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Finance for Europe

Consultation response

The Takeover Panel Consultation Paper 2017/1 – Asset Sales in Competition with an Offer and other Matters

September 2017

Response of the AFME Corporate Finance Committee

The Corporate Finance Committee (the "Committee") of the Association of Financial Markets in Europe ("AFME") has considered the questions raised in PCP 2017/1 and our views are set out below.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. It advocates stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

While our answer to question 1 below is "Yes", the Committee notes that the Panel has never before sought to regulate the sale of assets by a company and so this is taking the Code into new territory. We are keen to ensure that such changes to the Code as are deemed necessary to impose the restriction described in question 1 are not excessive in extending the Panel's jurisdiction, given that they seek to address quite unusual circumstances which are not expected to arise often. We believe that the changes to the Code should be with the objective of preventing offerors or potential offerors from circumventing the existing Code rather than extending considerably the Code's reach.

We also note that the PCP does not seek to address other areas of difference between an offer and a competing asset sale proposal, such as conditionality of the transaction, the "put up or shut up" regime, or certainty of funding. We feel that these are issues that the Code Committee should consider further and we are concerned that without further consideration to and clarity on these points there is a risk that the buyer in a competing asset sale is placed at a considerable advantage to a Code offeror which we do not believe is the objective of these changes.

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?

A1 Yes, but please see introductory comments.

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)?

A2 We believe a more appropriate test would be "all or substantially all" of the assets of the target company, as this would be likely to have the same or similar economic outcome for target shareholders as an offer. If this test is adopted, we would welcome published guidance from the Panel on its interpretation of "all or substantially all" in this context, and favour the Panel retaining flexibility in its interpretation in addition to any stated numerical threshold.

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

A3 No.

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?**

A4 Yes to both questions.

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?**

A5 In circumstances where a shareholder vote is not required, we would suggest that companies be permitted to publish the information via a RIS rather than be required to publish a circular.

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

A6 No.

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?**

A7 Yes. We would suggest that the limit should be 1% of the highest value among the offers then announced, at the time of the Rule 2.7 announcement. We would also suggest that this might also be amended in Note 1(a) to Rule 21.2, although we recognise that is out of the scope of this consultation.

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

A8 Only that in the text of the proposed new Note 8 on Rule 21.1 the word "more" has been omitted from the phrase "two or more competing offerors".

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?**

A9 Yes.

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

A10 We suggest that any such statement should be required to include the amount per share expected to be paid to shareholders, in order to make it comparable with a competing offer.

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?

A11 Yes. We note that the consideration for an asset sale may be non-cash. In such circumstances it may be difficult for the target board to make a statement quantifying the amount per share that is expected to be paid to shareholders, but it may be possible (for example if arrangements have been made to sell or to hedge the non-cash consideration). Would share purchases be allowed in such circumstances? We note the parallel with Rule 11.1(b) in this context.

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

A12 No.

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

A13 No.

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?

A14 No. We agree this should make R2.8 announcements clearer.

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

A15 No.

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

A16 No.

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

A17 No.

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