RS 2017/1 11 December 2017

THE TAKEOVER PANEL

ASSET SALES AND OTHER MATTERS

RESPONSE STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE CONSULTATION ON PCP 2017/1

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1. Introduction and summary

(a) Background

1.1 On 12 July 2017, the Code Committee of the Takeover Panel (the "**Code Committee**") published a public consultation paper ("**PCP 2017/1**" or the "**PCP**") in which it proposed a number of amendments to the Takeover Code (the "**Code**"), as summarised below.

(b) Summary of proposals

(i) Preventing an offeror from circumventing the Code by purchasing assets which are significant in relation to the offeree company

1.2 Section 2 of the PCP proposed amendments 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 a person subject to the restrictions in any of those Rules, or to the restrictions in any of Rules 2.5(a) (Terms and pre-conditions in possible offer announcements), 31.5 (No extension statements) and 32.2 (No increase statements), from avoiding their application by purchasing assets which are "significant" in relation to the offeree company.

1.3 It was proposed that, in assessing whether assets are significant, the Panel should have regard to consideration, assets and profits tests similar to those currently set out in Note 2 on Rule 21.1 (Restrictions on frustrating action). It was proposed that, under the proposed new Note 5 on Rule 2.8, relative values of more than 50% should normally be regarded as significant for these purposes.

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

1.4 Section 3 of the PCP proposed various amendments to Rule 21.1, including the introduction of requirements that:

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

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21.1, or would be so sought but for the fact that the taking of the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must send a circular to shareholders containing prescribed information.

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

1.5 Section 4 of the PCP proposed amendments with regard to circumstances where, in competition with an existing offer or possible offer, the board of an offeree company states that it proposes 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. This would include the introduction of requirements 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 or possible offer is withdrawn or lapses should be treated as a "quantified financial benefits statement"; and

(b) a purchaser of some or all of the offeree 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.

(iv) Setting aside a Rule 2.8 statement

1.6 Section 5 of the PCP proposed the introduction of a new Note 2 on Rule 2.8 to require a person making a "no intention to bid" statement to specify in the statement any circumstances in which it reserves the right to set the statement aside (as opposed to the restrictions in Rule 2.8 automatically ceasing to apply in certain circumstances, as specified in the current Note 2 on Rule 2.8).

(v) Social media

1.7 Section 6 of the PCP proposed minor amendments to Rule 20.4 (Social media) and Note 1 on Rule 19.1 (Financial advisers' responsibility for publication of information).

(vi) Dispensation from the mandatory offer requirement

1.8 Section 7 of the PCP proposed amendments to the Notes on Dispensations from Rule 9 to reflect the fact that the Panel will 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.

(c) Responses to the consultation

1.9 The consultation period in relation to PCP 2017/1 ended on 22 September 2017. The Code Committee received comments on the consultation questions from the eight 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.

1.10 Respondents broadly supported the aim of preventing an offeror or potential offeror from circumventing provisions of the Code by purchasing an offeree company's assets. A significant number of respondents considered that the Panel should regulate asset transactions only to the extent this was necessary. Some respondents considered that the restrictions on asset purchases proposed in Section 2 of the PCP should apply only in relation to the purchase of "all or substantially all" of the offeree company's assets.

1.11 Respondents broadly supported the other proposals in the PCP, although some respondents expressed reservations in relation to the proposal that, where shareholder approval is to be sought for a proposed action under Rule 21.1, the board of the offeree company should be required to obtain competent independent

advice as to whether the financial terms of the proposed action are fair and reasonable.

(d) The Code Committee's conclusions

1.12 The Code Committee emphasises that, in putting forward the proposals in the PCP, it was not seeking to extend the application of the Code to asset transactions generally. In making proposals in relation to certain asset transactions, the Code Committee had two principal aims, as follows:

(a) the aim of the amendments proposed in Section 2 of the PCP was to ensure that a person subject to the restrictions in any of Rules 2.8, 12.2(b)(i) and 35.1, or to the restrictions in any of Rules 2.5(a), 31.5 and 32.2, could not avoid the application of those rules by purchasing assets which are significant in relation to the offeree company. Shareholders in the offeree company and other market participants are likely to make investment decisions in reliance on statements to which those rules apply and the Code Committee considers that those rules should not be capable of being circumvented by means of the offeror or potential offeror purchasing significant offeree company assets instead of acquiring the company itself; and

(b) the aim of the amendments proposed in Section 4 of the PCP was to provide full information and other specific protections for shareholders in an offeree company where the board of the offeree company states that it is proposing to sell all or substantially all of the company's assets and return to shareholders all or substantially all of the company's cash balances as an alternative to an offer or possible offer.

1.13 Having considered the responses to the consultation, the Code Committee has adopted the amendments to the Code which were proposed in PCP 2017/1, subject to certain modifications. These modifications include amending the proposed new Note 5 on Rule 2.8 so that, in assessing whether assets are significant in relation to the offeree company for the purposes of that Note, relative values of 75% (rather than 50% as proposed in the PCP) will normally be regarded as significant. The

modifications to the proposals in the PCP are explained in more detail in the relevant sections of this Response Statement.

(e) Code amendments

1.14 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.

1.15 A summary of how the restrictions in the new paragraphs (f)/(F) of Rules 2.8, 12.2(b)(i) and 35.1 will operate is set out in Appendix C. Examples of "no intention to bid" statements which might be made under the amended Rule 2.8 are set out in Appendix D.

(f) Implementation

1.16 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 amended Code will take effect from that date, including in respect of announcements or statements made on or after that date in relation to ongoing offers.

A: ASSET SALES

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

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?**

(a) Introduction

2.1 Section 2 of the PCP proposed, among other matters, the introduction of an additional restriction into each of Rules 2.8 (Statements of intention not to make an offer), 12.2(b)(i) (Competition reference periods) and 35.1 (Delay of 12 months). In each case, the proposed new paragraph (f)(F) would provide that a person subject to any of those rules (including a former offeror or former potential offeror) would 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**".

2.2 In order to ensure that these anti-avoidance measures would be effective, the Code Committee proposed that the restriction in the new paragraph (f)(F) of each of Rules 2.8, 12.2(b)(i) and 35.1 should apply in relation to the purchase of assets which are "significant" in relation to the offeree company. The proposed new Note 5 on Rule 2.8 provided that, in assessing whether assets are significant for these purposes, the Panel should have regard to consideration, assets and profits tests similar to those set out in Note 2 on Rule 21.1 (When shareholders' consent is required). The Code Committee proposed that relative values of more than 50% should normally be regarded as "significant" for these purposes.

(b) General comments from respondents and the Code Committee's response

2.3 The aim of the amendments proposed in Section 2 of the PCP was to ensure that a person subject to the restrictions in any of:

(a) Rules 2.8, 12.2(b)(i) and 35.1; or

(b) Rules 2.5(a) (Terms in possible offer announcements), 31.5 (No extension statements) and 32.2 (No increase statements),

could not avoid the application of those rules by purchasing assets which are significant in relation to the offeree company.

2.4 Although this was the aim of the proposed amendments, six respondents were concerned that the proposals sought to regulate asset transactions more generally. Those respondents expressed concerns that:

(a) the Code has not historically sought to regulate asset transactions and that it would be undesirable for the Code to do so unless this was necessary and within the objectives of the Code, i.e. where the board of the offeree company decides to sell the company's assets to a former offeror or former potential offeror in competition with a transaction to which the Code applies; and

(b) where the offeree company's shares are publicly traded, any significant asset sale will typically be subject to regulation under applicable listing rules and there was no need for the Code to impose additional requirements.

2.5 The Code Committee confirms that it is not seeking to regulate generally sales of assets by a company to which the Code applies to a former offeror or former potential offeror. The aim of the proposals in Section 2 of the PCP was to ensure that an offeror or potential offeror should not be able to avoid the restrictions which apply under the rules referred to in paragraph 2.3 above by purchasing or agreeing to purchase assets which are significant in relation to the offeree company as an alternative to acquiring the offeree company by means of an offer subject to the Code. Shareholders in the offeree company and other market

participants are likely to make investment decisions in reliance on statements to which those rules apply and the Code Committee considers that those rules should not be capable of being circumvented by means of the offeror or potential offeror purchasing significant offeree company assets instead of acquiring the company itself.

2.6 Furthermore, in view of the anti-avoidance nature of the proposed amendments, the Code Committee does not consider that the fact that a sale of assets by the offeree company may, in addition, be subject to the requirements of applicable listing rules obviates the need for the introduction of the proposed amendments.

2.7 In view of the fact that a significant number of respondents appeared to understand that the proposed amendments to the Code would have a wider effect than is in fact the case, the Code Committee has set out in Appendix C a summary of how the restrictions in the new paragraphs (f)/(F) of Rules 2.8, 12.2(b)(i) and 35.1 will operate. The Code Committee notes that, as explained in Appendix C, in practice:

(a) the restrictions in the new paragraph (f) of Rule 35.1 will apply only where an offeror has made a "no increase statement" or "no extension statement" and has not reserved the right to set that statement aside with the agreement of the board of the offeree company; and

(b) the restrictions in the new paragraph (f) of Rule 2.8 and the new Note 2(d) on Rule 2.8 will apply only where a potential offeror has made a statement to which Rule 2.5(a) applies (a "**Rule 2.5(a) statement**") and has not reserved the right to set that statement aside with the agreement of the board of the offeree company.

(c) Restriction on asset sales following a Rule 2.8 statement

2.8 One respondent noted that the proposed restriction on asset purchases under the new Rule 2.8(f) could result in an asset purchase being restricted where, in equivalent circumstances, an offer would be permitted. This was on the basis that, in view of the operation of Rule 2.5(a) and the proposed new Note 2(d) on Rule 2.8 (see paragraphs 8 to 11 of Appendix C), if a potential offeror:

(a) made a statement to which Rule 2.5(a) applies (for example, a statement that it would not increase its indicative offer of 100 pence per share) and did not include a reservation that it could set that Rule 2.5(a) statement aside with the agreement of the board of the offeree company; and

(b) subsequently made a statement to which Rule 2.8 applies (a "**Rule 2.8 statement**") which included a reservation that the Rule 2.8 statement could be set aside with the agreement of the board of the offeree company,

the potential offeror could still, with the agreement of the board of the offeree company, make an offer within three months of the date of the Rule 2.8 statement, provided that the terms of that offer were consistent with the previous Rule 2.5(a) statement (i.e. at a price equal to or below 100 pence per share). By contrast, on the face of the new Note 2(d) on Rule 2.8, as proposed in the PCP, the same potential offeror would not be able to purchase assets which are significant in relation to the offeree company during this period, even if it could be established that the terms of the purchase would be on terms that were consistent with the previous Rule 2.5(a) statement.

2.9 The Code Committee acknowledges the respondent's concern and considers that the Panel should have the flexibility to permit a purchase of assets in the circumstances described in paragraph 2.8 if it can be established that the purchase terms are consistent with the previous Rule 2.5(a) statement. Accordingly, the Code Committee has added the words "except with the consent of the Panel" into Note 2(d) on Rule 2.8 as set out in paragraph 5.14(b) below. A similar issue could arise under Rule 35.1 in the three month period following the end of the offer period in relation to a purchase of assets by a lapsed offeror which had previously made an unqualified "no increase statement". However, the Code Committee considers that the inclusion of the word "normally" in the current Note (a)(i) on Rules 35.1 and 35.2 already provides the Panel with appropriate flexibility to address the issue.

(d) Assets which are significant in relation to the offeree company

2.10 Two respondents agreed that the proposed new restriction in each of Rules 2.8, 12.2(b)(i) and 35.1 should apply in relation to the purchase of assets which are

significant in relation to the offeree company by reference to a 50% threshold. Four respondents considered that a 50% threshold was too low and that any restriction on asset purchases should only apply where a proposed asset purchase would have the same or a similar economic outcome for offeree company shareholders as an offer, i.e. in relation to a sale of "all or substantially all" of the assets of the offeree company. Two of those respondents also considered that any restriction should apply only when the board of the offeree company intended to return the offeree company's cash balances to its shareholders.

2.11 As noted above, the aim of the proposed amendments was to prevent an offeror or potential offeror from avoiding the application of the Code by purchasing assets of an offeree company. The Code Committee has taken into account the views of those respondents who considered that the proposed 50% threshold was too low and has amended the new Note 5 on Rule 2.8 so that, in assessing whether assets are significant in relation to the offeree company, relative values of 75% will normally be regarded as significant. The Code Committee believes that this is an appropriate level in order to ensure that an offeror or potential offeror to which the new restrictions in Rules 2.8, 12.2(b)(i) or 35.1 apply is not able to avoid the application of the Code by purchasing assets of an offeree company.

2.12 Paragraph (ii) of the proposed new Note 5(a) on Rule 2.8 provided that one of the tests for whether assets are significant in relation to the offeree company would be the value of the assets purchased compared with the total assets of the offeree company, excluding cash and cash equivalents. One respondent asked whether "cash and cash equivalents" would be required to be excluded in relation to both the value of the assets to be purchased and the value of the total assets of the offeree company. The Code Committee confirms that cash and cash equivalents should be excluded from both values (to the extent applicable) and has made a drafting change to the new Note 5(a)(ii) on Rule 2.8 to clarify this point.

(e) Code amendments

2.13 In the light of the above, and having taken into account certain drafting suggestions made by respondents, the Code Committee has:

(a) adopted the new Rule 2.8(f) as proposed in Section 2 of the PCP and adopted the other amendments to Rule 2.8 proposed in Section 5 of the PCP, as referred to in paragraph 5.14(a) below;

(b) adopted the amendments to Rules 12.2(b)(i) and 35.1 as proposed;

(c) adopted the new Note 2(d) on Rule 2.8, amended as referred to in paragraph 2.9 above (as set out in paragraph 5.14(b) below);

(d) adopted the new Note 5 on Rule 2.8 with certain amendments, 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 in each case cash and cash equivalents); and

(iii) the operating profit (i.e. 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 proposed 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.

(c) Relative values of more than ~~50~~75% will normally be regarded as being significant.";

(e) adopted the new Note 5 on Rule 12.2 and the new Note 2 on Rule 35.1 as proposed; and

(f) adopted the amendments to Note (a) on Rules 35.1 and 35.2 (which has been renumbered as Note 1 on Rules 35.1 and 35.2) as proposed.

2.14 In addition:

(a) as the new Rule 2.8(f) and the new Note 2(d) on Rule 2.8 have implications in respect of a Rule 2.5(a) statement, the Code Committee has amended Note 2 on Rule 2.5 so as to include a cross-reference to Rule 2.8(f), as set out in Appendix B; and

(b) as the new Rule 35.1(f) has implications in respect of a "no extension statement" or a "no increase statement" to which Rule 31.5 and/or Rule 32.2 respectively applies, the Code Committee has amended Rule 31.5 and Rule 32.2, in each case so as to include a cross-reference to the new Rule 35.1(f) and to Note 1(a)(i) on Rules 35.1 and 35.2, as set out in Appendix B.

3. Asset sales and other transactions subject to Rule 21.1

(a) Rule 21.1 circulars and general meetings

(i) Summary of proposals

3.1 Rule 21.1 (Restrictions on frustrating action) restricts the board of an offeree company from taking certain actions which might have the effect of frustrating an offer unless the company obtains the prior approval of its shareholders in general meeting. Section 3 of the PCP proposed that certain amendments be made to Rule 21.1 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 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, as set out in the proposed new Note 1 on Rule 21.1. The proposed new Note would also require any contracts entered into in connection with the proposed action to be published on a website; and

(c) 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. As noted in paragraph 3.12 of the PCP, 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.

3.2 Section 3 of the PCP also proposed that Rule 21.1 should set out all the circumstances in which the Panel will normally dispense with the requirement for a proposed action subject to Rule 21.1 to be approved by shareholders in general meeting, including where:

(a) the offeror consents to the proposed action (as currently set out in Note 1 on Rule 21.1);

(b) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (as explained above); or

(c) 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 (as currently set out in Note 8 on Rule 21.1).

(ii) Competent independent advice

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

3.3 Two respondents agreed that, where shareholder approval is to be sought for a proposed action under Rule 21.1, the board of an offeree company should be required to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable. Five respondents questioned whether it was appropriate for the board of an offeree company to be required to obtain competent independent advice in such circumstances. The points raised included the following:

(a) four respondents noted that, where the offeree company's securities are publicly traded, the relevant listing rules are likely to set out requirements for material transactions and/or shareholder circulars and considered that

the Code should not seek to impose additional regulation beyond the requirements of such listing rules;

(b) two respondents considered that a separate requirement to obtain competent independent advice on the financial terms of a proposed action subject to Rule 21.1 would be duplicative of the requirement under Rule 3.1 to obtain competent independent advice on the financial terms of an offer;

(c) one respondent was concerned that the requirement to obtain competent independent advice would increase the cost of, and may delay, a transaction; and

(d) two respondents questioned whether it was necessary for the requirement to obtain competent independent advice to apply to proposed actions subject to Rule 21.1 other than material asset transactions.

3.4 The Code Committee notes that, in most cases, the board of an offeree company will address the application of Rule 21.1 by either:

(a) seeking, and obtaining, offeror consent to the proposed action; or

(b) making the taking of the proposed action conditional on the offer being withdrawn or lapsing.

In those cases, there will be no requirement for the board of the offeree company to obtain competent independent advice in relation to the financial terms of the proposed action since shareholder approval for the proposed action will not be sought in general meeting.

3.5 However, where the board of the offeree company seeks shareholder approval for the proposed action in general meeting, it is possible, if shareholder approval is forthcoming, that the offeror may then seek to invoke a condition so as to withdraw or lapse its offer. Accordingly, where shareholder approval is sought for a proposed action in general meeting, the shareholders' voting decision at that general meeting could, in effect, obviate the need for them to make a separate decision as to whether to accept the offer. Therefore, the Code Committee

considers that, in such circumstances, it is important that shareholders receive the substance of competent independent advice given to the board as to whether the financial terms of the proposed action are fair and reasonable.

3.6 The Code Committee does not believe that this should lead to significant additional costs for the offeree company or materially delay the transaction, given that the adviser appointed under Rule 3.1 would be expected to have taken the terms of the proposed action into account in giving its advice on the financial terms of the offer. In addition, given that the proposed action may, in effect, be an alternative to the offer, the Code Committee does not consider that the requirements of applicable listing rules for material transactions will, of themselves, be sufficient. This is on the basis that the approval of a proposed action under Rule 21.1 could cause an offer to be withdrawn or lapse. By contrast, applicable listing rules do not contemplate a situation where approval of a proposed transaction under those listing rules may cause an offer to be withdrawn or lapse.

3.7 Having considered the responses received, the Code Committee has adopted the requirement, where shareholder approval is sought for a proposed action under Rule 21.1, 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, as proposed in the PCP.

(iii) Date of the general meeting

Q4(b) Where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, should a requirement be introduced for the Panel to be consulted regarding the date on which the general meeting is to be held?

3.8 All of the respondents who commented on the matter agreed with the proposal to introduce a requirement for the Panel to be consulted regarding the date on which the general meeting to approve a proposed action under Rule 21.1 is to be held. Accordingly, the Code Committee has adopted the new requirement, as proposed in the PCP.

(iv) Publication of a circular

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?**

3.9 The new Rule 21.1(f) proposed in the PCP provided as follows:

> "**(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.**".

3.10 Four respondents suggested that, where the taking of a proposed action was conditional on the offer being withdrawn or lapsing, the information set out in the proposed new Note 1 on Rule 21.1 could be published by the board of the offeree company via a Regulatory Information Service ("**RIS**") rather than in a circular sent to shareholders. One respondent did not agree with the introduction of a requirement for the board of the offeree company to publish a circular in relation to the taking of an action subject to Rule 21.1.

3.11 Having considered the responses received, the Code Committee has amended Rule 21.1 so as to provide that, in respect of a proposed action which is subject to Rule 21.1:

(a) where a general meeting is to be held, the board of the offeree company must send a circular to shareholders containing the details set out in the new Note 1 on Rule 21.1; and

(b) where a general meeting is not to be held because the proposed action is conditional on the offer being withdrawn or lapsing, the board of the

offeree company must make an announcement containing the details set out in the new Note 1 on Rule 21.1.

3.12 The Code Committee notes that, under Rule 30.1(c), where an announcement is required to be published under the Code, the Panel may require a document which includes the contents of the announcement to be sent to shareholders (in which case Rule 27.2 will apply and the document sent to shareholders must include any material changes in the information disclosed in any circular previously published by the board of the offeree company). The Code Committee considers that where information with regard to a proposed action which is conditional on an offer being withdrawn or lapsing is likely to be important information in relation to a shareholder's decision whether to accept the offer, particularly where the proposed action is, in effect, being presented to shareholders as an alternative to the offer, the Panel is likely to consider that a document which includes the contents of the announcement should be sent to shareholders in accordance with Rule 30.1(c).

3.13 One respondent queried whether the contents requirements for the circular should include a specific reference to any quantified financial benefits statement ("**QFBS**") made by the offeree company in connection with the proposed action.

3.14 The Code Committee considers that, if the board of an offeree company has made a QFBS in the circumstances referred to in the new Note on the definition of "quantified financial benefits statement" (see Section 4(a) below), it will most likely want to include that QFBS in any circular sent to shareholders under the proposed new Rule 21.1(f) (which has been adopted as Rule 21.1(d)(iii)). Any such QFBS is also likely to fall within paragraph (e) of the new Note 1 on Rule 21.1 as "any other information necessary to enable shareholders to make an informed decision". However, the Code Committee does not consider it necessary to include in the new Note 1 on Rule 21.1 a specific requirement to include in the circular or announcement any QFBS made by the board of the offeree company.

3.15 Two respondents noted the requirement in the proposed new Note 1 on Rule 21.1 for any contracts entered into in connection with the proposed action to be published on a website. The respondents requested clarification of the proposed operation of this requirement, particularly where such publication would involve

the disclosure of commercially sensitive information or would not otherwise be required under applicable listing rules.

3.16 The Code Committee considers that contracts entered into in connection with a proposed action to which Rule 21.1 applies should be required to be published on a website under the new Note 1 on Rule 21.1 even if those contracts may not otherwise be required to be disclosed under other provisions of the Code and/or applicable listing rules. This is on the basis that the transaction to which Rule 21.1 applies is likely to be important in relation to a shareholder's decision whether to accept the offer, particularly given that the transaction may be presented to shareholders as, in effect, an alternative to the offer, and therefore shareholders should have access to all relevant details regarding the transaction.

3.17 Two respondents requested clarification as to the period of time for which the contracts referred to in the new Note 1 on Rule 21.1 must be published on a website. The Code Committee confirms that such contracts should be published on a website in accordance with Rule 26.1(a). In accordance with Note 1 on Rule 26, those contracts must remain on a website until the end of the offer (i.e. whilst the offer remains open for acceptance or, in the case of a scheme of arrangement, until the effective date) and the Code Committee has amended the new Note 1 on Rule 21.1 so as to include a cross-reference to Rule 26.1. However, the Code Committee considers that, if the contracts published on a website cease to be relevant for shareholders in the offeree company (which may be the case if, for example, the proposed action is not approved at a general meeting and will therefore not proceed), the offeree company might wish to seek the Panel's consent to remove those contracts from the website.

(iv) General comments

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

3.18 All of the respondents who commented on the matter agreed with the proposal to make explicit the circumstances in which the Panel will normally dispense with the requirement to hold a general meeting, which the Code Committee has therefore adopted. There were no other comments on the proposed amendments to

Rule 21.1 other than drafting comments and comments made in response to other questions.

3.19 In addition to the modifications described above, the Code Committee has made some additional drafting amendments to Rule 21.1, as set out in paragraph 3.20 below.

(vii) Code amendments

3.20 In the light of the above, the Code Committee has:

(a) adopted the amendments to Rule 21.1 proposed in the PCP but with certain amendments so that it will provide 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, 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:

(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 21.1(a).

(c) The Panel will normally ~~dispense with the requirements of this~~ agree to disapply Rule 21.1(a) if:

(i) ~~the offeror consents to the action proposed to be taken by the board of the offeree company~~the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(e));

(ii) ~~the taking of the proposed action is conditional on the offer being withdrawn or lapsing~~the offeror consents to the action proposed to be taken by the board of the offeree company; ~~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~~.~~;

~~(d) Where:~~

(iv) the proposed action is in pursuance of a contract entered into ~~earlier~~ before the beginning of the period referred to in Rule 21.1(a) or another pre-existing obligation; or

(~~ii~~v) a decision to take the proposed action had been taken before the beginning of the period referred to ~~above~~ in Rule 21.1(a) which:

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

(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~~d~~) Where shareholder approval is to be sought in general meeting for a proposed action ~~under this Rule~~ in accordance with Rule 21.1(a):

(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 of ~~on which~~ the general meeting ~~is proposed to be held.~~; and

~~(f)~~ (iii) ~~Where shareholder approval:~~the board of the offeree company must send a circular to shareholders containing the details set out in Note 1 as soon as practicable after the announcement of the proposed action.

~~(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.**~~

(e) Where the Panel has agreed to disapply Rule 21.1(a) because the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must publish an announcement containing the details set out in Note 1. (See also Rule 30.1(c), pursuant to which the Panel may require a copy of the announcement (or a document which includes the contents of the announcement) to be sent to the persons referred to in that Rule.)";

(b) deleted the current Note 1 on Rule 21.1 and adopted the new Note 1 on Rule 21.1 with certain amendments such that it will provide as follows:

"***1. ~~Circular to shareholders~~ Details to be included in circular or announcement***

~~The~~ Any circular sent to shareholders in accordance with Rule 21.1(~~f~~d)(iii) or announcement published in accordance with Rule 21.1(e) 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~~d)(i) 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 offeree company must also publish the circular or announcement, and any contracts entered into in connection with the proposed action, ~~must be published~~ on a website~~. from the time the circular is published~~ (See also Rule 26.1(a).)~~.~~";

(c) adopted the minor amendments to Note 2 on Rule 21.1 and Rule 3.1 as proposed; and

(d) deleted the current Note 8 on Rule 21.1 (which has been superseded by the new Rule 21.1(c)(iii)) as proposed.

(b) Inducement fees

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?

(i) Summary of proposals

3.21 Under the current Rule 21.1(b)(v), the board of an offeree company is not permitted to enter into a contract otherwise than in the ordinary course of its business, unless it has obtained the prior approval of shareholders in general meeting.

3.22 Section 3(g) of the PCP proposed the introduction of a new Note 8 on Rule 21.1 which would codify the Executive's practice of permitting an offeree company to enter into an agreement to pay an inducement fee to an asset purchaser without shareholder approval of the agreement having to be obtained (as a contract otherwise than in the ordinary course of business), provided that the fee did 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.

3.23 The Code Committee considered that this practice should apply in relation to any transaction to which Rule 21.1 applies and not only in relation to asset sales. In addition, the Code Committee considered that, if more than one inducement fee agreement were to be entered into, the 1% cap should apply to the aggregate of all the inducement fees payable by the offeree company.

(ii) Responses

3.24 In general, respondents who expressed a view on the matter agreed that an offeree company should be permitted to 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 did not exceed the limits referred to above.

3.25 One respondent suggested that the offeree company should be permitted to agree to pay multiple inducement fees up to the 1% individual cap, with a total aggregate cap of 2.5% of the value of the offeree company.

3.26 One of the respondents who agreed that the aggregate amount payable by way of inducement fees should not exceed 1% of the value of the offer queried whether it was appropriate to restrict inducement fees any more than this. For example, the respondent considered that an offeree company negotiating an asset transaction should be allowed to agree an inducement fee that represented more than 1% of the value of the asset transaction, provided that (when aggregated with any other inducement fees) it did not exceed 1% of the value of the offer. This was on the basis that the respondent considered that the limit of 1% of the value of the offer would not be material and would provide sufficient protection for an offeror for the company.

3.27 Having considered the suggestions made by respondents, the Code Committee continues to consider that the limit on inducement fees, as proposed in the PCP, is set at the correct level.

3.28 One respondent considered that the new Note 8 on Rule 21.1 should be more explicit that it would be permissible to agree inducement fees with multiple counterparties, either in a single agreement or across more than one agreement. The Code Committee has re-cast the new Note 8 on Rule 21.1 as set out in paragraph 3.30(a) so as to address this point.

3.29 The Code Committee considers that the aggregate value of the inducement fees payable in respect of all transactions in relation to the same assets should be limited to 1% of the value of those assets. Accordingly, if, for example, the offeree company agreed to pay a purchaser an inducement fee of 1% of its

purchase consideration and then a second purchaser agreed to pay a higher price for the same assets, the offeree company could agree to pay the second purchaser an inducement fee of up to 1% of the amount by which the consideration payable by the second purchaser exceeded the consideration payable by the first purchaser.

(iii) Code amendments

3.30 In the light of the above, the Code Committee has:

(a) adopted the new Note 8 on Rule 21.1 as set out below (in which underlining indicates new text as compared with the current provisions of the Code):

"***8. Inducement fees***

The Panel will normally consent to the offeree company entering into an inducement fee arrangement with a counterparty to a transaction to which Rule 21.1 applies, provided that:

(a) the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and

(b) the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no more than 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 more offerors, the first offer) at the time of the announcement made under Rule 2.7."; and

(b) adopted the amendment to the heading to Rule 21.2 as proposed.

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

(a) Amendments to the definition of "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"?**

(i) Summary of proposals

4.1 Section 4(b) of the PCP proposed the introduction of a new Note on the definition of "quantified financial benefits statement". This would provide that where, in competition with an offer or possible offer, an offeree company announces 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 would be treated as a QFBS. This was 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. As a result of the proposed new Note, any such 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 they are applicable; and

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

(Requirements for profit forecasts and quantified financial benefits statements) confirming that, respectively, the statement has been properly compiled on the basis stated and prepared with due care and consideration.

4.2 In general, the respondents who expressed a view on this matter broadly agreed with the Code Committee's proposals.

(ii) Application of the Note on "quantified financial benefits statement"

4.3 Two respondents considered that it should be made clear that the new Note on the definition of "quantified financial benefits statement" would only apply where the offeree company had agreed to sell its assets and would not apply to a statement by the offeree company merely of an intention to sell its assets.

4.4 The Code Committee has made some minor drafting amendments to the new Note to make clear that it applies only when the offeree company has announced that it has agreed terms on which it intends to sell all or substantially all of its assets (which would include an agreement in principle).

4.5 One respondent sought guidance on the meaning of the term "all or substantially all" of the offeree company's assets in the proposed new Note.

4.6 The Code Committee notes that this will be determined by the Panel and will depend on the circumstances of each case. If there is any doubt as to whether the assets concerned would constitute all or substantially all of an offeree company's assets in a particular case, the Panel should be consulted.

(iii) Application of Rule 28.6

4.7 Two respondents considered that it was inappropriate to apply the disclosure requirements of Rule 28.6 to a statement by an offeree company made in the circumstances referred to in the proposed new Note on the definition of "quantified financial benefits statement".

4.8 The Code Committee recognises that Rule 28.6 will not apply in full to a statement by the board of an offeree company made in the circumstances referred to in the new Note on the definition of "quantified financial benefits statement".

The Code Committee considers that the following provisions of Rule 28.6 are those that are likely to be relevant to a statement by an offeree company under the new Note:

(a) Rule 28.6(a) (bases of belief supporting the statement);

(b) Rule 28.6(b) (analysis, explanation and quantification of the constituent elements);

(c) Rule 28.6(f) (indication of when the expected financial benefits are expected to be realised); and

(d) Rule 28.6(h) (costs of realising the expected financial benefits).

Whilst the Code Committee does not consider that it is necessary to introduce a new rule to apply solely in relation to statements which fall within the new Note on the definition of "quantified financial benefits statement" (which statements are likely to be made only rarely), the Code Committee has adopted a new Note 2(b) on Rule 28.6 to refer to the requirements of Rule 28.6 which are likely to be applicable to such statements.

(iv) Application of Rule 28.1

4.9 One respondent noted the costs and potential difficulty of obtaining reports from reporting accountants and financial advisers, particularly for smaller companies.

4.10 The Code Committee accepts that the new requirement will potentially lead to additional costs being incurred by an offeree company but notes that this will only be the case where the offeree company announces that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale). Given that, in these circumstances, the board of the offeree company is promoting the asset disposal as an alternative to the offer, the Code Committee considers that this additional cost burden is justified.

(v) Aggregate amount/price per share

4.11 One respondent requested clarification as to whether the new Note on the definition of "quantified financial benefits statement" was intended to relate either to a statement with regard to the aggregate amount to be returned to offeree company shareholders or to a statement with regard to an amount per share, or to both. Two respondents suggested that any statement to which the new Note applied should be required to include an amount per share expected to be returned to shareholders, in order to provide a comparison with the consideration per share payable under any offer with which the sale by the offeree company of all or substantially all of its assets was in competition.

4.12 The Code Committee confirms that the Note is intended to apply to any statement made by the offeree company quantifying the cash sum expected to be paid to shareholders, regardless of whether this is an aggregate amount or an amount per share. However, the Code Committee does not consider that it is necessary to address this in the Note.

4.13 The Code Committee expects that an offeree company which makes a QFBS in the circumstances referred to in the new Note will want to refer to an amount per share so as to provide a comparison with the consideration payable under any competing offer. The Code Committee notes that, if an asset purchaser or potential asset purchaser wants to be able to buy shares in the offeree company in accordance with the new Rule 4.7 (see Section 4(b) below), it will only be able to do so if the offeree company has made a statement quantifying the cash sum expected to be returned to shareholders on an amount per share basis. Given this, the Code Committee has amended the new Note on the definition of "quantified financial benefits statement" so as to cross-refer to the new Rule 4.7.

(vi) Where a range is stated

4.14 One respondent requested clarification as to the meaning of the phrase "a statement by the offeree company quantifying the cash sum expected to be paid to shareholders" in the proposed new Note and queried whether this would include a statement by the offeree company indicating that the amount that shareholders could expect to receive would be within a range.

4.15 The Code Committee has made a drafting change to make clear that the new Note on the definition of "quantified financial benefits statement" will apply where the cash sum which the offeree company has stated it expects to be paid to shareholders is stated as a range. As noted in Section 4(b) below, if an offeree company states the cash sum as a range, the asset purchaser or potential asset purchaser will only be able to purchase shares in the offeree company under Rule 4.7 at a price per share not exceeding the bottom of the range.

(vii) Code amendments

4.16 In the light of the above, the Code Committee has:

(a) adopted the 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~~ announce~~d~~s ~~its intention~~ that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends 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 (either as a specific amount or as a range) will be treated as a quantified financial benefits statement. See also Rule 4.7."; and

(b) renumbered the current Note 2 on Rule 28.6 as Note 2(a) and adopted a new Note 2(b) on Rule 28.6 as follows:

"*(b) In relation to a statement made in the circumstances described in the Note on the definition of "quantified financial benefits statement", the Panel will normally consider that the requirements of Rules 28.6(a), (b), (f) and (h) are applicable to that statement.*".

(b) Acquisitions of interests in shares in the offeree company by 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?

(i) Summary of proposals

4.17 Section 4(c) of the PCP proposed the introduction of a new Rule 4.7 (Asset disposals in competition with an offer). This provided that 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 company's assets and to return to shareholders all or substantially all of the company's cash balances, including the proceeds of the asset sale, 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. In addition, the proposed new Rule 4.7 provided that, 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 for any such acquisition must not exceed the bottom of the range.

4.18 The Code Committee proposed that the restriction in the proposed new Rule 4.7 should apply not only in relation to acquisitions by the asset purchaser but also to acquisitions by 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.

(ii) Responses

4.19 In general, the respondents who expressed a view on this matter broadly agreed with the proposals in Section 4(c) of the PCP.

4.20 One respondent noted that, if the asset purchaser was not acquiring all of the assets of the offeree company, the price it could pay for shares would nevertheless be limited to the amount per share expected to be returned to shareholders. The Code Committee notes that Rule 4.7 will only apply where "all or substantially

all" of the assets of the offeree company are being sold and that the difference in value between the assets being sold and the total assets of the offeree company should not be significant. If an asset purchaser is acquiring "substantially all" of the assets of the offeree company (rather than all of those assets), the price the asset purchaser could pay for shares in the offeree company under Rule 4.7 is likely to be less than the price it could pay for shares if it was acquiring all of the assets of the offeree company. However, the difference in price should not be material.

(iii) Code amendments

4.21 The Code Committee has amended the new Rule 4.7 to reflect the changes to the new Note on the definition of "quantified financial benefits statement" (see paragraph 4.16(a) above).

4.22 In addition, the Code Committee considers that the new Rule 4.7 should apply regardless of whether the announcement by the offeree company that it has agreed terms on which it intends to sell all or substantially all of the company's assets is made before or after the offer or possible offer is announced. The words "in competition with an offer or possible offer" have therefore been deleted from the beginning of the first sentence of Rule 4.7 and the heading of Rule 4.7 has been amended as set out in paragraph 4.23 below.

4.23 In the light of the above, the Code Committee has made some drafting amendments to the new Rule 4.7, which has been adopted as follows:

> "**4.7 ~~ASSET DISPOSALS IN COMPETITION WITH AN OFFER~~SALE OF ALL OR SUBSTANTIALLY ALL OF THE OFFEREE COMPANY'S ASSETS**
>
> **(a) Where~~, in competition with an offer or possible offer,~~ an offeree company ~~has announced~~s ~~an intention~~ that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a purchaser or potential 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.".

(c) Application of Rule 21.3

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

(i) Summary of proposals

4.24 Rule 21.3 (Equality of information to competing offerors) ensures 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.

4.25 Section 4(d) of the PCP proposed a new Note 6 on Rule 21.3 to make clear how Rule 21.3 applies in relation to a purchaser of assets from the offeree company. Under the new Note, the requirement in Rule 21.3 that information given to one offeror or potential offeror must be given to another offeror or bona fide potential offeror would be applied so that:

(a) if the board of the offeree company commences discussions with a potential asset purchaser in relation to the sale of all or substantially all of the offeree company's 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, information given to that potential asset purchaser would be subject to Rule 21.3 and must, on request, be given to another offeror or bona fide potential offeror; but

(b) if the board of the offeree company was in discussions with a potential asset purchaser in relation to the sale of all or substantially all of the offeree company's assets (excluding cash and cash equivalents) before an offer was made or before the date on which the board had reason to believe that a bona fide offer might be imminent, information given to that

potential asset purchaser, either before or after discussions commenced with an offeror or potential offeror, would not be subject to Rule 21.3 and would not have to be given to an offeror or bona fide potential offeror.

4.26 It was proposed that the requirement referred to in paragraph 4.25(a) would usually only apply where there had been a public announcement of the discussions between the offeree company and the potential asset purchaser(s) or, if there had been no public announcement, when the offeror or bona fide potential offeror requesting the information had been informed authoritatively that the offeree company and the potential asset purchaser(s) were having such discussions.

(ii) Responses

4.27 One respondent queried whether it was correct that the new Note 6 on Rule 21.3 would apply only so as to require information given by the offeree company to a potential asset purchaser to be given to an offeror or potential offeror and that it would not apply so as to require information given by the offeree company to an offeror or potential offeror to be given to a potential asset purchaser.

4.28 The Code Committee notes that the new Note 6 on Rule 21.3 relates to information which must be given by the offeree company to an offeror or bona fide potential offeror. The new Note 6 does not require information to be given to a potential asset purchaser. This is on the basis that it is not the responsibility of the Panel to prevent a particular asset purchaser from being frustrated. The Code Committee has made some drafting amendments to clarify that the new Note 6 on Rule 21.3 relates only to information which must be given by the offeree company to an offeror or bona fide potential offeror.

4.29 One respondent queried whether requiring an offeror to have been "informed authoritatively" that the offeree company and the potential asset purchaser were having discussions would be workable. The Code Committee notes that this phrase has been used in Rule 21.3 for a number of years in the context of a possible offer by a potential competing offeror and the Code Committee is not aware of there having been any particular issues in relation to the interpretation and application of this phrase.

(iii) Code amendments

4.30 In the light of the above, the Code Committee has adopted the new Note 6 on Rule 21.3 subject to some minor drafting changes as follows:

> "***6. Information given to a purchaser of assets***
>
> *(a) ~~Where~~ 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 (excluding cash and cash equivalents) during an offer or following the date on which the board of the offeree company 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) must, on request, be given to an offeror or bona fide potential offeror.*
>
> *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~~ If 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) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror*."

B: OTHER MATTERS

5. Setting aside a Rule 2.8 statement

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 of the PCP?

(a) Summary of proposals

5.1 Section 5 of the PCP proposed amendments to Rule 2.8 (Statements of intention not to make an offer) and the introduction of a new Note 2 on Rule 2.8, the effect of which would be to require a person making a Rule 2.8 statement to specify in the statement the circumstances in which it reserved the right to set the statement aside (as opposed to the current regime under which the restrictions in Rule 2.8 automatically cease to apply in the circumstances specified in the current Note 2 on Rule 2.8). The circumstances in which, under the new Note 2 on Rule 2.8, a person could reserve the right to set a Rule 2.8 statement aside would be the same as the circumstances in which, under the current Note 2 on Rule 2.8, the restrictions in Rule 2.8 cease to apply.

5.2 With regard to a reservation to set aside a Rule 2.8 statement with the agreement of the board of the offeree company, the Code Committee proposed to introduce new provisions, in paragraphs (b) and (c) of the new Note 2 on Rule 2.8, replicating the existing provisions in paragraphs (a)(i) and (a)(ii) of the current Note 2 on Rule 2.8. In summary, the effect of these provisions would be that, if a Rule 2.8 statement is made after a third party has announced a firm intention to make an offer:

(a) the Rule 2.8 statement may only specify the agreement of the offeree board as a circumstance in which the Rule 2.8 statement may be set aside to the extent that that agreement is given after the third party's offer has been withdrawn or lapsed; and

(b) if the person who made the Rule 2.8 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 Rule 2.8 statement and before the third party offer is withdrawn or lapses, the agreement of the offeree company board may not be relied on as a reason to set aside the Rule 2.8 statement after the third party's offer has been withdrawn or lapsed.

5.3 The Code Committee also proposed to delete the final paragraph of the current Note 2 on Rule 2.8 which provides 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 was on the basis that the Code Committee considers that this should be a matter which should be determined by the Panel on a case by case basis.

5.4 Certain other minor and consequential amendments were also proposed.

(b) Responses

(i) Summary

5.5 The respondents who expressed a view on this matter broadly agreed with the proposals in Section 5 of the PCP.

(ii) Panel discretion

5.6 Three respondents considered that a discretion should be retained in Rule 2.8 for the Panel to permit an unreserved Rule 2.8 statement to be set aside in appropriate circumstances.

5.7 The Code Committee agrees with this suggestion and has included the words "Except with the consent of the Panel" at the beginning of the second sentence of the amended Rule 2.8.

(iii) Form of reservations

5.8 One respondent asked how the Panel would expect reservations in a Rule 2.8 statement to be presented in accordance with the new Note 2 on Rule 2.8. In particular, the respondent asked whether, given the proposed new Rule 2.8(f) (see Section 2 above), the statement would need to refer to the potential offeror being

restricted from purchasing assets which are significant in relation to the offeree company.

5.9 At the suggestion of the Code Committee, the Executive has prepared two examples of Rule 2.8 statements, as set out in Appendix D:

(a) one which relates to a situation where, at the time the Rule 2.8 statement is made, a third party has not announced a firm intention to make an offer; and

(b) one which relates to a situation where, at the time the Rule 2.8 statement is made, a third party has announced a firm intention to make an offer.

5.10 The Code Committee notes that, if a potential offeror follows the examples set out in Appendix D, and reserves the right "to set aside the restrictions in Rule 2.8" (rather than simply reserving the right to make an offer) in the circumstances described, it should not be necessary for the Rule 2.8 statement to make specific reference either to the additional new restriction in Rule 2.8(f) or to the potential offeror reserving the right to make an offer for, or to purchase assets from, the offeree company.

(iv) Formal sale processes

5.11 One respondent queried whether the announcement by the offeree company of a formal sale process would be permitted as a reservation to a Rule 2.8 statement under the new Note 2 on Rule 2.8. Another respondent queried whether the offeree company announcing a formal sale process after a Rule 2.8 statement has been made would be regarded as a material change of circumstances.

5.12 The current Note 2 on Rule 2.8 sets out the circumstances in which the restrictions in Rule 2.8 will no longer apply. If the Rule 2.8 statement is made during an offer period, these circumstances do not include the announcement of a formal sale process. If the Rule 2.8 statement is made outside an offer period, the Rule 2.8 statement may (with the consent of the Panel) specify an event (including, for example, the announcement of a formal sale process) following which the restrictions in Rule 2.8 will no longer apply. As noted in paragraph 5.1 above, the

PCP proposed that the circumstances in which, under the new Note 2 on Rule 2.8, a person could reserve the right to set a Rule 2.8 statement aside should be the same as the circumstances in which, under the current Note 2 on Rule 2.8, the restrictions in Rule 2.8 cease to apply.

5.13 Accordingly, under the terms of the new Note 2 on Rule 2.8, the announcement of a formal sale process would not be permitted as a reservation to a Rule 2.8 statement made during an offer period. However, in accordance with paragraph (v) of the new Note 2(a) on Rule 2.8, the announcement of a formal sale process could, with the consent of the Panel, be included as a reservation to a Rule 2.8 statement made outside an offer period. In addition, if, as permitted by paragraph (i) of the new Note 2(a) on Rule 2.8, a potential offeror has included the agreement of the board of the offeree company as a reservation to its Rule 2.8 statement, the potential offeror may be able to rely on that reservation to set aside the Rule 2.8 statement if it participates in a formal sale process with the agreement of the board of the offeree company.

(c) Code amendments

5.14 In the light of the above, the Code Committee has:

(a) adopted the amendments to Rule 2.8 proposed in Section 5 of the PCP, save that the words "Except with the consent of the Panel" have been reintroduced at the beginning of the second sentence of Rule 2.8 as follows:

"**2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER**

A person making a statement that it does not intend to make an offer for a company should make the statement as clear and unambiguous as possible. <u>Except with the consent of the Panel, u</u>~~U~~nless 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:";

(b) adopted the new Note 2 on Rule 2.8 as proposed, save for the following minor amendments to paragraphs (b), (c) and (d) (and, in relation to Note 2(d), see also paragraph 2.9 above);

"*(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~~ only to the extent that 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 third party has announced 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, except with the consent of the Panel, 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."; and

(c) adopted the consequential amendments to Note 4 on Rule 2.2, and the minor amendments to the Note on Rules 35.1 and 35.2 (which has been renumbered as Note 1), as proposed in the PCP.

6. Social media

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

(a) Summary of proposals

6.1 Section 6 of the PCP proposed that:

(a) Rule 20.4 (Social media) should be amended so as to:

(i) remove the current 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 itself); and

(ii) permit the publication via social media of videos approved by the Panel in accordance with Rule 20.3 (Videos); and

(b) Note 1 on Rule 19.1 (Financial advisers' responsibility for publication of information) should be amended so as 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.

6.2 In addition, the Code Committee proposed to delete the second sentence of Rule 20.3(b) which currently requires an offeror or offeree company to publish an announcement via a RIS noting when a video is published on a website.

(b) Responses

6.3 Both of the respondents who addressed the issue agreed with the proposed amendments.

(c) Code amendments

6.4 The Code Committee has adopted the amendments to Note 1 on Rule 19.1, Rule 20.3(b) and Rule 20.4 as proposed in the PCP.

7. Dispensation from the mandatory offer requirement

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

(a) Summary of proposals

7.1 Section 7 of the PCP proposed the introduction of a new paragraph (c) of Note 5 of the Notes on Dispensations from Rule 9. This would reflect an existing practice of the Executive to consider granting a waiver from the obligation for a person 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 confirm in writing that they approve the proposed waiver and would vote in favour of any resolution to that effect at a general meeting.

(b) Responses

7.2 Both respondents who addressed the issue agreed with the proposed amendments.

(c) Code amendments

7.3 The Code Committee has adopted the new paragraph (c) of Note 5 on the Notes on Dispensations from Rule 9 as proposed.

7.4 The Code Committee notes that the Panel has today published Instrument 2017/7 which makes a consequential amendment to the Document Charges section of the Code to reflect the new Note 5(c) of the Notes on Dispensations from Rule 9.

APPENDIX A

Respondents to PCP 2017/1

1. Association for Financial Markets in Europe
2. CMS Cameron McKenna Nabarro Olswang LLP
3. Institute of Chartered Accountants in England and Wales
4. Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales
5. KPMG LLP
6. PricewaterhouseCoopers LLP
7. Quoted Companies Alliance
8. Strand Hanson

APPENDIX B

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 announces that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends 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 (either as a specific amount or as a range) will be treated as a quantified financial benefits statement. See also Rule 4.7.

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 (a)(ii) above the Panel will normally consent to the restrictions in paragraph (a)(i) above 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 (a)(ii) above the Panel will normally consent to the restrictions in paragraphs (a)(i) and (a)(ii) above 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.

(~~b~~c) Where a potential offeror to which a dispensation has been granted under paragraph (a) has ceased actively to consider making an offer, the Panel may nonetheless require an announcement to be made where:

(i) any rumour and speculation continues or is repeated; and/or

(ii) it considers that this is otherwise necessary in order to prevent the creation of a false market.

Any such announcement made by the offeree company will not normally be required to identify the former potential offeror, unless it has been specifically identified in rumour and speculation.

Rule 2.5

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

…

NOTES ON RULE 2.5

…

2. Duration of restriction

The restrictions imposed by Rule 2.5(a) will normally apply throughout the period during which the offeree company is in an offer period and for a further three months thereafter.

However, where a potential offeror has made a statement to which Rule 2.8 applies but the offeree company remains in an offer period, the restrictions imposed by Rule 2.5(a) will normally apply for three months following the making of the statement to which Rule 2.8 applies. See also Rule 2.8(f).

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 specify the agreement of the board of the offeree company as a circumstance in which the statement may be set aside only to the extent that 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 a third party has announced 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, except with the consent of the Panel, 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 in each case cash and cash equivalents); and

(iii) the operating profit (i.e. 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 announcement of the proposed 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.

(c) Relative values of more than 75% 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(d)(i).)

Rule 4.7

4.7 SALE OF ALL OR SUBSTANTIALLY ALL OF THE OFFEREE COMPANY'S ASSETS

(a) Where an offeree company announces that it has agreed terms on which it intends to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and that it intends to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), a purchaser or potential 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 21.1(a).

(c) The Panel will normally agree to disapply Rule 21.1(a) if:

(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(e));

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

(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.**~~

~~**Where it is felt that:**~~

(~~A~~iv) the proposed action is in pursuance of a contract entered into ~~earlier or another~~ before the beginning of the period referred to in Rule 21.1(a) or another pre-existing obligation; or

(~~B~~v) a decision to take the proposed action had been taken before the beginning of the period referred to ~~above~~ in Rule 21.1(a) 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.**~~

(d) Where shareholder approval is to be sought in general meeting for a proposed action in accordance with Rule 21.1(a):

(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;

(ii) the Panel must be consulted regarding the date of the general meeting; and

(iii) the board of the offeree company must send a circular to shareholders containing the details set out in Note 1 as soon as practicable after the announcement of the proposed action.

(e) Where the Panel has agreed to disapply Rule 21.1(a) because the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must publish an announcement containing the details set out in Note 1. (See also Rule 30.1(c), pursuant to which the Panel may require a copy of the announcement (or a document which includes the contents of the announcement) to be sent to the persons referred to in that Rule.)

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. Details to be included in circular or announcement

Any circular sent to shareholders in accordance with Rule 21.1(d)(iii) or announcement published in accordance with Rule 21.1(e) 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(d)(i) 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.

The offeree company must also publish the circular or announcement, and any contracts entered into in connection with the proposed action, on a website. (See also Rule 26.1(a).)

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 (i.e. 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.

(c) 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.

(d) 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.

(e) 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 Panel will normally consent to the offeree company entering into an inducement fee arrangement with a counterparty to a transaction to which Rule 21.1 applies, provided that:

(a) the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and

(b) the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no more than 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 more offerors, the first offer) at the time of the announcement made 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) If 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 of the offeree company has reason to believe that a bona fide offer might be imminent, information given by the offeree company to the potential asset purchaser(s) must, on request, be given to an offeror or bona fide potential offeror.

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) If 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) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror.

Rule 28.6

28.6 DISCLOSURE REQUIREMENTS FOR QUANTIFIED FINANCIAL BENEFITS STATEMENTS

…

NOTES ON RULE 28.6

…

2. Statements by the offeree company

(a) The Panel will not normally permit an offeree company to publish a statement quantifying the financial benefits expected to accrue from an offer by a particular offeror unless the statement is published with the consent of that offeror, in which case the requirements of Rule 28.1 will apply. However, the offeree company will be permitted to publish its views on any quantified financial benefits statement published by an offeror.

(b) In relation to a statement made in the circumstances described in the Note on the definition of "quantified financial benefits statement", the Panel will normally consider that the requirements of Rules 28.6(a), (b), (f) and (h) are applicable to that statement.

Rule 31.5

31.5 NO EXTENSION STATEMENTS

…

(c) If an offeror wishes to include a reservation to a no extension statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.

Rule 32.2

32.2 NO INCREASE STATEMENTS

…

(c) If an offeror wishes to include a reservation to a no increase statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.

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 C

Summary of how the restrictions in the new paragraphs (f)/(F) of Rules 2.8, 12.2(b)(i) and 35.1 operate

Overview

1. Under each of Rules 2.8, 12.2(b)(i) and 35.1, a person subject to the relevant rule is restricted for a designated period from, among other matters, announcing an offer or possible offer for the offeree company or from making any statement which raises or confirms the possibility that an offer might be made for the offeree company.

2. The aim of the amendments adopted in Section 2 of the Response Statement is to prevent a person subject to the restrictions in any of:

   (a) Rules 2.8, 12.2(b)(i) and 35.1; or

   (b) Rules 2.5(a), 31.5 and 32.2,

   from avoiding their application by purchasing assets which are significant in relation to the offeree company.

Effect of the amendment to Rule 35.1

3. Under Rule 35.1, an offeror whose offer has lapsed or been withdrawn is restricted for 12 months from, among other matters, announcing an offer or possible offer for the offeree company. However, Note (a)(i) on Rules 35.1 and 35.2 (to be renumbered as Note 1(a)(i)) provides that the Panel will normally give its consent to the restrictions in Rule 35.1 ceasing to apply if the board of the offeree company so agrees. Accordingly, although the amendment to Rule 35.1 means that a lapsed offeror will be subject to the additional restriction referred to in the new Rule 35.1(f), the practical effect of this is, subject to what is said in paragraph 5 below, limited, given that a person can, in practice, only purchase a company's assets with the agreement of the company's board.

4. Under Rule 32.2, an offeror which makes a "no increase statement" is not permitted to amend the terms of its offer in any way and, under Rule 31.5, an

offeror which makes a "no extension statement" is not permitted to extend its offer beyond the stated date. However, in each case, the offeror 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 board of the offeree company agreeing to the statement being set aside.

5. As an anti-avoidance measure, Note 1(a)(i) (as renumbered) on Rules 35.1 and 35.2 provides that the Panel will not normally give its consent to the restrictions in Rule 35.1 ceasing to apply within three months of the lapsing of an earlier offer if the offeror was prevented from revising or extending its offer as a result of a "no increase statement" or a "no extension statement". Therefore, the principal effect of introducing the additional restriction in the new Rule 35.1(f) will be to prevent an offeror which has made a "no increase statement" or "no extension statement", and has not reserved the right to set that statement aside with the agreement of the board of the offeree company, from avoiding the application of the restrictions in Rule 32.2 and Rule 31.5 respectively by purchasing assets which are significant in relation to the offeree company for three months following the date on which its offer lapsed.

6. However, even following the introduction of the new Rule 35.1(f), a lapsed offeror which either:

   (a) did not make a "no increase statement" or a "no extension statement"; or

   (b) made a "no increase statement" or a "no extension statement" but which reserved the right to set that statement aside with the agreement of the board of the offeree company,

   would continue to be able to purchase assets which are significant in relation to the offeree company during this three month period.

Effect of the amendment to Rule 2.8 (and the introduction of the new Note 2(d) on Rule 2.8)

7. Under Rule 2.8, a person who makes a statement that it does not intend to make an offer (a "**Rule 2.8 statement**") is restricted for six months from, among other matters, announcing an offer or possible offer for the offeree company. At present, the restrictions in Rule 2.8 automatically cease to apply in the circumstances specified in the current Note 2 on Rule 2.8. Following the amendments adopted in Section 5 of the Response Statement, a person who has made a Rule 2.8 statement will be permitted to set the statement aside only if it reserved the right to do so at the time that the Rule 2.8 statement was made and the circumstances contemplated in the reservation subsequently arise. Such circumstances could include the board of the offeree company agreeing to the statement being set aside.

8. 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 its 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.

9. However, similar to "no increase statements" and "no extension statements" under Rules 32.2 and 31.5, the potential offeror may set aside a statement to which Rule 2.5(a) applies (a "**Rule 2.5(a) statement**") if:

   (a) it reserved the right to do so at the time that the Rule 2.5(a) statement was made; and

   (b) the circumstances contemplated in the reservation subsequently arise.

   Such circumstances may include the board of the offeree company agreeing to the statement being set aside.

10. As an anti-avoidance measure, 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 Rule 2.8 statement).

11. If a potential offeror makes a Rule 2.8 statement and it reserves the right to set that statement aside with the agreement of the board of the offeree company, the effect of introducing:

    (a) the additional restriction in the new Rule 2.8(f); and

    (b) the new Note 2(d) on Rule 2.8 (which, similarly to Note 1(a)(i)(as renumbered) on Rules 35.1 and 35.2, provides for a three month anti-avoidance period where a potential offeror makes a Rule 2.5(a) statement without reserving the right to set the statement aside with the agreement of the board of the offeree company),

    would simply be to prevent the potential offeror, if it had previously made a Rule 2.5(a) statement and has not reserved the right to set that statement aside with the agreement of the board of the offeree company, from avoiding the application of Rule 2.5(a) by purchasing assets which are significant in relation to the offeree company for three months following its Rule 2.8 statement.

12. However, if the potential offeror either:

    (a) had not previously made a Rule 2.5(a) statement; or

    (b) had previously made a Rule 2.5(a) statement but had reserved the right to set that statement aside with the agreement of the board of the offeree company,

    the potential offeror would continue to be able to purchase assets which are significant in relation to the offeree company during this three month period.

13. If, alternatively, a person, including a potential offeror, made a Rule 2.8 statement without reserving the right to set the statement aside with the agreement of the board of the offeree company, that person would be restricted from purchasing assets which are significant in relation to the offeree company for the next six months (in the same way that it would be restricted from announcing an offer or

possible offer for the offeree company during this period). This is consistent with the objective that a person should not be able to avoid restrictions which apply to it under the Code by purchasing assets which are significant in relation to the offeree company.

Effect of the amendment to Rule 12.2(b)(i)

14. Under Rule 12.2(b)(i), an offeror whose offer has been referred to a Phase 2 CMA reference, or in respect of which Phase 2 European Commission proceedings have been initiated, is restricted during the competition reference period from, among other matters, announcing an offer or possible offer for the offeree company.

15. Unlike the restrictions in Rules 35.1 and 2.8, the restrictions in Rule 12.2(b)(i) may not be set aside with the agreement of the board of the offeree company or in any other circumstances. Accordingly, the effect of introducing the additional restriction in the new Rule 12.2(b)(i)(F) is to prevent an offeror whose offer has been referred to a Phase 2 CMA reference, or in respect of which Phase 2 European Commission proceedings have been initiated, from avoiding the restrictions in Rule 12.2(b)(i) by purchasing assets which are significant in relation to the offeree company during the competition reference period.

APPENDIX D

Examples of Rule 2.8 statements

1. Rule 2.8 statement for use by a potential offeror (X) where no third party has announced a firm intention to make an offer for the offeree company (Y) at the time that the Rule 2.8 statement is made

"**No intention to bid statement**

X confirms that it is not intending to make an offer for Y.

This is a statement to which Rule 2.8 of the Takeover Code (the "Code") applies.

Under Note 2 on Rule 2.8 of the Code, X reserves the right to set the restrictions in Rule 2.8 aside in the following circumstances[1]:

(a) with the agreement of the board of Y;

(b) if a third party announces a firm intention to make an offer for Y[2];

(c) if Y announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover (as defined in the Code); and

(d) if there has been a material change of circumstances (as determined by the Takeover Panel)."

[1]If the Rule 2.8 statement is made outside an offer period, X may specify other circumstances if these have been agreed with the Panel.

[2] If, at the time that the Rule 2.8 statement is made, a potential competing offeror ("P") has been publicly identified, this reservation may state "if a third party, including P, announces a firm intention to make an offer for Y".

2. Rule 2.8 statement for use by a potential offeror (X) where a third party (Z) has announced a firm intention to make an offer for the offeree company (Y) at the time that the Rule 2.8 statement is made

"**No intention to bid statement**

X confirms that it is not intending to make an offer for Y.

This is a statement to which Rule 2.8 of the Takeover Code (the "Code") applies.

Under Note 2 on Rule 2.8 of the Code, X reserves the right to set the restrictions in Rule 2.8 aside in the following circumstances:

(a) in the event that the offer by Z is withdrawn or lapses, with the agreement of the board of Y;

(b) if a third party announces a firm intention to make an offer for Y[3];

(c) if Y announces a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover (as defined in the Code); and

(d) if there has been a material change of circumstances (as determined by the Takeover Panel)."

[3] If, at the time that the Rule 2.8 statement is made, a potential competing offeror ("P") has been publicly identified, this reservation may state "if a third party, including P, announces a firm intention to make an offer for Y".