



RS5 Issued on 4 December 2001

THE PANEL ON TAKEOVERS AND MERGERS

ELECTRONIC ACCEPTANCES IN CREST

STATEMENT BY

THE CODE COMMITTEE OF THE PANEL

FOLLOWING THE EXTERNAL CONSULTATION

PROCESS ON PCP 5

1. Introduction

- 1.1 In September 2001 the Code Committee of the Takeover Panel published a Public Consultation Paper (PCP 5) on electronic acceptances in CREST.
- 1.2 The proposals in PCP 5 suggested that the Code should be amended to enable electronic acceptances to be possible, without the need for a paper form of acceptance.
- 1.3 The purpose of this paper is to provide details of the Code Committee's response to the external consultation process on PCP 5.

2. Number of responses received

A total of eight responses were received from a range of persons including major industry bodies.

3. Significant conflicts of views

All respondents agreed with the proposals although some respondents suggested that certain items of the procedures should be clarified in the Code, for example, whether or not acceptances could be withdrawn electronically.

4. The Code Committee's conclusions

- 4.1 The Code Committee wishes to make clear that, while the purpose behind the amendments to the Code is to permit electronic acceptances in takeovers, the detailed procedures to be followed are the responsibility of CREST. In preparing these procedures, CREST has taken account of existing Code processes. Accordingly, for example, if acceptances are electronic, withdrawals may be made in the same way and, further, the CREST procedures will permit shareholders to accept various forms of consideration.

- 4.2 The Code Committee confirms that the Code will be amended as suggested in PCP 5.
- 4.3 Since PCP5 was issued, a further CREST development was brought to the Panel's attention, namely that from 26 November, proposals relating to Electronic Transfer of Title ("ETT") became law. Accordingly legal title to securities being transferred in CREST will pass at the time of settlement rather than when the registrar amends the register. In other words, the proposal for ETT will re-characterise the CREST records as themselves the register of uncertificated securities but the registrar will continue to maintain the register of certificated securities, together with a record of uncertificated holdings. It will be this combined record held by the registrar which will be used for the purposes of public inspection and on which processing of corporate actions will be based (the CREST register itself cannot be inspected). As a result it is necessary to alter the Code in order to deal with the fact that there are two distinct registers. The Code Committee has approved further amendments to cover this issue.
- 4.4 For ease of reference, the full text of the relevant Rules of the Code amended as suggested in PCP 5, and including the additional amendments, is set out in the Appendix to this statement.

Appendix

SECTION G. THE VOLUNTARY OFFER AND ITS TERMS

RULE 10. THE ACCEPTANCE CONDITION

NB This Rule should be read in conjunction with Appendix 4.

It must be a condition of any offer for voting equity share capital which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting rights of the offeree company that the offer will not become or be declared unconditional as to acceptances unless the offeror

has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights attributable to:-

- (a) the equity share capital alone; and**

- (b) the equity share capital and the non-equity share capital combined.**

NOTES ON RULE 10

1. *Waiver of 50% condition*

In certain exceptional cases, the Panel will consider waiving the requirements of this Rule subject to prior consultation and to appropriate safeguards. This might be appropriate where, for example, following a major change of management policy, it is desired to provide an opportunity for shareholders to dispose of their shares and where the offer is made on behalf of a group of investors who are otherwise wholly unconnected and whose purpose is not to gain control.

2. *New shares*

For the purpose of the acceptance condition, the offeror must take account of all shares carrying voting rights which are unconditionally allotted or issued before the offer becomes or is declared unconditional as to acceptances, whether pursuant to the exercise of conversion or subscription rights or otherwise. If in any case, for example, as a result of a rights issue, shares have been allotted in renounceable form (even if provisionally), the Panel should be consulted.

3. *Information to offeror during offer period and extension of offer to new shares*

Following the announcement of a firm intention to make an offer, the offeree company must, on request, provide the offeror as soon as possible with all relevant details of the issued shares and, to the extent not issued, the allotted shares and details of any conversion or subscription rights or any other rights

pursuant to the exercise of which shares may be unconditionally allotted or issued during the offer period. In the case of conditionally allotted shares, the details should include the conditions and the date on which such conditions may be satisfied. In the case of rights, the details should include the number of shares which may be unconditionally allotted or issued during the offer period as a result of the exercise of such rights, identifying separately those attributable to rights which commence or expire on different dates, and the various prices at which these rights could be exercised.

The offeree company must immediately notify the offeror of any allotment or issue of shares and of the exercise of any such rights during the offer period and provide the offeror as soon as possible with all relevant details.

The offeror must make appropriate arrangements to ensure that any person to whom shares of a type to which the offer relates are unconditionally allotted or issued during the offer period will have an opportunity of accepting the offer in respect of such shares.

In cases of doubt, the Panel must be consulted.

4. Acceptances

NB1 Attention is drawn to Note 6 below which will be relevant if an acceptance condition is to be fulfilled before the final closing date.

NB2 It is a matter for the offeror and its advisers, in particular the receiving agent, to determine whether, for shareholders within CREST, an offer can be accepted (and the acceptance withdrawn) electronically without the need for an acceptance form. If so, the procedure to be adopted must be made clear in the offer document.

An acceptance may not be counted towards fulfilling an acceptance condition unless:-

(a) if it is to be effected by means of CREST without an acceptance form, the transfer to the relevant member's escrow account has settled in respect of the relevant number of shares on or before the last time for acceptance set out in

the offeror's relevant document or announcement; or

if it is to be effected by means of an acceptance form, both:

(b) it is received by the offeror's receiving agent on or before the last time for acceptance set out in the offeror's relevant document or announcement and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received or relevant escrow transfers identified; and

(c) the acceptance form is completed to a suitable standard (see below) and is:

(i) accompanied by share certificates in respect of the relevant shares and, if those certificates are not in the name of the acceptor, such other documents (eg a duly stamped transfer of the relevant shares in favour of the acceptor executed by the registered holder and otherwise completed to a suitable standard) as are required by the practice set out in the then current edition of Company Secretarial Practice --- The Manual of the Institute of Chartered Secretaries and Administrators ("the ICSA Manual") in order to establish the right of the acceptor to become the registered holder of the relevant shares; and if an acceptance is accompanied by share certificates in respect of some but not all of the relevant shares then, subject to the other requirements of this sub-paragraph (i) being fulfilled in respect of the shares which are covered by share certificates, the acceptance may be treated as fulfilling the requirements of this sub-paragraph (i) insofar as it relates to those covered shares; or

(ii) in the case of a holding in CREST, covered by a transfer to the relevant member's escrow account, details of which must be provided on the acceptance form; if the acceptance is covered by a transfer to escrow in respect of some but not all of the relevant holding, it may be treated as fulfilling the requirement of this sub-paragraph (ii) in respect of that part of the holding transferred to escrow; or

(iii) from a registered holder or his personal representatives (but only up to the amount of the registered holding as at the final time for acceptance and only to the extent that the acceptance relates to shares which are not taken into account under another sub-paragraph of this paragraph (c)); or

(iv) certified by the offeree company's registrar.

For this purpose an acceptance form is completed to a suitable standard:

(1) *where the form constitutes a transfer, if it meets the criteria (other than being duly stamped) for the registration of transfers set out in the ICSA Manual; or*

(2) *where the form does not constitute a transfer, if it constitutes a valid and irrevocable appointment of the offeror or some person on its behalf as an agent or attorney for the purpose of executing a transfer of the type referred to in (1) above on behalf of the acceptor.*

If the acceptance form is executed by a person other than the registered holder, appropriate evidence of authority (eg grant of probate or certified copy of a power of attorney) must be produced as required by the practice set out in the ICSA Manual.

5. Purchases

NB Attention is drawn to Note 6 below which will be relevant if an acceptance condition is to be fulfilled before the final closing date.

A purchase of shares by an offeror or its nominee (or in the case of a Rule 9 offer, a person acting in concert with the offeror, or its nominee) may be counted towards fulfilling an acceptance condition only if:-

(a) *the offeror or its nominee (or in the case of a Rule 9 offer, a person acting in concert with the offeror, or its nominee) is the registered holder of the shares;*
or

(b) *a transfer of the shares in favour of the offeror or its nominee (or in the case of a Rule 9 offer, a person acting in concert with the offeror, or its nominee) executed by or on behalf of the registered holder and otherwise completed to a*

suitable standard (as specified in paragraph (c) (i) of Note 4 above) and accompanied by the relevant share certificates or certified by the offeree company's registrar is delivered by or on behalf of the offeror to the offeror's receiving agent on or before the last time for acceptance set out in the offeror's relevant document or announcement and the offeror's receiving agent has recorded that the transfer and accompanying documents have been so received.

A person who has agreed to sell shares to the offeror or a person acting in concert with it is not, by virtue only of the agreement, a "nominee" for the purposes of this Note.

The offeror must advise its receiving agent of any parties whose registered holdings or purchases are relevant for the purpose of the acceptance condition. The offeror's receiving agent must then certify the holding of each such party on the basis of the register (or, in relation to holdings in CREST in respect of which CREST maintains the register, the record of securities held in uncertificated form).

- 6. Offers becoming or being declared unconditional as to acceptances before the final closing date*

In determining whether an acceptance condition has been fulfilled before the final closing date, all acceptances and purchases that comply with the requirements of Notes 4 and 5 on Rule 10 may be counted, other than those which fall within paragraph c(iii) of Note 4.

- 7. Offeror's receiving agent's certificate*

Before an offer may become or be declared unconditional as to acceptances, the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the number of acceptances which have been received which comply with Note 4 on Rule 10 and the number of shares otherwise acquired, whether before or during an offer period, which comply with Note 5 on Rule 10 and, in each case, if appropriate, Note 6 on Rule 10.

Copies of the receiving agent's certificate must be sent to the Panel and the offeree company's financial adviser by the offeror or its financial adviser as soon as possible after it is issued.

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

(a) Except with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day the initial offer document was posted. The Panel's consent will normally only be granted:-

(i) if a competing offer has been announced (in which case both offerors will normally be bound by the timetable established by the posting of the competing offer document); or

(ii) if the board of the offeree company consents to an extension; or

(iii) as provided for in Rule 31.9; or

(iv) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.

(b) For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in respect of which all relevant electronic instructions or documents (as required by Notes 4 and 5 on Rule 10) are received by its receiving agent before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 1.00 pm on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended). In the event of an extension with the consent of the Panel in circumstances other than those set out in paragraphs (a) (i) to (iii) above, acceptances or purchases in respect of which relevant electronic instructions or documents are received after 1.00 pm on the relevant date may only be taken into account with the agreement of the Panel, which will only be given in exceptional circumstances.

(c) Except with the consent of the Panel, on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended) an announcement should be made by 5.00 pm as to whether the offer is unconditional as to acceptances or has lapsed. Such announcement should include, if possible, the details required by Rule 17.1 but in any event must include a statement as to the current position in the count. (See Note 2.)

NOTES ON RULE 31.6

1. *Extension of offer under Rule 31.6(a)*

It should be noted that the effect of Rule 31.6(a) is that, unless the offer is unconditional as to acceptances by midnight on the final closing date (or the Panel gives permission for the offer to be extended), the offer will lapse. When, however, there is a Code matter outstanding on the final closing date, it may be inappropriate for the offer to become or be declared unconditional as to acceptances or to lapse at that time. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.6(a), give permission for the offer to be extended, but with no extension of the time by which all relevant electronic instructions or documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule 31.6(b) and Rule 34.

2. *Rule 31.6(c) announcement*

Under Rule 31.6(c), an announcement as to whether the offer is unconditional as to acceptances or has lapsed should normally be made by 5.00 pm on the final closing date. This requirement should not be reflected in the terms of the offer pursuant to Rule 24.6, but, if there is any question of a delay in the announcement required by Rule 31.6, the Panel should be consulted as soon as practicable. Only in exceptional circumstances will the Panel agree to an offeror's request that this announcement may be made after 5.00 pm.

3. *The Competition Commission and the European Commission*

If there is a significant delay in the decision on whether or not there is to be a reference or initiation of proceedings, the Panel will normally extend "Day 39" (see Rule 31.9) to the second day following the announcement of such decision with consequent changes to "Day 46" (see Rule 32.1) and "Day 60".

APPENDIX 4

APPENDIX 4 is amended as follows:

- (a) The current "NB" prior to section 1 becomes "NB 1"

The following is added:

"NB 2 If an offer relates to securities some or all of which are held in uncertificated form in CREST and in respect of which CREST maintains the register, references in this Appendix to the register shall be deemed to be references to:-

- (a) the register of securities held in certificated form (if any); and*
 - (b) the record of securities held in uncertificated form maintained by the offeree company's registrar."*
- (b) In the first paragraph of Section 3(c), the final sentence can be deleted since the registrar will no longer be notifying the CREST operator of such updates.