied in a scheme. In addition, one respondent invited the Code Committee to consider whether, in the context of a scheme, there should be an obligation on an offeror to make arrangements to ensure that it acquires any shares which the offeree company might issue after the scheme has become effective.

3.25 The Code Committee does not consider that it would be appropriate for the Code to impose an absolute obligation either on an offeror to acquire such shares or on a future shareholder in the offeree company to dispose of its shares to the offeror. The Code Committee considers that the position in relation to holders of convertible securities, options and subscription rights is adequately dealt with in Rule 15, which requires an offeror to make an “appropriate offer or proposal” to the holders of such securities. (See also section 12 below in relation to Rule 15.)

3.26 The Code Committee has therefore included Rule 31.4 in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 3.31 of the PCP.

(j) *Latest date for shareholder meetings (Rules 31.6 and 31.7)*

Q.17 Do you agree that, where there is no competitive situation, the Code should not impose maximum time periods in a scheme for the holding of shareholder meetings and/or the fulfilment of other scheme conditions?

3.27 In paragraph 3.37 of the PCP, the Code Committee concluded that, in the absence of a competitive situation, the Code should not specify maximum time periods for the holding of shareholder meetings and/or the fulfilment of other conditions to a scheme and that the offeree board and the offeror should therefore be free, subject to the views of the court, to agree the timetable of the scheme. Where a recommended offer is being effected by way of a scheme in a non-competitive context, the Code Committee considers that:

- (a) the offeree board will not be under unreasonable siege since it will have consented to the scheme timetable; and
- (b) offeree shareholders will not be “locked in” to the scheme since, unlike in a contractual offer, where accepting shareholders may not be able to withdraw their acceptances in order to sell their shares, shareholders in an offeree company which is the subject of a scheme are generally free to sell their shares until the effective date of the scheme.

3.28 Of the eight respondents to Question 17, five agreed and three disagreed. Two of the respondents who agreed with the proposal considered that, in addition, maximum time periods should not necessarily be imposed simply because of the existence of a competitive situation and that the Panel should approach the particular circumstances of each case with flexibility. Another of the respondents who agreed with the Code Committee’s conclusions noted that it has become increasingly common for an implementation agreement relating to a scheme to shift timetable and other matters to within the offeror’s control.

3.29 The three respondents who disagreed considered that the Code should impose an orderly framework for all schemes in the same way as it does for all contractual

offers, and that the lack of a Code timetable for schemes could result in a long period of uncertainty for offeree shareholders. One of those respondents made detailed suggestions as to the Code timetable which should apply during a scheme.

3.30 On balance, the Code Committee continues to be of the view that the Code should not impose maximum time periods for the holding of shareholder meetings and/or the fulfilment of the other conditions to a recommended scheme in a non-competitive context and has therefore included Rules 31.6 and 31.7 in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 3.33 of the PCP. In summary, the Code Committee's reasons for reaching this conclusion are that:

- (a) in a recommended scheme in a non-competitive context, the timetable is ultimately under the control of the offeree board (albeit that it may have ceded a certain amount of that control to the offeror in the course of negotiating an implementation agreement);
- (b) since it is recommending the scheme, the offeree board will have accepted that it will be "under siege" for the duration of the transaction;
- (c) the offeree board is required, together with its Rule 3 adviser, to take into account the best interests of offeree shareholders when considering the scheme timetable; and
- (d) whilst it is possible that a scheme may continue for longer than a contractual offer in the absence of an equivalent timetable, unlike shareholders who accept a contractual offer (where withdrawal rights are limited to the period between the date which is 21 days after the first closing date and the date on which the offer becomes or is declared unconditional as to acceptances), shareholders in a company which is subject to a scheme are not "locked in" and are generally free to sell their shares at any time before the effective date.

(k) Settlement of consideration (Rule 31.8)

Q.18 Do you agree with the proposed provision relating to the settlement of consideration in a scheme?

3.31 Paragraph 3.41 of the PCP proposed that the Schemes Appendix should include, at section 10, a provision requiring consideration to be posted to offeree shareholders within 14 days of a scheme of arrangement finally becoming effective, except with the consent of the Panel.

3.32 All seven respondents to Question 18 agreed with the proposed provision, although three respondents sought clarification of the reference to a scheme “finally becoming effective”. The Code Committee considers this issue at paragraph 2.19. In addition, one respondent suggested that, in the same way that Rule 24.6 requires the offer document to incorporate language which appropriately reflects the provisions of Rule 31.8 in the context of a contractual offer, the requirement to post consideration within 14 days of a scheme becoming effective should be reflected in the terms of the scheme, in order that it might be enforced by offeree shareholders. The Code Committee has accepted this suggestion.

3.33 The Code Committee has therefore included Rule 31.8 of the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 3.41 of the PCP, and has adopted section 10 of the Schemes Appendix in a slightly different form from that proposed, as follows

“10 SETTLEMENT OF CONSIDERATION

Except with the consent of the Panel, the consideration must be posted within 14 days of the effective date ~~the scheme of arrangement finally becoming effective~~. The terms of the scheme must reflect this requirement.”

(l) Offeree company announcements after Day 39 (Rule 31.9)

Q.19 Do you agree that Rule 31.9 should be disapplied in a scheme?

3.34 All seven respondents to this question agreed that Rule 31.9, which relates to offeree company announcements after “Day 39” of a contractual offer, should be disapplied in a scheme. The Code Committee has therefore included Rule 31.9 in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 3.45 of the PCP.

(m) Return of documents of title (Rule 31.10)

3.35 See paragraphs 10.11 to 10.13 below.

4. Announcements following key events in a scheme

Q.20 Do you agree with the proposed provisions in relation to announcements following key events in a scheme?

4.1 In section 4 of the PCP, the Code Committee proposed provisions requiring an announcement to be made following three key events in a scheme, namely (a) the shareholder meetings, (b) the court sanction hearing, and (c) the scheme becoming effective (which will take place on the “effective date” – see paragraphs 2.19 and 2.20). In relation to the announcement following the shareholder meetings, the Code Committee concluded that the announcement should not only specify whether the resolutions put to the meetings had been passed by the requisite majorities, but should also give details of the voting results in relation to the meetings, including, in relation to a court-convened meeting, the number of shareholders who voted for and against the resolution.

4.2 All seven respondents to Question 20 agreed that provisions should be introduced into the Code requiring announcements to be made following the key events in a scheme. A number of respondents made comments on the detail of the proposed provisions.

4.3 One respondent disagreed with the proposed requirement that, in addition to giving details of the number of shares voted, the announcement following a court-convened meeting should also give details of the number of shareholders who

voted for and against the resolution to approve the scheme. The respondent argued that this went beyond what was required by company law in relation to a scheme, and that there was no similar provision in relation to a contractual offer in Rule 17.1 (which sets out the requirements for announcements of acceptance levels).

- 4.4 Under company law, at the court-convened meeting, a scheme of arrangement must be approved by a majority in number representing 75% in value of the shareholders present and voting, either in person or by proxy. The Code Committee acknowledges that company law does not require details of the number of shareholders who voted for and against the scheme to be announced, and that there is no directly equivalent provision in Rule 17. Nevertheless, the Code Committee considers that this information may be of use to shareholders and other interested parties. The Code Committee agrees with the comment of another respondent, who strongly supported the disclosure of voting results generally, who noted that “[g]iven that this data is already gathered, there should be no significant cost or administrative implications and so little reasonable opposition to this proposal”.
- 4.5 A third respondent suggested that section 5 of the Schemes Appendix should set the latest time by which the required announcements should be made, consistent with the provisions of Rule 17.1. The Code Committee considers that the announcements required by section 5 of the Schemes Appendix should be made as soon as practicable after the relevant event has taken place. Consistent with the views expressed in paragraph 4.9 of the PCP, and with the provisions of Rule 20.1, the Code Committee emphasises that the offeree company should seek to ensure that information in relation to an offer should be made equally available to all offeree shareholders as nearly as possible at the same time.
- 4.6 In relation to the announcement of the results of the shareholder meetings, whilst acknowledging that it may take some time to verify the results of the resolutions, the Code Committee agrees with the suggestion that section 5 of the Schemes Appendix should specify the latest time by which those results should be announced. The Code Committee therefore believes that section 5 should provide

that the details of the voting results should be announced not only (a) as soon as practicable after the votes on the relevant resolutions, but also (b) in any event by no later than 8.00 am on the business day following the shareholder meetings. In addition, the Code Committee considers that offeree companies should consider whether it is necessary to make a “holding” announcement, for example, stating whether the resolutions have been passed but not the detailed voting results, if they believe that those present at the meetings might ascertain whether the relevant resolutions have been passed before a public announcement has been made through a RIS. However, the Code Committee does not believe that it is necessary for this to be reflected in the Code.

- 4.7 In the light of the above, and having accepted certain minor drafting suggestions made by respondents, the Code Committee has adopted section 5 of the Schemes Appendix in a slightly revised form from that proposed in paragraph 4.6 of the PCP, as follows:

“5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME

(a) As soon as practicable after the ~~results of the votes on the relevant resolutions at the shareholder meetings are known~~ and, in any event, by no later than 8.00 am on the business day following the shareholder meetings, the offeree company must make an announcement stating whether or not the resolutions were passed by the requisite majorities (and, if not, whether or not the scheme has lapsed) and giving details of the voting results in relation to the meetings, including:

(i) in the case of the ~~extraordinary~~ any general meeting of the offeree company convened to consider any resolution to approve or give effect to the scheme, if a poll was taken, the number of shares of each class which were voted for and against the resolutions and the percentage of the shares voted which those numbers represent; and

(ii) in the case of the ~~each~~ each court-convened meeting:

(aa) the number of shareholders of ~~each~~ the class who voted for and against the resolution to approve the scheme and the percentage of those voting shareholders which those numbers represent;

~~(bb)~~ the number of shares of each the class which were voted for and against the resolution to approve the scheme and the percentage of the total shares voted which those numbers represent; and

~~(ce)~~ the percentage of the issued shares of each the class which the shares voted for and against the resolutions represent.

(b) As soon as practicable following the court sanction hearing, the offeree company must make an announcement stating the decision of the court and including details of whether the scheme will proceed or has lapsed.

(c) As soon as practicable ~~after the scheme of arrangement finally becomes~~ on the effective date, the offeree company or the offeror must make an announcement stating that the scheme has become effective.”.

4.8 In addition, the Code Committee has included Rules 17.1 and 17.2 in the List of Disapplied Provisions in the Schemes Appendix.

5. Competition references (Rule 12)

(a) *Rule 12.1*

Q.21 Do you agree with the proposed amendments to Rule 12.1?

5.1 Rules 12.1(a) and (b) provide that it must be a term of a contractual offer that it will lapse if there is a reference to the Competition Commission or an initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC (a “competition reference”) before (i) the first closing date, or (ii) the date the offer becomes or is declared unconditional as to acceptances, whichever is the later. Section 5 of the PCP proposed that, in order to make the application of Rule 12.1 in the context of a scheme of arrangement as consistent as possible with the application of Rule 12.1 in a contractual offer, an offer implemented by way of a scheme should provide that it will lapse if there is a competition reference before the date of the shareholder meetings.

- 5.2 Of the seven respondents to Question 21, five agreed with the proposed amendments to Rule 12.1, one requested further explanation of the intention behind the proposals and one disagreed and considered that there was no significant difference between a competition reference being made before or after the shareholder meetings.
- 5.3 As indicated in paragraph 5.5 of the PCP, the Code Committee considers that, in order to provide a degree of consistency between contractual offers and offers implemented by way of a scheme of arrangement, Rules 12.1(a) and (b) should be applied in the context of a scheme. In order to achieve this, the Code Committee considers that there should be a minimum period of time within which a competition reference should cause an offer being implemented by way of a scheme to lapse. A contractual offer will lapse if there is a competition reference before the offer becomes or is declared unconditional as to acceptances (or, if later, the first closing date) and the Code Committee considers that an offer being implemented by way of a scheme should lapse in similar circumstances. The Code Committee proposes to achieve this by amending the Code to provide that an offer that is being implemented by way of a scheme should lapse if the competition reference occurs before the date of the shareholder meetings, on the basis that this is the date on which shareholders, in effect, make their investment decision. However, if the competition reference occurs after the date of the shareholder meetings, the Code Committee does not believe that the Code should require the offer to lapse as a result. Nonetheless, a decision by the competition authorities to make a competition reference (or a decision not to make a reference subject to the agreement of terms, or the provision of undertakings, which are not satisfactory to the offeror) may give rise to a right for the offeror to invoke a condition to the offer included pursuant to Rule 12.1(c). In addition, a scheme may lapse if it reaches its longstop date without the necessary competition clearances having been granted.
- 5.4 Therefore, having accepted some minor drafting suggestions made by certain respondents, the Code Committee has adopted the amendments to Rule 12.1 proposed in paragraph 5.6 of the PCP in a slightly revised form, as follows:

“12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER

(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that:—

(i) in the case of a contractual offer, it the offer will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer scheme should provide that it will lapse and the scheme will not become effective if there is a reference before the date of the shareholder meetings (as defined in Appendix 7).

(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that ~~it will lapse if either: (i) the European Commission initiates proceedings under Article 6(1)(c); or (ii) there is a reference to the Competition Commission following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission;~~

(i) in either the case of a contractual offer, the offer will lapse if this occurs before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme should provide that it will lapse if the European Commission initiates proceedings under Article 6(1)(c), or if there is a subsequent reference to the Competition Commission following a referral by the European Commission under Article 9.1, will not become effective if this occurs before the date of the shareholder meetings (as defined in Appendix 7).”.

5.5 In addition, the Code Committee has included the Note on Rule 12.1 in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 5.7 of the PCP.

(b) Rule 12.2**Q.22 Do you agree with the proposed amendment of Rule 12.2 and with the consequential amendments?**

5.6 Section 5 of the PCP proposed that Rule 12.2 should be amended so as to make it clear what the position would be if an offer being implemented by way of a scheme became the subject of a competition reference, either before or following the shareholder meetings. In addition, the Code Committee proposed the introduction of a Note on the definition of “competition reference period” and minor consequential amendments to Note 4 on Rule 20.1, Note 5 on Rule 20.2 and Note 4 on Rule 21.1.

5.7 Five of the seven respondents to Question 22 agreed with the amendment of Rule 12.2 and with the consequential amendments, one thought that the drafting of the amended Rule 12.2 was not sufficiently clear and one disagreed for the same reasons that it had disagreed with Question 21.

5.8 The Code Committee has made some minor revisions to the proposals and has:

- (a) adopted the amendments to Rule 12.2 proposed in paragraph 5.14 of the PCP in a slightly revised form as a new Note 1 on Rule 12.2, as follows:

“NOTES ON RULE 12.2

1. Schemes of arrangement

In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

2. After a reference or initiation of proceedings

...”;

- (b) not adopted the new Note on the definition of “competition reference period” proposed in paragraph 5.15 of the PCP, on the basis that the proposed Note was unnecessary; and
- (c) adopted the amendments to Note 4 on Rule 20.1, Note 5 on Rule 20.2 and Note 4 on Rule 21.1 as proposed in paragraph 5.16 of the PCP.

6. Holding statements (Note 1 on Rule 19.3)

Q.23 Do you agree with the proposed provision relating to holding statements made during an offer period involving a scheme?

- 6.1 In section 6 of the PCP, the Code Committee addressed the issue of when, in the context of a scheme of arrangement, a potential competing offeror who has made a statement that it is considering making an offer for the offeree company (or an offeror who has made a statement that it is considering its position in the light of new developments) should be required to clarify that statement. The Code Committee concluded that such clarification should normally be required in advance of the date of the shareholder meetings, but that the Code should expressly acknowledge that, in certain circumstances, the Panel might exercise its discretion to permit an offeror or potential competing offeror to clarify its position after the shareholder meetings but before the court sanction hearing. These conclusions were consistent with the Panel Executive’s current application of Note 1 on Rule 19.3 in the context of a scheme, as described in Practice Statement No. 14, and the Code Committee proposed that they should be reflected in sections 4(a) and (b) respectively of the Schemes Appendix.
- 6.2 The nine respondents to Question 23 all agreed that it was preferable that offeree shareholders should have clarity as to an offeror or potential competing offeror’s intentions prior to the shareholder meetings. As regards the possibility of requiring clarification following the shareholder meetings, one respondent considered that this would be unfair on offeree shareholders because they should have all relevant information prior to the shareholder meetings. A second respondent considered that the Code should set out objective criteria for the

exercise of the Panel's discretion to permit such clarification. A further two respondents suggested that the deadline by which holding statements should normally be clarified should be expressed more specifically than proposed, for example, by providing that such clarification is required by the date that is 10 days prior to the shareholder meetings.

6.3 As to the circumstances in which the Panel might exercise its discretion to permit clarification after the date of the shareholder meetings, but before the date of the court sanction hearing, paragraph 6.5 of the PCP gave the example of a situation in which a short scheme timetable had been established by a first offeror and the offeree board which might have the effect of giving a potential competing offeror little opportunity to consider its position and undertake the necessary preparatory work ahead of the shareholder meetings. In such circumstances, the Panel might consider it appropriate, and in the interests of offeree shareholders (who might otherwise run the risk of losing the prospect of a competing or increased offer), to set a date for clarification by the potential competing offeror that is after the shareholder meetings but before the date on which the court sanction hearing is expected to take place. The proposed section 4(b) of the Schemes Appendix, as set out in paragraph 6.7 of the PCP, then provided that, in determining whether to permit clarification after the date of the shareholder meetings, the Panel would take into account all relevant circumstances, including:

- (a) the interests of offeree shareholders and the desirability of clarification prior to the shareholder meetings; and
- (b) the time that the offeror or potential offeror has had to consider its position.

The Code Committee continues to believe that this is the correct approach.

6.4 As to the deadline by which holding statements by offerors and potential competing offerors of the type described in Note 1 on Rule 19.3 should normally be clarified, the Code Committee understands that the Panel Executive intends to

continue to apply its current policy, namely that an offeror or potential competing offeror should normally clarify its intentions either:

- (a) on or around 10 calendar days prior to the last day on which the offer is able to become unconditional as to acceptances; or
- (b) in the case of a scheme, on or around 10 calendar days prior to the date of the shareholder meetings.

However, the Code Committee considers that the Panel's ability to act flexibly in this area should be preserved and does not therefore consider that it would be appropriate for this policy to be codified.

6.5 The Code Committee has therefore adopted section 4 of the Schemes Appendix as proposed in paragraph 6.7 of the PCP and has introduced the cross-reference to the Schemes Appendix into Note 1 on Rule 19.3, as proposed in paragraph 6.8 of the PCP.

6.6 As indicated in paragraph 1.30 above, the Code Committee understands that, as a result of the amendments adopted in paragraphs 2.20 and 6.5, the Panel Executive intends to withdraw Practice Statement No. 14 in due course.

7. Revision (Rule 32)

(a) *Latest date on which a scheme may be revised*

Q.24 Do you agree with the proposed provision in relation to the revision of a scheme?

7.1 Paragraph 7.8 of the PCP proposed that section 7 of the Schemes Appendix should provide that any revision of an offer implemented by way of a scheme of arrangement should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings, and that the consent of the Panel would be required if it was proposed to make a revision after that date. In paragraph 7.6 of the PCP, the Code Committee stated that it considered that the

Panel should normally grant its consent to a revision in the 14 days prior to the shareholder meetings only if the offeree board and its Rule 3 adviser had provided certain confirmations to the Panel.

- 7.2 Of the eight respondents to Question 24, six agreed in principle with the proposals, subject to a number of comments. A seventh respondent expressed reservations about the proposed approach and argued (i) that requiring revisions to be made 14 days prior to the shareholder meetings was impracticable, (ii) that whether or not a revision should be permitted was a matter for the court, and (iii) that shareholders should not need 14 days to consider a simple increase in the value of a cash offer. The eighth respondent disagreed with the proposals and considered that amendments to a scheme should be considered by the court.
- 7.3 One of the respondents who agreed with the proposals was concerned (i) that the giving of the confirmations referred to in paragraph 7.6 of the PCP could become a “box ticking” exercise, (ii) that the proposed approach placed too much weight on the views of the offeree board and its Rule 3 adviser, and (iii) that, notwithstanding the previous points, the Panel should seek comfort from the offeree board and Rule 3 adviser that the proposed revision would not be likely to result in the court refusing to sanction the scheme. A further respondent considered that the confirmations described in paragraph 7.6 of the PCP should be referred to in the Code in the form of a Note on section 7 of the Schemes Appendix.
- 7.4 Having considered these comments, the Code Committee continues to believe that the Panel’s consent should be obtained if it is proposed to make any revision to an offer being implemented by way of a scheme of arrangement in the 14 days prior to the date of the shareholder meetings and that the Panel should normally grant such consent only if the board and its Rule 3 adviser provide appropriate confirmations. One of the Code Committee’s principal concerns in this regard is to seek to ensure that the resolutions to approve and give effect to the revised offer are not defeated in circumstances where they might otherwise have been passed if shareholders had been given more time to become aware of, and react to, the revision to the offer.

7.5 The Code Committee agrees with the suggestion that the Panel should obtain confirmation that a proposed revision would not be likely to result in the court's refusing to sanction the scheme. However, the Code Committee does not believe that the confirmations to be obtained by the Panel should be described in the Code itself and considers that the Panel's flexibility in this area should be preserved. The Code Committee therefore considers that the Panel should normally grant its consent to a revision of a scheme in the 14 days prior to the shareholder meetings only when the Panel has received confirmation from each of the offeree board and its Rule 3 adviser that:

- (a) in its opinion, the revision is in the best interests of offeree shareholders;
- (b) in its opinion, it is in offeree shareholders' best interests for the revision to be considered without adjourning the shareholder meetings;
- (c) in its opinion, the resolutions to approve and give effect to the revised scheme are likely to be passed at the shareholder meetings if those meetings are not adjourned; and
- (d) legal advice has been received that the proposed revision would not be likely to result in the court refusing to sanction the scheme.

The Code Committee considers that the offeree board should also be required to undertake that it will propose the adjournment of the shareholder meetings if, at any stage, it no longer believes that the resolutions to approve and give effect to the revised scheme are likely to be passed at the shareholder meetings.

7.6 In addition, the Code Committee notes that, on occasion, the Panel's consent might be sought to a revision of a scheme following the shareholder meetings, but before the court sanction hearing, i.e. where it is not proposed to convene further shareholder meetings to approve the revised scheme. In such circumstances, the Code Committee would still expect the Panel to obtain confirmations from the offeree board and its Rule 3 adviser that the revision was in the best interests of

offeree shareholders and that legal advice had been received that the court would not be likely to refuse to sanction the scheme as a result of the revision.

- 7.7 The Code Committee does not regard the giving of such confirmations as a “box-ticking” exercise. It would remain within the Panel’s discretion as to whether, on the facts of the case, the Panel should grant its consent to the revision of the scheme without the shareholder meetings being adjourned (or the court sanction hearing being delayed).
- 7.8 In addition, the Code Committee notes that Rule 32.1(a) provides that, if an offer is revised, a revised offer document must be posted to offeree shareholders. In circumstances where the Panel consents to a revision of a scheme less than 14 days prior to, or following, the shareholder meetings, the Code Committee considers that the Panel may also need to consider whether to grant a dispensation from the requirement to post a supplementary scheme circular pursuant to Rule 32.1(a). In such circumstances, the Code Committee considers that the Panel should obtain confirmations from the offeree board and its Rule 3 adviser that are similar in nature to the confirmations described in sub-paragraphs (a), (c) and (d) of paragraph 7.5 above in relation to not posting a supplementary scheme circular.
- 7.9 In the light of the above, and having accepted certain minor drafting suggestions made by respondents, the Code Committee has adopted section 7 of the Schemes Appendix in a slightly revised form from that proposed in paragraph 7.8 of the PCP, as follows:

“7 REVISION

Any revision to a scheme of arrangement should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings (or any later date to which such meetings are adjourned). The consent of the Panel must be obtained if it is proposed to make any revision to a scheme ~~after that date~~ either:

(a) less than 14 days prior to the date of the shareholder meetings (or any later date to which such meetings are adjourned); or

(b) following the shareholder meetings.”

7.10 In addition, as proposed in paragraph 7.8 of the PCP, the Code Committee has included Rule 32.1(b) in the List of Disapplied Provisions in the Schemes Appendix.

(b) *Triggering Rule 9*

Q.25 Do you agree that Note 4 on Rule 32.1 should be disapplied in a scheme?

7.11 All of the respondents to this question agreed that Note 4 on Rule 32.1 should be disapplied in a scheme and the Code Committee has therefore included that Note in the List of Disapplied Provisions in the Schemes Appendix.

(c) *“No increase statements”*

Q.26 Do you agree that paragraph (b) of Note 3 on Rule 32.2 should be disapplied in a scheme?

Q.27 Do you agree with the proposed amendment to Note 4 on Rule 32.2?

Q.28 Do you agree that Note 5 on Rule 32.2 should be disapplied in a scheme?

7.12 All of the respondents to these questions agreed with the proposals made in paragraphs 7.13, 7.15, and 7.17 of the PCP, which the Code Committee has therefore adopted as proposed.

8. Competitive situations (Rule 32.5)

Q.29 Do you agree with the Code Committee’s conclusions in relation to competitive situations involving a scheme and with the introduction of a new Note 3 on Rule 32.5 as proposed?

(a) *Proposal and responses*

8.1 In paragraph 8.3 of the PCP, the Code Committee stated its belief that an auction procedure in accordance with Rule 32.5 will normally be the most appropriate way in which to resolve a competitive situation which continues to exist in the

later stages of an offer period involving a scheme. At paragraph 8.14 of the PCP, the Code Committee proposed a new Note 3 on Rule 32.5, as follows:

“3. *Schemes of arrangement*

Where the competing offer is a scheme of arrangement, the parties must consult the Panel as to the applicable timetable. The Panel will then determine the date on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all the relevant circumstances.”.

- 8.2 Five of the eight respondents to Question 29 were in general agreement with the proposal in the PCP.
- 8.3 One of the five respondents who agreed with the proposals considered that it was particularly important that the proposals would enable the Panel to apply the Code flexibly in an area where market practice and court procedure continue to develop quickly. However, the same respondent suggested that the Code Committee’s thinking as to the applicable timetable for the resolution of a competitive situation involving a scheme, as set out in paragraphs 8.4 to 8.8 of the PCP, should be included in the Schemes Appendix. Two further respondents considered that the proposed Note 3 on Rule 32.5 was not sufficiently certain and suggested that there should be a default timetable for the resolution of a competitive situation involving a scheme.
- 8.4 The Code Committee does not believe that it would be practicable for the Code to prescribe the precise date or dates on which final revisions to competing offers must be announced and on which the auction procedure under Rule 32.5 will commence, in circumstances which involve a scheme of arrangement. There are numerous possible scenarios in which this issue may arise and the Code Committee considers that the Panel should continue to have the flexibility to determine the precise dates in each individual case at the relevant time and in the light of all the prevailing circumstances, taking into account, inter alia, (i) that offeree shareholders should have sufficient time and information to enable them to reach a properly informed decision on the bid, and (ii) that the offeree company should not be hindered in the conduct of its affairs for longer than is reasonable.

8.5 In addition, one of the respondents suggested that the Panel should be consulted as to the applicable timetable in all competitive situations involving a scheme of arrangement and not only in circumstances where the second offer is to be implemented by way of a scheme. The Code Committee accepts this suggestion.

(b) *Contractual offer made in competition with an existing scheme*

8.6 In paragraphs 8.4 and 8.5 of the PCP, the Code Committee discussed what the position might be where a contractual offer was made in competition with an existing offer that is being implemented by way of a scheme of arrangement. The Code Committee considered that, in such circumstances, both offerors would normally be bound by the timetable established by the posting of the second offeror's offer document such that (i) the competing offers should not be revised after "Day 46" of the new timetable, other than in accordance with any auction procedure established under Rule 32.5, and (ii) the auction procedure provided for by Rule 32.5 would normally commence on Day 46 of the new timetable. The Code Committee continues to consider this to be the case.

(c) *Scheme proposed in competition with an existing contractual offer*

8.7 In paragraphs 8.6 to 8.9 of the PCP, the Code Committee discussed what the position might be where an offer that is being implemented by way of a scheme of arrangement was made in competition with an existing contractual offer. The Code Committee considered that the 14th day prior to the date originally set for the shareholder meetings to approve the competing scheme should normally be treated as the equivalent of "Day 46". However, the Code Committee noted, at paragraph 8.8 of the PCP, that it might be inappropriate to adopt this approach if, for example, the shareholder meetings in relation to the scheme were set for a date which was earlier than the 60th day following the posting of the first offeror's offer document. The Code Committee therefore considered that the precise date(s) on which final revisions to the competing offers should be announced, and on which the auction procedure under Rule 32.5 should commence, should be for

the Panel to determine at the relevant time, in the light of all the prevailing circumstances.

- 8.8 Where an auction is held in a competitive situation in accordance with Rule 32.5, the Panel may require that “Day 60” of a contractual offer should be extended, with the result that the final offer is posted after the original “Day 46”. The Code Committee notes that, similarly, if a competitive situation involves a scheme, and if the Panel determines that final revisions to the competing offers should be made on the 14th day prior to the date originally set for the shareholder meetings to approve that scheme, this might result in the shareholder meetings being adjourned. This might be the case if, for example, following the auction procedure, there would no longer be sufficient time between the posting of the revised offer and the date originally set for the shareholder meetings for shareholders to come to a properly informed decision on the final offers.

(d) Scheme proposed in competition with an existing scheme

- 8.9 In paragraphs 8.10 to 8.13 of the PCP, the Code Committee discussed the position in relation to the competing offers for Corus Group plc (“Corus”) by Tata Steel UK Limited (“Tata”) and CSN Acquisitions Limited (“CSN”). In that case, CSN was permitted to announce a firm intention to make an offer for Corus and, subject to the satisfaction of a pre-condition that the Tata offer, which was being implemented by way of a scheme, had lapsed, for CSN also to implement its offer by way of a scheme. In the particular circumstances of that case, the Panel Executive ruled that the last date for the announcement of revised competing offers, and for the commencement of an auction procedure under Rule 32.5, would be the 46th day following the posting of the “information document” which the Panel Executive required CSN to post to Corus shareholders promptly after the announcement of its offer.
- 8.10 At the time of the issue of the PCP in June 2007, the Code Committee was not aware of any other case of a scheme having been proposed in competition with an existing scheme. However, there has since arisen an example of “parallel” competing schemes in the case of iSOFT Group plc (“iSOFT”). In that case, each

of IBA Health Limited and CompuGROUP UK Limited announced an offer for iSOFT which was to be implemented by way of a scheme and, in conjunction with iSOFT, posted a scheme circular to iSOFT shareholders. The competitive situation in the iSOFT case was resolved without the need for an auction procedure in accordance with Rule 32.5. However, the Code Committee considers that the Panel's approach to a situation which involves "parallel" schemes is likely to be similar to the approach in a situation where a scheme of arrangement is proposed in competition with an existing contractual offer, i.e. that the 14th day prior to the date originally set for the shareholder meetings to approve the second scheme should normally be treated as the equivalent of "Day 46".

(e) Conclusion

8.11 Having considered the responses to Question 29, and in the light of the above, the Code Committee has adopted the new Note on Rule 32.5 in a slightly revised form from that proposed in paragraph 8.14 of the PCP, as follows:

"3. Schemes of arrangement

Where one or more of the competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Panel as to the applicable timetable. The Panel will then determine the date or dates on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all the relevant circumstances."

9. Switching

Q.30 Do you agree with the Code Committee's conclusions in relation to switching?

(a) Introduction

9.1 Section 9 of the PCP addressed various issues in relation to the situation where an offeror wishes to change the structure of the transaction by "switching" either

(i) from a scheme of arrangement to a contractual offer, or (ii) from a contractual offer to a scheme of arrangement.

(b) *Reserving the right to switch; requirement for Panel consent to a switch; when consent to a switch might be withheld*

9.2 In paragraph 9.8 of the PCP, the Code Committee concluded that there was no need for the Code to require an offeror to reserve the right to switch and that an offeror's ability to switch should not be dependent on its having made such a reservation. One respondent suggested that the Code should be clear that there is no requirement for an offeror to reserve the right to switch. The Code Committee has accepted this suggestion and has added such a provision to section 8(a) of the Schemes Appendix.

9.3 In paragraph 9.10 of the PCP, the Code Committee concluded that an offeror's ability to switch from a scheme to a contractual offer, or from a contractual offer to a scheme, should not be unrestricted, but should be subject to the prior consent of the Panel. Paragraph 9.11 of the PCP set out the Code Committee's conclusion that, in considering whether to consent to a proposed switch, the Panel should primarily have regard to the effect that the switch is likely to have on the interests of offeree shareholders. In paragraph 9.12 of the PCP, the Code Committee stated its belief that the situations in which the Panel would withhold its consent to a proposed switch were likely to be limited, on the bases that the purpose of a proposed switch would normally be to make the offer more, rather than less, likely to become unconditional following the switch, and that such an increase in "deliverability" would not normally be detrimental to the interests of offeree shareholders. Examples of switches which would, and would not, be likely to reduce the deliverability of the offer were set out in paragraphs 9.13 and 9.14 of the PCP respectively. The Code Committee considered that a switch from a scheme to a contractual offer with a 50% acceptance condition, or a switch from a contractual offer with a 90% acceptance condition to a scheme, would be unlikely to reduce deliverability. However, the Code Committee considered that a switch from a scheme to a contractual offer with a 90% acceptance condition, or a switch from a contractual offer with a 50% acceptance condition to a scheme, would be

likely to reduce deliverability and as such should be subject to closer scrutiny by the Panel.

- 9.4 Three respondents to Question 30 sought further clarification of the circumstances in which the Panel's consent to a switch would be granted and the factors which the Panel would take into account in giving such consent. One of these respondents asked what the maximum acceptable level of the acceptance condition would be in the case of a switch from a scheme to a contractual offer. This respondent also considered that the Code should require an offeror to state from the outset of the transaction what acceptance condition would apply in the event of a switch from a scheme to a contractual offer, in order to clarify the position for the benefit of market participants.
- 9.5 As indicated in paragraphs 9.11 and 9.12 of the PCP, the Code Committee considers that, in determining whether to consent to a proposed switch, the Panel should primarily have regard to the effect that the switch is likely to have on the interests of offeree shareholders, taking into account, in particular, whether the switch is likely, or is intended, to make the offer less "deliverable". The Code Committee believes that the Panel's flexibility to assess each proposed switch (including, in the case of a switch from a scheme to a contractual offer, the proposed acceptance condition) on its particular merits should be preserved and that it would not be appropriate to identify a maximum acceptance condition level which would be of general application.
- 9.6 Similarly, the Code Committee does not believe that it would be necessary for the Code to require an offeror to state from the outset what acceptance condition would apply if it switches the structure of the transaction from a scheme to a contractual offer since the level at which the offeror may wish to set this may depend on the facts at the time. However, the Code Committee considers that if an offeror chooses to specify a particular acceptance condition that will apply if it switches to a contractual offer, the offeror should not be permitted to switch into a contractual offer with a higher acceptance condition. In addition, the Code Committee does not consider that the fact that an offeror specifies a particular

acceptance condition would in any way influence the Panel's determination as to the acceptance condition that it would permit in the event of a switch.

- 9.7 In the light of the above, the Code Committee has adopted the following as section 8(a) of the Schemes Appendix:

“8 SWITCHING

(a) With the consent of the Panel, the offeror may switch from a scheme of arrangement to a contractual offer or from a contractual offer to a scheme of arrangement, whether or not the offeror has reserved the right to change the structure of the offer.”.

(c) *The announcement of a switch*

- 9.8 Paragraph 9.18 of the PCP concluded that the Code should require a switch to be publicly announced and that such an announcement should set out the details described in that paragraph. None of the respondents commented specifically on these conclusions and the Code Committee has therefore adopted section 8(c) of the Schemes Appendix as proposed in paragraph 9.44 of the PCP.

(d) *Timetable issues*

- 9.9 Paragraph 9.23 of the PCP set out the Code Committee's conclusion that the Panel should determine the offer timetable that will apply following any switch to which it consents and the factors that the Panel might take into account when making such a determination. One respondent suggested that switching could be addressed within the detailed timetable which it had proposed should apply to a scheme (see paragraph 3.29).
- 9.10 The Code Committee does not consider that any changes should be made to the proposals in the PCP and, in order to preserve the Panel's flexibility to deal appropriately with different cases, has adopted section 8(b) of the Schemes Appendix, and the Note on section 8, as proposed in paragraph 9.44 of the PCP.

(e) *“No increase statements”*

9.11 Paragraph 9.34 of the PCP concluded that switching the structure of an offer should not normally, of itself, be regarded as an amendment which would be precluded by an earlier “no increase statement” in relation to the value or type of consideration offered, and that it would not therefore be necessary for an offeror making such a statement specifically to reserve the right to switch its offer structure. Only one respondent commented specifically on these conclusions, arguing that a switch should be treated as if it were an increase in the offer. The Code Committee disagrees since, as indicated in the PCP, it considers that a switch from a contractual offer to a scheme (or vice versa) will only affect the manner in which the offer is to be implemented and will not, of itself, affect the value or specie of the consideration offered. The Code Committee has therefore adopted the new Note 6 on Rule 32.2 as proposed in paragraph 9.45 of the PCP.

(f) *New conditions*

9.12 Paragraph 9.39 of the PCP concluded that Rule 32.4 should be amended so as specifically to permit the introduction of new conditions to the extent necessary to implement a switch to, or from, a scheme of arrangement to which the Panel has consented. None of the respondents commented on this proposal. The Code Committee has therefore amended Rule 32.4 as proposed in paragraph 9.46 of the PCP, save that the heading has been amended so as to to read “**NEW CONDITIONS FOR INCREASED OR IMPROVED OFFERS OR ~~FOR SWITCHES~~ FOLLOWING A SWITCH**”.

(g) *Unacceptable statements*

9.13 Paragraph 9.42 of the PCP set out the Code Committee’s conclusion that, consistent with the Panel Executive’s interpretation of Rule 19.3, as described in Practice Statement No. 7, Rule 19.3 should not be limited to statements about increases in the financial value of an offer, and that it should extend also to statements relating to changes designed to improve the chances of success of an offer, for example, changes to the structure, conditionality or non-financial terms

of the offer. None of the respondents commented on this conclusion and the Code Committee has therefore amended Rule 19.3 as proposed in paragraph 9.47 of the PCP.

9.14 As indicated in paragraph 1.30, the Code Committee understands that, as a result of the amendments adopted in paragraph 9.13, the Panel Executive intends to withdraw Practice Statement No. 7 in due course.

10. Alternative consideration and withdrawal rights (Rules 33 and 34)

(a) *Minimum period for which elections for alternative consideration should be capable of being made*

Q.31 Do you agree that Rule 33 should be disapplied in a scheme and that an election for alternative consideration should be capable of being made at least until the date of the shareholder meetings?

10.1 All seven respondents to this question agreed with the proposals. One respondent suggested that the deadline for an election for alternative consideration should be set on a day which is a business day and a second respondent sought clarification as to the precise deadline by which the election should be capable of being made. With regard to the former point, the Code Committee considers that it is unlikely that the shareholder meetings would be held on a day other than a business day and does not therefore believe that the suggested amendment is necessary. With regard to the latter point, the Code Committee considers that elections should be capable of being made until the actual time that the shareholder meetings occur on the day in question and has decided to make this clear by deleting the reference to “the date of” the shareholder meetings. In addition, the Code Committee has made some minor drafting changes to section 9(a) of the Schemes Appendix.

10.2 The Code Committee has therefore included Rule 33 in the List of Disapplied Provisions in the Schemes Appendix and has adopted section 9(a) of the Schemes Appendix in a slightly different form from that proposed in paragraph 10.5 of the PCP, as follows:

“(a) If a scheme of arrangement permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportions in which they receive different forms of consideration, the ability of shareholders to make such elections must not be closed off or withdrawn before ~~be capable of being made at least until the date of the shareholder meetings.~~”

Q.32 Do you agree with the proposed Note on Section 9 of the Schemes Appendix in relation to Rule 11.1?

10.3 All six respondents to this question agreed that the obligation to make cash available under Rule 11.1 should be considered to have been met if, at the time an acquisition to which Rule 11.1 applies was made, shareholders were able to elect for cash consideration at a price per share not less than that required by Rule 11.1, even if such an election subsequently ceased to be available. The Code Committee has therefore included Note 3 on Rule 11.1 in the List of Disapplied Provisions in the Schemes Appendix and has adopted the Note on section 9 of the Schemes Appendix, as proposed in paragraph 10.6 of the PCP.

(b) The right to withdraw an election for alternative consideration

Q.33 Do you agree that Rule 34 should be disapplied in a scheme and that a right of withdrawal should be introduced for offeree shareholders who elect for alternative consideration in a scheme as proposed?

10.4 As indicated in paragraph 10.8 of the PCP, shareholders who elect for alternative consideration under a scheme will not typically retain control of their shares in the offeree company and will therefore, in effect, be “locked in” to the offer being implemented by way of the scheme. This is because such elections are usually expressed to be irrevocable and because, typically, electing shareholders who hold shares in certificated form are required to return their form of election together with their share certificates or other documents of title, whilst shareholders who hold uncertificated shares in CREST are required to transfer their shares into an escrow account. In paragraph 10.14 of the PCP, the Code Committee proposed that section 9(b) of the Schemes Appendix should provide that a shareholder who has elected to receive a particular form of consideration in respect of any of his

shares should be entitled to withdraw his election up to one week prior to the court sanction hearing.

- 10.5 Of the seven respondents to Question 33, four agreed and three disagreed.
- 10.6 One of the respondents who agreed with the proposed section 9(b) of the Schemes Appendix, and one of those who disagreed, noted that the proposed position in relation to the withdrawal of an election in the context of a scheme was different from the position in a contractual offer under Rule 34. Whereas Rule 34 provides that the right to withdraw an acceptance of a contractual offer is only required to run from the date which is 21 days after the first closing date of the offer until “Day 60” or, if earlier, the time at which the offer becomes or is declared unconditional as to acceptances, it was proposed that the right to withdraw an election for an alternative form of consideration would run from the outset of a scheme. The Code Committee recognises this difference. However, the Code Committee’s intention was that there should be a consistency of approach not so much as between a scheme and a contractual offer, but as between an offeree shareholder who happens to make an election for an alternative form of consideration and an offeree shareholder who makes no such election. Further, the proposed right would not be equivalent to a right to withdraw an acceptance of a contractual offer and would not have the same consequences. A right to withdraw and election would not have any impact on the outcome of the scheme itself, but would instead lead to a change in the nature of the consideration to be paid to a particular shareholder if the scheme becomes effective.
- 10.7 The second respondent referred to in paragraph 10.6 considered that, in any event, the proposed right should not be required to be extended beyond the date of the shareholder meetings, unless a competitive situation were to arise after that date. The Code Committee agrees that the emergence of a competing offeror might be one of the reasons why a shareholder who has elected for alternative consideration might wish no longer to be bound by that election. However, the Code Committee considers that there may also be other reasons why such a shareholder might wish no longer to be bound by such an election, for example, when there will be a significant delay between the date of the shareholder meetings and the

date of the court sanction hearing (whether or not such a delay had been expected at the outset of the transaction).

10.8 A third respondent suggested that the right to withdraw an election should run until a fixed number of days prior to the date on which the ability to elect for the alternative consideration would cease to be available (the earliest date for this being the date of the shareholder meetings), rather than to up to a week prior to the date of the court sanction hearing. The Code Committee does not agree and continues to consider it to be important that the proposed right runs beyond the date of the shareholder meetings and into the later stages of the offer period. The Code Committee considers that it would be unsatisfactory if an offeree shareholder was “locked in” to the scheme (see paragraph 10.4) if there was a delay to the timetable after this date, or if some other material event occurred, (such as the emergence of a competing offeror).

10.9 In the light of the above, the Code Committee has included Rule 34 in the List of Disapplied Provisions in the Schemes Appendix and has adopted section 9(b) of the Schemes Appendix in a slightly revised form from that proposed in paragraph 10.14 of the PCP, as follows:

“(b) A shareholder who has elected to receive a particular form of consideration in respect of any of his shares must be entitled to withdraw his election. However, ~~the~~ this right of withdrawal may be shut off ~~up to~~ not earlier than one week prior to the date on which the court sanction hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, ~~up to~~ not earlier than one a-week prior to that later date.”

Q.34 Do you agree that Note 2 on Rule 13.5 and Rule 24.13 should be disapplied in a scheme?

10.10 Six of the seven respondents to this question agreed. The seventh respondent, who had disagreed with Question 33, referred to its comments on that question. The Code Committee has therefore included Note 2 on Rule 13.5 and Rule 24.13 in the List of Disapplied Provisions in the Schemes Appendix.

(c) *Return of documents of title*

Q.35 Do you agree with the proposed amendments in relation to the return of documents of title?

10.11 In paragraph 10.20 of the PCP, the Code Committee proposed various amendments in relation to the return of documents of title, including the inclusion of the following provision as section 11 of the Schemes Appendix:

“If a scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.”.

10.12 Six respondents of the seven respondents to Question 35 agreed with the proposed amendments in relation to the return of documents of title. The seventh respondent noted that it might be difficult to judge precisely when a scheme lapses or is withdrawn. The Code Committee addresses this issue in section 1 above.

10.13 The Code Committee has therefore:

- (a) amended Rule 31.10 and included it in the List of Disapplied Provisions in the Schemes Appendix, as proposed in paragraph 10.20 of the PCP;
- (b) adopted section 11 of the Schemes Appendix in a slightly revised form from that proposed in paragraph 10.20 of the PCP, as follows

“11 RETURN OF DOCUMENTS OF TITLE

If an offer being implemented by way of a scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within 14 days of such lapsing or withdrawal) and the receiving agent

should immediately give instructions for the release of securities held in escrow.”; and

(c) amended Rule 34 as proposed in paragraph 10.20 of the PCP.

11. Mandatory offers (Rule 9)

Q.36 Do you agree that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme?

Q.37 Do you agree that an offeror proceeding by way of a scheme should only trigger a mandatory offer if it has obtained the Panel’s prior consent to switch to a contractual offer?

11.1 Of the eight respondents to Question 36, four agreed that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme of arrangement, with one respondent strongly endorsing the Code Committee’s proposal. The four respondents who did not agree considered that, in some or all circumstances, it could be unduly harsh to deny an offeror the advantages of satisfying its mandatory offer obligation by way of a scheme and that a mandatory offer should therefore be permitted to be effected by way of a scheme, subject to the offeror being required to make a contractual offer should the offer that is being implemented by way of a scheme lapse. Three of those respondents suggested that the disadvantages of an offeror proceeding by way of a contractual offer, rather than a scheme, included:

(a) the requirement to pay stamp duty on the value of the consideration paid under a contractual offer, which is not payable in the case of a scheme involving a reduction of capital (although it is payable in the case of a “transfer scheme”);

(b) where securities are being offered to offeree shareholders as consideration in addition to the cash required by Rule 9, a prospectus would usually be required if the offer were to be effected by means of a contractual offer, whereas no such requirement would occur if the offer were to be effected by means of a scheme; and

- (c) where securities are being offered to offeree shareholders as consideration in addition to the cash required by Rule 9, a contractual offer will not benefit from the exemption from the requirement to register securities offered into the USA which is usually afforded to an issue of securities pursuant to a scheme of arrangement under section 3(a)(10) of the United States Securities Act of 1933.
- 11.2 The arguments identified by the Code Committee in favour of and against permitting a mandatory offer obligation to be satisfied by means of a scheme of arrangement were finely balanced and were set out in paragraphs 11.4 and 11.5 of the PCP.
- 11.3 On the one hand, it was argued in paragraph 11.4 of the PCP that a mandatory offeror should be allowed to enjoy the benefits of a scheme, provided that this was not detrimental to the interests of offeree shareholders. As such, it was argued that the Code should permit a mandatory offer to be implemented by way of a scheme subject to a requirement that the offeror should make a contractual offer should the scheme not become effective. This would be similar to the approach taken in Note 3(a) on Rule 9.3, pursuant to which the Panel may consent to a mandatory offer being made conditional upon the offeror financing the cash consideration by an issue of new securities, provided that, if the offer lapses as a result of the financing condition not being satisfied, the offeror will immediately make a new offer in cash in compliance with Rule 9.
- 11.4 On the other hand, it was argued in paragraph 11.5 of the PCP that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme of arrangement on the basis that, since a scheme of arrangement is binding on all shareholders upon becoming effective, a mandatory offer implemented by way of a scheme would deny shareholders the opportunity, which they would otherwise have under a contractual offer (assuming that the offeror was unable to apply the statutory “squeeze out” procedure), of remaining as a minority in the offeree company. It was argued that such an outcome would be undesirable and that a person who triggers a mandatory offer obligation should

bear the consequences of doing so, including potentially being the controller of a company which has minority shareholders. In addition, it was argued that a person who acquires control of a company should be required to make a mandatory offer at the earliest opportunity and that this would not be the case if a contractual mandatory offer were made only after a scheme of arrangement had failed to become effective.

11.5 For the reasons given in paragraph 11.5 of the PCP, the Code Committee continues to be of the belief that an obligation to make a mandatory offer under Rule 9 should normally be satisfied by means of a contractual offer and should not normally be satisfied by means of a scheme of arrangement. However, having considered the views of the respondents to Question 36, the Code Committee has concluded, on balance, that the Panel should be given the express ability to consent to a mandatory offer being effected by means of a scheme. The Code Committee considers that the factors which the Panel should take into account when considering an application for consent to satisfy a mandatory offer obligation by way of a scheme include the likely timetable and, importantly, the views of the offeree board and its Rule 3 adviser (which might be expected to reflect their views as to the impact on offeree shareholders of proceeding by way of a scheme). The Code Committee also considers that, if permitted to satisfy a mandatory offer obligation by means of a scheme, an offeror should be required to make a contractual offer if the scheme lapses for a reason which would not have caused a contractual offer to lapse, for example, because a resolution to approve and give effect to the scheme is not approved at the shareholder meetings or the scheme is not sanctioned by the court. In addition, the Code Committee considers that, in such circumstances, until the posting of the offer document in respect of the new contractual offer, the Panel should impose restrictions on the ability of the offeror and persons acting in concert with it to exercise, or procure the exercise of, voting rights of the offeree company attaching to the shares in which they have any interest, similar to the restrictions imposed under Note 3(a) on Rule 9.3.

11.6 Of the seven respondents to Question 37, five agreed that an offeror proceeding by way of a scheme should only trigger a mandatory offer if it had obtained the

Panel's prior consent to switch to a contractual offer. One of the respondents who disagreed considered that the offeror should be permitted to continue with the scheme, subject to being required to switch to a contractual offer should the scheme fail. The seventh respondent was unconvinced by the reasons given for precluding a mandatory offer from being implemented by way of a scheme.

11.7 In the light of the above, the Code Committee has:

- (a) adopted section 2 of the Schemes Appendix in a modified form from that proposed in paragraph 11.6 of the PCP, and has adopted a new Note 1 on section 2 of the Schemes Appendix, reflecting the conclusions set out above; and
- (b) adopted the Note which was proposed in paragraph 11.7 of the PCP as Note 2 on section 2 of the Schemes Appendix and has introduced additional wording into the Note, reflecting the conclusions set out above,

as follows:

“2 MANDATORY OFFERS

An obligation to make a mandatory offer under Rule 9 may not be satisfied by way of a scheme of arrangement except with the prior consent of the Panel.

NOTES ON SECTION 2

1. When the Panel's consent may be granted

Factors which the Panel will take into account when considering an application to satisfy a mandatory offer obligation by way of a scheme include the views of the offeree board and its independent adviser and the likely timetable of the scheme.

If the Panel permits the mandatory offer obligation to be so satisfied and the scheme lapses for a reason which would not have caused a contractual offer to lapse, the Panel will require the offeror to make a new contractual offer immediately in compliance with Rule 9. The scheme circular must include a statement by the offeror that, if the scheme lapses for such a reason, the offeror will make a new contractual offer as required by the Panel. Until the posting of the offer document in respect of a new

contractual offer, the Panel may impose restrictions on the ability of the offeror and persons acting in concert with it to exercise, or procure the exercise of, voting rights of the offeree company attaching to the shares in which they have an interest.

2. Triggering Rule 9 during a scheme

Where an offeror is ~~proceeding~~ implementing its offer by way of a scheme of arrangement, the offeror and persons acting in concert with it may acquire an interest in shares which causes ~~it~~ the offeror to have to extend a mandatory offer under Rule 9 only if the offeror has obtained the Panel's prior consent either to satisfy its mandatory offer obligation by way of a scheme or to switch to a contractual offer (see Section 8 of this Appendix 7).

12. Appropriate offers or proposals and comparable offers (Rules 15 and 14)

Q.38 Do you agree with the proposed amendments to Rule 15(d) and Rule 14.1?

- 12.1 As explained in section 12 of the PCP, Rule 15 provides that, where the offeree company has outstanding convertible securities, options or subscription rights ("Rule 15 securities"), the offeror must make an appropriate offer or proposal (a "Rule 15 offer") to the holders of the Rule 15 securities. The first sentence of Rule 15(d) provides that a Rule 15 offer should not normally be made conditional on any particular level of acceptances.
- 12.2 The first sentence of Rule 14.1 provides that, where a company has more than one class of equity share capital, the offeror must make a comparable offer for each class. The second sentence of Rule 14.1 provides that an offer for a class of non-voting equity share capital (a "Rule 14 offer") should not be made conditional on any particular level of acceptances unless the offer for the voting equity share capital (the "main offer") is also conditional on the success of that Rule 14 offer.
- 12.3 The purpose of Rule 15 and the second sentence of Rule 14.1 is to ensure that, upon an offer being made for the voting equity share capital of an offeree company, the holders of non-voting equity (in the case of Rule 14) and potential equity (in the case of Rule 15) are provided with, in effect, an unconditional opportunity to exit the offeree company, should they not wish to remain as

holders of securities in the offeree company once control has passed to the offeror.

- 12.4 However, the second sentence of Rule 15(d) provides that a Rule 15 offer may be “put by way of a scheme”. Since a scheme of arrangement will always be conditional upon the approval of the class to which it relates, and upon the sanction of the court, the Panel Executive’s practice is to seek a commitment from the offeror that, if a Rule 15 offer put by way of a scheme is not approved at the relevant meeting, or is not sanctioned by the court, the offeror will immediately make a further Rule 15 offer by means of a contractual offer that must not be conditional on any particular level of acceptances. Paragraph 12.4 of the PCP proposed that this practice should be codified. Similarly, paragraph 12.6 of the PCP proposed that Rule 14.1 should be clarified so as to make clear that, unless the main offer is conditional upon the success of the Rule 14 offer, a Rule 14 offer should not be conditional upon the approval of the class of non-voting equity share capital in question (as would be the case if a Rule 14 offer were to be effected by means of a scheme).
- 12.5 All seven respondents to Question 38 agreed with the proposed amendments to Rule 15(d) and Rule 14.1. However, one respondent suggested that Rules 14 and 15 were not entirely consistent.
- 12.6 First, the respondent suggested that, notwithstanding the terms of the first sentence of Rule 15(d), in order to be consistent with the position in relation to a Rule 14 offer, it should be permissible for the main offer to be subject to a condition relating to the level of acceptance of a Rule 15 offer and for the Rule 15 offer to be conditional on the success of the main offer. The Code Committee agrees that the Panel might permit this and considers that such an inter-conditional arrangement would fall within the scope of the word “normally” in the first sentence of Rule 15(d).
- 12.7 Secondly, the respondent suggested that, in order to be consistent with Rule 15(d) (as proposed to be amended), as an alternative to a Rule 14 offer being made conditional on the success of the main offer, it should be permissible to put a

Rule 14 offer by way of a scheme, provided that the offeror is required to make an unconditional Rule 14 offer should the scheme fail. Again, the Code Committee agrees that the Panel might permit such an arrangement. However, since Rule 14 offers are typically made simultaneously with, and inter-conditional upon, the main offer, the Code Committee considers that these circumstances are unlikely often to arise in practice and does not therefore consider it necessary to amend the Code in this regard. The Code Committee does, however, consider that the amendment of Rule 15(d) is warranted since Rule 15 offers are frequently made only once the main offer has become unconditional.

12.8 The Code Committee has therefore adopted the amendments to Rule 15(d) and the second sentence of Rule 14.1 in slightly revised forms from those proposed in paragraphs 12.4 and 12.6 of the PCP, as follows:

(a) Rule 15(d):

“(d) The offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders’ meeting provided that, if the scheme is not approved at that meeting, or is not sanctioned by the court, the offeror shall immediately make an offer or proposal to stockholders which is not conditional on any particular level of acceptances or approval.”; and

(b) Rule 14.1:

“... An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances ~~or approval~~ in respect of that class, or on the approval of that class, unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. ...”.

13. Voting by an exempt principal trader (Rules 38.3 and 38.4)**Q.39 Do you agree with the proposed amendments in relation to voting by connected exempt principal traders?**

13.1 Section 13 of the PCP proposed that the Panel Executive's practice in relation to voting by an exempt principal trader on a resolution put to offeree company shareholders to approve a scheme of arrangement should be codified in section 12 of the Schemes Appendix. The Panel Executive's practice, as described in paragraph 13.3 of the PCP, is as follows:

- (a) an EPT connected with the offeror whose offer is being implemented by way of a scheme is not normally permitted to vote in favour of the scheme, but is normally permitted to vote against it;
- (b) an EPT connected with a competing offeror (or potential offeror) is not normally permitted to vote against the scheme, but is normally permitted to vote in favour of it; and
- (c) an EPT connected with the offeree company is permitted to vote in favour of or against the scheme (or schemes).

13.2 Of the seven respondents to Question 39, three agreed with the proposed amendments. One of those respondents questioned whether, in addition, Rule 38.4, which provides that securities owned by an EPT connected with either an offeror or the offeree company must not be voted "in the context of an offer", should also be amended so as to permit voting by an EPT connected with the offeree company in such circumstances. Three other respondents questioned whether any connected EPTs should in fact be allowed to vote on a resolution to approve or give effect to a scheme and argued that a more straightforward approach would be simply to prohibit all connected EPTs from voting on scheme resolutions. The seventh respondent was concerned as to the impact that the Panel Executive's practice, and the proposed amendments, might have in relation

to classes of members for the purposes of the scheme and considered that the court should be informed as to what voting has been permitted by the Panel.

- 13.3 The Code Committee acknowledges that an absolute prohibition on connected EPTs voting on scheme resolutions would be simpler than the provisions proposed to be included in section 12 of the Schemes Appendix. However, the Code Committee understands that the Panel Executive has not encountered any particular difficulties in applying the practice described in paragraph 13.1 and therefore considers that prohibiting connected EPTs from voting altogether would be disproportionate. The Code Committee agrees that, if appropriate, the court should be informed as to what voting by connected EPTs the Panel has permitted.
- 13.4 In relation to an EPT which is connected with the offeree company, the Code Committee considers that such an EPT should be free to vote as it wishes on a resolution to approve a scheme of arrangement. This is because, for these purposes, the Code Committee regards voting on a resolution to approve a scheme of arrangement as analogous to assenting offeree company securities to a contractual offer. As such, the Code Committee considers that permitting an EPT connected with the offeree company to vote on a resolution to approve a scheme would be consistent with the approach taken by Rule 38.3, which provides that an EPT connected with the offeror (but not an EPT connected with the offeree company) is prohibited from assenting offeree company securities to a contractual offer until the offer is unconditional as to acceptances. The Code Committee considers that voting on a resolution to approve a scheme by an EPT which is connected with the offeree company should not fall within the scope of Rule 38.4, since this provision was not intended to prevent such EPTs from assenting their shares to the offer.
- 13.5 In relation to an EPT connected with an offeror, the Code Committee considers that, where the Panel is satisfied that the manner in which the EPT is proposing to vote on a resolution to approve or give effect to a scheme is contrary to the interests of the offeror with which it is connected, the independence of the EPT will be beyond doubt and that there would therefore be no need to prohibit the EPT from so voting. For the reasons set out above, the Code Committee does not

consider that permitting EPTs connected with the offeree company and, in certain circumstances, EPTs connected with the offeror to vote on resolutions to approve a scheme, means that such EPTs should be permitted to vote in relation to other votes put to the shareholder meetings, for example, to adjourn the meetings to a later date.

- 13.6 The Code Committee has therefore adopted section 12 of the Schemes Appendix as proposed in paragraph 13.5 of the PCP. In addition, the Code Committee has introduced a new Note on each of Rules 38.3 and 38.4, cross-referring to section 12 of the Schemes Appendix, as proposed in paragraph 13.6 of the PCP.

14. Financial information and documents on display (Rules 24.2 and 26)

Q.40 Do you agree with the proposed Note 6 on Rule 24.2 and the proposed amendment to paragraph (f) of Rule 26?

- 14.1 In section 14 of the PCP, the Code Committee proposed the introduction of a new Note 6 on Rule 24.2 which, in summary, provided that the Panel would normally consent to certain provisions of Rule 24.2 being disapplied in relation to offers where the consideration is solely in cash and the offer is structured so that no person would remain or become a minority shareholder in the offeree company (or the risk of anyone doing so would be negligible). Consequential amendments to Rule 26(f), relating to the documents required to be put on display, were also proposed.

- 14.2 Six of the seven respondents to Question 40 agreed with the proposals. The seventh respondent queried the need for any financial information on a “cash offeror” to be included in an offer document and argued that it was the intentions and future behaviour of the offeror once it had obtained control of the offeree company that would be of concern to possible minority shareholders, not the offeror’s historical financial position. The respondent suggested that the requirement to provide financial information pursuant to Rule 24.2 should either remain unchanged or be removed for all cash offers (regardless of whether there might be a continuing minority). If the latter route were adopted, the respondent

queried the purpose of the proposed retention of the “further information” requirements of paragraph (i), and paragraphs (ii) and (iii) of Rule 24.2(c).

- 14.3 The Code Committee considers that, in the context of a cash offer, the provision of offeror information to shareholders is required to enable offeree shareholders to decide whether they should either (a) retain their shares in the offeree company and remain a minority shareholder in the offeree company under the control of the offeror, or (b) accept the offer. However, there are occasions where the terms of the offer are such that no person would remain or become a minority shareholder in the offeree company (or the risk of anyone doing so is negligible). This would be the case, for example, if an offer is being implemented by way of a scheme and the consideration is solely in cash because, if the scheme is approved and becomes effective, the offeror will acquire 100% of the share capital of the offeree company and there would therefore be no prospect of a person remaining or becoming a minority shareholder in the offeree company. The Code Committee considers that this could also be the case under a contractual offer where the consideration is solely in cash – for example if there is a non-waivable 90% acceptance condition and the offeror gives an undertaking to invoke its statutory “squeeze out” rights.
- 14.4 In such circumstances, the Code Committee considers that offeree shareholders will generally require substantially less information in relation to the offeror than would otherwise be the case because their principal concern, if any, in relation to the offeror is likely to be assessing the offeror’s ability to fund the offer. The Code Committee therefore continues to believe that it will normally be appropriate to relax the amount of financial information required in respect of cash offerors in these circumstances.
- 14.5 However, the Code Committee considers that the “further information” requirements of paragraph (i) and paragraphs (ii) and (iii) of Rule 24.2(c) should be retained in respect of all offers. Paragraphs (ii) and (iii) of Rule 24.2 (c) require the disclosure of details of certain persons who have made an investment in the offeror for the purpose of the offer or who have a pre-existing interest in the offeror such that they have or will have a direct or indirect interest in the offeree

company. Paragraph (i) of Rule 24.2(c) gives the Panel the right to require the offer documentation to contain such further information as the Panel may require in the particular circumstances of the case. Whilst, in cash offers being considered above, offeree shareholders' principal concern is likely to be certainty as to funds, the information that will be disclosed pursuant to paragraphs (ii) and (iii) of Rule 24.2(c) may nevertheless be helpful to offeree shareholders in reaching a properly informed decision on the offer. If, for the same reason, the "further information" referred to in paragraph (i) of Rule 24.2(c) was considered by the Panel to be likely to be helpful to offeree shareholders, the Code Committee considers that the Panel should be in a position to require its inclusion in the offer documentation.

14.6 In addition, the Code Committee considers, on reflection, that the requirement in Rule 24.2(b)(iii) and Rule 24.2(c)(i) (to the extent that it refers to Rule 24.2(a)(ix)) to include the names of the offeror's directors in the offer documentation should not be disapplied.

14.7 Accordingly, having considered the responses to Question 40, the Code Committee has amended Rule 26(f) as proposed in paragraph 14.10 of the PCP and has adopted the new Note 6 on Rule 24.2 proposed in paragraph 14.10 of the PCP, albeit in a revised form. The revisions to the Note 6 have been made (i) with the intention of clarifying (but not altering) the circumstances in which the relevant provisions of Rule 24.2 will be disapplied and (ii) so as not to disapply the requirement to include the names of the offeror's directors in the offer documentation. The form in which Note 6 on Rule 24.2 has therefore been adopted by the Code Committee is as follows:

"NOTES ON RULE 24.2

...

6. Certain offers where the consideration is solely in cash

The Panel will normally consent to the provisions of Rules 24.2(b), (c)(i) (to the extent that it refers to Rule 24.2(a)) and (f) being disapplied in relation to offers where the consideration is solely in cash provided that the offer (including all related offers and proposals) is structured so that

no person will remain or become a minority shareholder in the offeree company, or the risk of anyone doing so is negligible. In such circumstances, the offer document or scheme circular must nonetheless contain the names of the offeror's directors.

If an offer to which this Note applies is subsequently restructured with the effect that:

(a) the consideration is no longer solely in cash; or

(b) the transaction structure switches to a contractual offer where the risk of a person remaining or becoming a minority shareholder in the offeree company is not negligible,

the provisions of Rules 24.2(b), (c)(i) and (f) will apply in full and the information required by those provisions must be included in the supplementary scheme circular or offer document (as appropriate).

Where Rule 24.2(c)(i) applies, compliance with the "further information" requirements of that rule will still be required (see Note 2 on Rule 24.2).

The Panel should be consulted in advance where consent to the disapplication of any of the requirements of Rule 24.2(b), (c)(i) or (f) is sought."

15. Formula offers (Appendix 2)

Q.41 Do you agree with the proposed amendments to the Formula Offers Guidance Note in Appendix 2 of the Code?

15.1 All respondents who specifically addressed this question agreed with the amendments to the Formula Offers Guidance Note in Appendix 2 of the Code.

15.2 Therefore, save for the introduction of a cross-reference to Appendix 7 after the term "court sanction hearing" in the Note on section 3 of Appendix 2, the Code Committee has adopted the amendments as proposed.

16. Disapplied provisions

Q.42 Do you agree that the provisions listed in paragraph 16.1 should be disapplied in a scheme?

16.1 All seven respondents to this question agreed. The Code Committee has therefore included the provisions listed in paragraph 16.1 of the PCP in the List of Disapplied Provisions in the Schemes Appendix, as proposed.

16.2 In addition, as mentioned in paragraph 1.18 of the PCP, the Code Committee has introduced a number of headnotes and footnotes to the existing provisions of the Code, drawing the reader's attention to where a provision is disapplied in a scheme, or where a provision in the Schemes Appendix relates to a particular provision in the main body of the Code (see Appendix A).

APPENDIX A

Amendments to the Code (including the Schemes Appendix)

In this Appendix, underlining indicates new text and striking through indicates deleted text.

INTRODUCTION

3 COMPANIES, TRANSACTIONS AND PERSONS SUBJECT TO THE CODE

...

(b) Transactions

In cases falling within paragraphs (a)(i) or (ii) above, the Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of statutory merger or ~~Court-approved~~ scheme of arrangement (as defined in the Definitions Section). ...

DEFINITIONS

Irrevocable commitments and letters of intent

Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent:

(a) to accept or not to accept (or to procure that any other person accept or not accept) an offer; or

(b) and also irrevocable commitments and letters of intent to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree company (or of its shareholders) in the context of the an offer, including a resolution to approve or to give effect to a scheme of arrangement.

Offeree company

...

In the case of a scheme of arrangement, a reference to the offeree company should normally be construed as a reference to the company whose shares are proposed to be acquired under the scheme.

Offeror

...

In the case of a scheme of arrangement, a reference to an offeror should normally be construed as a reference to the person who it is proposed will acquire shares of the offeree company under the scheme.

Offer period

...

In the case of a scheme of arrangement, the offer period will continue until it is announced in accordance with Section 5(c) of Appendix 7 that the scheme has become effective or that the scheme has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.

Scheme of arrangement or scheme

A transaction effected by means of a scheme of arrangement under the Companies Act 1985, the Companies Act 2006 or similar statutory provisions in the Channel Islands or the Isle of Man.

Rule 2.9**2.9 PUBLICATION OF AN ANNOUNCEMENT ABOUT AN OFFER OR POSSIBLE OFFER**

...

NOTES ON RULE 2.9

...

2. *Rules 6, 7, 9, 11, 17, 30, 31, 32, Appendix 1.6, ~~and~~ Appendix 5 and Appendix 7*

Announcements made under Rules 6.2(b), 7.1, 9.1(Note 9), 11.1(Note 6), 17.1, 30.1(a), 30.2(a), 31.2, 31.6(a)(Note 1(b)), 31.6(c), 31.7(Note 2), 31.8(Note), 31.9, 32.1, 32.6(a), Appendix 1.6, ~~and~~ Appendix 5.5, Appendix 7.6 and Appendix 7.8 must also be published in accordance with the requirements of this Rule.

Rule 4.5**4.5 RESTRICTION ON THE OFFEREE COMPANY ACCEPTING AN OFFER IN RESPECT OF TREASURY SHARES***

...

** This Rule is disapplied in a scheme.*

Rule 9

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARY RESPONSIBLE FOR MAKING IT

...

NOTES ON RULE 9.1

...

*9. Triggering Rule 9 during an offer period**

...

In the case of a scheme of arrangement, see Note 2 on Section 2 of Appendix 7.

Rule 10

RULE 10. THE ACCEPTANCE CONDITION*

...

** This Rule is disapplied in a scheme.*

Rule 11.1

11.1 WHEN A CASH OFFER IS REQUIRED

...

NOTES ON RULE 11.1

...

*3. When the obligation is satisfied**

...

** This Note is disapplied in a scheme.*

Rule 12

12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER

(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that:—

(i) in the case of a contractual offer, it the offer will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if there is a reference before the shareholder meetings (as defined in Appendix 7).

(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that ~~it will lapse if either:—(i) the European Commission initiates proceedings under Article 6(1)(c)₂ or (ii) there is a reference to the Competition Commission following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission;:-~~

(i) in either the case of a contractual offer, the offer will lapse if this occurs before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if this occurs before the shareholder meetings (as defined in Appendix 7).

...

NOTE ON RULE 12.1

*The effect of lapsing**

...

** This Note is disapplied in a scheme.*

12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIOD

...

NOTES ON RULE 12.2

1. Schemes of arrangement

In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

2. After a reference or initiation of proceedings

...

Rule 13.5

13.5 INVOKING OFFEREE PROTECTION CONDITIONS

...

NOTES ON RULE 13.5

...

2. Availability of withdrawal rights*

...

* This Note is disapplied in a scheme.

Rule 14

14.1 COMPARABLE OFFERS

Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not; the Panel should be consulted in advance. An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances in respect of that class, or on the approval of that class, unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in Rule 15.

Rule 15**RULE 15. APPROPRIATE OFFER FOR CONVERTIBLES ETC.**

...

(d) The offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders' meeting provided that, if the scheme is not approved at that meeting, or is not sanctioned by the court, the offeror shall immediately make an offer or proposal to stockholders which is not conditional on any particular level of acceptances or approval.

Rule 17**RULE 17. ANNOUNCEMENT OF ACCEPTANCE LEVELS***

...

** This Rule is disapplied in a scheme.*

Rule 18**RULE 18. THE USE OF PROXIES AND OTHER AUTHORITIES IN
RELATION TO ACCEPTANCES***

...

** This Rule is disapplied in a scheme.*

Rule 19.3**RULE 19.3 UNACCEPTABLE STATEMENTS**

Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer, or that it may make a change to the structure, conditionality or the non-financial terms of its offer, without committing itself to doing so and specifying the improvement or change. In the case of any doubt as to the application of this Rule to a proposed statement, parties to an offer or potential offer and their advisers should consult the Panel.

NOTES ON RULE 19.3

1. *Holding statements*

...

In the case of a scheme of arrangement, see Section 4 of Appendix 7.

Rule 19.4

19.4 ADVERTISEMENTS

...

(viii) **advertisements which are notices relating to ~~Court~~ a schemes of arrangement; or**

Rule 20.1

20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS

...

NOTES ON RULE 20.1

...

4. *Information issued by associates (eg brokers)*

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. Associates must, however, consult the Panel about the issue of circulars as described in this Note during the reference or proceedings. The Panel will normally apply the restrictions in this Note in the period of one month before the relevant authority is expected to make its recommendation or issue its decision as the case may be.

Rule 20.2

20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS

...

NOTES ON RULE 20.2

...

5. *The Competition Commission and the European Commission*

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. The Panel will, however, continue to apply Rule 20.2 during the reference or proceedings and, therefore, for the purposes of this Rule alone, will normally deem the referred offeror to be a bona fide potential offeror.

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

...

NOTES ON RULE 21.1

...

4. *The Competition Commission and the European Commission*

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. The Panel will, however, normally consider that General Principle 3 and Rule 21.1 apply during the competition reference period, but on a more flexible basis. For example, issues of shares, which do not increase the equity share capital or the share capital carrying voting rights as at the end of the offer period by, in aggregate, more than 15%, would normally not be restricted; and for the purpose of Note 2, a 15% rather than a 10% test would normally be applied.

Rule 24.2

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

...

NOTES ON RULE 24.2

...

6. *Certain offers where the consideration is solely in cash*

The Panel will normally consent to the provisions of Rules 24.2(b), (c)(i) (to the extent that it refers to Rule 24.2(a)) and (f) being disapplied in relation to offers where the consideration is solely in cash provided that the offer (including all related offers and proposals) is structured so that no person will remain or become a minority shareholder in the offeree company, or the risk of anyone

doing so is negligible. In such circumstances, the offer document or scheme circular must nonetheless contain the names of the offeror's directors.

If an offer to which this Note applies is subsequently restructured with the effect that:

(a) the consideration is no longer solely in cash; or

(b) the transaction structure switches to a contractual offer where the risk of a person remaining or becoming a minority shareholder in the offeree company is not negligible,

the provisions of Rules 24.2(b), (c)(i) and (f) will apply in full and the information required by those provisions must be included in the supplementary scheme circular or offer document (as appropriate).

Where Rule 24.2(c)(i) applies, compliance with the "further information" requirements of that rule will still be required (see Note 2 on Rule 24.2).

The Panel should be consulted in advance where consent to the disapplication of any of the requirements of Rule 24.2(b), (c)(i) or (f) is sought.

Rule 24.6

24.6 INCORPORATION OF OBLIGATIONS AND RIGHTS*

...

* This Rule is disapplied in a scheme.

Rule 24.13

24.13 CASH UNDERWRITTEN ALTERNATIVES WHICH MAY BE SHUT OFF*

* This Rule is disapplied in a scheme.

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

...

(f) all any material contracts described in the offer document or offeree board circular (as appropriate) in compliance with (Rules 24.2(a) and, Rule 24.2(c) and or Rule 25.6(a));

Rule 30.2**30.2 THE OFFEREE BOARD CIRCULAR**

...

NOTE ON RULE 30.2Where there is no separate offeree board circularWhere the offeree board's circular is combined with the offer document the references to the offeree board's circular being posted and made readily and promptly available after publication of the offer document will be inapplicable. Other than this, the requirements of Rule 30.2 will apply as usual to the single document.**Rule 31****RULE 31. TIMING OF THE OFFER***

...

* This Rule is disapplied in a scheme. See Appendix 7.

...

31.6 FINAL DAY RULE (FULFILMENT OF ACCEPTANCE CONDITION, TIMING AND ANNOUNCEMENT)

...

NOTES ON RULE 31.61. *Extension of offer under Rule 31.6(a)*(a) It should be noted ...(b) Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

...

31.7 TIME FOR FULFILMENT OF ALL OTHER CONDITIONS

...

NOTES ON RULE 31.7

1. The effect of lapsing

...

2. Extensions

Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

31.8 SETTLEMENT OF CONSIDERATION

...

NOTE ON RULE 31.8

Extensions

Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

...

31.10 RETURN OF DOCUMENTS OF TITLE

If an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned as soon as practicable (and in any event within 14 days of the lapsing of the offer) and the receiving agent should immediately give instructions for the release of securities held in escrow.

Rule 32

32.1 OFFER OPEN FOR 14 DAYS AFTER POSTING OF REVISED OFFER DOCUMENT

...

(b) ... acceptances.*

NOTES ON RULE 32.1

...

3. When revision is not permissible*

...

* Rule 32.1(b) and the first sentence of Note 3 on Rule 32.1 are disapplied in a scheme. See Section 7 of Appendix 7.

4. *Triggering Rule 9**

...

* This Note is disapplied in a scheme. See Section 2 of Appendix 7.

32.2 NO INCREASE STATEMENTS

...

NOTES ON RULE 32.2

...

3. *Competitive situations*

...

(b) *... posted.**

...

4. *Recommendations*

Subject to Note 2 above, the offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company.

5. *Rule 31.9 announcements**

...

* Paragraph (b) of Note 3, and Note 5, are disapplied in a scheme.

6. *Schemes of arrangement*

A switch to or from a scheme of arrangement will not normally, of itself, be regarded as an amendment which would be precluded by an earlier no increase statement in relation to the value or type of consideration offered. Therefore, it is not necessary for an offeror making such a statement specifically to reserve the right to switch its offer structure.

...

32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED OFFERS OR FOLLOWING A SWITCH

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increased or improved offer, or a switch to or from a scheme of arrangement, the offeror may introduce new conditions (eg obtaining shareholders' approval or the admission to listing or admission to trading of new securities).

32.5 COMPETITIVE SITUATIONS

...

NOTES ON RULE 32.5

...

3. Schemes of arrangement

Where one or more of the competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Panel as to the applicable timetable. The Panel will then determine the date or dates on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all the relevant circumstances.

Rule 33

RULE 33. ALTERNATIVE OFFERS*

...

** This Rule is disapplied in a scheme. See Appendix 7.*

Rule 34

RULE 34. RIGHT OF WITHDRAWAL*

(a) 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:

(ai) the time that the offer becomes or is declared unconditional as to acceptances; and

(bii) the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6.

(b) ~~An acceptor must also be entitled to withdraw his acceptance if so determined by the Panel in accordance with Rule 13.5.~~

(c) If a shareholder withdraws his acceptance, all documents of title and other documents lodged with the form of acceptance must be returned as soon as practicable following the receipt of the withdrawal (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.

** This Rule is disapplied in a scheme.*

Rule 36

36.4 OFFER FOR BETWEEN 30% AND 50%*

...

36.5 OFFER FOR 30% OR MORE REQUIRES 50% APPROVAL*

...

36.7 SCALING DOWN*

...

** This Rule is disapplied in a scheme.*

Rule 38

38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES

...

NOTES ON RULE 38.3

1. Withdrawal rights under Rule 38.5

...

2. Schemes of arrangement

See Section 12 of Appendix 7.

38.4 VOTING

...

NOTE ON RULE 38.4

Schemes of arrangement

See Section 12 of Appendix 7.

Appendix 2

APPENDIX 2

FORMULA OFFERS GUIDANCE NOTE

...

3 DATE ON WHICH THE FORMULA CRYSTALLIZES

In all circumstances, the consideration payable under the formula should be determined as at the day the offer becomes or is declared unconditional as to acceptances or, in the case of a scheme of arrangement, as at a date which is a fixed number of days prior to the court sanction hearing (in either case, the “FAV calculation date”). ~~The formula should then cease to operate, shareholders accepting the offer after that date receiving the consideration thus determined.~~

NOTE ON SECTION 3

Schemes of arrangement

In the case of a scheme, the FAV calculation date should normally be set for a date no earlier than seven days prior to the date of the court sanction hearing (as defined in Appendix 7). The Panel should be consulted if this is impracticable.

...

8 “FLOOR AND CEILING” CONDITIONS

There is no objection to the incorporation of conditions in a formula offer which provide for the offer to lapse in the event that the formula asset value (calculated on the FAV calculation date~~day the offer becomes or is declared unconditional as to acceptances~~) falls outside specified limits or if movements in certain securities markets’ indices exceed specified limits.

9 OFFEREE BOARD OBLIGATIONS

There is no obligation on the board of the offeree company to provide information relating to the calculation of the formula price until a successful offeror has taken control. Nevertheless, where an offer has a “floor and ceiling” condition related to the formula asset value, the board of the offeree company must announce, within 7 days ~~of~~ after the FAV calculation date ~~offer becoming or being declared unconditional as to acceptances,~~ whether the formula calculated on the FAV calculation date ~~day the offer became or was declared unconditional as to acceptances~~ fell within the specified limits.

...

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

DEFINITIONS AND INTERPRETATION

Court sanction hearing

The hearing of the court to sanction a scheme of arrangement.

Effective date

Effective date means the date on which the order of the court sanctioning the scheme is delivered to the registrar of companies for registration or, if later, the date on which the order of the court confirming the reduction of capital and minute of the reduction of capital are delivered to the registrar of companies and registered by him.

Offer documents and offeree board circulars

In the case of a scheme of arrangement, references in the Code to an offer document or to the first major circular from the offeree board (and related expressions) shall be construed as references to the scheme circular and references to a revised offer document or to a subsequent offeree board circular (and related expressions) shall be construed as references to any supplementary scheme circular.

Shareholder meetings

The meeting of shareholders in the offeree company (or meetings of relevant classes of shareholders) convened by the court to consider a resolution to approve a scheme of arrangement and any general meeting of the offeree company (and

related class meetings) convened to consider any resolution to approve or give effect to a scheme.

1 APPLICATION OF THE CODE TO SCHEMES OF ARRANGEMENT

The provisions of the Code apply to an offer effected by means of a scheme of arrangement in the same way as they apply to an offer effected by means of a contractual offer, except as set out in this Appendix 7.

2 MANDATORY OFFERS

An obligation to make a mandatory offer under Rule 9 may not be satisfied by way of a scheme of arrangement except with the prior consent of the Panel.

NOTES ON SECTION 2

1. When the Panel's consent may be granted

Factors which the Panel will take into account when considering an application to satisfy a mandatory offer obligation by way of a scheme include the views of the offeree board and its independent adviser and the likely timetable of the scheme.

If the Panel permits the mandatory offer obligation to be so satisfied and the scheme lapses for a reason which would not have caused a contractual offer to lapse, the Panel will require the offeror to make a new contractual offer immediately in compliance with Rule 9. The scheme circular must include a statement by the offeror that, if the scheme lapses for such a reason, the offeror will make a new contractual offer as required by the Panel. Until the posting of the offer document in respect of a new contractual offer, the Panel may impose restrictions on the ability of the offeror and persons acting in concert with it to exercise, or procure the exercise of, voting rights of the offeree company attaching to the shares in which they have an interest.

2. Triggering Rule 9 during a scheme

Where an offeror is implementing its offer by way of a scheme of arrangement, the offeror and persons acting in concert with it may acquire an interest in shares which causes the offeror to have to extend a mandatory offer under Rule 9 only if the offeror has obtained the Panel's prior consent either to satisfy its mandatory offer obligation by way of a scheme or to switch to a contractual offer (see Section 8 of this Appendix 7).

3 DATE OF SHAREHOLDER MEETINGS

The shareholder meetings must normally be convened for a date which is at least 21 days after the date of the scheme circular.

4 HOLDING STATEMENTS

(a) If a statement of the kind described in Note 1 on Rule 19.3 is made during an offer period involving a scheme of arrangement, the Panel will normally require the statement to be clarified by a date, to be specified by the Panel, in advance of the date of the shareholder meetings.

(b) Where appropriate, however, taking into account all relevant circumstances, including:

(i) the interests of offeree shareholders and the desirability of clarification prior to the shareholder meetings; and

(ii) the time which the offeror or potential offeror has had to consider its position,

the Panel may permit clarification after the date of the shareholder meetings but before the date of the court sanction hearing.

5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME

(a) As soon as practicable after the votes on the relevant resolutions at the shareholder meetings and, in any event, by no later than 8.00 am on the business day following the shareholder meetings, the offeree company must make an announcement stating whether or not the resolutions were passed by the requisite majorities (and, if not, whether or not the scheme has lapsed) and giving details of the voting results in relation to the meetings, including:

(i) in the case of any general meeting of the offeree company convened to consider any resolution to approve or give effect to the scheme, if a poll was taken, the number of shares of each class which were voted for and against the resolutions and the percentage of the shares voted which those numbers represent; and

(ii) in the case of each court-convened meeting:

(a) the number of shareholders of the class who voted for and against the resolution to approve the scheme and the percentage of those voting shareholders which those numbers represent;

(b) the number of shares of the class which were voted for and against the resolution to approve the scheme and the percentage of the total shares voted which those numbers represent; and

(c) the percentage of the issued shares of the class which the shares voted for and against the resolutions represent.

(b) As soon as practicable following the court sanction hearing, the offeree company must make an announcement stating the decision of the court and including details of whether the scheme will proceed or has lapsed.

(c) As soon as practicable on the effective date, the offeree company or the offeror must make an announcement stating that the scheme has become effective.

6 CHANGES TO THE EXPECTED SCHEME TIMETABLE

(a) Any adjournment of a shareholder meeting or court sanction hearing, or a decision by the offeree board to propose such an adjournment, must be announced promptly by the offeree company in accordance with the requirements of Rule 2.9. If the meeting or hearing is adjourned to a specified date, the announcement should set out the relevant details. If the meeting or hearing is adjourned without at the same time specifying a date for the adjourned meeting, a further announcement should be made in accordance with the requirements of Rule 2.9 once the new date has been set.

(b) Similarly, except with the consent of the Panel, any other change to the expected timetable of events set out in the scheme circular must be announced promptly by the offeror or offeree company (as appropriate) in accordance with the requirements of Rule 2.9.

(c) In all cases, the Panel should be consulted as to whether notice of an adjournment of any meeting or hearing or any other delay in, or change to, the expected timetable should, in addition, be posted to offeree company shareholders.

7 REVISION

Any revision to a scheme of arrangement should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings (or any later date to which such meetings are adjourned). The consent of the Panel must be obtained if it is proposed to make any revision to a scheme either:

(a) less than 14 days prior to the date of the shareholder meetings (or any later date to which such meetings are adjourned); or

(b) following the shareholder meetings.

8 SWITCHING

(a) With the consent of the Panel, the offeror may switch from a scheme of arrangement to a contractual offer or from a contractual offer to a scheme of arrangement, whether or not the offeror has reserved the right to change the structure of the offer.

(b) The Panel will determine the offer timetable that will apply following any switch to which it consents.

(c) The offeror must announce a switch in accordance with the requirements of Rule 2.9. The announcement must include:

(i) details of all changes to the terms and conditions of the offer as a result of the switch;

(ii) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);

(iii) an explanation of the offer timetable applicable following the switch (as determined by the Panel); and

(iv) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or its associates will remain valid following the switch.

NOTE ON SECTION 8

Determination of the offer timetable following a switch

Factors which the Panel may take into account when determining the offer timetable that will apply following a switch include:-

(a) the time required to enable shareholders in the offeree company to reach a properly informed decision;

(b) the time which has elapsed since the switching offeror's original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree board to be hindered in the conduct of its affairs;

(c) the views of the offeree board and the switching offeror; and

(d) the likely effect of the new offer timetable on any competing offeror.

9 ALTERNATIVE CONSIDERATION

(a) If a scheme of arrangement permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportions in which they receive different forms of consideration, the ability of shareholders to make such elections must not be closed off or withdrawn before the shareholder meetings.

(b) A shareholder who has elected to receive a particular form of consideration in respect of any of his shares must be entitled to withdraw his election. However, this right may be shut off not earlier than one week prior to the date on which the court sanction hearing is originally proposed to be

held or, if for any reason the court sanction hearing is rearranged for a later date, not earlier than one week prior to that later date.

NOTE ON SECTION 9

Rule 11.1

The obligation to make cash available under Rule 11.1 will be considered to have been met if, at the time the acquisition was made, shareholders were able to elect for cash consideration at a price per share not less than that required by Rule 11.1, even if such an election subsequently ceases to be available.

10 SETTLEMENT OF CONSIDERATION

Except with the consent of the Panel, the consideration must be posted within 14 days of the effective date. The terms of the scheme must reflect this requirement.

11 RETURN OF DOCUMENTS OF TITLE

If an offer being implemented by way of a scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within 14 days of such lapsing or withdrawal) and the receiving agent should immediately give instructions for the release of securities held in escrow.

12 VOTING BY CONNECTED EXEMPT PRINCIPAL TRADERS

Except with the consent of the Panel, securities owned by an exempt principal trader connected with an offeror or the offeree company must not be voted on a resolution put to shareholders in the offeree company to approve or to give effect to a scheme of arrangement. The Panel will normally grant its consent in the following circumstances:

(a) an exempt principal trader connected with an offeror whose offer is being implemented by way of a scheme will normally be permitted to vote against the scheme but will not normally be permitted to vote in favour of it;

(b) an exempt principal trader connected with a competing offeror (or potential offeror) will normally be permitted to vote in favour of such a scheme but will not normally be permitted to vote against it; and

(c) an exempt principal trader connected with the offeree company will normally be permitted to vote in favour of or against the scheme.

13 SCHEMES WHICH DO NOT HAVE THE SUPPORT OF THE OFFEREE BOARD

The Panel should be consulted if an offeror is considering announcing an offer or possible offer which it is proposed will be implemented by means of a scheme of arrangement without, prior to such announcement, obtaining the support of the offeree board.

14 PROVISIONS DISAPPLIED IN A SCHEME

The following provisions of the Code do not apply to a scheme of arrangement:

- (a) Rule 4.5 (restriction on the offeree company accepting an offer in respect of treasury shares);**
- (b) Rule 10 (the acceptance condition);**
- (c) Note 3 on Rule 11.1 (when the obligation to offer cash is satisfied);**
- (d) the Note on Rule 12.1 (the effect of lapsing);**
- (e) Note 2 on Rule 13.5 (availability of withdrawal rights);**
- (g) Rule 18 (the use of proxies and other authorities in relation to acceptances);**
- (h) Rules 24.6 (incorporation of obligations and rights) and Rule 24.13 (cash underwritten alternatives which may be shut off);**
- (i) Rules 31.1 to 31.10 (timing of the offer);**
- (j) Rule 32.1(b), Notes 3 (first sentence) and 4 on Rule 32.1, paragraph (b) of Note 3 on Rule 32.2 and Note 5 on Rule 32.2 (revision);**
- (k) Rules 33.1 to 33.3 (alternative offers);**
- (l) Rule 34 (right of withdrawal); and**
- (m) Rules 36.4, 36.5 and 36.7 (partial offers).**

APPENDIX B**Non-confidential respondents**

1. Association of British Insurers (ABI)
2. Hermes Pensions Management Ltd
3. Institute of Chartered Accountants in England and Wales (ICAEW)
4. KBC Peel Hunt
5. Kirkpatrick & Lockhart Preston Gates Ellis LLP (K&L Gates)
6. Law Reform Committee of the Bar Council of England and Wales
7. London Investment Banking Association (LIBA)
8. Macfarlanes
9. Quoted Companies Alliance (QCA)
10. Receiving Agent Group of the Institute of Chartered Secretaries and Administrators (ICSA)
11. Takeovers Joint 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