



RS4 Issued on 4 December 2001

THE PANEL ON TAKEOVERS AND MERGERS

DISCLOSURE OF SIDE AGREEMENTS

RELATING TO OFFER PRE-CONDITIONS AND

CONDITIONS

STATEMENT BY

THE CODE COMMITTEE OF THE PANEL

FOLLOWING THE EXTERNAL CONSULTATION

PROCESS ON PCP 4

1. Introduction

- 1.1 In September 2001 the Code Committee of the Takeover Panel published a Public Consultation Paper (PCP 4) on the disclosure of side agreements relating to offer pre-conditions and conditions.
- 1.2 The proposals in PCP 4 sought to amend the Code so that the terms of any agreements or arrangements relating to the circumstances in which an offeror may or may not invoke or seek to invoke a pre-condition or condition to an offer and any consequences of so doing would have to be disclosed publicly.
- 1.3 The purpose of this paper is to give details of the Code Committee's response to the external consultation process on PCP 4.

2. Number of Responses Received

Thirteen responses were received from a range of persons including major industry bodies.

3. Significant Conflicts of View

Most respondents broadly welcomed the proposals. There were some different views expressed on how the proposals should be implemented.

4. The Code Committee's Conclusions

- 4.1 The following questions were asked in PCP 4:
 - (a) **Question 1: Do you agree that the Code should be amended to require the public disclosure of any agreements or arrangements to which an offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke an acceptance condition to its offer and the consequences of it doing so?**
 - (b) **Question 2: If you agree with (1), do you also agree that the Code should be amended to require the public disclosure of any agreements or arrangements to which an offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke**

any other condition to its offer and the consequences of it doing so?

- (c) Question 3: If you agree with (2), do you also agree that the Code should be amended to require the public disclosure of any agreements or arrangements to which an offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke any pre-condition to its offer and the consequences of it doing so?**
- (d) Question 4: If you have a concern with (2) and (3) in the context of regulatory pre-conditions and conditions, do you agree that this can be satisfactorily addressed by the Panel being permitted to grant dispensations in the context of such pre-conditions and conditions where the offeree and its advisers confirm to the Panel in writing that they believe it to be in shareholders' interests for a particular side agreement not to be disclosed as to do so would result in the offer not being made or in an offer being made on less beneficial terms?**

- 4.2 Certain respondents, whilst acknowledging that the disclosure of side agreements as proposed in PCP 4 was a sensible proposal, questioned whether disclosure would, in fact, assist market transparency because shareholders or market participants might not appreciate the import or operation of the relevant side-agreements. The example was given of an agreement between an offeror and its lending bank that an acceptance condition will not be waived down below 90% without the consent of the bank. Uninformed market participants or shareholders might not realise that, in practice, banks are usually willing to allow an offer to be declared unconditional as to acceptances at a lower level. The Code Committee is of the view that disclosure of side agreements can only assist market transparency in that shareholders will be able to form their own view of the import of side agreements, aided if necessary by advice from the Board and their advisers.
- 4.3 The suggestion was made by some respondents that only side agreements which were legally enforceable, and not informal arrangements or understandings, should be disclosable under the proposed amendments to the Code. The Code Committee does not agree with this suggestion. Informal arrangements or understandings can govern the conduct of parties in the same way as formal arrangements or understandings. For this reason various provisions of the Code, such as the definitions of "Acting in Concert" and "Associate" (paragraph 6), and paragraph (iii) of Rule 4.4, refer to formal and informal agreements or understandings. Accordingly, the Code Committee is of the view that informal side agreements constitute material information for shareholders wishing to make an informed assessment of the risk of a condition to an offer being invoked and the offer lapsing or succeeding. In addition, without a requirement to disclose informal side agreements, there is a risk that parties might be led to agreeing such matters on an informal basis in order to avoid disclosure. The Code Committee is of the view

that informal arrangements or understandings should, accordingly, be disclosable under the Code.

- 4.4 Related to the issue discussed in paragraph 4.3 above was the suggestion that the proposed new Rule 26(n) should be more explicit in requiring that, where an agreement or arrangement has not been reduced to writing, a memorandum of the terms of such agreement or arrangement should be put on display. The Code Committee agrees with this suggestion and, accordingly, proposes that new Rule 26(n) should read as follows:-

"(n) a copy of any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, disclosed in the offer document pursuant to Rule 24.2(d) (vii)."

- 4.5 Some respondents argued that there was no need to amend the Code as proposed in PCP 4 because General Principles 4 and 6 provide sufficient protection for shareholders. The Code Committee's concern is that parties to takeover bids have in the past not observed these General Principles in a consistent manner. It therefore believes that amendments to the Code are necessary in order to ensure that a consistent and transparent approach is adopted.

- 4.6 The concern was also expressed that the requirement for side agreements to pre-conditions and conditions to be disclosed might result in parties also being required to disclose terms of agreements which are commercially sensitive and/or have no bearing on the condition or pre-condition. The Panel would adopt the same approach as it does in the case of Rules 25.6 and 26 where it has the ability, in exceptional cases, to grant dispensations from the obligation to summarise or disclose sections of a document which are commercially sensitive and/or do not have a bearing on an offer. This position is made clear in paragraph 3(a) of the Introduction to the Code.

- 4.7 PCP 4 contained a statement that, if relevant side agreements or arrangements are entered into and are publicly disclosed in the manner proposed, then, in accordance with normal Code principles, the offer must be conducted, and the parties will be required to behave, in a manner which is consistent with what has been publicly stated. A concern was expressed that parties who might have good commercial reasons for doing so, would not be permitted to amend the terms of side agreements once they had been publicly disclosed. As with other provisions of the Code, should an amendment be required, the Executive can always be consulted and has the ability to grant dispensations in appropriate cases. Therefore, the Code Committee does not believe that clarification of the proposed changes is necessary.

- 4.8 PCP 4 made it clear that the Code Committee did not intend that the proposed

amendments should cover a disclosure letter entered into between an offeror and an offeree where one or more of the conditions to the offer contains an explicit carve out for information disclosed in writing by the offeree or its advisers to the offeror or its advisers. The view was expressed that the proposed new Rule 2.5(b)(vi) appeared wide enough to require disclosure of such letters and that the wording of the new Rule should be amended accordingly. The Code Committee has considered this but, on balance, believes that further clarification is unnecessary.

- 4.9 The view was expressed that pre-conditions should not be subject to the same treatment as conditions and that it would be difficult to bring clarity to what may well be subjective pre-conditions. In PCP 4 the Code Committee stated that side agreements to pre-conditions constitute relevant information for parties dealing in offeror and offeree securities in the market while the offer is subject to the pre-condition in question, albeit that at this time offeree shareholders are not required or able to make an acceptance decision. The Code Committee still holds this view and, for this reason, believes that pre-conditions should be treated in the same way as conditions.
- 4.10 PCP 4 discussed the possibility of the Executive granting dispensations from the requirement to disclose a regulatory side agreement. It explained that such a dispensation might be granted if it was considered that an offeree's negotiating position would be unduly compromised because the relevant regulatory authority would be made aware of the concessions which an offeror was prepared to make in order to obtain clearance. The Consultation Paper went on to say that the Executive would only grant a dispensation where the offeree and its advisers confirmed to the Executive in writing that they believed that it was in shareholders' interests that the side agreement in question was not disclosed, as to do so would result in the offer not being made or in an offer being made on less beneficial terms. Questions were raised about the viability of this approach and the concern was expressed that an obligation to disclose a side agreement to a regulatory pre-condition or condition, either privately to the Panel or publicly, might result in the document ceasing to benefit from legal professional privilege. The consequence of this might be that the document becomes disclosable to the relevant regulatory authority, which in turn might result in the regulatory strategy agreed between the two parties being materially compromised. The Code Committee still believes that the Executive should have the ability to grant dispensations from disclosure in such cases. However, in the light of the views expressed, the Code Committee agrees that the basis of the written confirmation should be altered, such that the offeree and its advisers would be required to confirm in writing to the Executive that disclosure would be likely to prejudice negotiations with a relevant regulatory authority to an extent which was material in the context of the offer.

4.11 The full text of the relevant Rules of the Code amended as suggested in PCP 4 and in this statement is set out in the Appendix to this statement.

Appendix

2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

(a) The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror.

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

- (i) the terms of the offer;**
- (ii) the identity of the offeror;**
- (iii) details of any existing holding in the offeree company:
 - (a) which the offeror owns or over which it has control;**
 - (b) which is owned or controlled by any person acting in concert with the offeror (see Note 2);**
 - (c) in respect of which the offeror has received an irrevocable commitment to accept the offer;**
 - (d) in respect of which the offeror holds an option to purchase;**
 - (e) in respect of which any person acting in concert with the offeror holds an option to purchase;****

- (iv) details of any outstanding derivative referenced to securities in the offeree company entered into by the offeror or any person acting in concert with it (see Note 2);
 - (v) all conditions (including normal conditions relating to acceptances, listing and increase of capital) to which the offer or the posting of it is subject;
 - (vi) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result;
 - (vii) details of any arrangement of the kind referred to in Note 6(b) on Rule 8; and
 - (viii) in cases where the offer is announced to a stock exchange outside the United Kingdom on which any relevant securities are listed or traded, a summary of the provisions of Rule 8.3.
- (c) The announcement of an offer under Rule 9 should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer. (The party confirming that resources are available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available.)

NOTES ON RULE 2.5

1. *Unambiguous language*

The language used in announcements should clearly and concisely reflect the position being described. In particular, the word "agreement" should be used with the greatest care. Statements should be avoided which may give the impression that persons have committed themselves to certain courses of action (eg accepting in respect of their own shares) when they have not in fact done so.

2. *Holdings by a group of which an adviser is a member*

It is accepted that, for reasons of secrecy, it would not be prudent to make enquiries so as to include in an announcement details of any holdings of offeree company shares or options in respect of them held by or derivatives referenced to them entered into by other parts of an adviser's group (see (5) of "acting in concert" in Definitions Section). In such circumstances, details should be obtained as soon as possible after the announcement has been made and the Panel consulted. If the holdings are significant, a further announcement may be required.

3. *Irrevocable commitments*

References to commitments to accept an offer must specify in what circumstances, if any, they will cease to be binding, for example, if a higher offer is made.

4. *Subjective conditions*

Companies and their advisers should consult the Panel prior to the issue of any announcement containing conditions which are not entirely objective (see Rule 13).

5. *New conditions for increased or improved offers*

See Rule 32.4.

6. *Pre-conditions*

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

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

Except with the consent of the Panel:-

(a) where the consideration includes securities and the offeror is a company incorporated under the Companies Act 1985 (or its predecessors) and its shares are listed on the Stock Exchange or dealt in on the Alternative Investment Market, the offer document must contain:

(i) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, extraordinary items, minority interests, the amount absorbed by dividends and earnings and dividends per share;

(ii) a statement of the assets and liabilities shown in the last published audited accounts;

(iii) a cash flow statement if provided in the last published audited accounts;

(iv) all known material changes in the financial or trading position of the company subsequent to the last published audited accounts or a statement that there are no known material changes;

(v) details relating to items referred to in (i) above in respect of any interim statement or preliminary announcement made since the last published audited accounts;

(vi) inflation-adjusted information if any of the above has been published in that form;

(vii) significant accounting policies together with any points from the notes to the accounts which are of major relevance to an appreciation of the figures, including those relating to inflation-adjusted information;

(viii) where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated;

(ix) the names of the offeror's directors;

(x) the nature of its business and its financial and trading

prospects; and

(xi) a summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeror or any of its subsidiaries during the period beginning two years before the commencement of the offer period, including particulars of dates, parties, terms and conditions and any consideration passing to or from the offeror or any of its subsidiaries;

(b) where the consideration is cash only and the offeror is a company incorporated under the Companies Act 1985 (or its predecessors) and its shares are listed on the Stock Exchange or dealt in on the Alternative Investment Market, the offer document must contain:

(i) for the last two financial years for which information has been published, turnover and profit or loss before taxation;

(ii) a statement of the net assets of the company shown in the last published audited accounts;

(iii) the names of the company's directors; and

(iv) the nature of the business and its financial and trading prospects;

(c) if the offeror is other than a company referred to in (a) and (b) above, whether the consideration is securities or cash, the offer document must contain:

(i) in respect of the offeror, the information described in (a) above (so far as appropriate) and such further information as the Panel may require in the particular circumstances of the case (see Note 2);

(ii) in respect of any person who has made (or proposes to make or increase) an investment in the offeror for the purposes of the offer such that he has or will have a potential direct or indirect interest in any part of the capital of the offeree company which the Panel regards as equity capital, details of his identity and of his interest in the offeror and such further information as the Panel may require in

the particular circumstances of the case (see Note 2); and

(iii) in respect of any person not included in (ii) above whose pre-existing interest in the offeror is such that he has a potential direct or indirect interest of 5% or more in any part of the capital of the offeree company which the Panel regards as equity capital, details of his identity and of his interest in the offeror and such further information as the Panel may require in the particular circumstances of the case (see Note 2);

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

(i) a heading stating "If you are in doubt about this offer you should consult an independent financial adviser authorised under the Financial Services Act 1986";

(ii) the date when the document is despatched, the name and address of the offeror and, if appropriate, of the person making the offer on behalf of the offeror;

(iii) details of the securities for which the offer is made, including whether they will be transferred "cum" or "ex" any dividend;

(iv) the total consideration offered;

(v) particulars of all documents required, and procedures to be followed, for acceptance of the offer;

(vi) the middle market quotations for the securities to be acquired, and (in the case of a securities exchange offer) securities offered, for the first business day in each of the six months immediately before the date of the offer document, for the last business day before the commencement of the offer period and for the latest available date before the posting of the offer document (quotations stated in respect of securities listed on the Stock Exchange should be taken from the Daily Official List and, if any of the securities are not so listed, any information available as to the number and price of transactions which have taken place during the preceding six months should be stated together with the source, or an appropriate negative statement);

- (vii) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result;**
- (viii) in the case of a securities exchange offer, particulars of the first dividend or interest payment in which the new securities will participate and how the securities will rank for dividends or interest, capital and redemption and a statement indicating the effect of acceptance on the capital and income position of the offeree company's shareholders (if the new securities are not to be identical in all respects with an existing security listed on the Stock Exchange, full particulars of the rights attaching to the securities must also be included together with a statement of whether an application for listing has been or will be made to the Stock Exchange and whether admission to listing on any other stock exchange or the facility to deal on any other market has been or will be sought); and**
- (ix) in the case of a securities exchange offer, the effect of full acceptance of the offer upon the offeror's assets, profits and business which may be significant for a proper appraisal of the offer;**
- (e) the offer document must contain information on the offeree company on the same basis as set out in (a)(i) to (ix) above, whether or not the offeree company is listed on the Stock Exchange;**
- (f) all offer documents must contain a description of how the offer is to be financed and the source of the finance. The principal lenders or arrangers of such finance must be named. Where the offeror intends that the payment of interest on, repayment of or security for any liability (contingent or otherwise) will depend to any significant extent on the business of the offeree company, a description of the arrangements contemplated will be required. Where this is not the case, a negative statement to this effect must be made;**
- (g) if any document issued by the offeror contains a comparison of the value of the offer with previous prices of the offeree company's shares, a comparison between the current value of the offer and the price of the offeree company's shares on the last business day prior to the commencement of the offer period must be prominently included, no matter what other comparisons are made; and**

(h) if any document issued to shareholders of the offeree company in connection with an offer includes a recommendation or an opinion of a financial adviser for or against acceptance of the offer, the document must, unless issued by the financial adviser in question, include a statement that the financial adviser has given and not withdrawn his consent to the issue of the document with the inclusion of his recommendation or opinion in the form and context in which it is included.

NOTES ON RULE 24.2

1. *Where the offeror is a subsidiary company*

The Panel will normally look through unlisted subsidiaries in interpreting this Rule unless, with the agreement of the Panel, the subsidiary in question is regarded as being of sufficient substance in relation to the group and the offer. Accordingly if the offeror is part of a group, information will normally be required on the ultimate holding company in the form of group accounts.

2. *Further information requirements*

(a) For the purpose of Rule 24.2(c), the expression "person" will normally include the ultimate owner(s), and persons having control (as defined), of the offeror if not already included under (ii) or (iii). Whilst the precise nature of the further information which may be required to be disclosed under (i), (ii) or (iii) in any particular case will depend on the circumstances of that case, the Panel would normally expect it to include a general description of the business interests of the offeror and/or other person(s) concerned and details of those assets which the Panel considers may be relevant to the business of the offeree company.

(b) The Panel must be consulted in advance in any case to which Rule 24.2(c) applies, or may apply regarding the application of its provisions to that particular case.

3. *Partial offers*

Where the offer is a partial offer, the offer document must contain the information required under Rule 24.2(a), whether the consideration is securities or cash.

RULE 26. DOCUMENTS TO BE ON DISPLAY

Except with the consent of the Panel, copies of the following documents must be made available for inspection from the time the offer document or offeree board circular, as appropriate, is published until the end of the offer period. The offer document or offeree board circular must state which documents are so available and the place (being a place in the City of London or such other place as the Panel may agree) where inspection can be made:-

- (a) memorandum and articles of association of the offeror or the offeree company or equivalent documents;**
- (b) audited consolidated accounts of the offeror or the offeree company for the last two financial years for which these have been published;**
- (c) all service contracts of offeree company directors which have more than 12 months to run;**
- (d) any report, letter, valuation or other document any part of which is exhibited or referred to in any document issued by or on behalf of the offeror or the offeree company;**
- (e) written consents of the financial advisers (Rules 24.2(h) and 25.1(b));**
- (f) all material contracts (Rules 24.2(a) and (c) and 25.6);**
- (g) where a profit forecast has been made:
 - (i) the reports of the auditors or consultant accountants and of the financial advisers (Rule 28.3);**
 - (ii) the letters giving the consent of the auditors or consultant accountants and of the financial advisers to the issue of the relevant document with the report in the form and context in which it is included or, if appropriate, to the continued use of the report in a subsequent document (Rules 28.4 and 28.5);****

- (h) where an asset valuation has been made:**
 - (i) the valuation certificate and associated report or schedule containing details of the aggregate valuation (Rule 29.5);**
 - (ii) a letter stating that the valuer has given and not withdrawn his consent to the publication of his name in the relevant document (Rule 29.5);**
- (i) any document evidencing an irrevocable commitment to accept an offer;**
- (j) where the Panel has given consent to aggregation of dealings, a full list of all dealings (Note 4 on Rule 24.3);**
- (k) documents relating to the financing arrangements for the offer where such arrangements are described in the offer document in compliance with the third sentence of Rule 24.2(f);**
- (l) all derivative contracts which in whole or in part have been disclosed under Rules 24.3(a) and (c) and 25.3(a) and (c) or in accordance with Rule 8.1. Documents in respect of the last mentioned must be made available for inspection from the time the offer document or the offeree board circular is published or from the time of disclosure, whichever is the later;**
- (m) documents relating to the payment of an inducement fee or similar arrangement (Rule 21.2); and**
- (n) a copy of any agreements or arrangements or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, disclosed in the offer document pursuant to Rule 24.2(d)(vii).**

NOTE ON RULE 26

Copies of documents

A copy of each document on display must, on request, promptly be made available by an offeror or the offeree company to the other party and to any competing offeror or potential offeror.