Takeover Panel consultation paper PCP2014/1 –
Response of the 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

Below are the views of the 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 (the "Working Party") on the Panel Consultation Paper PCP 2014/1.

The Law Society of England and Wales is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The City of London Law Society (CLLS) represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

Q1 Should the latest date for a potential competing offeror to clarify its position be a firm date as opposed to a flexible date which is set by the Panel on a case-by-case basis?

See our response to Question 2 below.

Q2 Should the deadline by which a potential competing offeror must clarify its position be extended to seven days prior to the final day on which the first offeror's offer is capable of becoming or being declared unconditional as to acceptances, rather than 10 days prior to that time?

We have no objection to the introduction of a "fixed" date/deadline by which a potential competing offeror must clarify its position and in practice this requirement is already imposed by the Panel, albeit usually requiring clarification by Day 50.

Q3 Should the latest date by which a potential competing offeror must clarify its position be fixed at 5.00pm on the 53rd day following the publication of the first offeror's initial offer document?

See our response to Question 2 above.

Q4 Where the first offeror is proceeding by way of a scheme of arrangement, should the latest date by which a potential competing offeror must clarify its position normally be 5.00pm on the seventh day prior to the date of the shareholder meetings?

In our view a deadline of seven days before the meetings may in some cases result in too little notice ahead of the meeting, whilst in other cases it will be ample. An undisclosed bidder could in any event emerge at any point before the court hearing.

It would be helpful to have guidance on when a potential competing offeror would be permitted to clarify its intentions after the shareholder meetings. For example where the meetings are to be held some weeks after the first announcement of an offer by the first bidder (for example more than 53

days or 60 days after the announcement), it would be reasonable to expect the potential competing offeror to clarify its intentions not less than seven days before the meetings. If however the meetings are held 23 days after the offer was first announced, a potential competing offeror should be allowed to clarify its intentions after the meetings, to align the deadline with the position on a contractual offer.

It is worth noting that the current 10 day period would probably allow the original scheme to proceed on the original timetable whereas the target board may decide that to adjourn the shareholder meetings in the event that a potential competing offeror clarifies its intentions seven days before the meeting, even if the target decides to proceed with the original offeror/scheme.

To illustrate this, if the target does decide to proceed with the original offer, it would need to send a circular to its shareholders to tell them what has happened and give them time to change their proxy votes ahead of the proxy deadline; if the competing offeror makes an offer on Day -7, given the need for the target to convene board meeting to consider the bid, the earliest shareholder circular publication date is likely to be Day -5. Shareholders would not therefore get the circular until Day- 4 and proxies would need to be lodged on Day -2.

Para 2.15(c) of PCP 2014/1 is based on the need for shareholders to have seven days in which to make and process decisions but, given the 48 hour proxy deadline on a scheme, it does not in reality give them seven days.

A target board could alternatively decide not to adjourn the meeting and "bank" shareholder approval for the first offer.

Q5 Should the Panel, in appropriate cases, continue to be able to permit a potential competing offeror to clarify its position after the date of the shareholder meetings and, in such cases, should the deadline be set for a date which is no later than 5.00pm on the seventh day prior to the date of the court sanction hearing?

As noted above, as an undisclosed bidder may emerge after the scheme meetings, the Panel should continue to be able to permit a potential competing offeror to clarify its position after the meetings and before the sanction hearing. In our view, it would not be helpful to prescribe in the Code a specific deadline by which a competing offeror must clarify its position after the shareholder meetings but prior to the sanction hearing. An announcement at that stage would be likely to result in an adjournment to the sanction hearing, even if the target board were to stick with the original scheme (factoring into this seven day period the need for the judge’s bundle to be lodged 2 days ahead of the sanction hearing). The current wording in Section 4 of Appendix 7, where there is no suggested timing for clarification after the shareholder meetings, seems preferable given that it will be exceptional for the Takeover Panel to permit a clarification after the shareholder meetings and the Takeover Panel should be able to determine an appropriate deadline in light of whatever those exceptional circumstances may be.

Q6 Do you have any comments on the proposed amendments to Rules 2.6(d) and (e), Note 3 on Rule 2.6 and Section 4 of Appendix 7?

For the heading and text of the proposed amended Note 3 on Rule 2.6, as a drafting improvement we would suggest changing "date" to deadline" given that (unlike in the original version of the note) the reference is to a time (5pm on Day 53) rather than only a date (on or around Day 50). The same comment also applies to new paragraph 4(c) of Appendix 7.

Q7 Do you have any comments on the proposed new Note 5 on Rule 32.1 with regard to extensions to Day 60?

Q8 What are your views on the proposed amendment to Note 2 on Rule 2.8?

Q9 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed so as to restrict a person who is subject to that Note, together with any person who acted, or subsequently acts, in concert with it, from acquiring interests in shares of the offeree company?

On the proposed amendment to Note 4 on Rule 2.2 (When a dispensation may be granted), where it says "if such a dispensation is granted, neither the potential offeror, nor any person who acted in concert with it, nor any person who is subsequently acting in concert with either of them, may….", we believe that the words "nor any person who is subsequently acting in concert with either of them" are much too wide. In our view, it should be enough to say "nor any person who is subsequently acting in concert with the potential offeror". If the suggested wording stands, there would have to be an enormous exercise to find all the concert parties of the potential offeror's concert parties and make sure they did not carry out any of the prohibited actions.

On the proposed changes to Rule 2.2, it would be helpful to clarify some of the comments in para 4.7 of PCP 2014/1. Presumably there is no change to the position that a bidder that is bound by Rule 2.8 can still make one phone call to the target to see if it is willing to engage again (although not within the first 3 months if they have downed tools)?

Should the reference to "may only" [consent to the restrictions….] in the new language in Note 4(a) be to "will normally" in order to allow the Takeover Panel more flexibility?

Q10 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed so as to restrict a person who is subject to that Note, together with any person who acted, or subsequently acts, in concert with it, from making an approach to the board of the offeree company?

See our response on Question 9 above.

Q11 Should paragraph (b) of Note 4 on Rule 2.2 be amended as proposed so as to require that an announcement which the Panel requires to be made by the offeree company under that paragraph (b) should normally identify the former potential offeror?

Q12 Should paragraph (a) of Note 4 on Rule 2.2 be amended as proposed to as to restrict a person who is granted a dispensation, and any person acting in concert with it, from actively considering an offer, from making an approach and from acquiring an interest in shares of the offeree company for a period of three months following the date on which the dispensation was granted and from doing any of the things set out in Rules 2.8(a) to (e) for the following three month period?

Q13 Should the default auction procedure be based on the Existing Default Procedure? If not, is there an alternative model which would be more appropriate?

The codification of a default auction procedure under the Takeover Code would be useful.

In reality if the parties cannot agree on a mutually satisfactory resolution process then any imposed solution is likely to have drawbacks, as is reflected in a number of the past situations. Whilst it will be helpful to have the default process clearly set out in the Code, it will not change the fact that certain bidders will find a protracted public auction process unattractive or unwieldy. We are also

not convinced that the proposed default process will necessarily achieve the Panel's stated aims in terms of transparency.

For example, in the arguments in favour of adopting a modified version of the existing "default" procedure, the Panel asserts that it is important for each round of bidding to be on a business day to enable the market/competing bidders and target shareholders to evaluate the terms of any revised bid and its impact (see para 5.39) but the announcement time of 5pm is outside UK market hours. As a result there will inevitably be a delay until the following business day before the target's "home" market can react to the revised bid announcement. This may only be an overnight delay in most cases but it could be a three day delay if there is an intervening public holiday weekend. In the meantime, trading in instruments linked to the target's shares could still occur on other markets, which seems an unattractive outcome.

On balance, and accepting its potential drawbacks, we would favour a simple "out of hours" single round sealed bid process as the default.

Q14 Should the default auction procedure be incorporated into the Code as a new Appendix 8?

See our response to Question 13 above.

Q15 Should the Proposed Auction Procedure provide for an auction process with a maximum of five rounds over five consecutive business days?

See our response to Question 13 above.

Q16 Should both of the competing offerors be permitted to announce a revised offer in the first round of the auction?

See our response to Question 13 above.

Q17 In the second, third and fourth rounds, should a competing offeror be permitted to announce a revised offer only if the other competing offeror has announced a revised offer in the previous round?

Q18 Should both of the competing offerors be entitled to announce a revised offer in the fifth and final round?

Q19 Do you agree that the Proposed Auction Procedure should not require revised offers to incorporate minimum incremental increases to previous offers?

Q20 Should the Proposed Auction Procedure prohibit the announcement of a revised offer where the consideration is calculated by reference to a formula that is determinable by reference to the value of a revised offer by the other competing offeror (in the absence of agreement between the parties that such formula offers should be permitted)?

Q21 Should a competing offeror be permitted to submit a revised offer to the Panel in the fifth and final round subject to the condition that it will be announced only if the other competing offeror also submits a revised offer?

Q22 Do you agree that the introduction of new forms of consideration during the auction should not be prohibited?

Q23 Should the terms of the Proposed Auction Procedure prohibit dealings in the relevant securities of the offeree company by the parties to the offer and persons acting in concert with them, and the procuring of irrevocable commitments and letters of intent, during the auction procedure?

Q24 Should the terms of the Proposed Auction Procedure provide that, between the end of the auction procedure and the end of the offer period, a competing offeror and any person acting in concert with it must not acquire any interest in the shares of the offeree company if it would then be required to revise its offer?

Q25 Should the terms of the Proposed Auction Procedure prohibit announcements by the competing offerors or the offeree company (or persons acting in concert with them) which relate to, or could reasonably be expected to affect the orderly operation of, the auction procedure or which relate to the terms of either competing offeror's offer?

Q26 Do you have any comments on the proposed amendments to Rule 32.5 or the proposed new Appendix 8?

As regards the reference to embargoing the publications of announcements under Sections 3(e) and 4(c) of the new Appendix 8, a cross reference in Rule 30.3(b), which prohibits embargo of announcements, to the auction procedure where an embargo is permitted, may be appropriate in order to avoid confusion.

Q27 Should the Code be amended so as to require a whitewash transaction circular to state that potential controllers which are granted a Rule 9 waiver are not restricted from making an offer for the company?

Any statement of no intent to bid or standstill agreement would appear to entail a consequential amendment to Rule 26.2, e.g. to Rule 26.2(b).

Q28 Do you have any comments on the proposed amendments to Note 1 of the Notes on Dispensations from Rule 9, Section 4 of Appendix 1 and Note 5 on the definition of "acting in concert"?

Is it intended that the last paragraph of note 5 on the definition of acting in concert means that any kind of agreement not to trade a target company's shares for any period of time would amount to a "standstill agreement" which requires consultation with Panel if the target or its sponsor/financial adviser is not a party to that agreement? If that is the case then "no dealing" provisions in confidentiality agreements between potential consortium members or standstill agreements as part of wall-crossing arrangements would all fall within the net.

Q29 Should Rule 2.11(b) be amended so as to require irrevocable commitments and letters of intent procured prior to an offer period to be disclosed following the identification of the offeror as such, and Rule 2.11(c) deleted, as proposed?

The proposed changes seem to remove any disclosure requirement on the part of the target in respect of irrevocables not to accept an offer that it may have obtained prior to the commencement of the "offer period". Whilst this may be a rare (possibly only theoretical) scenario, a target could in theory obtain an irrevocable from a shareholder not to accept an offer following an approach by a potential bidder but prior to any Rule 2.4 or 2.7 announcement. We believe that the Code should cover this possible scenario and that disclosure in that case should be by 12 noon on the business day following the commencement of the offer period.

Also, we think Rule 2.11(b) should start "Except with the consent of the Panel...". This would enable the Panel to agree that any irrevocables which have lapsed need not be disclosed. For example, a target shareholder may have given an irrevocable that would lapse if the bid was not announced within "x" days. In the event of the irrevocable having lapsed, we think it would be unhelpful and potentially misleading for the Code to require disclosure of an irrevocable that has been "procured" but has now lapsed. We believe that this change would be consistent with the Panel's approach to this issue, albeit the situation is rare in practice.

Q30 Should Rule 2.7 be amended so as to require details of interests and short positions in relevant securities of the offeree company, and irrevocable commitments and letters of intent, to be included in the announcement of a firm intention to make an offer, and the new Note 3 on Rule 2.7 introduced, as proposed?

See our response to Question 29 above.

Q31 Should Note 2(a)(i) on Rule 8 be amended such that the "10 business days" deadline would apply to an offeror's Opening Position Disclosure, regardless of when it announced its firm intention to make an offer?

Q32 Should Note 1 on Rule 2.11 be amended so as to make clear that no separate disclosure is required when details of irrevocable commitments and letters of intent are disclosed in a firm or possible offer announcement made by no later than 12 noon on the business day following the date on which they are procured?

Q33 Should paragraph (viii) of Note 5(a) be deleted so as to remove the requirement to disclose details of irrevocable commitments and letters of intent in an Opening Position Disclosure?

Q34 Should Note 3 on Rule 2.11 be amended so as require the disclosure of any outstanding conditions to which an irrevocable commitment is subject?

We believe the current drafting at the end of the sentence under proposed Note 3(d) on Rule 2.11 would flow better if it read "to which terms the potential offeror will then be bound in accordance with…".

Q35 Should Note 12 on Rule 8 be amended so as to make clear that it applies to any participant in a formal sale process, and should consequential amendments be made to Note 1 on Rule 2.4, Note 2 on Rule 2.6 and the Note on Rule 7.1, as proposed?

If Note 12 on Rule 8 is to be amended along the lines being proposed, we think the drafting should make it clear that, where a potential offeror has joined a formal sale process (FSP) after the initial announcement, the disclosure obligations only bite after the time of joining the FSP. As currently drafted, the amendment appears to impose the disclosure requirements with effect from the initial FSP announcement notwithstanding that the potential bidder only joined the process at a later date.

This could be addressed by the insertion of the words "...or, if later, the date of becoming a participant in the formal sale process,..." after the words "..the time of that announcement.." in the penultimate line of the first paragraph of the note.

As a consequence of this amendment to Note 12 on Rule 8, should the proposed new Form 8 (DD) also include under Section 1(d) (in the italicised list of examples of the status of persons making the disclosure) the “identified” formal sale participant for the sake of clarity?

Q36 Should Rule 26.1 be amended so as to make clear that the specified documents are required to be published on a website by no later than 12 noon on the business day following a firm offer announcement (or, if later, the date of the relevant document)?

We have no objection to the proposed clarification of Rule 26.1. However we think it would be helpful to market participants to draw attention to the requirement in Rule 30.4(a) that any RIS announcement must be published on the website by 12 noon the next business day. In practice this means that the parties will need to have the appropriate website/section of the website ready for when the first Rule 2.4 announcement is made and not only for when the Rule 2.7 announcement is made. We believe it would be helpful to add a new note on Rule 26.1 making explicit reference to this requirement.

Q37 Should Rule 2.10 be amended so as to bring forward the latest deadline for announcements of the numbers of relevant securities in issue from 9.00am to 7.15am?

Q38 Should Note 5(f) on Rule 8 be amended so as to require that, where the owner or controller of an interest or short position is a trust, details of the trustee(s), the settlor and the beneficiaries of the trust must be disclosed?

We do not believe the rules should go beyond the requirements of DTR 5 and that it is the person who controls the shares that is of interest.

We also believe a degree of proportionality is required. Where a trust is set up for the benefit of a large number of family members, the details of all the beneficiaries, in particular where they are under 18, should not have to be disclosed. We would also suggest that the reference to "defined group" should be changed to a "connected group" to allow the exemption to be relied upon in a broader range of circumstances. For example, if a trust is set up for all children and grandchildren excluding one or two, there is not a defined group ("children and grandchildren") but it should not be necessary to list all the beneficiaries in that situation. We believe that a generic description of "certain family members" would be sufficient, even though this will not be the definition used in the trust deed.

We are not clear why the identity of the settlor is relevant unless they control the voting rights.

Q39 Should Note 5(a) on Rule 8 be amended to provide for aggregated disclosure by a connected principal trader where the sole reason for the connection is that the principal trader is controlled by, controls or is under the same control as a connected adviser to an offeror, the offeree company or any person acting in concert with the offeror or the offeree company?

Q40 Should the Code be amended as proposed in respect of matters relating to the redemptions and purchases by offeree companies and offerors of their own securities?

In the proposed new Rule 21.1(b)(i), should the reference be to a redemption of "relevant securities" rather than shares?

Para 8.4 of PCP 2014/1 seems to suggest that there may be a change of policy in the context of offeree buybacks – is this intentional or just a recognition that Rule 21.1 contains more in-built flexibility than the current carve out in Rule 37.3(a). When might this flexibility be used?

Q41 Should Note 4 on Rule 20.1, Note 5 on Rule 19.1 and Section 6 of Appendix 2 be amended as proposed?

In amending Note 4 on Rule 20.1, we believe that the connected advisers to identified formal sale participants should also be subject to the same constraints relating to publication of circulars as apply to those advising possible offerors.

Q42 Do you have any comments on the proposed amendments to Note 2 on Rule 32.2 and Note 2 on Rule 31.5?

Para 10.5 of PCP 2014/1 links the proposed wording in Note 2 on Rule 32.2 and Rule 31.5 relating to subjectivity to Rule 13.1. We believe that the drafting should be worded consistently with Rule 13.1.

Q43 Do you have any comments on the proposed amendments to Note 5 on Rule 32.2 and Note 5 on Rule 31.5?

Q44 Should Rule 3.1 and Note 3 on Rule 3.1 be amended as proposed so as to make clearer the roles of the board of the offeree company and the independent adviser?

Q45 Should the second paragraph of Note 16 on Rule 9.1 be amended as proposed so as to make clear that it applies only to shares acquired and held by a principal trader in a client-serving capacity?