PCP 2017/1 - ASSET SALES IN COMPETITION WITH AN OFFER AND OTHER MATTERS

Responses of CMS Cameron McKenna Nabarro Olswang LLP

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of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?

We are not wholly persuaded that the changes to Rule 2.8 are necessary or appropriate. As a practical point, it seems to us likely that if the Rule is amended as proposed most parties that make a "no intention to bid" statement will, out of caution, simply include in it a reservation to the effect that they may acquire assets from the target if the target's board so agrees. And as a philosophical point, we are not convinced that the "siege principle" which we believe underlies this Rule is as relevant to an asset purchase, which of course cannot proceed without the board of the target agreeing to it. If a party that has made a no intention to bid statement were, during the next three months, to approach the target board with an offer to purchase some or all of the target's assets, the board could of course reject such proposal and, unlike a would-be offeror for the target's shares, the would-be assets purchaser would not of course be able to make an offer directly to target shareholders to purchase the target's assets. Although the would-be assets purchaser could of course seek to pressurise the target board into considering its proposal using the types of methods that are typically employed by activist shareholders, in such circumstances we do not think that most target companies would feel nearly as "under siege" as when a possible takeover offer is announced.

In summary, although we do not strongly object to the proposed Rule change, we are not convinced that it is necessary and if, as we suspect, most parties will include in their no intention to bid statement a reservation to the effect that they may acquire assets from the target if the target's board so agrees, we do not think that the change will make much difference in practice.

However, we are more inclined to agree with the proposed changes to Rules 12.2 and 35.1.

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)?

Yes. However, we would make the following points:

- The proposed threshold of over 50% is different to the 30% that is used in Rules 35.1 and 2.8. Is a different threshold definitely appropriate?
- Where a proposed asset purchase is announced during an offer period, should the determining market value of the target not be determined both by reference to the share price immediately prior to the announcement of the asset purchase and also the share price immediately prior to the commencement of the offer period? This would ensure consistency with Note 2 on Rule 21.1.

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

As currently drafted, new paragraphs (f)/(F) to each of Rules 2.8, 12.2(b)(i) and 35.1 could be circumvented by a bidder agreeing to purchase assets through a series of transactions none of which individually meet the threshold of "significant". To avoid this, new paragraphs (f)/(F) could be amended by inserting "whether in a single transaction or a series of transactions" after "purchasing assets". Similar changes could be made to new Note 5 on Rule 2.8 so that transactions are aggregated when assessing whether assets are significant.

The period over which a series of transactions is taken into account could perhaps be linked to the period in the relevant rule. For example, for Rule 2.8, transactions could be aggregated over the six month period from the date of the Rule 2.8 statement.

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

We agree in principle with this proposal, but we question whether it is necessary and proportionate to require a target board to obtain such advice in relation to *all* the types of action that are listed in the Rule.

We agree that it would be helpful for target shareholders to have such an opinion where the target proposes to sell or purchase assets of a material amount. But we are not convinced that it would be especially helpful or necessary where the target proposes to issue shares or warrants, particularly because where the target's shares are quoted on a market (which will usually be the case) shareholders will be able to compare the proposed issue or exercise price to the prevailing and historic market price of the target's shares. And where the target proposes to enter into a non-ordinary course contract, as a practical matter an independent adviser (most likely a financial adviser or firm of accountants) may find it difficult to give an opinion as to whether the financial terms of the proposed contract are fair and reasonable.

Target shareholders are of course already protected against non-arm's length deals to some extent by existing rules in the general law and the Listing Rules / AIM Rules, and they will be afforded further protection by the new requirement in Rule 21.1(f) for the target to send a circular setting out full details of the proposed course of action. We therefore suggest that the Panel considers carefully whether it is appropriate to require an opinion in respect of all the types of action listed in Rule 21.1.

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

Yes, we agree.

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?

Generally we agree with this proposal. However, where shareholder approval is not required – because the proposed transaction is conditional on the offer lapsing or being withdrawn – we think it would be odd and unusual for the target to have to send an "information only" circular to its shareholders. Instead, we suggest that the target should be required to make a RIS announcement containing the necessary information (similar to an announcement about a Class 2 transaction under the Listing Rules).

With regard to the information to be contained in the circular, we wonder whether, for consistency with the requirements for an offer, the circular should include information relating to the acquiror's intentions with regard to the assets/business, employees and pension schemes of the target, and any opinions from the employees and pension scheme trustees. It would seem inconsistent to require such information and any such opinions for a takeover offer but not for an asset disposal that may achieve substantially the same result.

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

See above.

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?

Yes, we agree.

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

No.

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?

Yes, we agree with this proposal. We would note, however, that the cost and effort involved in obtaining the necessary reports for the QFBS may lead some companies to try to avoid the requirements. For example, a target might say that it is unable presently to give a figure or range of figures for the amount that shareholders can expect to receive (or the likely timing), but that the board is confident that the amount will be "substantially higher than the offer price".

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

We suggest that "quantifying the cash sum" could be clarified. In particular, we assume it is intended to apply where the target indicates that the amount shareholders can expect to receive will be within a *range*, and that in such circumstances the reports on the QFBS should be prepared on that basis. See also our response to the previous question: should the QFBS requirements apply in such circumstances?

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?

Although we are not convinced that acquisitions of shares by a potential asset purchaser are really comparable to acquisitions by a potential share purchaser, we do not have any strong objection to this proposed change.

However, we would make one point. Usually a target will agree to sell all or substantially all of its assets and return the proceeds, and other cash amounts, to its shareholders only if it is confident that the amount that will ultimately be received by its shareholders will be higher than the offer price. If this is the case, and the target states the amount or range of amounts that shareholders can expect to receive, under the proposed new Rule 4.7 the would-be asset purchaser and its concert parties will be able to buy target shares at above the offer price. Conversely, if the target does *not* state the amount, or range of amounts, that are expected to be returned to shareholders – perhaps because as suggested above the target wants to avoid the QFBS requirements - the would-be asset purchaser will be prohibited from buying target shares at any price. To avoid confusion in the market, in either circumstance should the target and/or the would-be asset purchaser be required to publish a statement clarifying what the would-be asset purchaser is, or is not, permitted to do in relation to market purchases?

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

See above.

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

We note that under the proposed new Note 6, Rule 21.3 will apply to information given by the target to the potential asset purchaser(s), but not vice versa. While we do not disagree with this approach, we think it would be helpful if the Panel could explain its thinking on this point in its Response Statement.

We also question whether requiring the bidder to have been "informed authoritatively" will prove workable. Discussions between the target and would-be asset purchaser are likely to be conducted under conditions of strictest secrecy. Absent an obligation to announce or disclose the fact of the discussions, it is unlikely that an offeror or potential offeror will learn "authoritatively" about the proposed asset sale until it is publicly announced. Perhaps the Panel could consider including an obligation on the target to respond honestly to any questions from an offeror or potential offeror regarding discussions it is having about a proposed disposal of assets, provided that the offeror or potential offeror agrees to keep confidential any information that the target provides in response (subject to any requirement for the offeror to disclose details in any document relating to its offer).

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?

See questions 1 to 3 above.

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

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?

No.

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

No.