

RS 2017/2 11 December 2017

THE TAKEOVER PANEL

STATEMENTS OF INTENTION AND RELATED MATTERS

RESPONSE STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE CONSULTATION ON PCP 2017/2



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1. Introduction and summary

(a) *Background*

1.1 On 19 September 2017, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2017/2**” or the “**PCP**”) in which it proposed a number of amendments to the Takeover Code (the “**Code**”), as summarised below.

(b) *Summary of proposals*

1.2 Section 2(b) of the PCP proposed that, in addition to the current requirements for an offeror to make statements of intention with regard to the business, employees and pension schemes of the offeree company, an offeror should be required to make specific statements of intention with regard to:

- (a) the offeree company’s research and development functions;
- (b) the balance of the skills and functions of the offeree company’s employees and management; and
- (c) the location of the offeree company’s headquarters and headquarters functions.

1.3 Section 2(c) of the PCP proposed that an offeror should be required to make statements of intention earlier than is currently the case, i.e. that statements of intention should be made at the time of the announcement by the offeror of its firm intention to make an offer.

1.4 Section 2(d) of the PCP proposed that an offeror must not publish an offer document for 14 days from the announcement of its firm intention to make an offer without the consent of the board of the offeree company.

1.5 Section 2(e) of the PCP proposed that offerors and offeree companies should be required to publish:

- (a) annual reports on their compliance with post-offer undertakings given during the course of an offer; and

(b) confirmations in relation to post-offer statements of intention given during the course of an offer.

(c) *Responses to the consultation*

1.6 The consultation period in relation to PCP 2017/2 ended on 31 October 2017. The Code Committee received comments on the consultation questions from the 13 respondents listed in Appendix A. Each of the responses has been published on the Panel's website at www.thetakeoverpanel.org.uk. The Code Committee thanks the respondents for their comments.

1.7 Respondents were generally supportive of the proposals. The principal comments and suggestions made by respondents are summarised in sections 2 to 6 of this Response Statement.

(d) *The Code Committee's conclusions*

1.8 Having considered the responses to the consultation, the Code Committee has adopted the amendments proposed in the PCP, subject to certain modifications, as described in sections 2 to 6 below.

(e) *Code amendments*

1.9 The amendments to the Code which the Code Committee has adopted in this Response Statement are set out in Appendix B. In Appendix B, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code. Unless otherwise stated, where new or amended provisions of the Code are set out in the main body of this Response Statement, they are marked to show changes from the provisions as they were proposed to be amended in the PCP.

(f) *Implementation and transition*

1.10 The amendments to the Code introduced as a result of this Response Statement will take effect, and revised pages of the Code will be published, on Monday, 8 January 2018 (the "**implementation date**").

- 1.11 The Code, as amended, will be applied from the implementation date to all companies and transactions to which it relates, including those on-going transactions which straddle that date, except where to do so would give the amendments retroactive effect.
- 1.12 As regards the application of specific rules:
- (a) **Rules 2.7 and 24.2:** if an offeror announces a firm intention to make an offer under Rule 2.7 before the implementation date and then publishes an offer document under Rule 24.1(a) on or after the implementation date, the offer document will be required to comply with the requirements of the amended Rule 24.2;
 - (b) **Rule 24.1(a):** an offeror which, before the implementation date, has announced a firm intention to make an offer under Rule 2.7 but which has not yet published an offer document will, owing to the terms of the amended Rule 24.1(a), only be able to publish its offer document within 14 days of its firm offer announcement if it has the consent of the board of the offeree company to do so; and
 - (c) **Rule 19.6(c):** a party to the offer which makes or repeats a post-offer intention statement on or after the implementation date will be required to give confirmations in relation to those post-offer intention statements under the new Rule 19.6(c) at the end of the period of 12 months from the date on which the offer period ended, or such other period as was specified in the statement.
- 1.13 Where parties have doubts as to the consequences of any of the rule changes, in particular the impact on any transaction which is in existence or contemplation, they should consult the Panel prior to the implementation date to obtain a ruling or guidance.

2. Content requirements for offeror statements of intention

- Q1** Should Rule 24.2(a) be amended so as to require an offeror to make specific statements of intention with regard to the offeree company's research and development functions, the balance of the skills and functions of the offeree company's employees and management, and the location of the offeree company's headquarters and headquarters functions?
- Q2** Do you have any comments on the proposed amendments to Rules 24.2(a) and (b)?

(a) *Summary of proposals*

2.1 Section 2(b) of the PCP proposed that:

- (a) Rule 24.2(a)(i) (*intentions with regard to the future business of the offeree company*) should be amended to include a requirement for an offeror to state its intentions for the offeree company's research and development functions;
- (b) Rule 24.2(a)(ii) (*intentions with regard to the continued employment of employees and management*) should be amended to include a requirement for an offeror to state its intentions with regard to any material change in the balance of the skills and functions of the offeree company's employees and management; and
- (c) Rule 24.2(a)(iii) (*strategic plans for the offeree company and their likely repercussions on employment and the locations of the offeree company's places of business*) should be amended to include a requirement for an offeror to state the likely repercussions of its strategic plans on the location of the offeree company's headquarters and headquarters functions.

2.2 In addition, a minor amendment to extend the scope of Rule 24.2(b) was proposed.

(b) *Respondents' comments*

2.3 Most respondents agreed that Rule 24.2(a) should be amended so as to require an offeror to make specific statements of intention with regard to the offeree company's research and development functions, the balance of the skills and

functions of the offeree company's employees and management, and the location of the offeree company's headquarters and headquarters functions.

- 2.4 One respondent, whilst supportive of the proposals, considered that there should be a framework for the vetting and blocking of takeovers which might have a detrimental effect on the UK's economy and supply chain, although the respondent acknowledged that this was beyond the Panel's remit.
- 2.5 The respondents who did not agree that Rule 24.2(a) should be amended as proposed considered that:
- (a) offeree company shareholders were unlikely to base their investment decisions on the proposed additional statements of intention, and that the amendments were therefore unwarranted;
 - (b) it was unlikely that the proposed new requirements would result in offerors making more specific statements of intention than at present; and
 - (c) the requirement for additional statements of intention, which might involve the disclosure of sensitive and strategic information, could be burdensome and, particularly if the offer were not to succeed, harmful to the offeror and its shareholders.
- 2.6 A number of respondents sought guidance as to:
- (a) how an offeror would be expected to comply with the requirement to state its intentions for the offeree company's research and development functions, and what disclosure would be required where the offeree company did not have such functions;
 - (b) how an offeror would be expected to comply with the requirement to state its intentions with regard to any material change in the balance of the skills and functions of the employees and management of the offeree company; and
 - (c) the application of Rule 24.2(a) in the context of, for example, a hostile offer or in circumstances in which the offeror had carried out only limited

due diligence, and the scope for an offeror to change its intentions during the course of an offer (particularly given that, if the changes proposed in section 2(c) of the PCP were adopted, offerors would in future be required to make statements of intention not only in offer documents but also in firm offer announcements).

(c) *The Code Committee's response*

(i) *The role of the Panel*

2.7 As the respondent who raised the issue acknowledged, it is not the purpose of the Panel to review whether a takeover would have a detrimental effect on matters such as the UK's economy and supply chain. Such matters are for consideration by Government and other bodies.

(ii) *Requirement to make additional statements of intention*

2.8 As mentioned in the PCP, the Code has for many years included requirements for an offeror to explain the long-term commercial justification for its offer and to state its intentions with regard to the future of the offeree company's business. Since 2006, the EU Takeovers Directive, as implemented by Chapter 1 of Part 28 of the Companies Act 2006, has mandated the inclusion of such requirements in the Code.

2.9 The disclosure by an offeror of the information which is required to be stated in the offer document under Rule 24.2(a) (and which will be required to be stated in the firm offer announcement under the new Rule 2.7(c)(iv)) allows shareholders in the offeree company to reach a properly informed decision as to the merits or demerits of an offer and to take that information into account when making their investment decisions. Such disclosures also:

- (a) assist the board of the offeree company in meeting the obligation in Rule 25.2(a) to give its opinion on the offer and on the offer's effects and repercussions; and
- (b) facilitate the giving of informed opinions by the offeree company's employee representatives and pension scheme trustees under Rule 25.9.

2.10 The Code Committee considers that the new requirements for an offeror to make statements of intention with regard to:

- (a) the offeree company's research and development functions;
- (b) the balance of the skills and functions of the offeree company's employees and management; and
- (c) the location of the offeree company's headquarters and headquarters functions

will further assist offeree company boards, employee representatives and pension scheme trustees in this regard.

2.11 The Code Committee recognises that there may be costs to an offeror in having to disclose its future intentions for the offeree company which it is proposing to acquire. However, the Code Committee considers that these costs are outweighed by the benefits for various other interested parties and that they are therefore proportionate.

(iii) Research and development functions

2.12 The Code Committee considers that many offeree companies are likely to have a research and development function of some sort and that an offeror will be capable of addressing its intentions for that function when stating its intentions with regard to the future business of the offeree company.

2.13 However, the Code Committee recognises that certain offeree companies may not have a research and development function and agrees that, where this is the case, it would be appropriate for the offeror to make a statement to this effect.

2.14 The Code Committee has therefore adopted the amendment to Rule 24.2(a)(i) (and paragraph (a)(i) of the new Note 1 on Rule 2.7) in the form proposed, subject to a minor amendment, as follows:

“(a) In the offer document, the offeror must explain the long-term commercial justification for the offer and must state:

(i) its intentions with regard to the future business of the offeree company, including, in particular, its intentions for the offeree company's any research and development functions of the offeree company".

(iv) Balance of the skills and functions of employees and management

2.15 The PCP proposed to amend Rule 24.2(a)(ii) so as to require an offeror to state its intentions with regard to:

"any material change ... in the balance of the skills and functions of the employees and management".

2.16 The Code Committee considers that, in addressing this requirement, an offeror would need to consider the consequences of its plans for the offeree company on the composition of the workforce. If, for example, the proportion of workers with certain technical skills or particular qualifications, or the proportion of employees or management allocated to production, research and development or other functions, would be likely to change following the offer, this would need to be stated.

(v) Application of Rule 24.2(a)

2.17 The Code Committee believes that an offeror will have a business rationale for seeking to acquire the offeree company and intentions as to what it will do (or not do) in the 12 months following completion of the acquisition. The Code Committee considers that any statement made by an offeror under Rule 24.2(a) (or the new Rule 2.7(c)(iv)) should be specific and bespoke, appropriately reflecting the offeror's unique business rationale and intentions.

2.18 The Code Committee recognises that there may be circumstances where an offeror's intentions for the offeree company change during an offer. For example, the intentions of a hostile offeror may change as a result of negotiations with the board of the offeree company or if the offeror obtains access to new due diligence information. Where an offeror's intentions change, the Code Committee considers that this would be likely to be a material change to the information previously disclosed and that the new intentions would be required to be announced promptly. In accordance with Rule 19.6(a), any post-offer intention statement by

a party to an offer must be an accurate statement of that party's intention at the time that it is made and made on reasonable grounds.

- 2.19 The Code Committee understands that, on occasion, an offeror may wish to state that it will undertake a review of the offeree company's business following completion of the offer. The Code Committee considers that a statement by an offeror that it intends to undertake such a review will not, of itself, satisfy the requirements of Rule 24.2 (or the new Rule 2.7(c)(iv)). The Code Committee considers that, in such circumstances, the offeror should disclose what the review is likely to cover and its expectations in relation to the review.
- 2.20 The Code Committee expects the Panel Executive (the "**Executive**") to continue to ensure that Rule 24.2 (and the new Rule 2.7(c)(iv)), Rule 25.2 and Rule 19.6 are complied with by offerors and the boards of offeree companies and expects parties to an offer to consult the Executive if they are in any doubt as to the application of those Rules.

(d) Code amendments

- 2.21 Save for the amendment to Rule 24.2(a)(i) set out in paragraph 2.14 above, the Code Committee has adopted the amendments to Rules 24.2(a) and 24.2(b) as proposed in section 2(b) of the PCP.

3. Timing requirements for offeror statements of intention

- Q3** Should Rule 2.7 be amended so as to bring forward to the firm offer announcement the requirement for an offeror to state its intentions with regard to the business, employees and pension scheme(s) of the offeree company and, where appropriate, the offeror?
- Q4** Do you have any comments on the proposed amendments to Rule 2.7 and Rule 25.9?

(a) *Summary of proposals*

- 3.1 Section 2(c) of the PCP proposed the amendment of Rule 2.7 so as to introduce a requirement for an offeror to state in its firm offer announcement its intentions with regard to the business, employees and pension schemes of the offeree company (and, where appropriate, the offeror), as currently required by Rule 24.2 in relation to an offer document. It was proposed that a general requirement to make such statements should be introduced as a new subparagraph (iv) of Rule 2.7(c) and that the detailed requirements for those statements (which would mirror those in Rule 24.2, as proposed to be amended) would be set out in a new Note 1 on Rule 2.7. It was proposed that the current Note 1 on Rule 2.7 should be deleted.
- 3.2 In addition, minor formatting amendments to Rule 25.9 and some minor consequential amendments to certain other provisions of the Code were proposed.

(b) *Respondents' comments*

- 3.3 Respondents generally agreed with the proposed amendment of Rule 2.7. One respondent considered that the current requirements of the Code were adequate and that the amendments were unnecessary.
- 3.4 Issues raised by respondents included the following:
- (a) whether there would be a requirement for an offeror to provide statements of intention with regard to the offeree company in an announcement made prior to a firm offer announcement under Rule 2.7;

- (b) whether an offeror which had been forced to announce a firm offer before all the offer details had been finalised might be expected to make less detailed statements of intention; and
- (c) when the offeree company board would be required to comment on statements of intention made by an offeror in its firm offer announcement.

3.5 None of the respondents made any comments on the textual amendments to Rules 2.7 and 25.9 other than those made in response to other questions.

(c) *The Code Committee's response*

(i) *Possible offer announcements*

3.6 The Code Committee confirms that, following the implementation of the amendments adopted in this Response Statement, there will continue to be no requirement for an offeror to include statements of intention in an announcement relating to a possible offer.

(ii) *"Forced" offerors*

3.7 The Code Committee does not agree with the premise that an offeror may be "forced" to announce a firm offer. Whilst a potential offeror may be subject to a so-called "put up or shut up" deadline under Rule 2.6(a), the Code Committee notes that Rule 2.7(a) provides that:

"An offeror should announce a firm intention to make an offer only after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement the offer."

3.8 An offeror should therefore have finalised the details of its offer, and be in a position to make appropriate statements of intention, prior to announcing a firm intention to make an offer.

(iii) *Views of the offeree company board*

3.9 As explained in paragraph 2.26 of the PCP, once Rule 2.7 has been amended so as to require an offeror to state its intentions with regard to the offeree company in

its firm offer announcement, an offeror will nevertheless continue to be required to include statements of intention in its offer document in accordance with Rule 24.2. The board of the offeree company will then be required to publish a circular within 14 days of the publication of the offer document, in accordance with Rule 25.1. Under Rule 25.2(a), that circular must set out:

- (a) the opinion of the board on the offer and its reasons for forming that opinion;
- (b) the board's views on the effects of implementation of the offer on all the company's interests, including, specifically, employment; and
- (c) the board's views on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the offeree company's places of business.

3.10 The Code Committee confirms that there is no requirement under the Code for the board of the offeree company to comment before this time on the statements of intention made by an offeror.

(d) Code amendments

3.11 Save for the amendment of paragraph (a)(i) of the new Note 1 on Rule 2.7 referred to in paragraph 2.14 above, the Code Committee has adopted the amendments to Rule 2.7 and Rule 25.9 as proposed in section 2(c) of the PCP.

3.12 The minor consequential amendments to certain other provisions of the Code set out in Appendix A of the PCP have also been adopted.

4. Offeror not to publish offer document for 14 days without offeree board consent

Q5 Should an offeror be obliged to seek the consent of the board of the offeree company in order to publish an offer document within the 14 days following its firm offer announcement?

Q6 Do you have any comments on the proposed amendments to Rule 24.1 and Rule 25.1?

(a) Summary of proposals

4.1 Section 2(d) of the PCP proposed the amendment of Rule 24.1(a) so as to provide that an offeror must not publish an offer document for 14 days from the announcement of its firm intention to make an offer without the consent of the board of the offeree company.

4.2 The Code Committee considered that, where a hostile offeror announces its firm intention to make an offer, the board of the offeree company should, if it so wishes, be allowed to have more time than the minimum of 14 days currently provided by Rule 25.1(a) in order to formulate the opinion, reasons and views that it is required to publish under Rule 25.2(a) or otherwise to prepare its initial arguments and “defence” against the offer. The ability to withhold its consent to the publication of the offer document would provide the board of the offeree company with the certainty that it could have at least 28 days from the date of the offeror’s firm offer announcement until it had to publish its initial circular (i.e. the 14 days during which the offer document could not be published under the amended Rule 24.1(a) and the 14 days stipulated in Rule 25.1(a)).

4.3 In addition, it was proposed that the current Rule 24.1(b) would be renumbered as Rule 24.1(c) and that minor drafting changes would be made to Rule 25.1.

(b) Respondents’ comments

4.4 The majority of respondents supported the proposed amendment of Rule 24.1(a) but a significant minority did not.

4.5 Comments made by respondents included the following:

- (a) some respondents considered that the proposed amendment was too favourable to offeree company boards. One respondent noted that, in accordance with Rule 31.9, the board of an offeree company could continue to announce material new information up to and including the 39th day following the publication of the offeror's initial offer document. Some respondents suggested alternative solutions for giving the board of an offeree company additional time to formulate the opinion, reasons and views that it is required to publish under Rule 25.2(a), for example, by extending the deadline for the publication of the offeree board circular under Rule 25.1(a);
- (b) one respondent considered that, if an offeree company board withheld its consent to the publication of the offer document, this would prolong the offeror's "siege" of the offeree company;
- (c) one respondent considered that the proposed amendments would reduce the offeror's ability to build a stake in the shares of the offeree company, given that any shares acquired prior to the offer document having been published would not count for "squeeze out" purposes;
- (d) one respondent queried whether the board of an offeree company could give its consent to the publication of the offer document without being in breach of Rule 21.2, which prohibits "offer-related arrangements" between the offeree company and an offeror; and
- (e) one respondent sought clarification as to the application of the amended Rule 24.1(a) to a competing offeror whose offer was not recommended by the board of the offeree company.

4.6 None of the respondents made any comments on the textual amendments to Rules 24.1 and 25.1 other than those made in response to other questions.

(c) *The Code Committee's response*

(i) *Alternative solutions*

4.7 The Code Committee continues to believe that an offeree company board should be provided with the ability to take more than the current minimum of 14 days in order to formulate its opinion on an offer, its views on the effects and repercussions of the offer and, in the case of a hostile offer, its initial arguments and “defence”. The Code Committee recognises that there are various means by which this might be achieved.

4.8 In proposing that the board of the offeree company must give its consent if an offeror wishes to publish an offer document with 14 days of the announcement of its firm intention to make an offer, the Code Committee has sought to strike an appropriate balance between the interests of the various interested parties, whilst maintaining the key elements of the well-tested timetable for offers which the Code provides. The Code Committee does not consider that the alternative solutions suggested by respondents are demonstrably better than the amendments which the Code Committee has proposed.

(ii) *Prolonged “siege”*

4.9 Whilst the proposed amendment to Rule 24.1(a) would mean that an offeree company board could ensure that there was a minimum of 28 days before it was required to publish its circular under Rule 25.1(a), the Code Committee does not accept that the amendment would necessarily result in a longer period of time for which the offeree company was “under siege”.

4.10 If the board of the offeree company does not wish the offer timetable to be prolonged, it can consent to the publication by the offeror of its offer document within 14 days of the firm offer announcement.

(iii) *Stakebuilding*

4.11 The Code Committee notes that an effect of the proposed amendment to Rule 24.1(a) may be that an offeror's ability to build a stake in the offeree company is, in practice, delayed.

4.12 The Code Committee does not consider this to be a disproportionate consequence for offerors.

(iv) *Offer-related arrangements*

4.13 Rule 21.2 provides that the offeree company may not enter into any offer-related arrangement with the offeror during an offer period or when an offer is reasonably in contemplation. The Code Committee therefore considers that a "bid conduct agreement", or any similar agreement entered into by an offeror and the offeree company, would not be permitted to include an agreement by the board of an offeree company that it will consent to the offeror publishing its offer document within 14 days of its firm offer announcement.

4.14 However, the Code Committee considers that it would be permissible for a firm offer announcement made jointly by an offeror and the board of the offeree company to include a statement that the board had provided its consent to the publication of the offer document and that the offeror would then be able rely on that statement for the purposes of the amended Rule 24.1(a).

(v) *Competitive situations*

4.15 The Code Committee considers that the amended Rule 24.1(a) would apply to a subsequent competing offeror in the same way as to the initial offeror. In each case, it will be for the board of the offeree company to decide whether or not it wishes to consent to the publication of the relevant offeror's offer document within 14 days of the announcement of that offeror's firm intention to make an offer.

(d) Code amendments

4.16 In the light of the above, the Code Committee has adopted the amendments to Rules 24.1 and 25.1 as proposed in section 2(d) of the PCP.

5. Reports on post-offer undertakings

Q7 Should an offeror or offeree company which has made a post-offer undertaking always be required to publish, in whole or in part, any report submitted to the Panel under Rule 19.5(h)?

Q8 Do you have any comments on the proposed amendments to Rule 19.5(h)?

(a) *Summary of proposals*

5.1 Section 2(e) of the PCP described the framework for the regulation of statements made by offerors and offeree companies which was introduced into the Code in January 2015, following the consultation on PCP 2014/2¹. In summary, that framework:

- (a) distinguishes between:
 - (i) “**post-offer undertakings**”, i.e. statements relating to any particular course of action that an offeror or offeree company commits to take, or not take, after the end of the offer period and with which it is required to comply for the period of time specified in the undertaking, unless a qualification or condition set out in the undertaking applies; and
 - (ii) “**post-offer intention statements**”, i.e. statements relating to any particular course of action that an offeror or offeree company intends to take, or not take, after the end of the offer period, which are required to be accurate statements of the party’s intentions at the time that they are made and based on reasonable grounds;
- (b) in view of the distinction between them, applies separate requirements to post-offer undertakings and post-offer intention statements;
- (c) provides the Panel with the ability to monitor compliance with and, therefore, enforce post-offer undertakings by:

¹ PCP 2014/2 (“Post-offer undertakings and intention statements”), 15 September 2014

- (i) enabling the Panel to require the appointment of an independent supervisor to monitor compliance with a post-offer undertaking (Rule 19.5(i)); and
 - (ii) requiring an offeror or offeree company which makes a post-offer undertaking to provide periodic written reports to the Panel, which reports the Panel may require to be published, in whole or in part (Rule 19.5(h)); and
- (d) requires that if, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in a post-offer intention statement, an offeror or offeree company decides either:
- (i) to take a course of action different from its stated intentions; or
 - (ii) not to take a course of action which it had stated it intended to take,

it must consult the Panel and, except with the consent of the Panel, if that course of action is then taken or not taken (as appropriate), it must promptly make an announcement describing the course of action it has taken, or not taken, and explain its reasons for taking, or not taking, that course of action (Rule 19.6(b)).

5.2 Section 2(e) of the PCP proposed amendments to Rule 19.5(h) such that:

- (a) the requirement for an offeror or offeree company to publish, in whole or in part, any report submitted to the Panel with regard to a post-offer undertaking should apply in all cases, and not only at the discretion of the Panel; and
- (b) where a post-offer undertaking has a duration of longer than a year, such reports should be published at least annually.

(b) *Respondents' comments*

5.3 Respondents generally agreed with the proposed amendment of Rule 19.5(h).

5.4 One respondent expressed reservations with regard to the existing reporting regime for post-offer undertakings under Rule 19.5(h) (and the proposed

confirmation regime for post-offer intention statements under the new Rule 19.6(c) – see section 6(b) below) and regarded the proposed amendments as unwarranted developments.

5.5 One respondent sought confirmation that, with the consent of the Panel, commercially sensitive text could be redacted from a report published in accordance with Rule 19.5(h)(iv).

5.6 None of the respondents made any comments on the textual amendments to Rule 19.5(h) other than those made in response to other questions.

(c) The Code Committee's response

5.7 The amended Rule 19.5(h)(iv) requires the report on a post-offer undertaking which is submitted to the Panel to be published “in whole or in part (as required by the Panel)”. The Code Committee considers that this provides scope for the Panel either to require only parts of the report to be published or to consent to the redaction of parts of the report prior to its publication.

(d) Code amendments

5.8 In the light of the above, the Code Committee has adopted the amendments to Rule 19.5(h) as proposed in section 2(e) of the PCP.

6. Confirmations of post-offer intention statements

Q9 Should an offeror or offeree company which has made a post-offer intention statement be required, at the end of the period of 12 months from the date on which the offer period ends, or such other period of time as was specified in the statement, to confirm in writing to the Panel whether it has taken, or not taken, the course of action described in the post-offer intention statement and publish that confirmation via a RIS?

Q10 Do you have any comments on the proposed new Rule 19.6(c)?

(a) *Summary of proposals*

6.1 Section 2(e) of the PCP proposed the introduction of a new Rule 19.6(c) to require a party to an offer which has made a post-offer intention statement, at the end of the period of 12 months from the date on which the offer period ends (or such other period of time as was specified in the statement), to:

- (a) confirm in writing to the Panel whether it has taken, or not taken, the course of action described in the post-offer intention statement; and
- (b) publish that confirmation via a Regulatory Information Service (a “**RIS**”).

(b) *Respondents’ comments*

6.2 Most respondents agreed with the proposed new Rule 19.6(c).

6.3 The respondent referred to in paragraph 5.4 above repeated its reservations with regard to reporting regimes in relation to post-offer undertakings and post-offer intention statements.

6.4 Comments made by respondents included the following:

- (a) two respondents considered that a requirement to publish the confirmation provided to the Panel was unnecessary, particularly given that there is an existing practice of private confirmations being given to the Executive and that Rule 19.6(b) requires that a party to an offer which decides to take a course of action different from its stated intentions must, except with the consent of the Panel, make an announcement in which it must describe the new course of action and explain its reasons;

- (b) two respondents sought guidance as to the content of a confirmation required under the new Rule 19.6(c);
- (c) two respondents sought clarification as to the role of the advisers to a party to an offer with regard to confirmations required under the new Rule 19.6(c); and
- (d) one respondent questioned the practicalities of a party which did not maintain an account with a RIS publishing a confirmation in accordance with the requirements of Rule 30.1.

(c) *The Code Committee's response*

(i) *Form of confirmation*

6.5 The Code Committee considers that a confirmation given to the Panel and then published in accordance with the new Rule 19.6(c) is likely to be relatively brief and that it should not contain any material new information. This is because Rule 19.6(b) provides as follows:

“(b) If a party to an offer has made a post-offer intention statement and, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement, that party decides either:

(i) to take a course of action different from its stated intentions; or

(ii) not to take a course of action which it had stated it intended to take,

it must consult the Panel. Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate), the party must promptly make an announcement describing the course of action it has taken, or not taken, and explaining its reasons for taking, or not taking, that course of action (as appropriate).”.

6.6 Accordingly, if a party to an offer has, contrary to its post-offer intention statement, not taken the intended course of action (or taken a different course of action), the Code Committee would expect the relevant details already to have been announced prior to the time of the confirmation required under the new Rule 19.6(c). As a result, the Code Committee considers that, in the normal course, a

confirmation given under the new Rule 19.6(c) would need to say little more than that the party to the offer had, as intended, taken (or, if appropriate, not taken) the courses of action which it stated in its post-offer intention statements that it intended to take (or, if appropriate, not to take).

6.7 As noted in paragraph 2.42 of the PCP, it has been the Executive's practice to seek private confirmations from offerors and offeree companies at the end of the period to which a post-offer intention statement relates. The Code Committee understands that the Executive will continue to require the parties to an offer to provide to it a schedule of the intention statements made during an offer as one of the supplementary forms submitted with the checklist for an offer document or offeree board circular². As regards the confirmation to be given to the Panel under the new Rule 19.6(c)(i) and published under the new Rule 19.6(c)(ii), the Executive should be consulted if a person or its advisers are in any doubt as to whether the form of a proposed confirmation is in accordance with the requirements of the Code.

6.8 Notwithstanding that it would expect a confirmation given in accordance with the new Rule 19.6(c) to be brief, the Code Committee continues to believe that it is appropriate and proportionate to require a party to an offer, at the end of the period to which a post-offer intention statement relates, to give a confirmation to the Panel as to the status of that statement and to publish the confirmation.

(ii) *Advisers' responsibilities*

6.9 The question of the role of an adviser after the end of an offer was also addressed by the Code Committee in RS 2014/2, as follows:

“2.6 With regard to advisers' responsibilities, the Code Committee believes that the Panel will expect an adviser to a party to an offer at the time that a post-offer undertaking or intention statement is made to provide competent advice to that party as to the requirements for, and consequences of, making the undertaking or statement. The Code Committee notes paragraph 3(f) of the Introduction to the Code makes clear that financial advisers have a responsibility to ensure, so far as they are reasonably able, that their client and its directors are aware of their responsibilities under

² See <http://www.thetakeoverpanel.org.uk/checklists>

the Code and will comply with them. In particular, Note 1 on Rule 19.1 explains that the Panel regards financial advisers as being responsible for guiding their clients with regard to any information published during the course of an offer.

- 2.7 However, the Code Committee recognises that an adviser's mandate is likely to come to an end once the offer has ended and would not, therefore, expect an adviser to be responsible for ensuring, for example, that its former client complies with the terms of a post-offer undertaking after that time.

...

- 2.9 In view of the above, the Code Committee envisages that an adviser's involvement in any subsequent investigation or action by the Panel would be limited to responding to questions in relation to the advice which it gave at the time that the post-offer undertaking or intention statement was made. For example, the Code Committee believes that, as part of any such investigation, the Panel would wish to establish whether any breach of the Code arose, in whole or in part, from an adviser's failure to ensure that its client was aware of its responsibilities under the Code at the time that the post-offer undertaking or intention statement was made."

- 6.10 This continues to represent the Code Committee's view on this issue.

(iii) *Publication via a RIS*

- 6.11 A confirmation required to be given to the Panel under the new Rule 19.6(c)(i) must, under the new Rule 19.6(c)(ii), be published "in accordance with the requirements of Rule 30.1". Rule 30.1(a) provides as follows:

"Any announcement required to be published under the Code must be published via a RIS."

- 6.12 As the Code Committee has previously noted, the publication of announcements via a RIS is the primary method by which regulatory information is communicated to market participants in the UK and the Code Committee considers that this is the most appropriate method for the publication of announcements required to be made under the Code. Any person may open an account with a RIS in order to make announcements to market participants. The Code Committee understands that the cost of doing so is relatively modest and considers that it is proportionate to require a party to an offer to incur this cost.

(d) Code amendments

6.13 In the light of the above, the Code Committee has adopted the amendments to Rule 19.6(b) as proposed in section 2(e) of the PCP.

APPENDIX A**Respondents to PCP 2017/2**

- 1.** Allianz Global Investors GmbH
- 2.** EEF
- 3.** European Investors' Association IVZW
- 4.** GC100 Group
- 5.** Grant Thornton UK LLP
- 6.** Institute of Chartered Accountants in England and Wales
- 7.** Institute of Chartered Secretaries and Administrators
- 8.** International Corporate Governance Network
- 9.** The Investment Association
- 10.** Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales
- 11.** KPMG LLP
- 12.** Quoted Companies Alliance
- 13.** Strand Hanson

APPENDIX B

Amendments to the Code

DEFINITIONS

Acting in concert

...

NOTES ON ACTING IN CONCERT

...

11. Indemnity and other dealing arrangements

...

(b) ...

Such dealing arrangements must be disclosed as required by Note 2 on Rule 2.4, Rule 2.7(c)(~~viii~~x), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.

(c) *Note 11(b) does not apply to irrevocable commitments or letters of intent, which are subject to Rule 2.7(c)(vii) and Rule 2.10.*

...

Dealings

...

NOTES ON DEALINGS

1. Indemnity and other dealing arrangements

Dealing arrangements of the kind referred to in Note 11 on the definition of acting in concert in relation to relevant securities which are entered into during the offer period by any offeror, the offeree company or a person acting in concert with any offeror or the offeree company must be disclosed as required by Rule 2.7(c)(~~viii~~x), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.

Rule 2.7

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

...

(c) When a firm intention to make an offer is announced, the announcement must include:

- (i) the terms of the offer;
- (ii) the identity of the offeror;
- (iii) all conditions or pre-conditions to which the offer or the making of an offer is subject;
- (iv) the intentions of the offeror with regard to the business, employees and pension scheme(s) of the offeree company (see Note 1);
- (iv) details of any agreements or arrangements to which the offeror is party which relate to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or a condition to its offer and the consequences of its doing so, including details of any break fees payable as a result;
- (v) details of any relevant securities of the offeree company in which the offeror or any person acting in concert with it has an interest or in respect of which it has a right to subscribe, in each case specifying the nature of the interests or rights concerned (see Note 5 on Rule 8). Similar details of any short positions (whether conditional or absolute and whether in the money or otherwise), including any short position under a derivative, any agreement to sell, any delivery obligation or right to require another person to purchase or take delivery, must also be stated;
- (vi) details of any irrevocable commitment or letter of intent procured by the offeror or any person acting in concert with it (see Note 3 on Rule 2.10);
- (vii) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent, save for any borrowed relevant securities which have been either on-lent or sold and details of any financial collateral arrangements which the offeror or any person acting in concert with it has entered into (see Note 4 on Rule 4.6);
- (viii) details of any dealing arrangement of the kind referred to in Note 11 on the definition of acting in concert to which the offeror or any person acting in concert with it is a party;
- (ix) a summary of the provisions of Rule 8 (see the Panel's website at www.thetakeoverpanel.org.uk);
- (x) a summary of any offer-related arrangement or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2;

(xii) a list of the documents published on a website in accordance with Rule 26.2 and the address of the website on which the documents are published; and

(xiii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to offeree company shareholders, unless, and to the extent that, the announcement provides that offeree company shareholders will be entitled to receive and retain all or part of a specified dividend (or other distribution) in addition to the offer consideration.

...

NOTES ON RULE 2.7

1. ~~Unambiguous language~~

~~The language used in announcements should clearly and concisely reflect the position being described. In particular, the word "agreement" should be used with the greatest care. Statements should be avoided which may give the impression that persons have committed themselves to certain courses of action (eg accepting in respect of their own shares) when they have not in fact done so.~~

1. Intentions of the offeror with regard to the business, employees and pension scheme(s)

(a) For the purpose of Rule 2.7(c)(iv), the offeror must explain the long-term commercial justification for the offer and must state:

(i) its intentions with regard to the future business of the offeree company, including its intentions for any research and development functions of the offeree company;

(ii) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment or in the balance of the skills and functions of the employees and management;

(iii) its strategic plans for the offeree company, and their likely repercussions on employment and on the locations of the offeree company's places of business, including on the location of the offeree company's headquarters and headquarters functions;

(iv) its intentions with regard to employer contributions into the offeree company's pension scheme(s) (including with regard to current arrangements for the funding of any scheme deficit), the accrual of benefits for existing members, and the admission of new members;

(v) its intentions with regard to any redeployment of the fixed assets of the offeree company; and

(vi) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.

(b) If the offeror has no intention to make any changes in relation to the matters described under (a) above, or if it considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business, it must make a statement to that effect.

(c) Where the offeror is a company, and insofar as it is affected by the offer, the offeror must also state its intentions with regard to its future business and comply with (a)(ii) and (iii) with regard to itself.

Rule 2.10

2.10 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

...

NOTES ON RULE 2.10

1. Disclosure in firm offer announcement

Where the details required to be announced under Note 3 on Rule 2.10 are, pursuant to Rule 2.7(c)(vii), included in an announcement of a firm intention to make an offer which is published no later than 12 noon on the business day following the date on which the irrevocable commitment or letter of intent is procured, no separate announcement is required under Rule 2.10(a) or (b).

Rule 8

RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

...

NOTES ON RULE 8

...

14. Irrevocable commitments and letters of intent

See Rule 2.7(c)(vii) and Rule 2.10.

Rule 19.5

19.5 POST-OFFER UNDERTAKINGS

...

(h) A party to an offer which has made a post-offer undertaking must submit written reports to the Panel after the end of the offer period at such intervals (of not more than 12 months) and in such form as the Panel may require. Such reports must, as appropriate:

- (i) indicate whether any course of action that the party has committed to take has been implemented or completed within the specified period of time and, if not, the progress made to date and the steps being taken to implement or complete the course of action and the expected timetable for completion;**
- (ii) confirm that any course of action that the party has committed not to take has not been taken;**
- (iii) include such other documents or information as the Panel may require; and**
- (iv) ~~if so required by the Panel,~~ be published, in whole or in part (as required by the Panel), in accordance with the requirements of Rule 30.1.**

Rule 19.6

19.6 POST-OFFER INTENTION STATEMENTS

(a) Any post-offer intention statement made by a party to an offer must be:

- (i) an accurate statement of that party's intention at the time that it is made; and**
- (ii) made on reasonable grounds.**

(b) If a party to an offer has made a post-offer intention statement and, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement, that party decides either:

- (i) to take a course of action different from its stated intentions; or**
- (ii) not to take a course of action which it had stated it intended to take,**

it must consult the Panel. Except with the consent of the Panel, if such a course of action is then taken or not taken (as appropriate), the party must promptly make an announcement describing the course of action it has taken, or not taken, and explaining its reasons for taking, or not taking, that course of action (as appropriate).

(c) A party to an offer which has made a post-offer intention statement must, at the end of the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement:

(i) confirm in writing to the Panel whether it has taken, or not taken, the course of action it stated in the post-offer intention statement that it intended to take, or not to take; and

(ii) publish that confirmation in accordance with the requirements of Rule 30.1.

Rule 24.1

24.1 THE OFFER DOCUMENT

(a) Except with the consent of the Panel, tThe offeror must, normally within 28 days of the announcement of a firm intention to make an offer, send an offer document to shareholders in the offeree company and persons with information rights, in accordance with Rule 30.2—and must make the document readily available to the trustees of the offeree company’s pension scheme(s). However, the offeror may only publish an offer document within the 14 days following the announcement of its firm intention to make an offer with the consent of the board of the offeree company.

(b) At the same time as the offer document is published,;

(i) both the offeror and the offeree company must make the offer document readily available to their employee representatives (or, where there are no employee representatives, to the employees themselves); and, The Panel must be consulted if the offer document is not to be published within this period.

(ii) the offeror must make the offer document readily available to the trustees of the offeree company’s pension scheme(s).

(bc) Promptly following its publication, the offeror must:

(i) publish the offer document on a website; and

(ii) announce that the offer document has been so published.

Rule 24.2

24.2 INTENTIONS OF THE OFFEROR WITH REGARD TO THE BUSINESS, EMPLOYEES AND PENSION SCHEME(S)

(a) In the offer document, the offeror must explain the long-term commercial justification for the offer and must state:

- (i) its intentions with regard to the future business of the offeree company, including its intentions for any research and development functions of the offeree company;
 - (ii) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment or in the balance of the skills and functions of the employees and management;
 - (iii) its strategic plans for the offeree company, and their likely repercussions on employment and on the locations of the offeree company's places of business, including on the location of the offeree company's headquarters and headquarters functions;
 - (iv) its intentions with regard to employer contributions into the offeree company's pension scheme(s) (including with regard to current arrangements for the funding of any scheme deficit), the accrual of benefits for existing members, and the admission of new members;
 - (v) its intentions with regard to any redeployment of the fixed assets of the offeree company; and
 - (vi) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.
- (b) If the offeror has no intention to make any changes in relation to the matters described under (a)(ii) to (v) above, or if it considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business, it must make a statement to that effect.

Rule 25.1

25.1 THE OFFEREE BOARD CIRCULAR

- (a) Except with the consent of the Panel, the board of the offeree company must, normally within 14 days of the publication of the offer document, send a circular to shareholders in the offeree company and persons with information rights, in accordance with Rule 30.2 and must make the document readily available to the trustees of its pension scheme(s).
- (b) At the same time as the offeree board circular is published, the offeree company must make the circular readily available to its employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its pension scheme(s).
- (b) Promptly following its publication, the offeree company must:
 - (i) publish the offeree board circular on a website; and

- (ii) announce that the offeree board circular has been so published.

Rule 25.9

25.9 ~~THE EMPLOYEE REPRESENTATIVES' OPINION AND THE~~ PENSION SCHEME TRUSTEES' OPINION

(a) Where the board of the offeree company receives in good time before publication of its circular on the offer:

(ai) an opinion from employee representatives on the effects of the offer on employment; or

(bii) an opinion from the trustees of any of its pension scheme(s) on the effects of the offer on the pension scheme(s),

any such opinion must be appended to the circular.

(b) Where any such opinion is received but not in good time before publication of the offeree board circular, the offeree company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional.

Rule 26.2

26.2 DOCUMENTS TO BE PUBLISHED ON A WEBSITE FOLLOWING THE ANNOUNCEMENT OF A FIRM OFFER

The following documents must be published on a website promptly following the publication of the announcement of a firm intention to make an offer (or, if later, the date of the relevant document) and in any event by no later than 12 noon on the following business day:

...

(e) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer (Rule 2.7(c)(iv)).