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Dear Members of the Code Committee,

Following your invitation for comments on the Public Consultation Paper 2014/2 of 15 September 2014 on *POST-OFFER UNDERTAKINGS AND INTENTION STATEMENTS* I respectfully submit a series of comments. Please see below.

1. General

1.1. For the purposes of my doctoral thesis entitled '*Proposals for the Reform of the EU Takeover Directive following the lessons learned from the Kraft/Cadbury case study*' awarded in 2013, I undertook, among others, a careful study of the Kraft/Cadbury deal, which prompted the first set of reforms to the Code in 2010. My research led me, among others, to examine a series of provisions of the Code. I came to the conclusion that indeed there are a series of rules which would better serve the objectives of the Code were they to be the subject of further reform.

2. Question 1 – Should the new definitions be introduced as proposed?

2.1. The characteristic aspect of the Code is the shareholder primacy norm it endorses, which is reflected in the strict non-frustration principle encompassed in Rule 21 of the Code. In light of this, it is necessary to establish whether the distinction between different types of information is of significant value to the parties making the informed decision on the bid, which are the shareholders of the target company. If undertakings as opposed to statements have no significant value for shareholders who are called to make a decision, the proposed reform would only create a box-ticking information exercise imposing excessive costs for the parties involved and adding minimal value in terms of the overall objectives of the Code and PCP as set out in the introduction of both documents respectively. It may well be the case that financial advisers advising on the bid, may also make use of the distinction in their assessment. One must ascertain which parties will benefit from the distinction before proceeding to the reform. In the Kraft/Cadbury deal for example, the outcome of the bid was argued to have been dependent upon the bidder, i.e. Kraft, offering the 'right' price to such 'short-term' investors. It is questionable therefore what practical value such statements do in fact have on the bid process and outcome.

2.2. The term 'post-offer undertakings' as firm, binding commitments, should, in my opinion, be inserted into the Code provisions, as suggested by the Code Committee. However, I would refrain from making an explicit distinction between two types of statements. It may be

useful to first commission an up to date empirical study on the impact that different types of statements (e.g. facilities, employees, patents, management etc.) have on the share price and/or on the decision that different types of shareholders make regarding the bid. At this stage in time it may be best to simply provide for an inclusion of 'post-offer undertakings' and attach specific requirements to the way in which those are to be articulated, made and presented. Other statements need not fall under a particular category, but rather be assessed under the general Rule 19, deleting Note 3 to Rule 19 (which was added following the statements concerning the Somerdale facility in the Kraft/Cadbury deal).

2.3. In 2010 in response to Kraft's failure to comply with its undertaking, the Panel issued a statement of public criticism against Kraft finding Kraft in breach of Rule 19.1 of the Code.[1] According to the Panel, Kraft backing out of its prior commitment was the result of Kraft not having observed high standards of care and accuracy in the information communicated to the target shareholders in its offer regarding its prospective business plans for Cadbury.[2] One however could also argue that Kraft was unaware of the developments concerning the Somerdale factory considering that it had limited information on Cadbury when undertaking the due diligence for the takeover, which was from the outset a contested acquisition. The target board is not required by law to disclose privately held information on the target company's business, so that Kraft only became privy to information on the factory after the takeover was successfully completed. The closure of the Somerdale facility was already on Cadbury's agenda, so it would have been realised even in the event that Cadbury's had remained independent. In light of this, the Code Committee of the Panel may also want to include a provision which provides that the party making the statement in the form of a post-offer undertaking should disclose the source of information upon which they are basing the particular statement at the time the statement is made. For example, in the case of the Pfizer/AstraZeneca deal commitments made to a) complete the construction of AstraZeneca's planned research and development hub in Cambridge, b) base key scientific leadership in the UK, c) employ a minimum of 20% of the combined group's total research and development workforce in the UK; and d) retain substantial manufacturing facilities in Macclesfield, could have been better supported if Pfizer provided the basis upon which it was making such plans.

2.4. The requirement for *a particular set of* public statements of intention for any course of action that the bidder intends to take after the offer should be carefully drafted and should not bar the bidder's discretion as to how to proceed with corporate restructuring of the target, but rather to guarantee that, the more serious and well-thought out plans disclosed and upon which an assessment on the bid was made, will be in fact followed through. In the situation of contested takeovers it is usually the norm that the proposal to proceed with a takeover is made on the basis of very limited due diligence and is often insufficient in its scope and depth. In consideration of this it may well be the case that the

[1] Panel Statement 2010/14, The Takeover Panel 'Kraft Foods Inc. Offer for Cadbury Plc' at 4-5.

[2] *Ibid*., whereby the Panel applied an objective and subjective test to Kraft's statement, thus holding the company accountable for breach of Rule 19.1 of the Code.

focus of reform should be to revise the rules which allow the bidder to gain access to a greater level of information, potentially resulting in better quality due diligence being conducted. During the Code reforms of 2010, the Code Committee had clarified in relation to Rule 24.2 that statements of a general nature were unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence.[3] It is therefore worth considering whether a distinction should be made in the Code between contested takeovers and recommended offers, considering that in recommended offers the offeror will presumably have had an opportunity to undertake full due diligence.

3. Question 2 – Should the new Rule 19.7 be introduced as proposed?

3.1. Regarding Rule 19.7(a) I would propose to delete the requirement for the party making the statement to consult the Panel in advance of making that statement, and rather add a requirement for the party making such a statement to clearly stipulate the source of information upon which it is making such an undertaking, e.g. whether this is due to public information it has obtained on the target company or whether it is an independent plan which has been considered during an AGM or by the board of directors of the offeror or whether it is to be found in the articles of association as one of the company's objectives etc.

3.2. Regarding Rule 19.7(b)(iii) I would propose to remove the option of allowing the party making the statement to add a qualification or condition to which the statement is subject. Allowing for qualification or conditions would prompt parties to carefully draft statements in such a way that would protect the parties making the statement (labelled 'post-offer undertaking') from assuming direct liability in undertaking the particular statements. Rule 19.7(b)(iii) in its proposed form does not serve the objectives of the proposed reform. The aim of the reform is to provide clarity for interested parties and enable parties to an offer to make informative statements of intention.

3.3. Regarding Rule 19.7(d) I would, following the comments above, suggest that the Code does not provide an option for condition or qualification for statements labelled post-offer undertakings. If the party making the statement is uncertain of the level of commitment it intends to assume regarding the statement it is making, it can easily frame the statements as an intention. The intention would then merely be subject to the normal rules of care and accuracy which apply and parties making an informed decision on the merits of the bid would be informed well in advance of the fact that this is a statement rather than an undertaking.

3.4. Regarding Rule 19.7(f) I would propose imposing a requirement on the party to report to the Panel only in the situation in which it is *not* complying with the post-offer undertaking rather than impose a requirement for the Panel to request that the party report in the manner in which Rule 19.7(f)(i), (ii) and (iii) outline.

3.5. Regarding Rule 19.7(g) I would propose rather than appointing a supervisor to monitor, to adopt the following. I would propose to adopt a provision which allows the Panel to

[3] Response Statement 2011/1, The Takeover Panel Code Committee 'Review of Certain Aspects of the Regulation of Takeover Bids: Response Statement by the Code Committee of the Panel following the Consultation on PCP 2011/1' (RS 2011/1, 21 July 2011), at 80-81.

commission an investigation ad hoc in a situation in which compliance has not been followed.

3.6. In general, regarding monitoring and enforcement by the Panel, the following observations can be made. There are proposals put forward which require the parties which make the statements to produce written reports on the progress made with regard to the undertakings and/or intention statements. In my opinion, this may entail excessive costs on the party's and Panel's side associated with the production, as well as the monitoring of those statements respectively (With reference to your statement 'costs would not normally be material' in section 6.6. of the PCP 2014/2). Lobbying or other less formal procedures that take place may achieve similar results to monitoring compliance. In the case of the Kraft/Cadbury deal for example the continuation of Cadbury's CSR commitments was possibly the result of the fury on this issue generated by the media, trade unions and the House of Commons amidst the takeover process.[4]

3.7. It is questionable whether giving the Panel stronger powers to enforce 'post-offer undertakings' is the best way forward. The UK regulatory framework on takeover bids is positive insofar as it does not compel successful bidders to respect the target's commitments to its workforce, research and development and overall long-term practices. A legal requirement that would limit the bidder's freedom to precede with corporate restructuring post the bid would defy the entire purpose of the takeover bid, which is for the bidder to proceed to corporate restructuring post the acquisition in order to manage the company's assets and resources more effectively, having obtained after the acquisition all the information necessary to make a full assessment of how to proceed with its business plans.

3.8. If it is indeed the case that, as stipulated in the PCP 2014/2 page 11, when action has already been taken in breach of Note 3 Rule 19 it is unlikely it could be unwound, then one needs to consider what sort of penalty can be imposed under Section 11 of the Introduction of the Code which would be effective for a company in breach of the rules. A series of different types of penalties could be outlined in advance as a forewarning for firms.

4. Question 3 – Should the new Rule 19.8 be introduced as proposed?

4.1. Rule 19.8 is well drafted. Instead of labelling these statements as 'post-offer intention statements' however, I would suggest, that the Rule applies to any statement made, which does not fall under the category of a firm and binding commitment labelled 'post-offer undertaking'.

5. Question 4 – Should Rule 19.1 be amended, and Note 2 on Rule 19.1 deleted, as proposed?

5.1. Yes. Prior to the adoption of the Takeover Directive, the Code had 10 General Principles, one of which was the principle described in Rule 19. Upon the implementation of the Directive, the Panel adopted the Directive's principles in whole and incorporated the rationale of any former general principles which were not covered by the principles of

[4] (2010 HC 234) (n 171) at 29-30.

the Directive into the Code's rules.[5] This is merely mentioned in order to reflect on the importance of this provision and why the careful redrafting of this is of utmost importance for the effective operation of all other provisions on statements made during the offer period.

6. Question 5 – 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) be amended, as proposed?

6.1. I agree with the proposal to introduce the new Rules 24.2(d), 24.3(d)(xv) and agree with the amendments made to Rules 27.2(b) and (c).

6.2. Regarding Rules 25.2(c) and 25.7(c) however, I would wish to note the following. It is important to consider that Rule 24.2 states in some detail what the offeror must report on in terms of the long-term business plan, rationale for the acquisition and employees. Rule 25 however, which regulates the advice/opinion that the target board of directors are required to provide, lacks the detail necessary. This creates an imbalance as to the requirements imposed on one party as opposed to the other. It is also the case that the statements of the offeror are often linked to the information which is contained in target board opinions.

6.3. In my opinion, target board recommendations are an important aspect of the takeover procedure which need to be further regulated and therefore I propose that more emphasis should be given to this aspect when considering the reform of the Code with the inclusion of the term post-offer undertakings. It is not only the board of the offeror company that needs guidance on what to report on in the offer document and other statements. Boards of the target company must also be given guidance.

6.4. Such issues had arisen in the Kraft/Cadbury deal. On the 14th of January 2010, the board of directors of Cadbury's plc issued a second statement towards its shareholders urging them for a second time not to accept any offer made by Kraft Foods Inc. on the basis that Kraft's offer substantially undervalued Cadbury's. The statement however did not encompass specific forward-looking information on Cadbury's estimated performance but rather focused on Cadbury's present performance and provided generic estimations for the company's future profitability.[6] The Department for Business Innovation and Skills had issued a policy document entitled 'A long-term focus for corporate Britain – A call for evidence' in October 2010 with an aim of understanding whether and to what extent the UK system fosters the long-term growth of corporations or whether it undermines it.[7] A summary of responses to the review document was published in March 2011.[8] There were mixed responses about whether boards understand the long-term implications of takeovers and it was overall found that there was a difficulty for target boards: "in not recommending an offer to shareholders if it offered a high (and often excessive) price", as "boards would find it difficult to explain why such a bid should

[5] Panel Statement 2005/10, The Takeover Panel 'The European Takeover Directive on Takeover Bids' p. 18, para. (i) .

[6] Cadbury's Board Statement, 'Second Response Document to Cadbury's investors' (14 January 2010), at 14-17.

[7] Department for Business Innovation and Skills, 'A long-term focus for corporate Britain – A call for evidence' (London: October 2010) at 33.

[8] Department for Business Innovation and Skills, 'Summary of Reponses – A long-term focus for corporate Britain' (London: March 2011).

not be accepted".[9] Certain respondents were in favour of more disclosure on the long-term implications of a bid, whilst others considered the information that boards provide to be, as stated: "too backward-looking and focused on historical information."[10] The debate that had arisen in relation to the role that the target board is called to play during the takeover process should in my opinion be considered by the Code Committee when making amendments to include the term 'post-offer undertakings'. In my research I have addressed the controversial role that target directors are called to play during a bid, which I refer to for your kind consideration: G. Tsagas, 'A long-term vision for UK Firms? Reconsidering target directors' advisory role post the takeover of Cadbury's plc' (2014) 14(1) *Journal of Corporate Law Studies* 241

7. **Question 6 – Do you agree with the proposed minor amendments to Rule 24.2?**
   A separate numbered paragraph for the bidder's intentions for the future business of the target company is welcome. Consideration could also be given to aspects of the future business of the target company which the bidder could reflect on more specifically, e.g. its strategy, programmes and results on implementation by providing a provisional post-merger integration plan, in particular with respect to management positions, employment matters R&D and CSR policies.

Please note that from January 2015 I will be assuming a new post as Lecturer in Law at the University of Bristol Law School. E-mails or correspondence should please be addressed to:

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Yours sincerely,

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[9] *Ibid*., at 21.
[10] *Ibid*., at 22.