Takeover Panel consultation paper PCP2014/2 –
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 2014/2.

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.

Introductory comments

In our view the objective of the proposed regime is helpful and we welcome it. In particular the deletion of Note 3 on Rule 19.1 will, in our view, encourage more meaningful statements by parties to an offer about their future plans. The proposal will remove the unfairness whereby bona fide and reasonably made statements of intention are held to be binding, a position we have never supported.

Q1 Should the new definitions of "post-offer intention statement" and "post-offer undertaking" be introduced as proposed?

We have no specific comments on the definitions.

Q2 Should the new Rule 19.7 be introduced as proposed?

Carve outs and qualifications

Our biggest concern relates to the approach to carve outs and qualifications in post-offer undertakings and in particular the Panel's proposal that it will not allow general carve outs for force majeure, directors' fiduciary duties or material adverse change.

We accept that permitting a carve out for fiduciary duties could give a bidder too wide a discretion to walk away from an undertaking. However, in our view, carve outs relating to force majeure (a legally recognised concept) and for a material adverse change in circumstances which are beyond the control and reasonable anticipation of the parties should be permitted.

We understand that the Panel's view is that parties should include specific carve outs to address any concerns they may have or alternatively make a statement of intention. We agree that a party giving a post-offer undertaking should be required to specify the key carve outs and qualifications to its undertaking. However, in our view it would not be sensible to require, and most likely not be possible for, a party to list all the possible scenarios that may impact its ability to comply with the undertaking and any attempt to do that could run to dozens of pages, which would be of little interest or use to shareholders or other stakeholders. Taking the example of a factory which a bidder says it will keep open, among the events that could occur which could prevent a bidder from

keeping it open are a fire, a lightning strike, a sinkhole opening up, an aircraft flying into it – whilst the first could be within a party's contemplation, the others are significantly less likely to occur and it is not in anyone's interests for a bidder to list a series of highly unlikely events. There are multiple others we have not sought to list. This is why contracts do include force majeure clauses and allow material adverse change conditions, since the variety and unpredictability of adverse outcomes is vast. However we envisage that the specific key carve outs listed would be the benchmarks for the materiality level for any general carve outs and the bidder should include some form of definition of force majeure.

A further example is where a bidder wants to give a commitment to maintain a listing. Without being able to include a general carve out for circumstances beyond its control (for example if there is a change in the listing requirements, if it no longer meets the free float requirement due to the make up of its "public" shareholder base, or if it is taken over itself) a bidder may be unwilling to give such an undertaking in case it does not anticipate every scenario. This could well be to the detriment of the shareholders.

To prevent a bidder from giving what may be a welcome or constructive undertaking because it cannot or is not willing to anticipate every possibility, however remote the likelihood of it actually happening, does not seem sensible.

The proposal that parties be required to anticipate and list every eventuality is directly contrary to the proposed rule change to Rule 19.1, which will require clear and concise language.

We therefore believe that parties should list the key carve outs but also be permitted to include carve outs for force majeure and a material change in circumstances outside their control.

We believe that the Panel should be able to refuse to allow post-offer undertakings where the carve outs are so numerous as to render the undertaking worthless or where the carve outs go to the heart of, and so negate, the undertaking.

We believe that the consent of the Panel should not strictly be required before a party can rely on a qualification or carve out to any post-offer undertaking, as a party should be able to follow the approach it has set out, judged to a contractual standard. However, the Panel would obviously have the opportunity to review and consider whether the stated carve outs do justify allowing a party to invoke the qualification or carve out. Any force majeure or material change carve out could then, as indicated above, be judged in the context of the qualifications and conditions that the party has listed.

We also firmly believe that the Panel should also have residual discretion not to require a party to comply with an undertaking. Drawing an analogy with a no increase statement, the Panel could have the power to allow a party to walk away in "wholly exceptional circumstances". In particular we believe that the word "only" in the 5th line of Rule 19.7(d) should be deleted.

The position of the financial adviser

In our view it would be helpful to have clarification that a financial adviser does not have any on-going responsibility for ensuring their client complies with any post-offer undertaking after the end of the offer. We believe that they should only have responsibility at the time the undertaking is given and the Introduction to the Code should make that clear.

Limitations on post-offer undertakings

We believe that any post-offer undertaking should be required to be limited in time, perhaps with a maximum of five years (though parties should, as proposed, be free to choose a shorter period). Our concern is that the Panel could potentially be required to continue monitoring an undertaking over a long period and, depending on the nature of the undertaking, this could raise issues about compatibility with EU law, anti-competitive restrictions and the ability to enforce an undertaking. Parties may also use it as a solution to address a concern which should more properly be dealt with by other means, for example through a company's articles by a special share.

We also believe that post-offer undertakings should not be permitted in relation to the position of individuals, for example directors or employees. Matters which relate to contractual commitments should not be subject to this regime as they are capable of enforcement by the parties. To permit

such undertakings would risk the Panel becoming akin to an employment tribunal or a court overseeing contracts.

Post-offer reporting requirements and monitoring supervisors

It would be helpful to have clarification on who will be responsible for the selection and appointment of the monitoring supervisor and for the negotiation of their contract. Would the Panel and/or the party giving the undertaking be responsible for agreeing the terms of their engagement? Any costs involved should be reasonable and proportionate. Likewise, any reporting requirements should also be reasonable and proportionate.

We assume that the fees of the monitoring supervisor, if appointed prior to publication of the offer document, will need to be disclosed with other advisory fees under Rule 24.16. If appointed after the publication of the offer document, will the Panel require disclosure of the fees of the supervisor to be made public? In addition, fees for advisers to the offeror/offeree may well increase to over the 10% test in Rule 24.16 (c) and (d) if they are to be involved in the monitoring exercise in ways unanticipated at the time of the offer document, especially if the post-offer undertaking is complex or long. Will the Panel expect the fees attached to this part of the adviser's engagement also to be included in the offer document or subsequently disclosed or will the 10% test be disapplied where it is attributable to such work? We suggest that fees applying outside the offer period should not have to be aggregated with offer fees. It is likely that such fees in any event will be relatively small in most cases.

In Rules 19.7(f) and (g), we are unclear as to whether the Panel will require any public disclosure regarding compliance. In our view, only the outcome should be subject to any disclosure requirement, rather than any interim steps. Any disclosure requirement should also be proportionate. The simplest approach would seem to be for the Panel to have discretion to require an announcement.

Sanctions for breach

It would be helpful for the Introduction to the Code to specify which sanctions could apply in the event of a breach of a post-offer undertaking as distinct from the inappropriate making of a statement of intention.

Other comments

We believe that the standard of construction that should apply in relation to any enforcement of a post-offer undertaking should be a contractual standard (although the power to sanction for misleading statements should be normal Code standards).

Where a party gives an undertaking, will that party, subject to the carve outs, be required to use all reasonable efforts to ensure the satisfaction of the undertaking to the extent that matters are within its control? If an undertaking were being given pursuant to a contractual arrangement, it is likely that the contract would contain such an obligation.

The consultation paper says that the Panel would not intervene where there is a direct contractual commitment. Would a deed poll fall within or outside the regime? In some circumstances, the beneficiaries under a deed poll may be a sufficiently narrow group that they would be able to enforce the deed poll. However, in other situations, enforcement may be impractical. Likewise, a small group of beneficiaries is likely to have some negotiating power as regards the terms of the deed poll, whereas a wider group would not. There is a risk that a party may use a deed poll to make commitments to a wider community without being subject to the post-offer undertaking regime. It is unlikely that the general public would understand the differences between a deed poll and a post-offer undertaking. In our view, a pragmatic solution would be for there to be a requirement to consult the Panel when entering into a deed poll and for the Panel to have discretion as to the approach it takes. Where a bidder chooses to enter into a deed poll it should be required to state that it is not a post-offer undertaking and so will not be subject to the post-offer reporting and monitoring regime (assuming that is the case).

We understand that the new regime would not apply to any deferred or contingent consideration on an offer as it is a contractual commitment. However it seems an odd result that shareholders are left in a weaker position regarding enforcement of such a commitment than other stakeholders,

such as employees. We would recommend that this is an area that the Panel considers at some point in a future consultation.

Are there situations where the Panel will not permit a party to give a post-offer undertaking, for example where a provision in the company's articles or a direct contractual commitment would be more appropriate? Parties should be required to make it clear that any direct contractual commitment does not come within the post-offer undertaking regime.

We believe that it should be possible for a party to give a post-offer undertaking that is subject to pre-conditions, and the Code should make it clear that is acceptable.

In relation to new Rule 19.7(e), there may be circumstances where a document containing any post-offer undertaking should also be made available to offeror employee representatives / employees.

Q3 Should the new Rule 19.8 be introduced as proposed?

Is there a reason why the wording in the last paragraph of Rule 19.8 “Except with the consent of the Panel….(as appropriate)” reads differently to the corresponding wording in Rule 19.7(d) since it misses out a second reference to the Panel’s consent when taking/not taking a course of action?

What will be the status of statements of intention made before the rule changes take effect? Will parties be held to statements of intention for 12 months despite the deletion of Note 3 on Rule 19.1?

Q4 Should Rule 19.1 be amended, and Note 2 on Rule 19.1 deleted, as proposed?

We have no comments on this.

Q5 Should the new Rules 24.2(d), 24.3(d)(xv), 25.2(c) and 25.7(c) be introduced, and Rules 27.2(b) and (c) amended, as proposed?

We agree with these proposals.

Since many of the statements made under Rule 24.2(a) are included by parties in a firm offer announcement (and can on occasion be included in possible offer announcements), it may be appropriate to also include similar wording to that proposed for Rule 25.2(c) (e.g. “if any statement made is a post-offer undertaking, it must comply with the requirements of Rule 19.7”) in Rules 2.5 and 2.7(c).

Is it the Panel's intention that all statements of intention made in relation to Rule 24.2 would be post-offer intention statements? If that is the case, we think that the new Rule 27.2(b)(viii) would supersede Rule 27.2(b)(i).

Q6 Do you agree with the proposed minor amendments to Rule 24.2?

We have no comments on this.