

RS 2008/2 Issued on 19 December 2008

THE TAKEOVER PANEL

MISCELLANEOUS CODE AMENDMENTS

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2008/2**

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1. Introduction

1.1 On 18 July, the Code Committee of the Takeover Panel (the “Code Committee”) published a Public Consultation Paper (“PCP 2008/2” or the “PCP”) entitled “Miscellaneous Code Amendments”. The purpose of this Response Statement is to provide the Code Committee’s response to the external consultation process on PCP 2008/2.

(a) *Number of responses received*

1.2 Four responses were received. A list of respondents can be found at Appendix B.

(b) *Overview of responses*

1.3 As stated in the PCP, the purpose of most of the proposed changes was either to clarify the application of existing provisions within the Takeover Code (the “Code”) or to codify existing practice in relation to matters which have not previously been covered by the Code. In relation to the majority of the proposals, the respondents were either in favour of the amendments or expressed no view on them. The issues that were raised by the respondents are addressed below.

(c) *Code amendments*

1.4 The proposed amendments to the Code set out in Appendix A to the PCP have been adopted by the Code Committee subject to the amendments described in the main body of this Response Statement. Where new or amended provisions of the Code are set out in the main body of this Response Statement, they are marked to show changes from the provisions proposed in the PCP.

- 1.5 The provisions of the Code which are being introduced or amended as a result of the consultation exercise are set out in full in Appendix A to this Response Statement. In Appendix A, underlining indicates new text and striking through indicates deleted text, as compared to the current provisions of the Code.
- 1.6 In addition to this Response Statement, the Code Committee is also publishing today Response Statement 2008/3 (“RS 2008/3”). In a limited number of cases, the Code Committee has adopted amendments in RS 2008/3 which affect provisions of the Code that have also been amended by the changes described in this Response Statement. Where a provision of the Code has been amended by both this Response Statement and RS 2008/3, the provision has been included in Appendix A marked to show both sets of changes.

(d) Implementation

- 1.7 The amendments introduced as a result of this Response Statement and RS 2008/3 will take effect on 30 March 2009. Amended pages of the Code will be published prior to that date.
- 1.8 The Code as revised will be applied to all offers and possible offers from 30 March 2009.

PART A: Amendments relating to Rule 2**2. Rule 2.2: consultation requirement when parties wish to approach a wider group or when potential purchasers or offerors are sought****Q.1 Do you agree with the proposed amendments to Rule 2.2(e) and Note 1 on Rule 2.2?**

2.1 In section 2 of the PCP, the Code Committee proposed amendments to codify the best practice referred to in Practice Statement No. 20 that the Panel should be consulted prior to an offeree company or the seller of a controlling stake seeking more than one potential purchaser or offeror. In addition it was proposed to make clear that the Panel should be consulted if an offeror or the offeree company wishes to approach more than a very restricted number of people in relation to a possible offer. No substantive objections to the proposed amendments were received and the Code Committee is adopting the amendments as proposed.

3. Rule 2.4(c)

(a) Possible offer statements which have the effect of fixing a level of consideration

Q.2 Do you agree with the amendments to Rule 2.4(c) and the amendment to Note 5 on Rule 2.4?**Q.3 Do you agree that Note 6 on Rule 2.4 should apply to “no increase” statements made by potential offerors as referred to above?**

(i) Rule 2.4(c)(iii)

3.1 As stated in the PCP, the intention of Rule 2.4(c) is to ensure that, if a potential offeror makes a statement relating to the price of a possible offer,

then it is bound by the content of any such statement and any subsequent offer must be made on the same (or improved) terms.

- 3.2 In PCP 2008/2 the Code Committee proposed various amendments to Rule 2.4(c) and Note 5 on Rule 2.4 aimed at clarifying the intention of the Rule, particularly in relation to how any securities that form part of the consideration referred to in a possible offer announcement should be valued when a firm intention to make an offer is announced subsequently.
- 3.3 Two respondents indicated that the proposed drafting was not as clear as it might be and the Code Committee has taken the opportunity to make additional amendments to the Rule and to Note 5 which it believes will address the concerns raised.
- 3.4 The principle underlying Rule 2.4(c) has always been to ensure that, when an offer is made, its terms are consistent with any statements made by or on behalf of the offeror prior to the terms of the offer being finalised. Where a possible offer announcement states that securities are likely to form all or part of the consideration to be offered, particular issues arise regarding how those securities should be valued where the potential offeror has reserved the right to offer a different form and/or mix of consideration and exercises that right in the announcement of its firm intention to make an offer. However, the underlying principle that a potential offeror is bound by the content of its previous statements will apply and the revised rule and the examples set out below reflect this.
- 3.5 There are a number of ways in which the consideration of an offer or possible offer which includes securities can be expressed. In order to minimise the risk of confusion arising as to the effect of any statement which refers to the possible consideration to be offered, Rule 2.4(c) requires that the Panel is consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made. The examples set out in paragraph 3.7 below illustrate the Code Committee's understanding of what consideration could be offered in the circumstances outlined.

- 3.6 The Code Committee also considers it helpful to confirm that:
- (a) where a potential offeror has reserved the right to change the form and/or mix of the consideration referred to in its possible offer announcement, it is not necessary for it to specify the circumstances in which the reservation may be utilised;
 - (b) an offeror may always increase the value of the consideration referred to in its possible offer announcement without reserving the right to do so, unless it has made a statement indicating that the terms of the possible offer will not be increased or are final; and
 - (c) where there is any doubt as to how the price of any securities offered or to be offered should be established (for example where a firm offer is announced after the market has opened), the Panel should be consulted.
- 3.7 The following examples apply where a potential offeror has, in a relevant possible offer announcement to which Rule 2.4(c) applies, reserved the right to change the form and/or mix of the consideration and exercises that right when it announces its firm intention to make an offer:

(a) Where the potential offeror is bound by a statement which referred to a possible offer in cash

If a potential offeror is bound by a statement referring to a possible offer in cash and wishes to change the form of consideration to include offeror securities, the cash amount being replaced must be replaced by offeror securities of at least the same value by reference to their market price at the time of the announcement of the firm intention to make an offer.

For example, if a potential offeror is bound by a statement referring to a possible offer price of 100p per share, with a reservation to change the

form and/or mix, at the time of announcing the firm intention to make an offer the consideration must include:

- (i) at least 100p of cash; or
- (ii) offeror securities to a value of at least 100p (with the value of those offeror securities being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer); or
- (iii) cash and offeror securities that in aggregate are equal to a value of at least 100p (with the value of any offeror securities being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer).

(b) Where the potential offeror is bound by a statement which referred to a particular securities exchange ratio

If a potential offeror is bound by a statement referring to a possible offer at a particular securities exchange ratio and wishes to change the form of consideration to include cash, the amount of offeror securities being replaced must be replaced by a cash amount of at least the value of the offeror securities being replaced, calculated by reference to the market price of such offeror securities at the time of the announcement of the firm intention to make an offer.

For example, if a potential offeror is bound by a statement referring to a possible offer of 1 offeror share for every 1 offeree company share, with a reservation to change the form and/or mix, at the time of the announcement of the firm intention to make an offer the consideration must include:

- (i) at least 1 offeror share; or

- (ii) cash equal to the value of at least 1 offeror share (with the value of offeror shares being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer); or
- (iii) cash and offeror securities that in aggregate are equal to the value of at least 1 offeror share (with the value of any offeror securities being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer).

(c) *Where the potential offeror is bound by a statement which referred to a possible offer with a mix of cash and a particular securities exchange ratio*

If a potential offeror is bound by a statement where the consideration referred to is in the form of a mix of cash and a particular securities exchange ratio, each element of the mix is treated independently on the same basis as outlined above.

For example, if a potential offeror is bound by a statement referring to a possible offer of 100p and 1 offeror share for every 1 offeree company share, with a reservation to change the form and/or mix, at the time of the announcement of the firm intention to make an offer the consideration must include:

- (i) at least 100p and 1 offeror share (*i.e. the original mix*); or
- (ii) 100p and additional cash equal to the value of at least 1 offeror share (with the value of any offeror shares being calculated by reference to their market price at the time of the announcement of the firm intention to bid) (*i.e. cash only*); or
- (iii) 1 offeror share and additional offeror shares equal to the value of at least 100p (with the value of any offeror shares being calculated by

reference to their market price at the time of the announcement of the firm intention to make an offer) (*i.e. shares only*); or

- (iv) less cash (e.g. 60p), 1 offeror share, and additional offeror shares equal to at least the value of the reduction in cash (i.e. 40p's worth of shares) (with the value of any offeror shares being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer) (*i.e. reducing the cash amount of the mix and increasing the securities element by an equivalent amount*); or
- (v) fewer offeror shares (e.g. 0.75 shares), 100p and additional cash equal to at least the value of the reduction in offeror shares (i.e. the cash equivalent of 0.25 offeror shares) (with the value of any offeror shares being calculated by reference to their market price at the time of the announcement of the firm intention to make an offer) (*i.e. reducing the offeror share element of the mix and increasing the cash element by an equivalent amount*).

(ii) “No increase statements” made by potential offerors

3.8 The PCP made reference to the fact that, on occasion, a potential offeror may make a statement in relation to the terms on which any offer by it might be made, for example, by stating that the terms of any possible offer are “final”. These statements are commonly referred to as “no increase statements”. The Code Committee understands that the Executive’s practice is that a potential offeror making such a statement is not permitted to announce a firm offer at a higher level unless there occurs an event which the potential offeror specified in such statement as an event that would enable the level of consideration to be set aside. For the purposes of clarity, the Code Committee proposed that the Code should be amended to reflect the approach of the Executive by the inclusion of a new Rule 2.4(c)(ii).

- 3.9 One respondent observed that the reference in the proposed new Rule to “no increase statements” was unhelpful given that there were, albeit minor, differences in the effect of making a “no increase statement” to which Rule 32.2 applies (i.e. when an offer has been made) and the effect of making such a statement in the context of a possible offer announcement. The Code Committee considers that, whilst it is appropriate to draw an analogy between such statements made in either context, it would be advisable to remove the specific reference to “no increase statements” in the new Rule 2.4(c)(ii). This is reflected in the Rule as set out in paragraph 3.11 below
- 3.10 All respondents agreed that it is appropriate to restrict potential offerors who have previously made a possible offer announcement which states that its terms are final or will not be increased from announcing a higher offer in the period of three months following the end of the offer period, unless there occurs an event which the potential offeror had specified in its possible offer announcement as an event that would enable it to offer a higher level of consideration.
- 3.11 In the light of the observations above, the Code Committee is proposing to adopt Rule 2.4(c) and Note 5 thereon in a slightly revised form from that proposed in paragraph 3.14 of the PCP, as follows:

“2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

...

(c) Until a firm intention to make an offer has been notified, the Panel must be consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. Except with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials or advisers and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made. In particular:

(i) where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms. ~~Where, or to the extent that,~~ all or part of the consideration is expressed in terms of a monetary value, the offer or that element of the offer must be made at the same or a higher monetary value. ~~Where, or to the extent that,~~ all or part of the consideration has been expressed in terms of a securities exchange ratio, the offer or that element of the offer must be made on the same (or an improved) securities exchange ratio; and

(ii) where the statement concerned includes reference to the fact that the terms of the possible offer “will not be increased” or isare “final” or uses a similar expression ~~(a “no-increase-statement”)~~, the potential offeror will not be allowed subsequently to make an offer on better terms.

See also Note 5.

...

NOTES ON RULE 2.4

...

5. *Reservation of right to set statements aside*

The first announcement in which a statement subject to Rule 2.4(c) is made must also contain prominent reference to any reservation (precise details of which must also be included in the announcement). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation.

Except with the consent of the Panel, where a potential offeror has referred in a statement subject to Rule 2.4(c) to the level of consideration to be paid if an offer is made, that potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower level of consideration unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to set aside the level of consideration referred to.

Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement subject to Rule 2.4(c) (but remains bound to a specified minimum level of consideration) and exercises that right, the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement, calculated as at the time of

the announcement of the firm intention to make an offer. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

Where a potential offeror has made a “no increase statement” statement of the kind referred to in Rule 2.4(c)(ii) it will not be permitted to make ~~a firm an~~ offer at a higher level of consideration unless there has occurred an event which the potential offeror specified in the possible offer statement as an event that would enable ~~the level of consideration to be set aside~~ it to do so.”

(b) Clarifying the three month period set out in Note 6 on Rule 2.4

Q.4 Do you agree that Note 6 on Rule 2.4 should be amended as proposed?

3.12 In paragraph 3.20 of the PCP the Code Committee stated that, where Rule 2.4(c) is relevant, it considered it appropriate that a potential offeror which has made a statement to which Rule 2.8 applies should be restricted from making an offer on revised terms only for the three months following the making of that statement (as opposed to the whole time the offeree company is in an offer period and for three months thereafter). The Code Committee, therefore, proposed in paragraph 3.21 that Note 6 on Rule 2.4 should be amended to reflect this. All respondents to Question 4 agreed and the Code Committee has, therefore, adopted this proposal.

PART B: Amendments relating to Rule 9

4. Proposed removal of the requirement to seek the consent of the Panel to board appointments of nominees of Rule 9 offerors and clarification of both the application of voting restrictions and the requirements relating to the disposal of interests

Q.5 Do you agree with the proposed deletion of existing Rule 9.7?

Q.6 Do you agree with the proposed adoption of new Rule 9.7 together with its Note in the form outlined in paragraph 4.15 above and the other amendments to Rule 9 referred to in paragraph 4.16 above?

4.1 In PCP 2008/2, the Code Committee proposed the removal from the Code of the requirement to seek the consent of the Panel to board appointments of nominees of Rule 9 offerors and members of their concert parties. It also proposed the adoption of a new Rule 9.7 and a number of other related amendments to Rule 9 which sought to clarify both the requirements relating to the disposal, if applicable, of interests in shares by persons who have triggered a mandatory bid obligation and members of their concert parties and, again if applicable, the application of restrictions on the exercise of (or the procurement of the exercise of) voting rights attaching to shares in which such persons are interested.

4.2 All the respondents to Questions 5 and 6 agreed with these proposals. The Code Committee has adopted the proposals in a slightly revised form from that proposed in paragraph 4.15 of the PCP, as indicated below. In addition, minor additional amendments are also being made to Rule 9 by RS 2008/3.

“NOTE ON RULE 9.7

Calculation of number of shares to which voting restrictions will be applied and the number of interests to be disposed of

Where an obligation under Rule 9.1 has arisen by virtue of:

(a) Rule 9.1(a), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to vote less than 30% of the shares in the offeree company; or

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote ~~such number of shares as represents no more than the percentage of interests in the offeree company held by those persons prior to the triggering acquisition being made.~~

In each case the calculation will be made by reference to the reduced maximum number of shares entitled to be voted.

Where a disposal of interests in shares is ~~made~~ permitted as an alternative to making an offer, the interests in shares required to be disposed of ~~will~~ must be sufficient to take the total number of shares in which the offeror and persons acting in concert with it are interested ~~interests in shares either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage level of the total interests in shares in the offeree company held by the offeror and persons acting in concert with it in which they were interested prior to the triggering acquisition being made.~~

5. Note 11 on Rule 9.1

Q.7 Do you agree that Note 11 on Rule 9.1 should be amended as proposed?

5.1 For the reasons set out in Section 5 of the PCP, the Executive advised the Code Committee that the final sentence of the final paragraph of Note 11 on Rule 9.1 (*The reduction or dilution of a shareholding*) was redundant. The Code Committee, therefore, proposed its deletion. All the respondents to Question 7 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

PART C: Amendments to Rules 8, 35, and 38**6. Rules 8 and 38.5: amendments to dealing disclosures****Q.8 Do you agree with the proposed new Note 15 on Rule 8 and the proposed new Note 5 on Rule 38.5?**

6.1 In section 6 of the PCP the Code Committee proposed the adoption of a new Note on both Rule 8 and Rule 38.5 which sets out the Panel's requirements relating to the method of correcting erroneous information previously included in a dealing disclosure. All the respondents to Questions 8 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

7. Rules 35.1 and 35.2: dispensations from restrictions on re-bidding**Q.9 Do you agree that Note (a)(i) on Rules 35.1 and 35.2 should be amended as proposed?**

7.1 For the reasons set out in Section 7 of the PCP, the Executive advised the Code Committee that the final alternative contained in Note (a)(i) on Rules 35.1 and 35.2 starting "*or was one or more of two competing offerors ...*" is unnecessary. The Code Committee, therefore, proposed the deletion of these words. All the respondents to Question 9 agreed with this proposal and the Code Committee has, therefore, adopted this amendment.

8. Rule 38.2: application to corporate brokers**Q.10 Do you agree that Rule 38.2 should be amended as proposed?**

8.1 In section 8 of the PCP the Code Committee proposed adding "(including a corporate broker)" following the words "the advisers to the offeror" in the second sentence of Rule 38.2 to make it clear that the Rule applies to corporate brokers. No substantive objections to the proposed amendment

were received and the Code Committee is adopting the amendment as proposed.

APPENDIX A

Proposed amendments to the Code

Rule 2.2

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

An announcement is required:-

...

(e) when negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people (outside those who need to know in the ~~companies~~ parties concerned and their immediate advisers). ~~An offeror wishing to approach a wider group, for example in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitments or to organise a consortium to make the offer should consult the Panel; or~~

...

NOTES ON RULE 2.2

1. *Panel to be consulted*

...

Similarly, in the case of Rules 2.2(d) and (f)(i), the Panel should be consulted at the latest when the potential offeree company becomes the subject of any rumour and speculation or where there is a material or abrupt movement in its share price after the time when, in the case of Rule 2.2(d), an offer is first actively considered or, in the case of Rule 2.2(f)(ii)(i), either the potential seller or the board starts to seek one or more potential purchasers or offerors.

In the case of Rule 2.2(e), the Panel should be consulted if the offeror and/or the offeree company wish to approach a wider group than the very restricted number of people referred to in the Rule without making an announcement. In the case of Rule 2.2(f)(ii), the Panel should be consulted prior to more than one potential purchaser or offeror being sought.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

...

(c)-(i) Until a firm intention to make an offer has been notified, the Panel must be consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company. (ii) Except with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials or advisers and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made. In particular:

~~(iii)(i) Where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), except with the consent of the Panel, any offer made by the potential offeror for the offeree company will be required to be made on the same or better terms. Where all or part of the consideration is expressed in terms of a monetary value, the offer or that element of the offer must be made at the same or a higher monetary value. Where all or part of the consideration has been expressed in terms of a securities exchange ratio, the offer or that element of the offer must be made on the same (or an improved) securities exchange ratio; and~~

(ii) where the statement concerned includes reference to the fact that the terms of the possible offer “will not be increased” or are “final” or uses a similar expression, the potential offeror will not be allowed subsequently to make an offer on better terms.

~~the potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower value (taking the value of any securities concerned at the date of announcement of the firm intention to make the offer), unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to be set aside.~~

See also Note 5.

...

NOTES ON RULE 2.4

...

5. *Reservation of right to set statements aside*

The first announcement in which a statement subject to Rule 2.4(c) is made must also contain prominent reference to any reservation (precise details of which must also be included in the announcement). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation.

Except with the consent of the Panel, where a potential offeror has referred in a statement subject to Rule 2.4(c) to the level of consideration to be paid if an offer is made, that potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower level of consideration unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to set aside the level of consideration referred to.

Where a potential offeror has reserved the right to vary the form and/or mix of the consideration referred to in a statement subject to Rule 2.4(c) (but remains bound to a specified minimum level of consideration) and exercises that right, the value of any offer that is made subsequently must be the same as or better than the value of the consideration referred to in that statement, calculated as at the time of the announcement of the firm intention to make an offer. If, during the period ending when the market closes on the first business day after the announcement of the firm intention to make an offer, the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration. If there is a restricted market in the securities offered, or if the amount of securities to be issued of a class already admitted to trading is large in relation to the amount already issued, the Panel may require justification of prices used to determine the value of the offer.

Where a potential offeror has made a statement of the kind referred to in Rule 2.4(c)(ii) it will not be permitted to make an offer at a higher level of consideration unless there has occurred an event which the potential offeror specified in the possible offer statement as an event that would enable it to do so.

6. Duration of restriction

The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.

However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.4(c) will normally apply for three months following the making of the statement to which Rule 2.8 applies.

Rule 8

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

...

NOTES ON RULE 8

...

15. Amendments

If details included in a dealing disclosure are incorrect, they should be corrected as soon as practicable in a subsequent disclosure. Such disclosure should state clearly that it corrects details disclosed previously, identify the disclosure or disclosures being corrected, and provide sufficient detail for the reader to understand the nature of the corrections. In the case of any doubt, the Panel should be consulted.

Rule 9

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

...

NOTES ON RULE 9.1

...

7. *Placings and other arrangements*

When a person is to acquire an interest in shares which will result in his being interested in shares carrying 30% or more of the voting rights of a company, the Panel will consider waiving the requirements of this Rule if firm arrangements are made for the number of shares carrying voting rights in which he is interested to be reduced to below 30% prior to the acquisition (for example, by a placing of shares) or, in certain exceptional circumstances, if an undertaking is given to make such a reduction within a very short period after the acquisition. In all such cases, the Panel must be consulted in advance. The Panel will be concerned to ensure that none of the persons with whom the acquirer enters into transactions in order to reduce his interests is acting in concert with the acquirer; for example, an obligation under this Rule will not be avoided by placing shares with a number of persons having a common link, such as the discretionary clients of a fund manager who would be connected with the acquirer if he were an offeror (unless, in such circumstances, the fund manager would have exempt status). (See also Rule 9.7.)

...

10. *Convertible securities, warrants and options*

...

Where securities with conversion or subscription rights were issued at a time when no offer obligation on exercise of such rights would arise and no independent shareholders' approval was obtained, the Panel will consider the case on its merits and will have regard, inter alia, to the votes cast on any relevant resolution, the number of shares concerned and the attitude of the board of the company. It is always open to the holder of such rights to dispose of sufficient rights so that, on exercise, the shares in which he would be interested would together carry less than 30% of the voting rights in the company. In circumstances where such rights could not be transferred prior to exercise, the Panel would consider waiving the offer obligation arising upon an exercise of rights provided there was an undertaking to reduce the number of shares carrying voting rights in which he would be interested to below 30% within a reasonable time. (See also Rule 9.7.)

...

11. *The reduction or dilution of interests in shares ~~a shareholding~~*

...

~~... Additionally, in the case of dilution following the issue of new shares, the Panel will also consider waiving the requirements of the Rule if an arrangement can be made whereby shareholders approve, in the manner outlined in Note 1 of the Notes on Dispensations from Rule 9, the restoration of a diluted percentage interest by acquisitions from those to whom new shares are issued.~~

...

9.3 CONDITIONS AND CONSENTS

...

NOTES ON RULE 9.3

...

2. *Acceptance condition*

Notes 2-7 on Rule 10 also apply to offers under this Rule.

In the event that an offer under Rule 9 lapses because a purchase may not be counted as a result of Note 5 on Rule 10 and subsequently the purchase is completed, the Panel should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the percentage of shares in which the offeror and persons acting in concert with it are interested. (See also Rule 9.7.)

...

3. *When dispensations may be granted*

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

(a) when the necessary cash is to be provided, wholly or in part, by an issue of new securities. The Panel will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the other conditions required by the Note on Rules 13.1 and 13.3 are not satisfied within the time required by Rule 31.7, and as a result the offer lapses, ~~(i) the offeror will immediately announce a firm intention to make a new cash offer in compliance with this Rule at the price required by Rule 9.5 (or, if greater, at the cash price offered under the lapsed offer); and~~

~~(ii) until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it must consult the Panel as to their ability to exercise, or procure the exercise of, the voting rights of the offeree company attaching to the shares in which they have an interest.~~

~~When a dispensation is given, the offeror must endeavour to fulfil the other conditions with all due diligence; or.~~

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

~~When a dispensation is given, the offeror must endeavour to fulfil all the other conditions with all due diligence.~~

~~(See also Rule 9.7.)~~

~~[This Note also reflects amendments adopted by RS 2008/3.]~~

9.4 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION

...

NOTES ON RULE 9.4

1. If an offer lapses pursuant to Rule 12.1(a) or (b)

If an offer under Rule 9 lapses pursuant to Rule 12.1(a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is

allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30% or to its original level before the obligation to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12.1(a) or (b) to proceed with all due diligence before the Competition Commission or the European Commission. (See also Rule 9.7.)

...

~~9.7 RESTRICTIONS ON EXERCISE OF CONTROL BY AN OFFEROR~~

~~Except with the consent of the Panel, no nominee of an offeror or persons acting in concert with it may be appointed to the board of the offeree company, nor may an offeror and persons acting in concert with it exercise, or procure the exercise of, the votes attaching to any shares in the offeree company until the offer document has been posted.~~

9.7 VOTING RESTRICTIONS AND DISPOSAL OF INTERESTS

Where the Panel agrees to the disposal of interests in shares by a person as an alternative to making an offer pursuant to Rule 9.1, the Panel must be consulted as to the interests required to be disposed of and the application, pending completion of the disposal, of restrictions on the exercise of the voting rights (or the procurement of the exercise of the voting rights) attaching to the shares in which that person and persons acting in concert with that person are interested. Similarly, where an offer made pursuant to Rule 9.1 lapses for a reason other than the acceptance condition not being satisfied, or where a new offer is required pursuant to Note 2 on Rule 9.3, the Panel must be consulted regarding the ability of the offeror and any persons acting in concert with it to exercise, or procure the exercise of, the voting rights attaching to the shares of the offeree company in which they are interested.

NOTE ON RULE 9.7

Calculation of number of shares to which voting restrictions will be applied and the number of interests to be disposed of

Where an obligation under Rule 9.1 has arisen by virtue of:

(a) Rule 9.1(a), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(a) applies (together with persons acting in concert with that person) being able to vote less than 30% of the shares in the offeree company; or

(b) Rule 9.1(b), the number of shares in relation to which voting restrictions, if any, will be applied will normally be such number of shares as results in the person to whom Rule 9.1(b) applies (together with persons acting in concert with that person) being able to vote no more than the percentage of interests in the offeree company held by those persons prior to the triggering acquisition being made.

In each case the calculation will be made by reference to the reduced maximum number of shares entitled to be voted.

Where a disposal of interests in shares is permitted as an alternative to making an offer, the interests in shares required to be disposed of must be sufficient to take the total number of shares in which the offeror and persons acting in concert with it are interested either, if Rule 9.1(a) applies, to below 30% or, if Rule 9.1(b) applies, to the percentage in which they were interested prior to the triggering acquisition being made.

NOTES ON DISPENSATIONS FROM RULE 9

...

2. Enforcement of security for a loan

Where shares or other securities are charged as security for a loan and, as a result of enforcement, the lender would otherwise incur an obligation to make a general offer under this Rule, the Panel will not normally require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with the lender, so that the percentage of shares carrying voting rights in which the lender, together with persons acting in concert with it, is interested is reduced to below 30% in a manner satisfactory to the Panel. ~~The lender must consult the Panel as to its ability to exercise or procure the exercise of the voting rights attaching to the shares in which it is interested at any time before sufficient interests are disposed of, or if the interest in excess of 29.9% is likely to be temporary (for example because the company will be issuing more shares). (See also Rule 9.7.)~~

...

4. Inadvertent mistake

If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule, the Panel will not normally require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with him, so that the percentage of shares carrying voting rights in which the person, together with persons acting in concert with him, is interested is reduced to below 30% in a manner satisfactory to the Panel. ~~Any such person must consult the Panel as to his ability to exercise or procure the exercise of the voting rights attaching to the shares in which he is interested at any time before sufficient interests are disposed of, or if the interest in excess~~

~~of 29.9% is likely to be temporary (for example because the company will be issuing more shares). (See also Rule 9.7.)~~

Rule 35

35.1 DELAY OF 12 MONTHS

...

35.2 PARTIAL OFFERS

...

NOTE ON RULES 35.1 and 35.2

When dispensations may be granted

(a) *The Panel will normally grant consent under this Rule when:—*

(i) the new offer is recommended by the board of the offeree company. Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror ~~either~~ was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement ~~or was one of two or more competing offerors whose offers lapsed with combined acceptances of less than 50% of the voting rights of the offeree company; or~~

...

Rule 38.2

38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror (including a corporate broker) to ensure compliance with this Rule rather than the principal trader. (See also Rule 4.2(b).)

Rule 38.5

38.5 DISCLOSURE OF DEALINGS

...

NOTES ON RULE 38.5

...

5. Amendments

If details included in a dealing disclosure are incorrect, they should be corrected as soon as practicable in a subsequent disclosure. Such disclosure should state clearly that it corrects details disclosed previously, identify the disclosure or disclosures being corrected, and provide sufficient detail for the reader to understand the nature of the corrections. In the case of any doubt, the Panel should be consulted.

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

2 MANDATORY OFFERS

...

NOTES ON SECTION 2

1. *When the Panel's consent may be granted*

...

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. In such circumstances Rule 9.7 will apply.~~

APPENDIX B

List of respondents

Hermes Fund Managers Limited

Institute of Chartered Accountants in England and Wales

London Investment Bankers Association

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