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THE TAKEOVER PANEL

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

ASSET SALES IN COMPETITION WITH AN OFFER AND OTHER MATTERS

The Code Committee of the Takeover Panel (the "**Panel**") invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 22 September 2017.

Comments may be sent by e-mail to:
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Alternatively, please send comments in writing to:

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All responses to formal consultation will be made available for public inspection and published on the Panel's website at www.thetakeoverpanel.org.uk, unless the respondent explicitly requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure. Personal information, such as telephone numbers or e-mail addresses, will not be edited from responses.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

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1. Introduction and summary

(a) Introduction

1.1 In this Public Consultation Paper ("**PCP**"), the Code Committee of the Panel (the "**Code Committee**") proposes amendments to various provisions of the Takeover Code (the "**Code**"), as summarised below. These amendments fall into two categories:

(a) amendments to apply in relation to the sale by an offeree company of assets in competition with an offer or possible offer, as set out in Part A; and

(b) certain other amendments, as set out in Part B.

(b) Asset sales in competition with an offer

(i) Introduction

1.2 In late 2016, there were two cases in which the board of an offeree company in receipt of a unilateral offer decided that better value could be delivered to shareholders through the company selling all of its assets to a third party, returning the proceeds to shareholders and winding up the company. These cases raised a number of issues under the Code and, as a result, the Code Committee has reviewed the application of the Code to transactions under which, in competition with an offer, the board of an offeree company agrees to sell some or all of the assets of the offeree company to a third party. Following this review, the Code Committee is proposing that certain amendments should be made to the Code, as set out in this PCP.

(ii) Preventing an offeror from circumventing the Code by purchasing significant assets of an offeree company

1.3 In Section 2 of the PCP, it is proposed that an amendment should be made to each of Rules 2.8 (Statements of intention not to make an offer), 12.2 (Competition reference periods) and 35.1 (Delay of 12 months) so as to prevent persons subject to these Rules from avoiding their application by purchasing, agreeing to purchase, or making any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company. In assessing whether assets are significant for these purposes, the Panel would have regard to consideration, assets and profits tests similar to those set out in Note 2 on Rule 21.1, with relative values of more than 50% normally being regarded as being significant.

1.4 The proposed amendment to Rule 35.1 would also have the effect of preventing an offeror which has made an unqualified "no extension statement" or "no increase statement" from avoiding the application of the restrictions in Rule 31.5 and Rule 32.2 respectively by purchasing, agreeing to purchase, or making any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company for three months following the date on which its offer lapsed. Similarly, it is proposed that a potential offeror which has made an unqualified statement regarding the terms on which it might make an offer should be prevented from avoiding the application of Rule 2.5(a) (Terms and pre-conditions in possible offer announcements) by purchasing, agreeing to purchase, or making any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company for three months following the date on which it announces that it has no intention of making an offer.

(iii) Asset sales and other transactions subject to Rule 21.1

1.5 In Section 3, it is proposed that certain amendments be made to Rule 21.1 (Restrictions on frustrating action) so as to:

(a) make clear that shareholder approval will not be required under Rule 21.1 if the taking of the proposed action is conditional on the offer being withdrawn or lapsing;

(b) require that, where shareholder approval is to be sought in general meeting for a proposed action under Rule 21.1:

(i) the board of the offeree company must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and

(ii) the Panel must be consulted regarding the date on which the general meeting is proposed to be held;

(c) require that, where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, or would be sought in general meeting but for the fact that the taking of the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must send a circular to shareholders containing certain specified information; and

(d) permit an offeree company to enter into an agreement to pay an inducement fee to a counterparty to a transaction to which Rule 21.1 applies, provided that the fee is de minimis.

(iv) Sales of all or substantially all of the offeree company's assets in competition with an offer

1.6 In Section 4, it is proposed that certain amendments are made to apply where, in competition with an offer or possible offer, the board of an offeree company states that it is proposing to sell all or substantially all of the company's assets and to return to shareholders all or substantially all of the company's cash balances. These include proposals that:

(a) a statement made by the board of an offeree company in these circumstances quantifying the cash sum expected to be paid to shareholders if the offer is withdrawn or lapses should be treated as a "quantified financial benefits statement" and should therefore:

(i) satisfy the requirements of Rules 28.3 (Compilation of profit forecasts and quantified financial benefits statements) and 28.6 (Disclosure requirements for quantified financial benefits statements), to the extent that they apply; and

(ii) be the subject of reports prepared by the offeree company's reporting accountants and financial advisers in accordance with Rule 28.1;

(b) a purchaser of some or all of the company's assets in these circumstances should be restricted from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the cash sum expected to be paid to shareholders, and then only to the extent that the price paid does not exceed the amount stated; and

(c) the requirement in Rule 21.3 (Equality of information to competing offerors) that information given to one offeror or potential offeror must be given to another offeror or bona fide potential offeror should be applied also to one or more persons who, individually or collectively, are interested in purchasing all or substantially all of the assets of the offeree company.

(c) Other matters

(i) Setting aside a Rule 2.8 statement

1.7 In Section 5, it is proposed that Rule 2.8 and Note 2 on Rule 2.8 are amended to require a person making a "no intention to bid" statement to specify in the statement the circumstances in which it reserves the right to set the statement aside (as opposed to the current approach under which the restrictions in Rule 2.8 automatically cease to apply in certain circumstances, as specified in Note 2 on Rule 2.8).

(ii) Social media

1.8 In Section 6, it is proposed that:

(a) Rule 20.4 is amended to remove the restrictions on the use of social media for the publication of information about a party to an offer (such that the restrictions in Rule 20.4 would apply only to the use of social media for the publication of information relating to the offer) and to permit the publication via social media of videos approved by the Panel in accordance with Rule 20.3; and

(b) Note 1 on Rule 19.1 is amended to clarify that financial advisers are responsible for guiding their clients with regard to the publication of

information via social media in the same way as for information published by other means.

(iii) Dispensation from the mandatory offer requirement

1.9 In Section 7, it is proposed that the Notes on Dispensations from Rule 9 are amended to reflect an existing practice of the Panel Executive (the "**Executive**") to consider granting a waiver from the obligation to make a mandatory offer that would otherwise arise under Rule 9 as a result of an issue of new securities if independent shareholders holding shares carrying more than 50% of the voting rights of the company capable of being cast on a "whitewash" resolution give certain confirmations in writing.

(d) Invitation to comment

1.10 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 22 September 2017 and should be sent in the manner set out at the beginning of this PCP.

1.11 The full text of the proposed amendments is set out in Appendix A. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted.

1.12 For ease of reference, a list of the questions that are put for consultation is set out in Appendix B.

A: ASSET SALES IN COMPETITION WITH AN OFFER

2. Preventing an offeror from circumventing the Code by purchasing significant assets of an offeree company

(a) Introduction

2.1 The Code Committee is concerned that an offeror or potential offeror may be able to circumvent certain provisions of the Code by purchasing the assets of an offeree company.

(b) Background

(i) Rules 2.5, 31.5 and 32.2

2.2 Certain types of statement made by an offeror or potential offeror have significant consequences under the Code. For example:

(a) under Rule 2.5(a)(i), where a potential offeror makes a statement regarding the price at which it might make an offer for an offeree company, any offer subsequently made by it must be on the same or better terms. Similarly, under Rule 2.5(a)(ii), if a potential offeror states that the terms of its possible offer "will not be increased" (or words to that effect), the potential offeror will not be allowed subsequently to make an offer on better terms;

(b) under Rule 31.5, where an offeror makes a "no extension statement", it is not permitted subsequently to extend its offer beyond the stated date; and

(c) under Rule 32.2, where an offeror makes a "no increase statement", it is not permitted subsequently to amend the terms of its offer in any way.

2.3 In the case of each of the Rules referred to in paragraph 2.2 above, the person making the statement may set the statement aside if it reserved the right to do so at the time that the statement was made and the circumstances contemplated in the reservation subsequently arise. Such circumstances may include the agreement of the board of the offeree company to the statement being set aside.

2.4 The Code contains provisions to prevent an offeror or potential offeror which makes a statement to which Rule 2.5(a), Rule 31.5 or Rule 32.2 applies, and does not reserve the right to set the statement aside with the agreement of the board of the offeree company, from avoiding the application of the Rule by withdrawing its possible offer, or lapsing its offer, and then immediately announcing a new offer or possible offer with the agreement of the board of the offeree company. Accordingly:

(a) Note 2 on Rule 2.5 provides that the restrictions in Rule 2.5(a) apply not only during the offer period but also for a further three months following its end (or, if earlier, three months following the date on which the potential offeror made a statement that it had no intention to make an offer for the company (a "**Rule 2.8 statement**")); and

(b) Note (a)(i) on Rule 35.1 provides that the Panel's consent to an offeror whose offer has lapsed making a new offer which is recommended by the board of the offeree company will not normally be given within three months of the date on which the offer lapses if the offeror was prevented from extending or revising its offer as a result of a "no extension statement" or a "no increase statement".

2.5 However, the Code Committee notes that, where a statement is made which is subject to any of the Rules referred to in paragraph 2.2 above and is not made subject to a reservation that the statement may be set aside with the agreement of

the board of the offeree company, the effect of the Rule may be capable of being circumvented through the offeror or potential offeror agreeing with the board of the offeree company to purchase the offeree company's assets immediately following the end of the offer period and, in the case of Rules 2.5(a) and 32.2, to do so on terms which would be inconsistent with the statements previously made by the offeror or potential offeror.

(ii) Rules 2.8, 12.2 and 35.1

2.6 Similarly, Rule 2.8 provides that, where a person makes Rule 2.8 statement, it will be restricted for a period of six months from the date of the statement from, among other matters, announcing an offer or possible offer or from making any statement that raises or confirms the possibility that an offer might be made for the company. Unlike the statements referred to in paragraph 2.2 above, following a Rule 2.8 statement, the restrictions in Rule 2.8 automatically cease to apply in the circumstances set out in Note 2 on Rule 2.8, which include if the board of the offeree company so agrees, and there is currently no requirement for a reservation to this effect to be included in the statement itself. However, as set out in Section 5 of this PCP, the Code Committee is proposing that Rule 2.8 should be amended so as to require that any reservations to a Rule 2.8 statement should be included in the statement itself.

2.7 In relation to Rule 2.8, similar issues to those set out in paragraph 2.5 above may arise because:

(a) if the Code is amended to require reservations to be set out in a Rule 2.8 statement, a person who makes such a statement will be able to decide not to reserve the right to set the statement aside with the agreement of the board of the offeree company and, in that case, the restriction in Rule 2.8 on announcing an offer could be circumvented by the person instead

purchasing the offeree company's assets during the following six month period; and

(b) even if, alternatively, Note 2 on Rule 2.8 remains as currently drafted, a person who makes a Rule 2.8 statement could circumvent the restriction in Rule 2.8(d) on its making "any statement which raises or confirms the possibility that an offer might be made for the offeree company" by announcing instead that it was interested in purchasing the offeree company's assets (thereby potentially causing the offeree company to continue to be subject to unwelcome "siege").

2.8 Under Rule 35.1, the same restrictions as those set out in Rule 2.8 apply for a period of 12 months in relation to an offeror whose offer has been withdrawn or lapsed. However, the restriction in Rule 35.1(d) on a former offeror making a statement which raises or confirms the possibility that an offer might be made for the offeree company could be circumvented by its announcing that it was interested in purchasing the offeree company's assets.

2.9 Also, under Rule 12.2, the same restrictions as those set out in Rule 2.8 apply during a "competition reference period" in relation to an offeror whose offer has been subjected to a "Phase 2 CMA reference" or the initiation of "Phase 2 European Commission proceedings". Similarly, the restrictions in Rule 12.2(b)(i)(D) could be circumvented by the offeror announcing that it was interested in purchasing the offeree company's assets during the competition reference period.

(c) Proposed amendments

2.10 The Code Committee considers that it is undesirable that the Rules referred to above might be capable of being circumvented through an offeror or potential offeror purchasing the assets of the offeree company. Accordingly, the Code

Committee considers that an additional restriction should be introduced into each of Rules 2.8, 12.2(b)(i) and 35.1 prohibiting persons subject to these Rules from purchasing, agreeing to purchase, or making any statement which raises or confirms the possibility that it is interested in purchasing the assets of the offeree company. Furthermore, in order to ensure that this anti-avoidance provision is effective, the Code Committee considers that it should apply not just in relation to the purchase of, say, all or substantially all of the assets of the offeree company but instead in relation to the purchase of assets which are significant in relation to the offeree company. In assessing whether assets are significant for these purposes, the Panel will have regard to consideration, assets and profits tests similar to those set out in Note 2 on Rule 21.1 and relative values of more than 50% will normally be regarded as significant.

2.11 Accordingly, the Code Committee is proposing to:

(a) introduce a new paragraph (f)/(F) to each of Rules 2.8, 12.2(b)(i) and 35.1 to provide that:

" … **[neither the offeror/the person who made the Rule 2.8 statement, nor any person who acted in concert with it, may]:**

(f) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company"; and

(b) introduce a new Note 5 on Rule 2.8 as follows:

"***5. Significant asset purchases***

(a) In assessing whether assets are significant for the purpose of Rule 2.8(f), the Panel will normally have regard to:

(i) the aggregate value of the consideration for the assets compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate

(ii) the value of the assets to be purchased compared with the total assets of the offeree company (excluding cash and cash equivalents); and

(iii) the operating profit (ie profit before tax and interest and excluding exceptional items) attributable to the assets to be purchased compared with that of the offeree company.

For these purposes, "equity" will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business on the business day immediately preceding the date of the proposed announcement of the purchase or agreement to purchase the assets, or the statement which raises or confirms the possibility that the person is interested in purchasing the assets; and

(ii) for assets and profits, the figures stated in the latest published audited consolidated accounts of the offeree company or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

Relative values of more than 50% will normally be regarded as being significant."; and

(c) introduce a new Note 5 on Rule 12.2 and a new Note 2 on Rule 35.1 and 35.2 as follows:

"*In assessing whether assets are significant for the purpose of Rule [12.2(b)(i)(F)/35.1(f)], the Panel will have regard to the tests set out in Note 5 on Rule 2.8.*".

2.12 The effect of introducing this new restriction would be that:

(a) an offeror or potential offeror which was subject to the restrictions in one of Rules 2.8, 12.2(b)(i) or 35.1 would be restricted from avoiding the application of that Rule by purchasing, agreeing to purchase, or making

any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8) during the period for which the Rule applies. However, in the case of Rule 35.1, and also in the case of Rule 2.8 if the amendments proposed in Section 5 below are implemented and if an appropriate reservation is included at the time that the Rule 2.8 statement is made, this restriction would not apply with the agreement of the board of the offeree company; and

(b) an offeror which made a "no extension statement" or a "no increase statement" and which did not reserve the right to set the statement aside with the agreement of the board of the offeree company would be restricted from avoiding the application of the restrictions in Rule 31.5 or Rule 32.2 respectively by purchasing, agreeing to purchase, or making any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8) for three months following the date on which the offer lapsed. This is by virtue of the fact that Note (a) on Rules 35.1 and 35.2 provides that the Panel will not normally consent to the restrictions in Rule 35.1 ceasing to apply within three months of the lapsing of an earlier offer in circumstances where the former offeror was prevented from revising or extending its previous offer as a result of a "no extension statement" or a "no increase statement".

2.13 The position in relation to statements made by a potential offeror which are subject to Rules 2.5(a)(i) or (ii) is more complicated. This is on the basis that, under Note 2 on Rule 2.5, the restrictions in Rule 2.5 apply for three months following the date on which a Rule 2.8 statement is made. Accordingly, the effect of introducing the new Rule 2.8(f) would be to restrict the former potential offeror from purchasing offeree company assets on terms which were inconsistent with

the statement to which Rule 2.5(a)(i) or (ii) applied. However, an assessment of whether this is the case may not be straightforward given:

(a) that it is proposed that the restriction in the new Rule 2.8(f) should apply where assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8 – i.e. applying relative values of more than 50%) are acquired; and

(b) the possible lack of clarity around the valuation of any assets which are not part of the asset sale.

2.14 Accordingly, the Code Committee is proposing that a potential offeror which has made a statement in relation to its possible offer terms to which Rule 2.5(a) applies and which did not reserve the right not to be so bound with the agreement of the board of the offeree company should not be permitted to purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8) for three months following the date on which a Rule 2.8 statement is made.

2.15 In the light of the above, assuming that Note 2 on Rule 2.8 is amended in the manner described in Section 5 below, the Code Committee is proposing to introduce a new Note 2(d) on Rule 2.8 in the following terms:

> "*(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not agree to the restrictions in Rule 2.8(f) being set aside for three months following the date on which the statement to which Rule 2.8 applies is made.*".

Q1 Should an offeror or potential offeror be restricted from circumventing the provisions of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?

Q2 Should the proposed new restriction in each of Rules 2.8, 12.2 and 35.1 apply in relation to the purchase of assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8)?

Q3 Do you have any comments on the proposed amendments to Rule 2.8, Rule 12.2 and Rule 35.1?

3. Asset sales and other transactions subject to Rule 21.1

(a) Introduction

3.1 Where the board of an offeree company is considering selling assets of the company to a third party, a number of provisions of the Code apply in relation to the proposed asset sale, including that, under Rule 21.1, the board of the offeree company is not permitted, among other matters, to:

(a) take any action which may result in the offer being frustrated or in shareholders being denied the opportunity to decide on its merits (Rule 21.1(a));

(b) sell or agree to sell assets of a material amount[1] (Rule 21.1(b)(iv)); or

(c) enter into contracts otherwise than in the ordinary course of business (Rule 21.1(b)(v)),

unless the proposed action is approved by shareholders in general meeting.

3.2 However, the application of Rule 21.1 will normally be waived by the Panel:

[1] Broadly speaking, under Note 2 on Rule 21.1, a sale of assets of a "material amount" will take place where the consideration to be paid represents 10% or more of the market value of the offeree company or of the company's total asset base.

(a) under Note 1 on Rule 21.1, if this is acceptable to the offeror(s); or

(b) under Note 8 on Rule 21.1, if the holders of shares carrying more than 50% of the voting rights state in writing that they approve the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting.

In practice, another option is for the board of the offeree company to make the taking of the action in question conditional on the offer being withdrawn or lapsing (given that the action cannot then lead to the offer being frustrated against the will of the shareholders in the offeree company).

3.3 In addition, under Rule 31.9, the board of the offeree company is not permitted to announce any material new information, including proposals for any material asset sale, after the 39th day following the publication of the offeror's initial offer document. Where it is not practicable for information to be announced by this date, or where the matter arises after this date, the Panel will normally consent to a later announcement being made, in which event the Panel will normally also consent to a corresponding extension to, or re-setting of, the remaining key dates in the offer timetable – i.e. "Day 46" (last date for the offeror to publish a revised offer document), "Day 53" (deadline for a publicly identified potential competing offeror to clarify its position) and "Day 60" (final acceptance date). In view of this, Note 4 on Rule 31.5 and Note 4 on 32.2 provide that an offeror which makes a "no extension statement" or a "no increase statement" after "Day 39" may reserve the right to set the statement aside in the event of the offeree company thereafter making an announcement of the kind referred to in Rule 31.9.

3.4 The Code Committee believes that certain amendments should be made to the Code to enhance these provisions, as set out below.

(b) Requirement to send a circular to shareholders

3.5 Where the board of an offeree company seeks shareholder approval in general meeting for a proposed action that is subject to Rule 21.1, it will be required to send a circular to shareholders in order to convene the general meeting.

3.6 Where the board addresses the application of Rule 21.1 by making the taking of the action in question conditional on the offer being withdrawn or lapsing, there is no explicit requirement in the Code for the offeree company to send a circular to shareholders. However, in view of:

(a) General Principle 2 (Offeree company shareholders to have sufficient time and information to enable them to reach a properly informed decision on the bid);

(b) Rule 19.1 (Standards of care);

(c) Rule 23.1 (Sufficient information); and

(d) Rule 27 (Material changes),

the board of an offeree company which has agreed to a proposed action conditional on the offer being withdrawn or lapsing will, in practice, invariably send a circular to shareholders. In the light of the Rules referred to above, the Code Committee considers that the circular should include information on the proposed action comparable to the information which would be required if shareholder approval was being sought for the proposed action (see paragraph 3.9 below).

3.7 The Code Committee considers that the ability for the board of an offeree company to address the application of Rule 21.1 by making the taking of the

action in question conditional on the offer being withdrawn or lapsing should be specifically set out in the Code and that, where the board proceeds in this manner, the offeree company should be required under the Code to send a circular to shareholders.

(c) Information to be included in the circular

3.8 Where the board of an offeree company convenes a general meeting to seek shareholder approval for a proposed action that is subject to Rule 21.1, the Code provides little specific guidance on the information required to be included in the circular beyond stating in Rule 21.1 that "The notice convening any relevant meeting of shareholders must include information about the offer or anticipated offer".

3.9 The Code Committee proposes that the Code should require that, where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, or would be sought but for the proposed action being made conditional on the offer being withdrawn or lapsing, the board of the offeree company should be required to publish a circular setting out details of the proposed action which should contain:

(a) full details of the proposed action;

(b) the opinion of the board of the offeree company on the proposed action and the board's reasons for forming its opinion;

(c) information about the current status of the offer or possible offer; and

(d) any other information necessary for shareholders to make an informed decision.

Separately, Rule 27.2 would apply in relation to any changes in the information disclosed in any circular previously published by the board of the offeree company in connection with the offer, including the requirement in Rules 27.2(a)(ii) and 27.2(c)(vii) for the circular to include a summary of any material contract subsequently entered into by the offeree company. Also, under Rule 26.3(d)(ii), a copy of any such agreement would be required to be published on a website, on the basis that it would be a material contract entered into by the offeree company in connection with the offer.

3.10 In addition, the Code Committee considers that, where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, the board of the offeree company should be required to obtain competent independent advice in relation to whether the financial terms of the proposed action are fair and reasonable. This is on the basis that this would be likely to be important information for shareholders in relation to their voting decision at the general meeting. However, the Code Committee does not consider that it is necessary for this requirement also to apply where the proposed action is conditional on the offer being withdrawn or lapsing. This is on the basis that, in giving its advice on the financial terms of the offer, the competent independent adviser appointed under Rule 3.1 would be expected to have taken into account the financial terms of any proposed action which the board of the offeree company has stated that it intends to take conditional on the offer being withdrawn or lapsing.

(d) Timing of publication of circular and general meeting

3.11 The Code Committee considers that, where the board of the offeree company is required to publish a circular in relation to a proposed action which is subject to Rule 21.1, it should publish that circular as soon as practicable after the announcement of the proposed action.

3.12 The Code Committee also considers that, where shareholder approval is to be sought in general meeting for a proposed action which is subject to Rule 21.1, the board of the offeree company should be required to consult the Panel about when the general meeting should be held. This is because if, for example, the general meeting is proposed to be held prior to "Day 60", the Panel will wish to ensure that shareholders whose decision as to whether to accept the offer is influenced by what may happen at the general meeting have an opportunity to make that decision in the knowledge of the outcome of the meeting.

(e) Circumstances in which shareholder approval in general meeting will not be required

3.13 As noted in paragraph 3.2 above, there are a number of circumstances set out in Rule 21.1 in which the approval of shareholders in general meeting for a proposed action subject to Rule 21.1 will not be required. In addition, shareholder approval is not required if the proposed action is conditional on the offer being withdrawn or lapsing.

3.14 The Code Committee considers that it would be helpful if all the circumstances in which the approval of shareholders in general meeting for a proposed action subject to Rule 21.1 is not required were set out in Rule 21.1 itself.

(f) Proposed amendments

3.15 In the light of the above, the Code Committee proposes to amend Rule 21.1 and the Notes on Rule 21.1, and to introduce a new Note 1 on Rule 21.1, as follows:

"**21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED**

(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting: (a) take any

action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits~~;~~, or:

> **~~(b)~~(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;**
>
> **(ii) issue or grant options in respect of any unissued shares;**
>
> **(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;**
>
> **(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or**
>
> **(v) enter into contracts otherwise than in the ordinary course of business.**

(b) The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within this Rule.

(c) The Panel will normally dispense with the requirements of this Rule if:

> **(i) the offeror consents to the action proposed to be taken by the board of the offeree company;**
>
> **(ii) the taking of the proposed action is conditional on the offer being withdrawn or lapsing; or**
>
> **(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting.**

~~The notice convening any relevant meeting of shareholders must include information about the offer or anticipated offer.~~

(d) Where ~~it is felt that~~:

> **(~~A~~i) the proposed action is in pursuance of a contract entered into earlier or another pre-existing obligation; or**

(~~B~~ii) a decision to take the proposed action had been taken before the beginning of the period referred to above which:

(~~i~~A) has been partly or fully implemented before the beginning of that period; or

(~~ii~~B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business,

the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.

(e) Where shareholder approval is to be sought in general meeting for a proposed action under this Rule:

(i) the board of the offeree company must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and

(ii) the Panel must be consulted regarding the date on which the general meeting is proposed to be held.

(f) Where shareholder approval:

(i) is sought in general meeting for a proposed action under this Rule; or

(ii) would be sought in general meeting but for the fact that the taking of the proposed action is conditional on the offer being withdrawn or lapsing,

the board of the offeree company must send a circular to shareholders which must contain the details set out in Note 1. The circular must be published as soon as practicable after the announcement of the proposed action.

NOTES ON RULE 21.1

~~***1. Consent by the offeror***~~

~~*Where the Rule would otherwise apply, it will nonetheless normally be waived by the Panel if this is acceptable to the offeror.*~~

1. Circular to shareholders

The circular sent to shareholders in accordance with Rule 21.1(f) must contain the following:

(a) full details of the proposed action;

(b) the opinion of the board of the offeree company on the proposed action and the board's reasons for forming its opinion;

(c) if Rule 21.1(e) applies, the substance of the advice given to the board of the offeree company as to whether the financial terms of the proposed action are fair and reasonable;

(d) information about the current status of the offer or possible offer; and

(e) any other information necessary to enable shareholders to make an informed decision.

In addition, the circular and any contracts entered into in connection with the proposed action must be published on a website from the time the circular is published.

…

~~***8. Shares carrying more than 50% of the voting rights***~~

~~*The Panel will normally waive the requirement for a general meeting under this Rule where the holders of shares carrying more than 50% of the voting rights state in writing that they approve the action proposed and would vote in favour of any resolution to that effect proposed at a general meeting.*~~".

3.16 The Code Committee is also proposing to make certain minor amendments to Note 2 on Rule 21.1 and to introduce a cross-reference to the proposed new Rule 21.1(e)(i) (and also to Rule 15(b)) into Rule 3.1, as set out in Appendix A.

Q4 Where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, should a requirement be introduced:

(a) for the board of an offeree company to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and

(b) for the Panel to be consulted regarding the date on which the general meeting is to be held?

Q5 Do you have any comments on the proposed requirement for the board of an offeree company to publish a circular in the circumstances described in the proposed new Rule 21.1(f) containing the information set out in the proposed new Note 1 on Rule 21.1?

Q6 Do you have any comments on the proposed amendments to Rule 21.1?

(g) Inducement fees

3.17 Under the current Rule 21.1(b)(v), which is proposed to be re-numbered as Rule 21.1(a)(v), an offeree company is not permitted to enter into a contract otherwise than in the ordinary course of business during the course of an offer or where it has reason to believe that a bona fide offer might be imminent, unless it has obtained the prior approval of shareholders in general meeting.

3.18 The Code Committee understands that, as explained in the Report by the Director General in the Panel's Annual Report for 2002/2003, it is the practice of the Executive to permit an offeree company to enter into an agreement to pay an inducement fee to a purchaser of its assets without shareholder approval having to be obtained provided that the fee is de minimis. For these purposes, an inducement fee will be considered to be de minimis if it does not exceed the lower of:

(a) 1% of the value of the consideration for the asset disposal; and

(b) 1% of the value of the offeree company calculated by reference to the value of the offeror's offer (or, if there are two or more competing offerors, the first competing offer).

3.19 The Code Committee agrees with this practice and considers that it would be helpful for it to be made clear in the Code. The Code Committee also considers that this practice should apply in relation to any transaction to which Rule 21.1 applies, and not only in relation to asset sales.

3.20 In addition, if more than one inducement fee agreement were to be entered into, the Code Committee considers that this cap should apply to the aggregate of all the inducement fees payable by the offeree company.

3.21 Accordingly, the Code Committee is proposing to introduce a new Note 8 on Rule 21.1 as follows:

> "***8. Inducement fees***
>
> *The offeree company may agree to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the lower of:*
>
> *(a) 1% of the value of the transaction; and*
>
> *(b) 1% of the value of the offeree company calculated by reference to the price of the offeror's offer (or, if there are two or competing offerors, the first competing offer) at the time of its announcement under Rule 2.7.*".

3.22 The Code Committee is also proposing to delete the reference to "inducement fees" in the heading to Rule 21.2, as set out in Appendix A.

Q7 Should an offeree company be permitted to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the 1% limit referred to in Note 8 on Rule 21.1?

Q8 Do you have any comments on the proposed new Note 8 on Rule 21.1?

4. Sales of all or substantially all of the offeree company's assets in competition with an offer

(a) Introduction

4.1 The Code Committee considers that transactions under which, in competition with an offer or possible offer, the board of an offeree company is proposing to sell all or substantially all of the offeree company's assets and to return to shareholders all or substantially all of the company's cash balances, including the proceeds of any asset sale, should be addressed in the Code. This is on the basis that the economic outcomes of the two transactions for shareholders in the offeree company may be comparable and shareholders are therefore likely to measure the two transactions against each other when making their decision whether to accept the offer.

(b) Amendments to the definition of "quantified financial benefits statement"

(i) Introduction

4.2 Where, in competition with an offer or possible offer, the board of an offeree company states that it is proposing to sell all or substantially all of the company's assets and to return to shareholders all or substantially all of the company's cash balances, including the proceeds of any asset sale, any statement by the board as to the amount which it expects to return to shareholders if the offer is withdrawn or lapses will be significant to shareholders in their assessment of the merits or demerits of the offer.

4.3 At present, the Code does not impose any specific obligations in relation to such statements beyond the general requirement in Rule 19.1 that they must be prepared with the highest standards of care and accuracy and be adequately and

fairly presented. For example, there is no requirement that such statements must be reported on by third parties.

(ii) Proposed amendments

4.4 Under the Code, a "quantified financial benefits statement" includes "a statement by the offeree company quantifying any financial benefits expected to accrue to the offeree company from cost saving or other measures and/or a transaction proposed to be implemented by the offeree company if the offer is withdrawn or lapses". Accordingly, the definition does not apply to statements by the board of an offeree company quantifying any financial benefits expected to accrue to offeree company shareholders if the offer is withdrawn or lapses.

4.5 In view of the significance that shareholders are likely to attach to statements of the kind described in paragraph 4.2 above, and the uncertainties that are potentially involved in returning to shareholders all or substantially all of the company's cash balances, the Code Committee is proposing that any such statement should be treated as a quantified financial benefits statement and should be subject to the requirements of Rule 28 applicable to quantified financial benefits statements.

4.6 As a result, such a statement would be required to:

(a) satisfy the requirements of Rules 28.3 (Compilation of profit forecasts and quantified financial benefits statements) and 28.6 (Disclosure requirements for quantified financial benefits statements), to the extent that they apply; and

(b) be the subject of reports prepared by the offeree company's reporting accountants and financial advisers in accordance with Rule 28.1

confirming that, respectively, the statement had been properly compiled on the basis stated and had been prepared with due care and consideration.

4.7 In view of the fact that the Code Committee considers that these requirements should be applied where the economic outcome of the asset sale(s) may be comparable with an offer, the Code Committee believes that they should only apply where the board of the offeree company is proposing to:

(a) sell all or substantially all of the assets (excluding cash and cash equivalents) of the offeree company; and

(b) return all or substantially all of the company's cash balances, including the proceeds of the asset sale(s), to shareholders.

4.8 Accordingly, the Code Committee is proposing to introduce a new Note on the definition of "quantified financial benefits statement" as follows:

"***NOTE ON QUANTIFIED FINANCIAL BENEFITS STATEMENT***

Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a statement by the offeree company quantifying the cash sum expected to be paid to shareholders will be treated as a quantified financial benefits statement.".

Q9 Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a statement by the offeree company quantifying the cash sum expected to be paid to shareholders be treated as a quantified financial benefits statement?

Q10 Do you have any comments on the proposed new Note on the definition of "quantified financial benefits statement"?

(c) Acquisitions of interests in shares in the offeree company by the asset purchaser

4.9 Where, in competition with an offer or possible offer, the board of an offeree company has announced an intention to sell all or substantially all of the offeree company's assets and to return to shareholders all or substantially all of the company's cash balances, including the proceeds of any asset sale, the Code Committee considers that an offeror should not be placed at a competitive disadvantage by virtue of the fact that any acquisition by it of an interest in shares in the offeree company may have significant consequences under Rule 6 (Acquisitions resulting in an obligation to offer a minimum level of consideration) and/or Rule 11.1 (When a cash offer is required), but that an acquisition of an interest in shares in the offeree company by an asset purchaser would not have similar consequences.

4.10 Therefore, in order to provide an orderly framework for the conduct of competitive situations of this kind, the Code Committee proposes, by analogy with General Principle 1 (Equivalent treatment of shareholders in the offeree company), that in such cases the purchaser(s) of the offeree company's assets should only be permitted to acquire an interest in shares in the offeree company during an offer period at up to the value per share that the board of the offeree company has stated it expects to return to shareholders in the event that the asset sale and related distribution proceeds. If the board of the offeree company has stated that the amount to be paid to shareholders is within a particular range, the price paid must not exceed the bottom of the range. As explained above, the Code Committee proposes that the amount stated to be returned to shareholders should be subject to the requirements of Rules 28.3 and 28.6 and the subject of reports prepared in accordance with Rule 28.1. The Code Committee also considers that this restriction should apply not only in relation to any such asset purchaser but also to any person whose relationship with the asset purchaser is

such that, if the asset purchaser were making an offer for the offeree company, that person would be treated as acting in concert with the asset purchaser.

4.11 In the light of the above, the Code Committee is proposing to introduce a new Rule 4.7 as follows:

> "**4.7 ASSET DISPOSALS IN COMPETITION WITH AN OFFER**
>
> **(a) Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a purchaser of some or all of those assets must not acquire interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed the amount stated. If a range is stated, the price paid must not exceed the bottom of the range.**
>
> **(b) This restriction shall also apply to any person whose relationship with any asset purchaser is such that, if the asset purchaser were an offeror, that person would be treated as acting in concert with the asset purchaser.**".

Q11 Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a purchaser of some or all of those assets be restricted from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed that amount?

Q12 Do you have any comments on the proposed new Rule 4.7?

(d) Application of Rule 21.3

4.12 Rule 21.3 provides as follows:

> "**21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS**
>
> **Any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. This requirement will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror**.".

4.13 The purpose of Rule 21.3 is to ensure that, in a competitive or potentially competitive situation, a competing offer is not frustrated as a result of the board of the offeree company giving additional information to the preferred offeror with a view to assisting that offeror to succeed.

4.14 If the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its assets during an offer or following the date on which the board has reason to believe that a bona fide offer might be imminent, the Code Committee understands that the Executive's practice is to require information given to the potential asset purchaser(s) to be given, on request, to any offeror or bona fide potential offeror, but only where:

(a) there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s); or

(b) if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the offeree company and the potential asset purchaser(s) are having such discussions.

4.15 This is on the basis that the rationale which underpins Rule 21.3 could apply equally where, in competition with an offer or possible offer, the board of an

offeree company decides to sell all or substantially all of the assets of the offeree company.

4.16 However, it is not the Executive's practice to apply Rule 21.3 where a company is in discussions with one or more persons in relation to the sale of all or substantially all of its assets prior to an offer or the date on which the board has reason to believe a bona fide offer might be imminent. Accordingly, in these circumstances, any information given to the potential asset purchaser(s), including information given to the potential asset purchaser(s) after the offer is made or the date on which the board has reason to believe a bona fide offer might be imminent, is not required to be given to any offeror or bona fide potential competing offeror.

4.17 The Code Committee agrees with the Executive's policy in this area and considers that it should be made clear in the Code.

4.18 Accordingly, the Code Committee is proposing to introduce a new Note 6 on Rule 21.3 as follows:

> "***6. Information given to a purchaser of assets***
>
> *(a) Where the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its assets (excluding cash and cash equivalents) during an offer or following the date on which the board has reason to believe that a bona fide offer might be imminent, Rule 21.3 will apply to information given by the offeree company to the potential asset purchaser(s). This requirement will usually only apply when there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s) or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the offeree company and the potential asset purchaser(s) are having such discussions.*
>
> *(b) However, where a company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer*

might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s), including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent.".

Q13 Do you have any comments on the proposed new Note 6 on Rule 21.3?

B: OTHER MATTERS

5. Setting aside a Rule 2.8 statement

(a) Introduction

5.1 As explained in Section 2 above, a person who makes a Rule 2.8 statement (i.e. a statement that it does not intend to make an offer for a company) is restricted under Rule 2.8 from, among other matters, announcing an offer or possible offer for the company or from making any statement that confirms the possibility that an offer might be made for the company for a period of six months. However, these restrictions cease to apply in the circumstances set out in Note 2 on Rule 2.8.

5.2 Note 2 on Rule 2.8 provides as follows:

> "***2. When the restrictions will no longer apply***
>
> *The restrictions in Rule 2.8 will no longer apply if:*
>
> *(a) the board of the offeree company so agrees. However, where the statement was made after the announcement by a third party of a firm intention to make an offer, the restrictions will only cease to apply with the agreement of the board of the offeree company if:*
>
> > *(i) that third party offer has been withdrawn or has lapsed; and*
> >
> > *(ii) in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, neither the person who made the statement nor any person acting in concert with that person has acquired an interest in any shares of the offeree company;*
>
> *(b) a third party announces a firm intention to make an offer for the offeree company;*

> *(c) the offeree company announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;*
>
> *(d) the Panel determines that there has been a material change of circumstances; or*
>
> *(e) the statement was made outside an offer period and an event has occurred which was specified in the statement as being an event following which the restrictions set out in Rule 2.8 would cease to apply. If a person wishes to specify such an event in a statement to which Rule 2.8 will apply, the Panel should be consulted.*
>
> *The Panel will normally regard a switch by a third party offeror from a scheme of arrangement to a contractual offer in accordance with Section 8 of Appendix 7, or an announcement of its firm intention to do so, as a material change of circumstances under paragraph (d). However, a switch from a contractual offer to a scheme of arrangement will not normally be regarded as a material change of circumstances.*".

5.3 Note 2 has been in substantially its current form since 2011. Prior to that time, Rule 2.8 provided that a person who made a Rule 2.8 statement would be subject to the restrictions set out in Rule 2.8 for a period of six months unless there was a material change of circumstances or an event occurred which the person had specified in the statement as an event which would enable it to be set aside (a "**carve-out**"). Where a Rule 2.8 statement was made following the imposition of a "put up or shut up" deadline (under what is now Rule 2.6(a)), the permitted carve-outs were limited to, in effect, the circumstances set out in paragraphs (a) to (d) of the current Note 2 on Rule 2.8.

5.4 The rationale for Note 2 being changed into its current form was described in paragraph 2.47 of PCP 2011/1 (Review of certain aspects of the regulation of takeover bids) as follows:

> "Almost invariably, a person making a Rule 2.8 statement in response to the imposition of a "put up or shut up" deadline will include all of the permitted carve-outs in its statement. Given this, the Code Committee considers that it would be preferable to modify Rule 2.8 so as to avoid a person making a Rule 2.8 statement, whether in response to a "put up or shut up" deadline or otherwise, needing to repeat the standard carve-outs. The Code Committee

believes that the events described in Note 2 on Rule 2.8 should instead be cast as being events following which the Panel will normally consent to a Rule 2.8 statement being set aside (i.e. notwithstanding that the events would not have been included as carve-outs in the Rule 2.8 statement).".

(b) Proposed amendments

5.5 On reflection, the Code Committee considers that it would be preferable if the circumstances in which a Rule 2.8 statement may be set aside were required to be specified in the statement itself. This is on the basis of the following:

(a) if the carve-outs are specified in the Rule 2.8 statement itself, the statement is clear on its face as to the circumstances in which it may be set aside. This avoids any scope for confusion in the market as to the position. This is particularly important given that the circumstances in which the board of the offeree company may consent to the Rule 2.8 statement being set aside may vary from case to case depending upon, for example, whether, at the time that the Rule 2.8 statement is made, another party has announced a firm intention to make an offer for the offeree company (see paragraph (a)(i) of the existing Note 2 on Rule 2.8); and

(b) it would enable a person who wishes to make a "hard" Rule 2.8 statement – i.e. a statement which cannot be set aside in any circumstances, or only in very limited circumstances – to do so (which is not currently provided for in the Code).

5.6 In the light of the above, the Code Committee is proposing to amend Rule 2.8 and Note 2 on Rule 2.8 so as to require a person making a Rule 2.8 statement to specify in the statement the circumstances in which it reserves the right to set the statement aside. This would result in Rule 2.8 statements being treated in the same way as "no increase statements" and "no extension statements". The Code Committee is also proposing to introduce new provisions, in paragraphs (b) and

(c) of the new Note 2 on Rule 2.8, to replicate the existing provisions in paragraphs (a)(i) and (a)(ii) respectively of the current Note 2 on Rule 2.8. Subject to paragraph 5.7 below, the circumstances which may be stated to be the subject of a carve-out under the proposed new Note 2 on Rule 2.8 will be the same as the circumstances in which, under the existing Note 2 on Rule 2.8, the restrictions in Rule 2.8 currently no longer apply.

5.7 In addition, the Code Committee is proposing to delete the final paragraph of the current Note 2 on Rule 2.8. This is on the basis that the Code Committee considers that, as opposed to the Code providing that the Panel will normally regard a switch (or an announcement of a firm intention to switch) by a third party offeror from a scheme of arrangement to a contractual offer as a material change of circumstances, this should be a matter which should be considered by the Panel on a case by case basis (provided that an appropriate carve-out was included in the Rule 2.8 statement for the Panel determining that there has been a material change of circumstances).

5.8 Accordingly, the Code Committee is proposing to amend Rule 2.8, and to introduce a new Note 2 on Rule 2.8, (including paragraph (d) of Note 2 on Rule 2.8, as referred to in Section 2 above) as follows:

> "**2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER**
>
> **A person making a statement that ~~he~~ it does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. ~~Except in the circumstances described in Note 2 or otherwise with the consent of the Panel,~~ Unless circumstances occur that the person specified in its statement as being circumstances in which the statement may be set aside, neither the person making the statement, nor any person who acted in concert with that person, nor any person who is subsequently acting in concert with either of them, may within six months from the date of the statement:**
>
> …

NOTES ON RULE 2.8

…

2. Setting aside a statement to which Rule 2.8 applies

(a) The circumstances that a person is permitted to specify in a statement to which Rule 2.8 applies as circumstances in which the statement may be set aside are:

(i) subject to paragraph (b), the board of the offeree company so agreeing;

(ii) a third party (including another publicly identified potential offeror) announcing a firm intention to make an offer;

(iii) the offeree company announcing a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;

(iv) the Panel determining that there has been a material change of circumstances; or

(v) where the statement is made outside an offer period, such other circumstances as the person may, with the Panel's prior consent, specify.

(b) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer, the statement may only specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside if such agreement is given after that third party offer has been withdrawn or lapsed.

(c) Where the statement to which Rule 2.8 applies is made after the announcement by a third party of a firm intention to make an offer and the person who made the statement, or any person acting in concert with it, acquires an interest in any shares in the offeree company in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, the agreement of the board of the offeree company may not be relied on as a reason to set aside the statement after the third party offer has been withdrawn or lapsed.

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that

statement with the agreement of the board of the offeree company, the board of the offeree company may not agree to the restrictions in Rule 2.8(f) being set aside for three months following the date on which the statement to which Rule 2.8 applies is made.".

5.9 If Rule 2.8 and Note 2 on Rule 2.8 are amended in this manner, the Code Committee is also proposing that:

(a) certain consequential amendments should be made to Note 4 on Rule 2.2 (When a dispensation may be granted); and

(b) certain minor amendments should be made to the Note on Rules 35.1 and 35.2 (When consent may be given), which would be renumbered as Note 1,

in each case, as set out in Appendix A.

Q14 Do you have any comments on the proposed amendment to Rule 2.8 and to the introduction of the proposed new Note 2 on Rule 2.8?

Q15 Do you have any comments on the consequential and minor amendments referred to in paragraph 5.9?

6. Social media

(a) Introduction

6.1 As set out in paragraph 4.5 of PCP 2016/1 (The communication and distribution of information during an offer), the Code Committee recognises that an offeror or offeree company may wish to communicate information or opinions relating to an offer or to the party itself via social media, such as Twitter or Facebook. Following the consultation on PCP 2016/1, Rule 20.4 was introduced to address this issue.

6.2 Rule 20.4 provides that social media must not be used by or on behalf of an offeror or the offeree company to publish information relating to an offer or a party to an offer, other than for the publication of:

(a) the full text of an announcement which has been published via a RIS;

(b) the full text of a document which has been published on a website in accordance with the relevant provisions of the Code; or

(c) a notification of a link to the webpage on which such an announcement or document has been published, which notification must comply with the requirements of paragraph (b) of the Note on the definition of "website notification", i.e. that:

(i) the information in the notification must be confined to non-controversial information about the offer or a party to the offer and should not include any argument or opinion; and

(ii) the notification should not include a recommendation to take or not to take any action in relation to, or contain any view on the merits of, the offer except for a factual statement as to whether or not the offer is proceeding with the recommendation of the offeree company board.

6.3 All of the respondents to PCP 2016/1 who expressed a view in relation to Rule 20.4 agreed with its introduction in the form described above.

(b) Information in relation to a party to an offer itself

6.4 The Code Committee acknowledges that social media is used increasingly by companies in the ordinary course of business as a means of communicating with

the media, customers and suppliers, as well as with shareholders and other market participants, including for communicating information in relation to the company's financial performance, social responsibility initiatives and other developments.

6.5 Having reviewed the issue, the Code Committee considers that it is not appropriate for the restrictions on the use of social media set out in Rule 20.4 to continue to apply in relation to the communication via social media of information by an offeror or an offeree company in respect of itself. In coming to this conclusion, the Code Committee has taken into account the fact that a number of other provisions of the Code apply in relation to the communication by a party to an offer of information via social media, including, for example:

(a) Rule 19.1, which would require information published via social media to be prepared with the highest standards of care and accuracy and to be adequately and fairly presented;

(b) Rule 20.1, which would prohibit the publication of material new information or significant new opinions relating to an offer or a party to an offer via social media; and

(c) Rule 28 and Rule 29, which set out the reporting requirements which apply in relation to profit forecasts, quantified financial benefits statements and asset valuations published by a party to an offer.

6.6 However, the Code Committee considers that the restrictions in Rule 20.4 should continue to apply in relation to the publication of information relating to the offer via social media by, or on behalf of, a party to an offer. This is on the basis that the Code Committee considers that information about an offer should be published via a RIS and a company's website in accordance with the relevant provisions of the Code, and not solely via social media.

(c) Publication of videos via social media

6.7 The Code Committee notes that, pursuant to Rule 20.3(a), a video published by or on behalf of an offeror or the offeree company which includes any information or opinions relating to an offer or to the financial performance of a party to an offer must comprise only a director or senior executive reading from a script or participating in a scripted interview and that any such video may be published only with the prior consent of the Panel.

6.8 The Code Committee considers that it should be permissible for a party to an offer to publish via social media a video which has been published with the prior consent of the Panel in accordance with Rule 20.3 and proposes to make this clear in Rule 20.4.

(d) Financial advisers' responsibility for publication of information via social media

6.9 As is made clear in Note 1 on Rule 19.1, the Panel regards financial advisers as being responsible to the Panel for guiding their clients with regard to any information published during the course of an offer. The Code Committee considers that this responsibility applies in relation to information published via social media in the same way as to information published by other means and is proposing to amend the first paragraph of Note 1 on Rule 19.1 to make this explicitly clear.

(e) Proposed amendments

6.10 In the light of the above, the Code Committee is proposing to amend Rule 20.4 and Note 1 on Rule 19.1 as follows:

(a) Rule 20.4:

"**20.4 SOCIAL MEDIA**

Social media must not be used by or on behalf of an offeror or the offeree company to publish information relating to an offer ~~or a party to an offer~~, other than for the publication of:

(a) the full text of an announcement which has been published in accordance with Rule 30.1(a);

(b) the full text of a document which has been published on a website in accordance with the relevant provisions of the Code; ~~or~~

(c) a video which has been published with the prior consent of the Panel in accordance with Rule 20.3; or

(~~c~~d) a notification of a link to the webpage on which such an announcement, ~~or~~ document or video has been published, which notification must comply with the requirements of paragraph (b) of the Note on the definition of website notification."; and

(b) Note 1 on Rule 19.1:

"***1. Financial advisers' responsibility for publication of information***

The Panel regards financial advisers as being responsible to the Panel for guiding their clients and any relevant public relations advisers with regard to any information published during the course of an offer, including information published using social media.".

6.11 In addition, the Code Committee recognises that the publication of any material new information or significant new opinions relating to an offer or a party to an offer will be required to be published via a RIS in accordance with Rule 20.1(b). Therefore, the Code Committee considers that it may not be proportionate to require an offeror or offeree company to publish an announcement via RIS noting that a video has been published on a website. Accordingly, the Code Committee proposes to delete the second sentence of Rule 20.3(b), as set out in Appendix A.

Q16 Do you have any comments on the proposed amendments to Note 1 on Rule 19.1, Rule 20.3 and Rule 20.4?

7. Dispensation from the mandatory offer requirement

7.1 The Code Committee understands that it is the Executive's practice to apply a procedure similar to that set out in the current Note 8 on Rule 21.1 (which is proposed to be included in Rule 21.1(c)(iii)), referred to in paragraph 3.2(b) above, to an obligation to make a mandatory offer under Rule 9 as a result of the issue of new securities. As a result, it is the Executive's practice to consider waiving the requirement for a mandatory offer if independent shareholders holding shares carrying more than 50% of the voting rights of the company which would be capable of being cast on a "whitewash" resolution in accordance with Note 1 of the Notes on Dispensations from Rule 9 confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting. However, the Notes on Dispensations from Rule 9 do not specifically refer to a waiver being available in these circumstances.

7.2 The Code Committee agrees with the Executive's practice and believes that Note 5 of the Notes on Dispensations from Rule 9 should be amended to make clear that the Panel will consider waiving the requirement for a mandatory offer under Rule 9 in the circumstances described in paragraph 7.1 above. Accordingly, the Code Committee proposes to introduce a new paragraph (c) into Note 5 of the Notes on Dispensations from Rule 9 as follows:

> "***5. Shares carrying 50% or more of the voting rights***
>
> *The Panel will consider waiving the requirement for a general offer under this Rule where:*
>
> *(a) holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer; ~~or~~*
>
> *(b) shares carrying 50% or more of the voting rights are already held by one other person~~.~~; or*

> *(c) in the case of an issue of new securities, independent shareholders holding shares carrying more than 50% of the voting rights of the company which would be capable of being cast on a "whitewash" resolution (see Note 1) confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting.*".

7.3 The Code Committee is also proposing to include in Note 1 of the Notes on Dispensations from Rule 9 a cross-reference to the new Note 5(c), as set out in Appendix A.

Q17 Do you have any comments on the proposed amendment to Note 5 of the Notes on Dispensations from Rule 9?

C: ASSESSMENT OF THE IMPACT OF THE PROPOSALS

8. Proportionality, benefits and cost implications

8.1 The amendments proposed in this PCP relate to various different provisions to the Code and there is no over-arching theme to the changes.

8.2 The amendments proposed in Section 2 are intended to avoid the possibility of certain provisions of the Code being circumvented through an offeror or potential offeror purchasing the assets of the offeree company. In the opinion of the Code Committee, these amendments will not have additional cost implications.

8.3 The amendments proposed in Section 3 primarily focus on ensuring that shareholders are provided with full information in relation to a proposed action for which their approval is being sought under Rule 21.1 (or would be sought but for the proposed action being made conditional on the offer being withdrawn or lapsing). The Code Committee acknowledges that certain of the amendments proposed (including the introduction of a requirement for an offeree company board to obtain competent independent advice on proposals being put to shareholders) would likely lead to the offeree company incurring additional advisory and administrative costs. However, the Code Committee considers that these costs will be offset by the benefit to offeree company shareholders of receiving important information to enable them to make a properly informed decision in relation to the merits or demerits of an offer or their voting decision at the general meeting (as applicable). Therefore, the Code Committee believes that the proposed amendments are proportionate.

8.4 The Code Committee considers that the introduction into the Code of provisions to address transactions under which, in competition with an offer or possible offer, the board of an offeree company is proposing to sell all or substantially all of the offeree company's assets and to return to shareholders all or substantially

all of the company's cash balances, including the proceeds of any asset sale (as set out in Section 4) will be beneficial to offeree company shareholders and other market participants. Although an offeree company will incur additional costs in relation to the preparation of a report in accordance with the requirements of Rule 28 if it chooses to quantify the cash sum expected to be paid to shareholders, the Code Committee considers that, given the importance that an offeree company shareholder is likely to attach to such statements, these costs would be proportionate. The Code Committee also considers that, whilst the amendments proposed to Rule 4.7 and Rule 21.3 may impose certain additional burdens on an offeree company to quantify financial benefits or to share information, they strike an appropriate balance and represent a proportionate approach to ensure compliance with the General Principles (and, in particular, General Principles 1 and 3).

8.5 The Code Committee considers that requiring a Rule 2.8 statement to specify any circumstances in which it may be set aside, as set out in Section 5, will provide greater certainty to the parties to an offer and to the market. The Code Committee does not anticipate that these changes will result in any additional costs being imposed.

8.6 The Code Committee considers that the changes proposed to Rule 20.4 in Section 6 will provide the benefit to parties to an offer of greater flexibility to use social media during an offer period. The Code Committee does not anticipate that these changes will result in any additional costs being imposed.

8.7 The amendments proposed in Section 7 are designed to codify the existing practice of the Executive in relation to granting a waiver from the obligations that would otherwise arise under Rule 9 in relation to an issue of new securities if the independent shareholders provide certain confirmations in writing. Therefore, the Code Committee does not believe that they will place any new burdens or costs on parties to offers, other market participants or practitioners.

APPENDIX A

Proposed amendments to the Code

DEFINITIONS

Quantified financial benefits statement

…

NOTE ON QUANTIFIED FINANCIAL BENEFITS STATEMENT

Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a statement by the offeree company quantifying the cash sum expected to be paid to shareholders will be treated as a quantified financial benefits statement.

Rule 2.2

2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

…

NOTES ON RULE 2.2

…

4. When a dispensation may be granted

(a) The Panel may grant a dispensation from the requirement for an announcement to be made under Rule 2.2(c) or Rule 2.2(d) where it is satisfied that the potential offeror has ceased actively to consider making an offer for the offeree company. 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:

(i) within six months of the dispensation having been granted, do any of the things set out in Rules 2.8(a) to (ef); or

(ii) within three months of the dispensation having been granted, actively consider making an offer for the offeree company, make an approach to the board of the offeree company or acquire an interest in shares in the offeree company.

(b) After the end of the period referred to in paragraph (ii) the Panel will normally consent to the restrictions in paragraph (i) being set aside in the circumstances set out in paragraphs (a)(i) to (iv)~~(d)~~ of Note 2 on Rule 2.8, but during the period referred to in paragraph (ii) the Panel will normally consent to the restrictions in paragraphs (i) and (ii) being set aside only in the circumstances set out in paragraphs ~~(b) to (d)~~ (a)(ii) to (iv) of Note 2 on Rule 2.8.

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

A person making a statement that ~~he~~ it does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. ~~Except in the circumstances described in Note 2 or otherwise with the consent of the Panel,~~ Unless circumstances occur that the person specified in its statement as being circumstances in which the statement may be set aside, neither the person making the statement, nor any person who acted in concert with that person, nor any person who is subsequently acting in concert with either of them, may within six months from the date of the statement:

…

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(d) … **; ~~or~~**

(e) … **~~.~~; or**

(f) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company.

…

NOTES ON RULE 2.8

…

~~***2. When the restrictions will no longer apply***~~

~~*The restrictions in Rule 2.8 will no longer apply if:*~~

~~*(a) the board of the offeree company so agrees. However, where the statement was made after the announcement by a third party of a firm intention to make an offer, the restrictions will only cease to apply with the agreement of the board of the offeree company if:*~~

~~*(i) that third party offer has been withdrawn or has lapsed; and*~~

~~*(ii) in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, neither the person who made the statement nor any person acting in concert with that person has acquired an interest in any shares of the offeree company;*~~

~~*(b) a third party announces a firm intention to make an offer for the offeree company;*~~

~~*(c) the offeree company announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;*~~

~~*(d) the Panel determines that there has been a material change of circumstances; or*~~

~~*(e) the statement was made outside an offer period and an event has occurred which was specified in the statement as being an event following which the restrictions set out in Rule 2.8 would cease to apply. If a person wishes to specify such an event in a statement to which Rule 2.8 will apply, the Panel should be consulted.*~~

~~*The Panel will normally regard a switch by a third party offeror from a scheme of arrangement to a contractual offer in accordance with Section 8 of Appendix 7, or an announcement of its firm intention to do so, as a material change of circumstances under paragraph (d). However, a switch from a contractual offer to a scheme of arrangement will not normally be regarded as a material change of circumstances.*~~

2. Setting aside a statement to which Rule 2.8 applies

(a) The circumstances that a person is permitted to specify in a statement to which Rule 2.8 applies as circumstances in which the statement may be set aside are:

(i) subject to paragraph (b), the board of the offeree company so agreeing;

(ii) a third party (including another publicly identified potential offeror) announcing a firm intention to make an offer;

(iii) the offeree company announcing a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover;

(iv) the Panel determining that there has been a material change of circumstances; or

(v) where the statement is made outside an offer period, such other circumstances as the person may, with the Panel's prior consent, specify.

(b) Where the statement to which Rule 2.8 applies is made after a third party has announced a firm intention to make an offer, the statement may only specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside if such agreement is given after that third party offer has been withdrawn or lapsed.

(c) Where the statement to which Rule 2.8 applies is made after the announcement by a third party of a firm intention to make an offer and the person who made the statement, or any person acting in concert with it, acquires an interest in any shares in the offeree company in the period following the making of the statement and prior to the third party offer being withdrawn or lapsing, the agreement of the board of the offeree company may not be relied on as a reason to set aside the statement after the third party offer has been withdrawn or lapsed.

(d) Where the statement to which Rule 2.8 applies is made by a potential offeror which has made a statement to which Rule 2.5(a)(i) or (ii) applies and which did not reserve the right not to be bound by that statement with the agreement of the board of the offeree company, the board of the offeree company may not agree to the restrictions in Rule 2.8(f) being set aside for three months following the date on which the statement to which Rule 2.8 applies is made.

…

5. Significant asset purchases

(a) In assessing whether assets are significant for the purpose of Rule 2.8(f), the Panel will normally have regard to:

(i) the aggregate value of the consideration for the assets compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate

(ii) the value of the assets to be purchased compared with the total assets of the offeree company (excluding cash and cash equivalents); and

(iii) the operating profit (ie profit before tax and interest and excluding exceptional items) attributable to the assets to be purchased compared with that of the offeree company.

For these purposes, "equity" will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business on the business day immediately preceding the date of the proposed announcement of the purchase or agreement to purchase the assets, or the statement which raises or confirms the possibility that the person is interested in purchasing the assets; and

(ii) for assets and profits, the figures stated in the latest published audited consolidated accounts of the offeree company or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

Relative values of more than 50% will normally be regarded as being significant.

Rule 3.1

3.1 BOARD OF THE OFFEREE COMPANY

The board of the offeree company must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offers) are fair and reasonable and the substance of such advice must be made known to its shareholders. (See also Rule 15(b) and Rule 21.1(e)(i).)

Rule 4.7

4.7 ASSET DISPOSALS IN COMPETITION WITH AN OFFER

(a) Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a purchaser of some or all of those assets must not acquire interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed the amount stated. If a range is stated, the price paid must not exceed the bottom of the range.

(b) This restriction shall also apply to any person whose relationship with any asset purchaser is such that, if the asset purchaser were an offeror, that person would be treated as acting in concert with the asset purchaser.

Rule 9

NOTES ON DISPENSATIONS FROM RULE 9

1. Vote of independent shareholders on the issue of new securities ("Whitewash")

…

In exceptional circumstances, the Panel may consider waiving the requirement for a general offer where the approval of independent shareholders to the transfer of existing shares from one shareholder to another is obtained.

See also Note 5(c).

…

5. Shares carrying 50% or more of the voting rights

The Panel will consider waiving the requirement for a general offer under this Rule where:

(a) holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer; ~~or~~

(b) shares carrying 50% or more of the voting rights are already held by one other person~~.~~; or

(c) in the case of an issue of new securities, independent shareholders holding shares carrying more than 50% of the voting rights of the company which would be capable of being cast on a "whitewash" resolution (see Note 1) confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting.

Rule 12.2

12.2 COMPETITION REFERENCE PERIODS

…

(b) If the offer period ends in accordance with Rule 12.2(a):

(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:

…

(C) acquire ~~an~~ any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(D) … **; ~~or~~**

(E) … **; or**

(F) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company;

…

NOTES ON RULE 12.2

…

5. Significant asset purchases

In assessing whether assets are significant for the purpose of Rule 12.2(b)(i)(F), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.

Rule 19.1

19.1 STANDARDS OF CARE

…

NOTES ON RULE 19.1

1. Financial advisers' responsibility for publication of information

The Panel regards financial advisers as being responsible to the Panel for guiding their clients and any relevant public relations advisers with regard to any information published during the course of an offer, including information published using social media.

…

Rule 20.3

20.3 VIDEOS

…

(b) A video to which paragraph (a) applies must be published on a website. ~~At the same time, the offeror or offeree company must publish an announcement in accordance with Rule 30.1 noting that the video has been published on a website and including a link to the relevant webpage.~~

Rule 20.4

20.4 SOCIAL MEDIA

Social media must not be used by or on behalf of an offeror or the offeree company to publish information relating to an offer ~~or a party to an offer~~, other than for the publication of:

(a) the full text of an announcement which has been published in accordance with Rule 30.1(a);

(b) the full text of a document which has been published on a website in accordance with the relevant provisions of the Code; ~~or~~

(c) a video which has been published with the prior consent of the Panel in accordance with Rule 20.3; or

(~~c~~d) a notification of a link to the webpage on which such an announcement, ~~or~~ document or video has been published, which notification must comply with the requirements of paragraph (b) of the Note on the definition of website notification.

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting: , ~~(a)~~ take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits~~;~~, or:

~~(b)~~(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;

(ii) issue or grant options in respect of any unissued shares;

(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;

(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or

(v) enter into contracts otherwise than in the ordinary course of business.

(b) The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within this Rule.

(c) The Panel will normally dispense with the requirements of this Rule if:

(i) the offeror consents to the action proposed to be taken by the board of the offeree company;

(ii) the taking of the proposed action is conditional on the offer being withdrawn or lapsing; or

(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting.

~~**The notice convening any relevant meeting of shareholders must include information about the offer or anticipated offer.**~~

(d) Where ~~**it is felt that**~~**:**

(~~**A**~~**i) the proposed action is in pursuance of a contract entered into earlier or another pre-existing obligation; or**

(~~**B**~~**ii) a decision to take the proposed action had been taken before the beginning of the period referred to above which:**

(~~**i**~~**A) has been partly or fully implemented before the beginning of that period; or**

(~~**ii**~~**B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business,**

the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.

(e) Where shareholder approval is to be sought in general meeting for a proposed action under this Rule:

(i) the board of the offeree company must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and

(ii) the Panel must be consulted regarding the date on which the general meeting is proposed to be held.

(f) Where shareholder approval:

(i) is sought in general meeting for a proposed action under this Rule; or

(ii) would be sought in general meeting but for the fact that the taking of the proposed action is conditional on the offer being withdrawn or lapsing,

the board of the offeree company must send a circular to shareholders which must contain the details set out in Note 1. The circular must be published as soon as practicable after the announcement of the proposed action.

NOTES ON RULE 21.1

~~***1. Consent by the offeror***~~

~~*Where the Rule would otherwise apply, it will nonetheless normally be waived by the Panel if this is acceptable to the offeror.*~~

1. Circular to shareholders

The circular sent to shareholders in accordance with Rule 21.1(f) must contain the following:

(a) full details of the proposed action;

(b) the opinion of the board of the offeree company on the proposed action and the board's reasons for forming its opinion;

(c) if Rule 21.1(e) applies, the substance of the advice given to the board of the offeree company as to whether the financial terms of the proposed action are fair and reasonable;

(d) information about the current status of the offer or possible offer; and

(e) any other information necessary to enable shareholders to make an informed decision.

In addition, the circular and any contracts entered into in connection with the proposed action must be published on a website from the time the circular is published.

2. ~~"~~Material amount~~"~~

(a) ~~For the purpose of determining~~ In assessing whether a disposal or acquisition is of ~~"~~a material amount~~"~~ the Panel will~~, in general,~~ normally have regard to~~ the following~~:

> *(~~a~~i) the aggregate value of the consideration to be received or given compared with the aggregate market value of all the equity shares of the offeree company; and, where appropriate~~:~~*
>
> *(~~b~~ii) the value of the assets to be disposed of or acquired compared with the assets of the offeree company; and*
>
> *(~~c~~iii) the operating profit (ie profit before tax and interest and excluding exceptional items) attributable to the assets to be disposed of or acquired compared with that of the offeree company.*

For these purposes:

"assets" will normally mean total assets less current liabilities (other than short-term indebtedness); and

"equity" will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

> *(~~a~~i) for market value of the shares of the offeree company, the aggregate market value of all the equity shares of the company at the close of business either:*
>
> > *(~~i~~A) on the ~~last~~ business day immediately preceding the start of the offer period; or*
> >
> > *(~~ii~~B) if there is no offer period, on the ~~last~~ business day immediately preceding the announcement of the transaction; and*
>
> *(~~b~~ii) for assets and profits, the figures ~~shown~~ stated in the latest published audited consolidated accounts of the offeree company or, where appropriate, ~~interim or~~ a subsequent preliminary statement~~s~~ of annual results or half-yearly financial report.*

Subject to Note 4, ~~the Panel will normally consider~~ relative values of 10% or more will normally be regarded as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.

If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.

The Panel should be consulted in advance where there may be any doubt as to the application of the above.

…

~~8. Shares carrying more than 50% of the voting rights~~

~~The Panel will normally waive the requirement for a general meeting under this Rule where the holders of shares carrying more than 50% of the voting rights state in writing that they approve the action proposed and would vote in favour of any resolution to that effect proposed at a general meeting.~~

8. Inducement fees

The offeree company may agree to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the lower of:

(a) 1% of the value of the transaction; and

(b) 1% of the value of the offeree company calculated by reference to the price of the offeror's offer (or, if there are two or competing offerors, the first competing offer) at the time of its announcement under Rule 2.7.

Rule 21.2

21.2 ~~INDUCEMENT FEES AND OTHER~~ OFFER-RELATED ARRANGEMENTS

…

Rule 21.3

21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS

…

NOTES ON RULE 21.3

…

6. Information given to a purchaser of assets

(a) Where the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its assets (excluding cash and cash equivalents) during an offer or following the date on which the board has reason to believe that a bona fide offer might be imminent, Rule 21.3 will apply to information given by the offeree company to the potential asset purchaser(s). This requirement will usually only apply when there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s) or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the offeree company and the potential asset purchaser(s) are having such discussions.

(b) However, where a company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s), including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent.

Rule 35.1

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or made but has not become or been declared wholly unconditional and has been withdrawn or has lapsed otherwise than pursuant to Rule 12.1, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses ~~either~~:

…

(c) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with ~~him~~ it, would be interested and the shares in respect of which ~~he~~ it, or they, had acquired irrevocable

commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(d) …**; ~~or~~**

(e) …**; or**

(f) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company.

…

NOTES ON RULES 35.1 and 35.2

1. When consent may be given

(a) The Panel will normally only give its consent under this Rule if:

(i) ~~the new offer is recommended by~~ the board of the offeree company so agrees. Such consent will not normally be given within three months of the lapsing of an earlier offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement;

(ii) ~~the new offer follows the announcement by~~ a third party ~~of~~ announces a firm intention to make an offer for the offeree company;

(iii) ~~the new offer follows the announcement by~~ the offeree company ~~of~~ announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover ~~which has not failed or lapsed or been withdrawn~~; or

(iv) the Panel determines that there has been a material change of circumstances.

…

2. Significant asset purchases

In assessing whether assets are significant for the purpose of Rule 35.1(f), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.

APPENDIX B

List of questions

Q1 **Should an offeror or potential offeror be restricted from circumventing the provisions of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?**

Q2 **Should the proposed new restriction in each of Rules 2.8, 12.2 and 35.1 apply in relation to the purchase of assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8)?**

Q3 **Do you have any comments on the proposed amendments to Rule 2.8, Rule 12.2 and Rule 35.1?**

Q4 **Where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, should a requirement be introduced:**

(a) **for the board of an offeree company to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and**

(b) **for the Panel to be consulted regarding the date on which the general meeting is to be held?**

Q5 **Do you have any comments on the proposed requirement for the board of an offeree company to publish a circular in the circumstances described in the proposed new Rule 21.1(f) containing the information set out in the proposed new Note 1 on Rule 21.1?**

Q6 **Do you have any comments on the proposed amendments to Rule 21.1?**

Q7 **Should an offeree company be permitted to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the 1% limit referred to in Note 8 on Rule 21.1?**

Q8 **Do you have any comments on the proposed new Note 8 on Rule 21.1?**

Q9 **Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a statement by the offeree company quantifying the cash sum expected to be paid to shareholders be treated as a quantified financial benefits statement?**

Q10 Do you have any comments on the proposed new Note on the definition of "quantified financial benefits statement"?

Q11 Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a purchaser of some or all of those assets be restricted from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed that amount?

Q12 Do you have any comments on the proposed new Rule 4.7?

Q13 Do you have any comments on the proposed new Note 6 on Rule 21.3?

Q14 Do you have any comments on the proposed amendment to Rule 2.8 and to the introduction of the proposed new Note 2 on Rule 2.8?

Q15 Do you have any comments on the consequential and minor amendments referred to in paragraph 5.9?

Q16 Do you have any comments on the proposed amendments to Note 1 on Rule 19.1, Rule 20.3 and Rule 20.4?

Q17 Do you have any comments on the proposed amendment to Note 5 of the Notes on Dispensations from Rule 9?