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THE TAKEOVER PANEL

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

SCHEMES OF ARRANGEMENT

Before it introduces or amends any Rules of the Takeover Code (the "Code"), the Code Committee of the Takeover Panel (the "Code Committee") is normally required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Public Consultation Paper ("PCP"). Comments should reach the Code Committee by Monday, 17 September 2007.

Comments may be sent by email to:
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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

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Executive summary

In this PCP the Code Committee proposes a number of amendments to the Code as it applies to a transaction regulated by the Code which is implemented by way of a scheme of arrangement effected under section 425 of the Companies Act 1985. There has been a significant increase in recent years in the use of schemes of arrangement in order to implement transactions which are regulated by the Code and the aim of the proposals in this PCP is to codify for the first time the application of the Code to such schemes.

Having reviewed the application of the Code to schemes, and after undertaking an informal consultation exercise, the Code Committee considered various options for making the application of the Code to schemes more transparent and certain. It has concluded that the best approach will be to amend the Code and it therefore proposes:

- the introduction into the Code of a new "Schemes Appendix";
- where necessary, amendments to existing provisions of the Code; and
- listing those Code rules which should be disapplied where a scheme is used.

In addition, in the course of its review of the application of the Code to schemes, the Code Committee has identified a small number of the Code's provisions which, it believes, require amendment in relation to their application to contractual offers.

The Code Committee considers that the proposals in this PCP will be of benefit to practitioners, parties to schemes and other market participants and that they will not have significant cost implications.

Specific proposals covered in the PCP are summarised below.

Section 2 ("**Definitions and interpretation**") proposes the introduction into the Code of a new definition of "scheme of arrangement or scheme"; the inclusion in the Schemes Appendix of definitions of "offer documents and offeree board circulars", "shareholder meetings" and "court sanction hearing"; and the amendment of the existing definitions of "offer", "offeree company", "offeror", "irrevocable commitments and letters of intent" and "offer period".

Section 3 ("**Timing issues**") proposes that Rule 30 ("making the offer document and the offeree board circular available") should apply in a scheme in the same way as in a contractual offer but that the provisions of Rule 31 ("timing of the offer") should be disapplied in a scheme. The Code Committee proposes the inclusion in the Schemes Appendix of certain provisions relating to the timing of a scheme, including a requirement to consult the Panel as to whether a change to the expected scheme timetable should be posted to offeree shareholders. Similar provisions are proposed in relation to an extension of a contractual offer timetable. In addition, the Code Committee concludes that, where there is no competitive situation, the Code should not impose maximum time periods for the holding of the shareholder meetings or for the fulfilling of the other conditions to a scheme.

Section 4 ("**Announcements following key events in a scheme**") proposes that the Code should require an announcement to be made following key events in a scheme, namely the shareholder meetings, the court sanction hearing and the scheme becoming effective.

Section 5 ("**Competition references**") proposes the amendment of Rule 12.1 ("requirement for appropriate term in offer") so as to provide that, consistent with the approach taken in a contractual offer, a scheme should lapse if there is a reference to the Competition Commission, or if the European Commission initiates proceedings under Article 6(1)(c) of the EC Merger Regulation, before the date of the shareholder meetings.

Section 6 ("**Holding statements**") addresses the situation where a holding statement is made during an offer period involving a scheme, for example a statement by a potential competing offeror that it is considering making an offer. The Code Committee proposes that such statements should normally be clarified in advance of the shareholder meetings, but that the Panel should have the discretion, in appropriate cases, to permit clarification after the shareholder meetings and before the court sanction hearing.

Section 7 ("**Revision**") addresses various issues in relation to the revision of a scheme and proposes, amongst other things, that a revision to a scheme should normally be made no later than the date which is 14 days prior to the date of the shareholder meetings, with revisions after that date requiring the Panel's consent.

Section 8 ("**Competitive situations**") concludes that the application of the Code timetable is straightforward where a contractual offer is made in competition with an existing scheme. However, the Code Committee proposes that the Code should not prescribe what timetable should apply where a scheme is proposed in competition with an existing contractual offer, or with an existing scheme, and that this should be left to the Panel to determine in the light of all the prevailing circumstances.

Section 9 ("**Switching**") considers the situation where an offeror wishes to switch from a contractual offer to a scheme (or vice versa). The Code Committee concludes that there is no need for the Code to require an offeror to reserve the right to switch, but that an offeror's ability to switch should be subject to Panel consent. However, the Code Committee believes that the circumstances in which the Panel should withhold its consent to a switch are limited. New provisions are also proposed in relation to the announcement of a switch and the factors to be taken into account by the Panel when determining the offer timetable which will apply following the switch. In addition, the Code Committee proposes amendments to Rule 19.3 ("unacceptable statements"), Rule 32.2 ("no increase statements") and Rule 32.4 ("new conditions for increased or improved offers") in relation to switches.

Section 10 ("**Alternative consideration and withdrawal rights**") proposes that an election for alternative consideration should be capable of being made at least until the date of the shareholder meetings and that offeree shareholders who elect for alternative consideration in a scheme should have a right to withdraw such an election. In addition,

the Code Committee proposes a number of amendments in relation to the return of documents of title.

Section 11 ("**Mandatory offers**") proposes that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme.

Section 12 ("**Appropriate offers or proposals and comparable offers**") addresses certain issues which arise when it is proposed to implement an "appropriate offer or proposal" under Rule 15, or a "comparable offer" under Rule 14, by way of a scheme.

Section 13 ("**Voting by an exempt principal trader**") proposes amendments in relation to voting on a resolution to approve a scheme by exempt principal traders connected with an offeror or the offeree company.

Section 14 ("**Financial information and documents on display**") proposes that, where an offer is to be implemented by way of a scheme in which the consideration is solely in cash, the Panel should be able to grant a dispensation, where appropriate, from the requirements to provide information on the offeror set out in paragraphs (b) and (c)(i) of Rule 24.2. The Code Committee proposes the same approach in relation to a contractual offer where the consideration is solely in cash and which is structured such that there will be no minority shareholders in the offeree company.

Section 15 ("**Formula offers**") proposes some minor amendments to the Formula Offers Guidance Note in Appendix 2 of the Code.

Section 16 ("**Disapplied provisions**") lists a number of provisions of the Code which the Code Committee proposes should be disapplied in a scheme and which are not referred to elsewhere in this PCP.

1. Introduction

(a) Purpose of this PCP

1.1 In this PCP the Code Committee proposes a number of amendments to the Code as it applies to a transaction regulated by the Code which is implemented by way of a scheme of arrangement effected under section 425 of the Companies Act 1985.[1] There has been a significant increase in recent years in the use of schemes of arrangement in order to implement transactions which are regulated by the Code and the aim of the proposals in this PCP is to codify for the first time the application of the Code to such schemes.

(b) The Panel's treatment of schemes

1.2 The Introduction to the Code states that "the Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of … Court approved scheme of arrangement" (see further section 2 below). However, the Code is drafted from the perspective of a transaction implemented by way of a contractual offer by the offeror which is capable of being accepted by offeree company shareholders and its provisions do not specifically take into account the fact that a transaction might be implemented by way of a scheme. Whilst many of the provisions of the Code can be applied to a scheme with little difficulty, this is not universally so. A number of provisions use terminology which is specific to a contractual offer, so that their application to a scheme is not obvious, whilst others are simply inapplicable in the context of a scheme. In addition, a number of issues which may arise in the context of a scheme are not covered by the current provisions of the Code.

[1] In this PCP, a scheme of arrangement under section 425 of the Companies Act 1985 is referred to as either a "scheme of arrangement" or a "scheme" and a contractual offer is referred to as a "contractual offer". Section 425 of the Companies Act 1985 is due to be repealed on 6 April 2008 and replaced by provisions in Part 26 of the Companies Act 2006. As a consequence, any references in the Code to section 425 of the Companies Act 1985 will need to be amended at that time.

1.3 The Code Committee understands that, in view of the fact that the Code has not been drafted so as specifically to apply to schemes, the Panel Executive has, in the past, dealt with issues which have arisen in the context of schemes on a case by case basis, adopting a flexible approach to the Code's application where necessary. In doing so, the Panel Executive has been mindful, in particular, of the fact that schemes are also regulated by, and subject to the sanction of, the court.

1.4 As the frequency of schemes has increased, however, the number of issues which the Panel Executive has had to address has risen accordingly. In particular, difficult issues may arise in cases where:

(a) a scheme is used in a competitive, or potentially competitive, situation; and/or

(b) an offeror "switches" from a scheme structure to a contractual offer structure (or vice versa).

1.5 The Panel Executive has developed practices in relation to a number of the issues which arise in cases involving a scheme and certain of these practices have been publicised. For example, Practice Statement No. 14, issued on 9 November 2005, explained the approach taken by the Panel Executive in a scheme to (i) the definition of "offer period", and (ii) the application of Note 1 on Rule 19.3 (regarding "holding statements"). However, in other respects, in particular in relation to timetable issues, the Panel Executive's application of the Code to schemes remains unpublicised.

(c) Review of the application of the Code to schemes and informal consultation

1.6 In view of the above, the Code Committee, assisted by the Panel Executive, has undertaken a review of the application of the Code to schemes of arrangement,

with a view to establishing what amendments to the Code, if any, might be appropriate.

1.7 The principal issues for review having been identified, an informal consultation exercise was undertaken with, amongst others, practitioners from a number of law firms and investment banks (see Appendix D). In summary, the practitioners consulted believed that schemes generally operated well within the framework of the Code. However, there was a consensus that the Panel Executive's application of the Code to schemes required clarification and/or codification in a number of respects in order to provide a greater degree of transparency and certainty than at present, although the practitioners suggested that the Panel's ability to apply the Code to schemes flexibly should be preserved, where appropriate.

1.8 Following the review and informal consultation exercise, the Code Committee has concluded that the current lack of transparency and certainty as to the application of the Code to a scheme is unsatisfactory and that a situation in which the Panel Executive and practitioners are required to address the issues which arise in the context of schemes on a case by case basis results in undue administrative burdens. The Code Committee therefore believes that some action to codify the application of the Code to schemes should be taken in order to provide an orderly framework for the conduct of such transactions and to assist the enforcement of the Code in this area.

1.9 In addition, in the course of its review of the application of the Code to schemes of arrangement, the Code Committee identified a small number of the Code's provisions which, it believes, require amendment in relation to their application to contractual offers. These are identified in the text.

(d) Principal options for reform

1.10 In the course of its review, the Code Committee identified four possible ways in which the application of the Code to schemes of arrangement might be made more transparent and certain, as follows:

(a) by the Panel Executive issuing one or more Practice Statements, providing general or detailed guidance (as appropriate) as to the application of the Code to a scheme, but leaving the Code itself unchanged;

(b) by the Code Committee introducing a new Appendix into the Code in relation to schemes (referred to in this PCP as the "Schemes Appendix"), explaining how the provisions of the Code apply to a scheme (and setting out which provisions of the Code do not apply to a scheme);

(c) by the Code Committee amending the existing provisions of the Code on a "rule by rule" basis, so as to make it clear how each of them applies to a scheme (or that a provision does not apply to a scheme); or

(d) by a combination of options (b) and (c).

1.11 The Code Committee believes that it would not be possible to achieve the desired degree of transparency and certainty by means of the Panel Executive issuing one or more Practice Statements, as per option (a).

1.12 Both options (b) and (c) have the advantage of providing certainty of application of the Code to schemes and both would provide transparency, though in different ways. However, the Code Committee considers that, individually, each of these options has its own disadvantages. On the one hand, a new Schemes Appendix, covering the application of all provisions of the Code to schemes could, in effect, create a separate Code for schemes. The Code Committee would not favour such

an outcome; it believes the Code should remain one comprehensive rulebook, applicable to all transactions. Furthermore, it considers that such a complete Schemes Appendix would involve the unnecessary duplication of large sections of the Code. On the other hand, amending each of the provisions of the Code on a rule by rule basis, as per option (c), would be very cumbersome and could lead, in respect of some rules, to amendments of such complexity that transparency may in fact be reduced.

1.13 On balance, the Code Committee has concluded that it should adopt option (d), i.e. a combination of options (b) and (c). It believes that only amendment of the Code will provide the necessary degree of certainty and that transparency can best be provided by a combination of a separate Schemes Appendix, dealing with specific schemes-related issues (and setting out those provisions of the Code which do not apply to schemes), together with amendments to certain provisions of the Code which do apply to schemes but whose application can benefit from some clarification.

1.14 This PCP discusses in turn a number of the issues that arise in a scheme of arrangement and how the Code Committee proposes that they should be addressed in the Code in the light of its adoption of option (d).

(e) Schemes Appendix

1.15 The Code Committee proposes to introduce the Schemes Appendix into the Code as a new Appendix 7. The sections of the proposed Schemes Appendix fall into four categories, as follows:

(a) a definitions and interpretation section;

(b) Section 1, comprising a general statement that the provisions of the Code apply to a scheme of arrangement, except as set out in the Schemes Appendix;

(c) Sections 2 to 12, comprising detailed provisions in relation to the application of the Code to schemes of arrangement; and

(d) Section 13, which lists the provisions of the Code which are disapplied in a scheme of arrangement (referred to in this PCP as the "List of Disapplied Provisions").

1.16 The full text of the proposed Schemes Appendix is set out at Appendix A to this PCP.

(f) Amendments to the existing provisions of the Code

1.17 The full text of the proposed amendments to the existing provisions of the Code is set out at Appendix B to this PCP.

1.18 In addition, the Code Committee intends to introduce a number of headnotes and footnotes to the existing provisions of the Code, drawing the reader's attention to where a provision is disapplied in a scheme, or where a provision in the Schemes Appendix relates to a particular provision in the main body of the Code.

(g) Implementation and transitional arrangements

1.19 The Code Committee's current intention is that any amendments to the Code should take effect approximately one month after the date on which the Response Statement to this PCP is issued.

1.20 The Code Committee anticipates that the amended Code will be applied to all transactions from the date on which the amendments take effect, including those on-going transactions which straddle that date, except where to do so would give the amendments retroactive effect.

1.21 The Code Committee would welcome comments on these issues and will make a further statement in relation to implementation and transitional arrangements in the Response Statement.

2. Definitions and interpretation

(a) "Scheme of arrangement"

2.1 The definition of an "offer" in the Definitions Section of the Code provides that "[a]ny reference to an offer includes any transaction subject to the Code as referred to in section 3(b) of the Introduction". The first sentence of the first paragraph of section 3(b) of the Introduction states as follows:

> "… the Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of statutory merger or Court approved scheme of arrangement.".

The definition of an "offer" therefore includes transactions implemented by way of a scheme of arrangement effected under section 425 of the Companies Act 1985 to the extent that they fall within section 3(b) of the Introduction.

2.2 In addition, the final sentence of the first paragraph of section 3(b) of the Introduction provides that the Code "also applies to unitisation proposals which are in competition with another transaction to which the Code applies". This would include a unitisation proposal effected under either section 110 of the Insolvency Act 1986 or section 425 of the Companies Act 1985. Although such a proposal may be referred to as a "scheme", the Code would not apply to it in the

same way as it applies to a scheme of arrangement referred to in the first sentence of the first paragraph of section 3(b) of the Introduction. For the avoidance of doubt, unitisation proposals fall outside the scope of this PCP and the Code Committee believes that the application of the Code to such proposals should not be affected by the amendments proposed in this PCP.

2.3 The Code does not currently include a definition of a "scheme of arrangement" or "scheme". The Code Committee considers that such a definition should be introduced into the Definitions Section of the Code in order to avoid doubt as to the transactions to which the Schemes Appendix, and any other provisions of the Code which refer to a scheme of arrangement, apply. The proposed definition is as follows:

> "**Scheme of arrangement or scheme**
>
> A transaction effected by means of a scheme of arrangement under section 425 of the Companies Act 1985.".

2.4 Assuming the proposed definition is introduced, the Code Committee proposes to amend Section 3(b) of the Introduction and Rule 19.4(viii) so as to conform with the new defined term, as set out in Appendix B. See also section 12 below regarding the reference to a scheme in Rule 15(d).

Q.1 Do you agree with the proposed definition of "scheme of arrangement or scheme"?

(b) "Offer"

2.5 As a matter of construction, by virtue of section 3(b) of the Introduction, each reference in the Code to an offer includes an offer implemented by way of a scheme of arrangement. Indeed, the majority of the provisions of the Code which refer to an offer apply equally, in spirit if not by letter, to a scheme. However, in a number of instances, this is not the case.

2.6 For example, the concept of "acceptance", which is fundamental to a contractual offer, does not apply in a scheme and provisions such as Rule 10 (which stipulates the acceptance condition required in a voluntary contractual offer) are therefore inapplicable. Instead, in a scheme, the board of the company which the offeror is seeking to acquire proposes the scheme to its shareholders who decide whether or not to approve and implement it at a court-convened shareholders' meeting and at a separate general meeting of the offeree company. If the scheme becomes effective, the shareholders will then receive their consideration from the offeror and will have their shares in the offeree company either cancelled or transferred to the offeror.[2]

2.7 The Code Committee's understanding is that the fact that certain provisions of the Code use terminology specific to a contractual offer does not, in practice, give rise to major difficulties in applying those provisions to a scheme. Accordingly, the Code Committee does not believe that it is necessary to amend each provision of the Code which refers to an "offer" so as to ensure that its application to a scheme is clear from its face, or that the disruption to the Code which would flow from such amendments is merited.

2.8 However, the Code Committee considers that a general provision should be introduced, making it clear that, in a scheme, the offeror should be treated as if it were making a contractual offer to offeree shareholders. The Code Committee therefore proposes to introduce a new second paragraph into the definition of "offer" in the Definitions Section of the Code, as follows:

[2] In a "cancellation scheme", the shares in the offeree company are cancelled (the reduction of capital requiring the passing of a special resolution of the offeree company) and, in most cases, the reserves created are used to pay up new shares which are then issued to the offeror. In a "transfer scheme", the shares in the offeree company are transferred to the offeror and a nominee of the offeror is given the power to execute transfer forms on behalf of the offeree shareholders.

"**Offer**

…

In the case of a scheme of arrangement, the offeror shall be treated as if it were making a contractual offer to those shareholders of the offeree company who are parties to the scheme in respect of the shares subject to the scheme and references to an "offer" shall be construed accordingly.".

Q.2 Do you agree with the proposed new second paragraph of the definition of "offer"?

(c) "Offeree company" and "Offeror"

2.9 Similarly, the Code Committee believes that, for the avoidance of doubt, the Code should make it clear, in the case of a scheme of arrangement, that a reference to an offeree company should normally be construed as a reference to the company which is proposing the scheme, and that a reference to an offeror should normally be construed as a reference to the person who is seeking to acquire the offeree company under the scheme.

2.10 However, the Code Committee notes that this may not be the case in all circumstances, for example, if a new company is established to acquire two existing companies which are seeking to merge pursuant to inter-conditional schemes of arrangement. In such circumstances, both companies to be acquired will normally be treated as offeree companies for the purposes of Rule 8, but only the smaller of the two companies would normally be treated as the offeree company for the purposes of Rule 20.2 (see paragraph 4.16 of RS3, issued by the Code Committee on 4 December 2001).

2.11 In the light of the above, the Code Committee proposes to introduce new second paragraphs to each of the definitions of "offeree company" and "offeror" in the Definitions Section of the Code, as follows:

"**Offeree company**

…

In the case of a scheme of arrangement, a reference to the offeree company should normally be construed as a reference to the company which is proposing the scheme."; and

"**Offeror**

…

In the case of a scheme of arrangement, a reference to an offeror should normally be construed as a reference to the person who it is proposed will acquire all or part of the issued share capital of the offeree company under the scheme.".

Q.3 Do you agree with the proposed new second paragraphs of the definitions of "offeree company" and "offeror"?

(d) "Offer documents and offeree board circulars"

2.12 Where an offer is to be implemented by way of a scheme of arrangement, a scheme circular is sent by the offeree company to its shareholders comprising (typically): a letter from the chairman of the offeree company; an explanatory statement; the scheme itself; the conditions to the scheme; information required by company law, the Code and other regulations; and notices of the meetings to approve and to give effect to the scheme. No "offer document" as such is sent by the offeror to the offeree shareholders and, as in a recommended contractual offer, the information required to be contained in an offer document and the information required to be contained in the offeree board circular is included in a single document, i.e. the scheme circular.

2.13 In the case of a scheme, therefore, references in the Code to either an offer document or an offeree board circular should be construed as references to a scheme circular. Similarly, references to a revised offer document or to a subsequent offeree board circular should be construed as references to a

supplementary scheme circular. The Code Committee believes that, for the avoidance of doubt, this should be stated expressly in the Code.

2.14 The Code Committee therefore proposes to introduce a new definition of "offer documents and offeree board circulars" into the Definitions and Interpretation Section of the Schemes Appendix, as follows:

> "**Offer documents and offeree board circulars**
>
> In the case of a scheme of arrangement, references in the Code to an offer document or to the first major circular from the offeree board (and related expressions) shall be construed as references to the scheme circular and references to a revised offer document or to a subsequent offeree board circular (and related expressions) shall be construed as references to any supplementary scheme circular.".

Q.4 Do you agree with the proposed definition of "offer documents and offeree board circulars"?

(e) "Shareholder meetings" and "court sanction hearing"

2.15 A scheme of arrangement between a company and its members must be agreed to, at a meeting convened by order of the court, by "a majority in number representing three-fourths in value of the … members or class of members (as the case may be), present and voting either in person or by proxy at the meeting".[3] In practice, the scheme will also be conditional on resolutions to implement it being passed by offeree company shareholders in general meeting. In this PCP, the court-convened meeting of offeree company shareholders and the general meeting of the offeree company are together referred to as the "shareholder meetings".

2.16 If the scheme is approved by the requisite majorities at the shareholder meetings, an application is made to the court to petition the sanctioning of the scheme. In this PCP, the court hearing at which the petition to sanction the scheme is

[3] Section 425(2) of the Companies Act 1985

presented is referred to as the "court sanction hearing". The scheme then becomes effective upon the order of the court being delivered to the registrar of companies and, if the scheme involves a reduction of capital, registered.[4] On occasion, a scheme of arrangement will become effective in more than one stage, for example where the court sanction hearing takes place first and a second application to the court in relation to a reduction of capital in order to implement the scheme takes place some days later. In this PCP a reference to the date on which the scheme becomes effective (the "effective date") is a reference to the date on which the scheme finally becomes effective.

2.17 A number of the new provisions which the Code Committee is proposing refer to the "shareholder meetings" or to the "court sanction hearing". The Code Committee believes that these two terms should be defined in the Code and is therefore proposing to include definitions in the Definitions and Interpretation Section of the Schemes Appendix, as follows:

> "**Shareholder meetings**
>
> The meeting of shareholders in the offeree company (or meetings of relevant classes of shareholders) convened by the court to consider a resolution to approve a scheme of arrangement and any extraordinary general meeting of the offeree company (and related class meetings) convened to consider any resolution to approve or give effect to a scheme."; and
>
> "**Court sanction hearing**
>
> The hearing of the court at which a petition to sanction a scheme of arrangement is presented.".

Q.5 Do you agree with the proposed definitions of "shareholder meetings" and "court sanction hearing"?

(f) "Irrevocable commitments and letters of intent"

[4] Section 425(3) and section 138(2) of the Companies Act 1985

2.18 The definition of "irrevocable commitments and letters of intent" in the Definitions Section of the Code states as follows:

> "**Irrevocable commitments and letters of intent**
>
> Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent to accept or not to accept (or to procure that any other person accept or not accept) an offer and also irrevocable commitments and letters of intent to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree company in the context of the offer.".

2.19 Although the definition is inclusive and not exhaustive, it does not expressly refer to an irrevocable commitment to vote in favour of a resolution to approve or to give effect to a scheme of arrangement.

2.20 The Code Committee believes that, for the avoidance of doubt, the application of the definition of "irrevocable commitments and letters of intent" to a resolution to approve or to give effect to a scheme should be made clear and is therefore proposing to amend the definition as follows:

> "**Irrevocable commitments and letters of intent**
>
> Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent:
>
> (a) to accept or not to accept (or to procure that any other person accept or not accept) an offer; or
>
> (b) ~~and also irrevocable commitments and letters of intent~~ to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree company (or of its shareholders) in the context of ~~the~~ an offer, including a resolution to approve or to give effect to a scheme of arrangement.".

Q.6 Do you agree with the proposed amendments to the definition of "irrevocable commitments and letters of intent"?

(g) "Offer period"

2.21 The first sentence of the definition of "offer period" in the Definitions Section of the Code describes the point at which, in respect of a contractual offer, the offer period will end, as follows:

> "Offer period means the period from the time when an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when the offer becomes or is declared unconditional as to acceptances or lapses.".

2.22 In a contractual offer, the "battle for control" for the offeree company is over once the offer becomes or is declared unconditional as to acceptances. Whilst *de jure* control of the offeree company will not pass to the offeror until any outstanding conditions are fulfilled or waived, once the offer is unconditional as to acceptances, accepting shareholders will normally have no further say in the outcome of the offer and will have no right to withdraw their acceptances pending the fulfilment of the outstanding conditions. The Code therefore reflects the view that it is unnecessary for the rules which apply only during an offer period – most notably Rule 8 (disclosure of dealings) – to apply thereafter.

2.23 The definition of "offer period" does not make clear the point at which, in respect of a scheme of arrangement, the offer period will end. Historically, the Panel Executive's practice was that the offer period relating to a scheme of arrangement came to an end following the shareholder meetings to approve the scheme. The Code Committee understands that the basis for this was that the passing (or defeating) of the resolutions was regarded as being similar to a contractual offer becoming or being declared unconditional as to acceptances (or lapsing), since it was at this time that shareholders effectively made their investment decisions, i.e. whether or not to approve the scheme.

2.24 More recently, however, the Panel Executive's practice has been to rule that the offer period should continue until the effective date (or the date that the scheme lapses) and, in addition, to continue to apply those provisions of the Code which are expressed to apply "during the course of the offer" until that time. Accordingly, Practice Statement No. 14, issued by the Panel Executive on 9 September 2005, stated as follows:

> "… [T]he Executive's approach is normally to regard the offer period as ending on the Effective Date. Provisions in the Code which apply during the "offer period" or "during the course of an offer" (or similar) will normally be interpreted as applying until the Effective Date.".

2.25 The Panel Executive's revised practice is based upon the fact that, whilst the obtaining of shareholder approval and the sanction of the court are clearly critical to the success of a scheme, the scheme only becomes legally binding and effective on the effective date. By contrast with the situation once a contractual offer becomes or is declared unconditional as to acceptances, it is not necessarily the case in a scheme that offeree shareholders will have no further say in the company's destiny following the shareholder meetings. Following such meetings, shareholders will remain free to accept a competing offer, should one materialise, or to petition the court not to sanction the scheme at the subsequent court sanction hearing.

2.26 Indeed, notwithstanding that shareholder approval has been granted, it is in theory possible, subject to the terms of any implementation agreement in relation to the scheme, that the offeree board may propose not to petition the court to sanction the scheme and not to seek the approval of offeree company shareholders in general meeting to this proposed course of action. In such circumstances, or in any other circumstances in which the offeree board's proposed course of action might lead to the scheme lapsing, the Code Committee would expect the Panel to be consulted in order to determine whether, inter alia, this might constitute a

breach of General Principle 3 or Rule 21.1, which restrict "frustrating action" by the offeree board.

2.27 The Code Committee believes it to be important that the provisions of the Code which apply during an offer period should continue to apply until the scheme becomes effective (or lapses) and that the provisions of the Code which are expressed to apply "during the course" of an offer, or before it "closes for acceptance", should continue to apply for the same period.

2.28 The Code Committee therefore proposes to introduce a new second paragraph into the definition of "Offer period" in the Definitions Section of the Code, as follows:

> "**Offer period**
>
> …
>
> In the case of a scheme of arrangement, the offer period will continue until it is announced that the scheme has finally become effective or that it has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.".

If adopted, this amendment will supersede the first section of Practice Statement No. 14.

Q.7 Do you agree with the introduction of the proposed new second paragraph into the definition of "offer period"?

3. Timing issues (Rules 30 and 31)

(a) Introduction

3.1 Although the Code does not currently prescribe a specific timetable for a scheme of arrangement, certain timetable deadlines are applied by the Panel Executive in practice. For example, the Panel Executive normally seeks to apply a 28 day time

limit between the announcement of a scheme and the posting of the scheme circular (per Rule 30.1(a)) and a 14 day time limit for the settlement of consideration after the scheme has become effective (per Rule 31.8). The remainder of this section 3 considers the extent to which a scheme of arrangement should or should not be subject to a timetable similar to that which applies in the case of a contractual offer under Rules 30 and 31.

(b) The period between announcement and posting (Rules 30.1 and 30.2)

3.2 The first sentence of Rule 30.1(a) provides that "**[t]he offer document should normally be posted to shareholders of the offeree company within 28 days of the announcement of a firm intention to make an offer**". This provides an offeror making a contractual offer with a reasonable period following a "firm intention" announcement made in accordance with Rule 2.5 in which to prepare and post its offer document. However, by virtue of the word "normally" in Rule 30.1(a), the Panel is able to grant an extension to the 28 day period in appropriate circumstances and will usually do so if the extension is supported by the offeree board (as it is likely to be, in practice, in a recommended situation).

3.3 As indicated in paragraph 3.1 above, Rule 30.1(a) is currently applied by the Panel Executive to the posting of a scheme circular and the Code Committee believes that this should continue. In practice, however, because schemes are invariably recommended, the Panel would normally grant an extension to the posting date if that was supported by the offeree board.

3.4 Rule 30.1(b), which requires the offeror and the offeree company to make the offer document readily available to their employee representatives or, where there are no such representatives, to the employees themselves, is similarly applied to a scheme circular in the same way as it is applied to an offer document.

3.5 Assuming that the definition of "offer documents and offeree board circulars" is included in the Schemes Appendix as proposed in paragraph 2.14 above, the references to the "offer document" in Rule 30.1 will be construed as being references to the scheme circular and the Code Committee believes that no amendment to Rule 30.1 is required.

Q.8 Do you agree that Rule 30.1 should apply in a scheme in the same way as in a contractual offer?

3.6 Rule 30.2 states as follows:

> "**30.2 THE OFFEREE BOARD CIRCULAR**
>
> **(a) The board of the offeree company must publish a circular containing its opinion, as required by Rule 25.1(a), as soon as practicable after publication of the offer document and normally within 14 days and must:**
>
> **(i) post it to its shareholders; and**
>
> **(ii) make it readily and promptly available to its employee representatives or, where there are no such representatives, the employees themselves.**
>
> **On the day of posting, the board of the offeree company must put the circular on display in accordance with Rule 26 and announce in accordance with Rule 2.9 that the circular has been posted and where it can be inspected.**
>
> **(b) The board of the offeree company must append to the circular containing its opinion a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such opinion is received in good time before publication of that circular.**".

3.7 Rule 30.2 applies in a scheme of arrangement in the same way as it normally applies in a recommended contractual offer. In both cases, the obligations of the offeror and the offeree company to post a document or circular to offeree shareholders will be satisfied by a single document, namely the offer document in the case of a contractual offer and the scheme circular in the case of a scheme (see

paragraph 2.12 above). The reference in Rule 30.2(a) to the offeree board circular being posted and made readily and promptly available "as soon as practicable after publication of the offer document and normally within 14 days" is, therefore, redundant as the timing of the posting of the single document will, in effect, be governed by Rule 30.1(a) rather than by Rule 30.2(a).

3.8 Assuming that the definition of "offer documents and offeree board circulars" is included in the Schemes Appendix as proposed in paragraph 2.14 above, the references in Rule 30.2 to the offeree board circular will be construed as being references to the scheme circular.

3.9 As indicated above, the Code Committee believes that the application of Rule 30.2 to a scheme is no different from its normal application to a recommended contractual offer. For the avoidance of doubt, however, the Code Committee proposes to introduce a new Note on Rule 30.2, as follows:

> "*NOTE ON RULE 30.2*
>
> *Where there is no separate offeree board circular*
>
> *In the case of a scheme of arrangement, or in the case of a recommended contractual offer where the offeree board's circular is combined with the offer document, there will be only a single document and the reference to the offeree board's circular being posted and made readily and promptly available after publication of the offer document is therefore inapplicable. Other than this, the requirements of Rule 30.2 will apply as usual to the single document.*".

Q.9 Do you agree with the proposed new Note on Rule 30.2?

(c) Making documents and information available (Rule 30.3)

3.10 For the avoidance of doubt, the Code Committee considers that Rule 30.3, which provides that, unless there is sufficient objective justification for not doing so, documents and information must be made available to all shareholders and to

employee representatives or employees (as appropriate), applies in a scheme of arrangement in the same way as it applies in a contractual offer.

(d) The period between posting and the shareholder meetings (Rule 31.1)

3.11 Rule 31.1 provides that "**[a]n offer must initially be open for at least 21 days following the date on which the offer document is posted**". This derives from the first sentence of General Principle 2, which provides that holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision.

3.12 Since a scheme of arrangement does not remain "open" in the same way as a contractual offer, the Code Committee believes that Rule 31.1 is inapplicable on its terms and should be included in the List of Disapplied Provisions in the Schemes Appendix. However, the Code Committee has considered whether a provision similar to Rule 31.1 should be introduced in relation to a scheme, i.e. a provision requiring a minimum of 21 days between the date of the posting of the scheme circular and the date of the shareholder meetings.

3.13 The Code Committee acknowledges that, currently, it is unlikely that the shareholder meetings to approve a scheme would be convened on less than 21 days' notice. This is because, in most cases, a general meeting will be required at which special resolutions will be proposed and section 378 of the Companies Act 1985 requires at least 21 days' notice of a general meeting which includes a special resolution. However, the Code Committee understands that less than 21 days' notice would be possible in certain circumstances (such as a "transfer scheme" in relation to which there may be no requirement to pass a special resolution). In addition, upon the repeal of section 378 of the Companies Act 1985 and the commencement of Part 13 of the Companies Act 2006, which are expected to occur on 1 October 2007, the minimum notice period for all extraordinary general meetings will become 14 days and there will no longer be a

requirement of at least 21 days' notice for an extraordinary general meeting which includes a special resolution. Subject to the approval of the court, it will therefore be possible under company law to convene shareholder meetings to approve a scheme on less than 21 days' notice.

3.14 On the one hand, it might be argued that if the offeree company is able to convene the shareholder meetings on less than 21 days' notice under company law, a longer notice period should not be imposed by the Code.

3.15 On the other hand, it might be argued that the minimum period of time which offeree company shareholders should be given in order to reach their decision as to how to vote on a resolution to approve a scheme should be consistent with the minimum period for which a contractual offer must be open under Rule 31.1, i.e. 21 days. Bearing in mind that General Principle 2 requires that offeree shareholders must have sufficient time and information to enable them to reach a properly informed decision, it would seem anomalous for the minimum "sufficient time" required by the Code in a scheme to be less than that required in a contractual offer, notwithstanding that company law and the court might permit this.

3.16 The Code Committee believes that the latter argument represents the better view and has concluded that, in order to be consistent with the position in a contractual offer, the shareholder meetings to approve a scheme should normally be convened for a date which is at least 21 days after the posting of the scheme circular. The Code Committee therefore proposes to include the following as Section 3 of the Schemes Appendix:

> "**3 DATE OF SHAREHOLDER MEETINGS**
>
> **The shareholder meetings must normally be convened for a date which is at least 21 days after the date of the scheme circular.**".

Q.10 Do you agree that Rule 31.1 should be disapplied in a scheme?

Q.11 Do you agree that, in a scheme, the shareholder meetings should normally be convened for a date which is at least 21 days after the date of the scheme circular?

(e) The announcement of changes to the expected scheme timetable (Rule 31.2)

3.17 The first sentence of Rule 31.2 provides that "**[i]n any announcement of an extension of an offer, either the next closing date must be stated or, if the offer is unconditional as to acceptances, a statement may be made that the offer will remain open until further notice**".

3.18 Since a scheme is not "extended" in the same way as a contractual offer, Rule 31.2 is inapplicable on its terms. However, it is not uncommon for the expected timetable of principal events set out in the scheme circular to be extended. For example, following the announcement of a competing offer, the offeree board may propose the adjournment of the shareholder meetings and/or the court sanction hearing to either a specified date or an unspecified date (i.e. to a date to be confirmed in due course). Indeed, shareholders in the offeree company could themselves propose a resolution to adjourn the shareholder meetings.

3.19 The Code Committee has concluded that, in order to ensure that shareholders and other market participants are kept properly informed of the progress of a scheme, the Code should require that any adjournment of a shareholder meeting or court sanction hearing, or any decision by the offeree board to propose such an adjournment, should be announced promptly by the offeree company and that any such announcement should be published in accordance with the requirements of Rule 2.9.[5] The Code Committee considers that:

[5] In this PCP, the Code Committee is proposing to introduce a number of provisions which will require an announcement to be published in accordance with Rule 2.9. The required amendments to Note 2 on Rule 2.9 are set out in Appendix B to this PCP.

(a) if the meeting or hearing is adjourned to a specified date, the announcement should set out the relevant details; and

(b) if the meeting or hearing is adjourned to an unspecified date, a further announcement should be made once the new date has been set.

The Code Committee acknowledges that the offeree board would, in any event, be likely to make such announcements but nevertheless believes that there should be specific requirements in the Code to this effect.

3.20 In addition, the Code Committee has concluded that the Code should require any other change to the expected timetable of events set out in the scheme circular to be announced promptly by the offeror or offeree company (as appropriate) in accordance with the requirements of Rule 2.9.

3.21 The Code Committee therefore proposes to include the following provisions in the Schemes Appendix:

"**6 CHANGES TO THE EXPECTED SCHEME TIMETABLE**

(a) Any adjournment of a shareholder meeting or court sanction hearing, or a decision by the offeree board to propose such an adjournment, must be announced promptly by the offeree company in accordance with the requirements of Rule 2.9. If the meeting or hearing is adjourned to a specified date, the announcement should set out the relevant details. If the meeting or hearing is adjourned without at the same time specifying a date for the adjourned meeting, a further announcement should be made in accordance with the requirements of Rule 2.9 once the new date has been set.

(b) Similarly, any other change to the expected timetable of events set out in the scheme circular must be announced promptly by the offeror or offeree company (as appropriate) in accordance with the requirements of Rule 2.9.".

Q.12 Do you agree that details relating to the adjournment of a shareholder meeting or court sanction hearing and any other change to the expected timetable of events should be required to be announced as proposed?

(f) Notifying offeree shareholders of a change to a scheme timetable

3.22 The Code Committee has also considered whether, in addition to requirements to announce a change to the expected scheme timetable, there should be a requirement to notify offeree company shareholders by post. In this regard, the Code Committee notes that Practice Statement No. 13, issued by the Panel Executive on 14 August 2005 (and which related to both schemes of arrangement and contractual offers), stated as follows:

> "Where the documentation made available to shareholders has included a predicted date for one or more of (i) the satisfaction of all conditions, (ii) the completion of a scheme of arrangement, or (iii) the posting of the offer consideration to shareholders, any consent by the Executive to a timetable extension will normally be subject to a requirement that notice of the extension be posted to shareholders. An announcement of the extension will not suffice. Posting will normally be required by the Executive even where the offer or scheme documentation has included a warning that the predicted timetable is only indicative and may change.".

3.23 The Code Committee has concluded that there should not be a requirement that changes to the expected timetable of principal events set out in a scheme circular should always be notified by post to offeree company shareholders, and that an announcement of such changes to a Regulatory Information Service ("RIS") should normally suffice. However, the Code Committee believes that the Panel should retain the right to require such notice to be posted where appropriate. For example, if the posting of consideration to offeree shareholders is delayed, the Panel may consider that announcing the delay to a RIS would not constitute sufficient notice to those shareholders. The Code Committee believes that the Code should require the relevant party to consult the Panel in order to determine whether notice of an adjournment or other change to the expected timetable should be posted to offeree company shareholders.

3.24 The Code Committee therefore proposes to include the following provision in Section 6 of the Schemes Appendix:

> "**(c) In all cases, the Panel should be consulted as to whether notice of an adjournment or other change to the expected timetable should, in addition, be posted to offeree company shareholders.**".

Q.13 Do you agree that the Panel should be consulted as to whether notice of an adjournment or other change to the expected scheme timetable should be posted to shareholders?

(g) Notifying offeree shareholders of an extension of a contractual offer timetable

3.25 In view of the above, the Code Committee has also considered whether the Code should take a similar approach in relation to contractual offers to that proposed in relation to schemes, i.e. in relation to any extension of the deadlines in the Code for (i) the satisfaction of the acceptance condition, (ii) the satisfaction of any other conditions, or (iii) the posting of offer consideration. The Code Committee has concluded that it should.

3.26 The Code Committee therefore proposes that a new Note on each of Rules 31.6 ("final day rule"), Rule 31.7 ("time for fulfilment of all other conditions") and Rule 31.8 ("settlement of consideration") should be introduced in relation the extension of contractual offers, as follows:

> "*Any extension to which the Panel consents must be announced by the offeror in accordance with the requirements of Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.*".

Q.14 Do you agree that new Notes on Rules 31.6, 31.7 and 31.8 in relation to the announcement of an extension of a contractual offer should be introduced as proposed?

3.27 If the amendments to the Code proposed in paragraphs 3.24 and 3.26 are adopted, the Code Committee considers that they will supersede Practice Statement No. 13.

(h) No obligation to extend (Rule 31.3)

3.28 Rule 31.3 provides that **"[t]here is no obligation to extend an offer the conditions of which are not met by the first or any subsequent closing date**". Since a scheme of arrangement does not have "closing dates" which may be extended in the same way as in a contractual offer, Rule 31.3 is inapplicable.

3.29 The Code Committee therefore proposes to include Rule 31.3 in the List of Disapplied Provisions.

Q.15 Do you agree that Rule 31.3 should be disapplied in a scheme?

(i) Offer to remain open for 14 days after unconditional as to acceptances (Rule 31.4)

3.30 The first sentence of Rule 31.4 provides that "**[a]fter an offer has become or is declared unconditional as to acceptances, the offer must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired**". The purpose of Rule 31.4 is to provide an opportunity to shareholders who wish to accept an offer only in the event that the offeror is successful in acquiring statutory control of the offeree company to do so. Since a scheme of arrangement is immediately binding on all shareholders once effective, the concept of an offer remaining "open" after the "battle for control" has been won is not relevant and Rule 31.4 is therefore inapplicable.

3.31 The Code Committee therefore proposes to include Rule 31.4 in the List of Disapplied Provisions.

Q.16 Do you agree that Rule 31.4 should be disapplied in a scheme?

(j) Latest date for shareholder meetings (Rules 31.6 and 31.7)

3.32 Rule 31.6(a) provides that **"[e]xcept with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day the initial offer document was posted**", and that the Panel's consent will normally only be granted in certain specified circumstances. Rule 31.7 provides that **"[e]xcept with the consent of the Panel, all conditions [other than the acceptance condition] must be fulfilled or the offer must lapse within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later**". These Rules derive from General Principle 6, which provides that "**[a]n offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities**".

3.33 Since, in practice, the offeree company generally controls the timetable in a scheme, and cannot therefore be said to be "under siege", the Code Committee has concluded that Rules 31.6 and 31.7 are inapplicable. The Code Committee therefore proposes to include Rules 31.6 and 31.7 in the List of Disapplied Provisions.

3.34 Having concluded that Rules 31.6 and 31.7 should be disapplied in a scheme of arrangement, the Code Committee considered the following in relation to the timing of a scheme:

(a) whether the Code should require the shareholder meetings to approve the scheme to take place within a maximum period of time from the posting of the scheme circular (for example 60 days); and

(b) whether the Code should require all conditions to a scheme to be fulfilled (and/or the scheme to become effective) within a maximum period of time, for example (i) within 21 days of the approval of the scheme at the shareholder meetings, or (ii) within 81 days of the posting of the scheme circular.

3.35 On the one hand, it might be argued that, similar to the situation in a contractual offer, and in order to provide an orderly framework for an offer implemented by way of a scheme, the Code should stipulate maximum time periods (i) between the key events of a scheme, and (ii) for the completion of the scheme as a whole.

3.36 On the other hand, it might be argued that the offeree board and the offeror should be free, subject to the views of the court, to agree the scheme timetable. For example, the offeree board may agree to a long timetable as a result of the scheme being conditional (rather than pre-conditional) on the offeror obtaining a material official authorisation or regulatory clearance if the board is satisfied that there is a high degree of certainty that the scheme will become effective (and will not lapse on any other conditions) if the authorisation or clearance is obtained.

3.37 In the Code Committee's view, the primary reasons for the Code imposing maximum time periods for the satisfaction of the acceptance condition and the other conditions to a contractual offer are to ensure that:

(a) the offeree board is not put "under siege", and

(b) accepting shareholders are not "locked in" to an offer

for longer than is reasonable. However, these reasons do not apply in a scheme, where the timetable is generally under the control of the offeree board. The Code Committee has therefore concluded that the Code should not specify maximum time periods for the holding of shareholder meetings and/or the fulfilment of other

conditions to a scheme, unless there is a competitive situation (in relation to which see section 8 below).

Q.17 Do you agree that, where there is no competitive situation, the Code should not impose maximum time periods in a scheme for the holding of shareholder meetings and/or the fulfilment of other scheme conditions?

(k) Settlement of consideration (Rule 31.8)

3.38 In the case of a successful offer, Rule 31.8 states as follows:

> "**Except with the consent of the Panel, the consideration must be posted within 14 days of the later of: the first closing date of the offer, the date the offer becomes or is declared wholly unconditional or the date of receipt of an acceptance complete in all respects.**".

3.39 A scheme has no "first closing date", is not "accepted" by offeree shareholders and becomes effective rather than becoming or being declared "wholly unconditional". In practice, however, consideration is invariably posted to offeree shareholders within 14 days of a scheme becoming effective, as the Code Committee believes it should be.

3.40 Although it might be argued that the requirement to post consideration within 14 days of a scheme becoming effective is clear from the spirit of Rule 31.8, the Code Committee believes that, for the avoidance of doubt, this should be codified in the Schemes Appendix.

3.41 The Code Committee therefore proposes to include Rule 31.8 in the List of Disapplied Provisions and to include the following provision in the Schemes Appendix:

"**10 SETTLEMENT OF CONSIDERATION**

Except with the consent of the Panel, the consideration must be posted within 14 days of the scheme of arrangement finally becoming effective.".

Q.18 Do you agree with the proposed provision relating to the settlement of consideration in a scheme?

(l) Offeree company announcements after Day 39 (Rule 31.9)

3.42 The first sentence of Rule 31.9 provides that "**[t]he board of the offeree company should not, except with the consent of the Panel** …**, announce any material new information** … **after the 39th day following the posting of the initial offer document**". In the course of its review, the Code Committee considered whether a similar provision should be introduced in the context of a scheme.

3.43 The purpose of Rule 31.9 is to require the offeree company to announce material new information by "Day 39" in order to provide the offeror with sufficient time to absorb this information prior to the final deadline for the posting of any revised offer document on "Day 46". Typically, this will only be relevant where the offer is not recommended by the offeree board.

3.44 Although the Code Committee is proposing that any revision to a scheme should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings, and that the Panel's consent should be obtained to revisions after that date (see section 7 below), the considerations which apply in a (hostile) contractual offer are inapplicable in a scheme (which is invariably recommended), and the Code Committee believes that there is no need to impose a specific deadline for the announcement of material new information by an offeree company in the context of a scheme. In any event, changes to information in the scheme circular are regulated by the court process. If there is a material

change to the information in the scheme circular, or if material new information arises, the offeree company may be required to circulate the information to shareholders. Depending on the timing, this may or may not result in the need to adjourn the shareholder meetings. Further, where this occurs after the date of the shareholder meetings, the court has a discretion as to whether to order new meetings to be held.

3.45 The Code Committee has therefore concluded that Rule 31.9 should be disapplied in a scheme and proposes to include Rule 31.9 in the List of Disapplied Provisions.

Q.19 Do you agree that Rule 31.9 should be disapplied in a scheme?

(m) Return of documents of title (Rule 31.10)

3.46 See paragraphs 10.16 to 10.20 below.

4. Announcements following key events in a scheme

4.1 Rule 17.1 requires an offeror to announce, amongst other things, the number of shares which it may count towards the satisfaction of the acceptance condition of a contractual offer by no later than 8.00 am on the business day following the day on which the offer (i) is due to expire, or (ii) becomes or is declared unconditional as to acceptances, or (iii) is revised or extended. Rule 17.2 sets out the consequences of an offeror, having announced its offer to be unconditional as to acceptances, failing to comply with Rule 17.1. Since a scheme of arrangement is not "accepted" in the same way as a contractual offer, Rule 17 is inapplicable.

4.2 The Code Committee nevertheless considers that there are three events in a scheme following which the Code should require an announcement to be made, namely:

(a) the shareholder meetings;

(b) the court sanction hearing; and

(c) the scheme finally becoming effective.

The Code Committee believes that, following each of these events, it will be important for shareholders and other market participants to understand what has occurred and whether the scheme is continuing, has lapsed or has become effective. In practice, an offeree company will generally make such announcements in any event and the introduction of a Code requirement to do so should therefore not impose material additional administrative burdens.

4.3 In the case of an announcement following the shareholder meetings, the Code Committee has considered what level of detail should be included in the announcement.

4.4 On the one hand, it might be argued that the Code should require the announcement simply to specify whether or not the resolutions put to the shareholder meetings were passed by the requisite majorities (and, if not, whether or not the scheme has lapsed) and that there is no need for the Code to require the announcement to give any further details of the voting results in relation to the meetings.

4.5 On the other hand, it might be argued that the Code should require the announcement to specify not only whether or not the resolutions put to the meetings were passed by the requisite majorities, but also to give details of the voting results in relation to the meetings including (where applicable) the number of votes cast in favour of and against the resolutions and the number of shareholders who voted in favour of and against them. Such information might be

considered as potentially important insofar as it might give an indication of the level of support for the scheme and could inform the decisions of (i) a dissentient shareholder as to whether or not to challenge the scheme at the court sanction hearing, and (ii) a potential offeror as to whether or not to make a competing offer.

4.6 On balance, the Code Committee believes that the latter is the better argument and therefore proposes to include the following provision in the Schemes Appendix:

> "**5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME**
>
> **(a) As soon as practicable after the results of the shareholder meetings are known, the offeree company must make an announcement stating whether or not the resolutions were passed by the requisite majorities (and, if not, whether or not the scheme has lapsed) and giving details of the voting results in relation to the meetings, including:**
>
> **(i) in the case of the extraordinary general meeting of the offeree company convened to consider any resolution to approve or give effect to the scheme, if a poll was taken, the number of shares of each class which were voted for and against the resolutions and the percentage of the shares voted which those numbers represent;**
>
> **(ii) in the case of the court-convened meeting:**
>
> **(aa) the number of shareholders of each class who voted for and against the resolution to approve the scheme and the percentage of voting shareholders which those numbers represent;**
>
> **(bb) the number of shares of each class which were voted for and against the resolution to approve the scheme and the percentage of the shares voted which those numbers represent; and**
>
> **(cc) the percentage of the issued shares of each class which the shares voted for and against the resolutions represent.**

(b) As soon as practicable following the court sanction hearing, the offeree company must make an announcement stating the decision of the court and including details of whether the scheme will proceed or has lapsed.

(c) As soon as practicable after the scheme of arrangement finally becomes effective, the offeree company or the offeror must make an announcement stating that the scheme has become effective.".

Q.20 Do you agree with the proposed provisions in relation to announcements following key events in a scheme?

4.7 Rule 20.1 provides that "**[i]nformation about companies involved in an offer must be made equally available to all offeree company shareholders as nearly as possible at the same time and in the same manner**". The Code Committee has considered the application of Rule 20.1 to the announcement of the results of shareholder meetings at which resolutions to approve a scheme are put.

4.8 The Code Committee believes that such information is likely to be price sensitive and that the announcement should therefore be made as soon as possible after the results are known. In this regard, the Code Committee notes that LR 9.6.18 R of the FSA's Listing Rules provides that a listed company must notify a RIS as soon as possible after a general meeting of all resolutions passed.

4.9 The Code Committee acknowledges that, in practice, it might not be feasible for the offeree company to ensure that the results of the shareholder meetings are made known to those present at the meeting no earlier than the results are announced to the market and the Code Committee does not believe that it would be practicable to include a specific provision in the Code to this effect. However, the Code Committee notes the importance of Rule 20.1 and emphasises the need for an offeree company to announce the results of resolutions to approve a scheme of arrangement (or any other resolutions relevant to an offer) to a RIS as nearly as possible at the same time as they are announced to the meeting itself.

5. Competition references (Rule 12)

(a) Rule 12.1

5.1 Rule 12.1(a) states as follows:

> "**(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that it will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.**".

5.2 Similarly, Rule 12.1(b) states as follows:

> "**(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that it will lapse if either:—**
>
> > **(i) the European Commission initiates proceedings under Article 6(1)(c); or**
> >
> > **(ii) following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission,**
>
> **in either case before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.**".

5.3 Since there is neither a "first closing date" in a scheme, nor a date on which the scheme becomes "unconditional as to acceptances", it is not currently clear from the face of the Code whether, and if so by reference to what date, Rules 12.1(a) and (b) apply in a scheme.

5.4 Practice in this regard is currently varied. In the majority of schemes, the term required by Rule 12.1(a) or (b) is referenced to the date of the shareholder

meetings. However, in a minority of schemes, the competition reference term is referenced to the date on which the scheme becomes effective.

5.5 The Code Committee believes that, in order to be as consistent as possible with the approach taken in a contractual offer, Rules 12.1(a) and (b) should be applied in a scheme by reference to the date of the shareholder meetings.

5.6 The Code Committee therefore proposes to introduce a new final sentence into each of Rules 12.1(a) and (b) as follows:

> "**12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER**
>
> **(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that it will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later. In the case of a scheme of arrangement, the scheme should provide that it will lapse if there is a reference before the date of the shareholder meetings (as defined in Appendix 7).**
>
> **(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that it will lapse if either:—**
>
> > **(i) the European Commission initiates proceedings under Article 6(1)(c); or**
> >
> > **(ii) following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission,**
>
> **in either case before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later. In the case of a scheme of arrangement, the scheme should provide that it will lapse if the European Commission initiates proceedings under Article 6(1)(c), or if there is a subsequent reference to the Competition Commission following a referral by the European**

Commission under Article 9.1, before the date of the shareholder meetings (as defined in Appendix 7).".

5.7 In addition, the Code Committee proposes to include the Note on Rule 12.1, which relates to the lapsing of a contractual offer, in the List of Disapplied Provisions in the Schemes Appendix.

Q.21 Do you agree with the proposed amendments to Rule 12.1?

(b) Rule 12.2

5.8 Rule 12.2 states as follows:

"**12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIOD**

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end. A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.".

5.9 The definition of "competition reference period" in the Definitions Section of the Code states as follows:

"**Competition reference period**

Competition reference period means the period from the time when an announcement is made of the referral of an offer to the Competition Commission or of the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC, until the time of an announcement of clearance by the Competition Commission or of the issuance of a decision under Article 8(2) of the said Council Regulation.".

5.10 The Code Committee believes that Rule 12.2 should be amended so as to make clear what the position is if an offer being implemented by way of a scheme is referred to the Competition Commission or if the European Commission initiates proceedings under Article 6(1)(c).

5.11 In the case of a reference or initiation of proceedings before the date of the shareholder meetings, the scheme will lapse on the term to be included pursuant to Rule 12.1(a) or (b) (as proposed to be amended).

5.12 In the case of a reference or initiation of proceedings following the shareholder meetings, however, the term included pursuant to Rule 12.1(a) or (b) (as proposed to be amended) will not be relevant. In such circumstances, the Code Committee believes that Rule 12.2 should provide that the offer period should end (and a competition reference period commence) upon a reference or initiation of proceedings only if the scheme lapses upon the offeror invoking a condition included pursuant to Rule 12.1(c), which provides that an offeror may "make the offer conditional on a decision being made that there will be no reference, initiation of proceedings or referral".

5.13 Therefore, if the scheme lapses before the date of the shareholder meetings as a result of a term included pursuant to Rule 12.1(a) or (b) or, following the shareholder meetings, as a result of the offeror invoking a condition included pursuant to Rule 12.1(c), the offer period will end in accordance with Rule 12.2 (as proposed to be amended) and a competition reference period will commence. In accordance with Note (a)(iii) on Rule 35.1 (as referred to in Rule 12.2), if the Competition Commission subsequently gives clearance to the offer, or the European Commission issues a decision under Article 8(2) of Council Regulation 139/2004/EC, the offeror will then normally have 21 days after the announcement of the clearance or decision to announce a new offer, following which the provisions of Rule 35.1, which restricts the offeror from making a further offer within 12 months from the date on which an offer is withdrawn or lapses, will

apply. For the avoidance of doubt, if there is a reference or initiation of proceedings following the shareholder meetings and the offeror decides not to invoke a condition included pursuant to Rule 12.1(c) (such that the scheme will continue pending the outcome of the reference or proceedings) then the offer period will not end and no competition reference period will commence.

5.14 In view of the above, the Code Committee proposes to introduce a new second sentence into Rule 12.2, as follows:

> "**12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIOD**
>
> **When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end. However, in the case of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings, and a competition reference period will commence, only if the scheme then lapses on a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked. A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.**".

5.15 In addition, the Code Committee proposes to introduce a Note on the definition of "competition reference period", as follows:

> "*NOTE ON DEFINITION OF COMPETITION REFERENCE PERIOD*
>
> *In the case of a scheme of arrangement, a competition reference period will commence following a reference or initiation of proceedings only if the scheme then lapses on a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.*".

5.16 In addition, consequential amendments will be required to three of the provisions of the Code which refer to Rule 12.2, namely Note 4 on Rule 20.1, and Note 5 on Rule 20.2 and Note 4 on Rule 21.1, as set out in Appendix B.

Q.22 Do you agree with the proposed amendment of Rule 12.2 and with the consequential amendments?

6. Holding statements (Note 1 on Rule 19.3)

6.1 The first sentence of Note 1 on Rule 19.3 states as follows:

> "*While an offeror may need to consider its position in the light of new developments, and may make a statement to that effect, and while a potential competing offeror may make a statement that it is considering making an offer, it is not acceptable for such statements to remain unclarified for more than a limited time in the later stages of the offer period.*".

6.2 The interpretation of Note 1 on Rule 19.3 was the subject of a Panel hearing in November 1999 in relation to the statement by The Royal Bank of Scotland Group plc ("RBS") that it was considering making an offer in competition with the offer by Bank of Scotland ("BOS") for National Westminster Bank plc ("NatWest"). BOS had appealed against the Panel Executive's ruling that it would not set a firm deadline for RBS to make a clarifying announcement but would, depending on the circumstances, expect to require clarification by RBS no later than 10 days prior to the end of BOS's 60 day contractual offer timetable, in order to provide a reasonable time for NatWest shareholders to make acceptance decisions in the light of knowledge of all parties' intentions. The Panel upheld the Executive's ruling which, the Panel said, "achieve[d] the objective of the Rule, namely sufficient time for NatWest shareholders to reach a decision on whether or not to accept an offer". The Code Committee understands that since that time Note 1 on Rule 19.3 has consistently been interpreted as requiring clarification of

a potential competing offeror's intentions on or around 10 days prior to the end of the offer timetable of a contractual offer.

6.3 In November 2005, the Panel Executive described its application of Note 1 on Rule 19.3 to a scheme of arrangement in the second section of Practice Statement No. 14, as follows:

> "In the case of a Scheme, the Executive will normally set the latest date for clarification on or around 10 calendar days prior to the date of the Shareholders' Meetings. In certain cases, however, the Executive may set a date which falls after the date of the Shareholders' Meetings but prior to the Court Hearing. In considering the appropriate latest date for clarification, the Executive will consider each case on its facts and will seek to balance the desirability for shareholders of the offeree company to be given sufficient time to understand the position of any potential competing offeror(s) before they vote on the Scheme proposals against the need for potential competing offeror(s) to have sufficient time to prepare their competing proposals.".

6.4 The Code Committee agrees with the Panel Executive that it is important for offeree company shareholders, where practicable, to have clarity as to a potential competing offeror's intentions prior to the shareholder meetings at which they will decide whether or not to approve a scheme of arrangement. The Code Committee considers that this is consistent with the statement in the first sentence of General Principle 2 that the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision.

6.5 The Code Committee recognises, however, as did the Panel Executive in Practice Statement No. 14, that, on occasion, a potential competing offeror might have good arguments as to why it should not be required to clarify its intentions by a specified date in advance of the shareholder meetings. For example, the first offeror and the offeree board might have agreed to minimum time periods between (i) the announcement of the scheme and the posting of the scheme circular, and/or (ii) the posting of the scheme circular and the date of the

shareholder meetings, giving a potential competing offeror little opportunity to consider its position and to do such preparatory work as is necessary in order to clarify its intentions prior to the date of the shareholder meetings. In such circumstances, the Panel might consider it to be appropriate, and in the interests of offeree shareholders (who might stand a greater chance of losing the prospect of a competing or increased offer), to set a date for clarification by the potential competing offeror which is after the date for which the shareholder meetings have been convened but before the date for which the court sanction hearing is expected to take place. In those circumstances, the offeree board would have the choice either of recommending to offeree shareholders that they should proceed to hold the shareholder meetings on the date for which they have been convened, despite the lack of clarification, or of proposing the adjournment of the shareholder meetings pending such clarification.

6.6 The Code Committee has concluded that greater weight should continue to be placed on the need of offeree shareholders for certainty prior to the date of the shareholder meetings and that the default position should therefore be that a potential competing offeror should be required to clarify its intentions within a reasonable period prior to that time. However, the Code Committee believes that the Code should expressly acknowledge that, in certain circumstances, a potential competing offeror might be able to persuade the Panel to exercise its discretion to permit clarification after the date for which the shareholder meetings have been convened.

6.7 The Code Committee therefore believes that the policy in Practice Statement No. 14, as described above, should, in effect, be codified and proposes to include a new provision in the Schemes Appendix, as follows:

> "**4 HOLDING STATEMENTS**
>
> **(a) If a statement of the kind described in Note 1 on Rule 19.3 is made during an offer period involving a scheme of arrangement, the**

Panel will normally require the statement to be clarified by a date, to be specified by the Panel, in advance of the date of the shareholder meetings.

(b) Where appropriate, however, taking into account all relevant circumstances, including:

(i) the interests of offeree shareholders and the desirability of clarification prior to the shareholder meetings; and

(ii) the time which the offeror or potential offeror has had to consider its position,

the Panel may permit clarification after the date of the shareholder meetings but before the date of the court sanction hearing.".

6.8 In addition, the Code Committee proposes to introduce a cross-reference to the Schemes Appendix into Note 1 on Rule 19.3, as set out in Appendix B.

Q.23 Do you agree with the proposed provision relating to holding statements made during an offer period involving a scheme?

7. Revision (Rule 32)

(a) Latest date on which a scheme may be revised

7.1 Rule 32.1(b) provides that a revised offer "**must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore, no revised offer document may be posted in the 14 days ending on the last day the offer is able to become unconditional as to acceptances**".

7.2 The effect of Rule 32.1(b) is therefore that, absent an extension of "Day 60", a contractual offer may not generally be revised after the 46th day of the offer timetable, i.e. the date which is 14 days prior to the latest date on which the offer may become or be declared unconditional as to acceptances. However, in view of the Code Committee's conclusion in paragraph 3.37 above that the Code should

not specify maximum time periods for the holding of shareholder meetings and/or the fulfilment of other conditions to a scheme, and since a scheme of arrangement is not "kept open" and does not become "unconditional as to acceptances", it is unclear from its face whether, and if so how, Rule 32.1(b) applies to a scheme.

7.3 In the course of its review, the Code Committee therefore considered whether or not the Code should specify a date following which a scheme should not be revised. For example, if the date of the shareholder meetings were considered to be analogous to Day 60 of a contractual offer (on the basis of this being the time by which investment decisions need to be made by offeree shareholders), this might indicate that the latest date for revision of a scheme should be the date which is 14 days prior to those shareholder meetings.

7.4 On the one hand, it might be argued that a deadline for the revision of a scheme prior to the shareholder meetings is required to ensure that, in accordance with General Principle 2, shareholders are given sufficient time and information prior to the shareholder meetings to enable them to reach a properly informed decision on the revised scheme.

7.5 On the other hand, it might be argued that it is unnecessary for the Code to impose such a deadline, given that the court will sanction the scheme only if it is satisfied that shareholders have been given sufficient opportunity to consider any new information in connection with a revision. In this regard, the Code Committee understands that, on occasion, the Panel and the court have permitted revisions to a scheme of arrangement on notice of shorter than 14 days where this was held to be in the interests of shareholders.

7.6 On balance, the Code Committee has concluded that General Principle 2 (as reflected in Rule 32.1(b)) would best be respected by requiring any revision to a scheme normally to be made by no later than the date which is 14 days prior to the date of the shareholder meetings, and that the Code should require the Panel's

consent to be obtained if it is proposed to make any revision to a scheme after that date. In circumstances where the offeree board does not intend to propose the adjournment of the shareholder meetings, the Code Committee considers that the Panel should normally grant its consent to a revision within 14 days of the shareholder meetings only if the offeree board and its Rule 3 adviser confirm to the Panel that:

(a) the revision is in the best interests of offeree shareholders;

(b) they believe that resolutions to approve and to give effect to the scheme are likely to be passed at the shareholder meetings without those meetings being adjourned; and

(c) the offeree board will propose the adjournment of the shareholder meetings if it no longer believes it likely that those resolutions will be passed. The Code Committee considers that the Panel would wish to avoid the risk of the scheme lapsing owing to offeree shareholders not having sufficient time to reach a properly informed decision on the revision.

7.7 The Code Committee understands that, in a contractual offer, the Panel would be unlikely to grant a dispensation so as to permit an offeror to revise its offer after "Day 46" unless the offeree board had consented to an extension of "Day 60". However, the Code Committee considers that the Panel would be more likely to grant its consent so as to permit a revision to a scheme in the 14 days prior to the shareholding meetings. This is because:

(a) it is not necessarily the case that offeree shareholders will have no further say in the company's destiny following the shareholder meetings (see paragraph 2.25 above);

(b) it may be procedurally more difficult for the shareholder meetings in a scheme to be adjourned than it is for Day 60 of a contractual offer to be extended; and

(c) whereas the offeree board may itself consent to an extension of Day 60 of a contractual offer, whether to adjourn the shareholder meetings is ultimately not a matter for agreement between the offeree board and the offeror but a matter which offeree shareholders must decide upon.

7.8 The Code Committee therefore proposes to include Rule 32.1(b) in the List of Disapplied Provisions and to include the following provision in the Schemes Appendix:

"**7 REVISION**

Any revision to a scheme of arrangement should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings. The consent of the Panel must be obtained if it is proposed to make any revision to a scheme after that date.".

Q.24 Do you agree with the proposed provision in relation to the revision of a scheme?

(b) Triggering Rule 9

7.9 Note 4 on Rule 32.1 relates to the situation where an offeror making a voluntary contractual offer in cash triggers an obligation to extend a mandatory offer under Rule 9 at no higher than the existing offer price. The Note provides that the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), although it provides that an acquisition which triggers a mandatory offer can only be made if the offer can remain open for acceptance for at least 14 days following the date on which the amended offer document is posted.

7.10 In view of its conclusion at paragraph 11.6 below that a person should not be permitted to satisfy an obligation to make a mandatory offer under Rule 9 by way of a scheme, the Code Committee believes that, in circumstances where an offeror triggers a mandatory offer obligation during a scheme, the scheme would need to be withdrawn and a contractual offer made. The Code Committee therefore considers that Note 4 on Rule 32.1 is inapplicable in a scheme. The situation in which an offeror proceeding by way of a scheme of arrangement wishes to trigger a mandatory offer obligation is discussed further at paragraph 11.7 below.

Q.25 Do you agree that Note 4 on Rule 32.1 should be disapplied in a scheme?

(c) "No increase statements"

7.11 Rule 32.2 relates to "no increase statements" made by an offeror. The Code Committee considers that Rule 32.2 and the Notes thereon should apply in a scheme in the same way as in a contractual offer, subject to the points in paragraphs 7.12 to 7.17 below and the amendments proposed in section 9 below.

(i) Note 3 on Rule 32.2

7.12 Paragraph (b) of Note 3 on Rule 32.2 provides that if a competitive situation arises after a no increase statement has been made by an offeror then, subject to having reserved the right to do so, the offeror can choose not to be bound by the statement and to be free to revise its offer, provided that "any shareholders who accepted the offer after the date of the no increase statement are given a right of withdrawal for a period of 8 days".

7.13 Since a scheme of arrangement is not "accepted" in the same way as a contractual offer, offeree shareholders will not be "locked in", and so no right of withdrawal is required. Paragraph (b) of Note 3 on Rule 32.2 is therefore inapplicable.

Accordingly, the Code Committee proposes that paragraph (b) of Note 3 on Rule 32.2 should be included in the List of Disapplied Provisions in the Schemes Appendix.

Q.26 Do you agree that paragraph (b) of Note 3 on Rule 32.2 should be disapplied in a scheme?

(ii) Note 4 on Rule 32.2

7.14 Note 4 on Rule 32.2 provides that, subject to having reserved the right to do so "*the offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended for acceptance by the board of the offeree company*".

7.15 The Code Committee considers that Note 4 applies to a scheme of arrangement in the same way as to a contractual offer. However, although a scheme will normally be recommended, technically it is not recommended "for acceptance", since a scheme is not accepted in the same way as a contractual offer. In order to avoid any doubt that it applies to a scheme in the same way as a contractual offer, the Code Committee proposes that the words "for acceptance" should be deleted from Note 4 on Rule 32.2, as set out in Appendix B.

Q.27 Do you agree with the proposed amendment to Note 4 on Rule 32.2?

(iii) Note 5 on Rule 32.2

7.16 Note 5 on Rule 32.2 states as follows:

> "*Subject to Note 2 above, if the offeree company makes an announcement of the kind referred to in Rule 31.9 after the 39th day and after a no extension statement has been made, the offeror can choose not to be bound by that statement and to be free to extend its offer if permitted by the Panel under Rule 31.9, provided that notice to this effect is given as soon as possible (and in any event within 4 business days after the date of the*

offeree company announcement) and shareholders are informed in writing at the earliest opportunity.".

7.17 In view of its conclusion in paragraph 3.45 above that Rule 31.9 should be disapplied in a scheme, the Code Committee believes that Note 5 on Rule 32.5 should also be disapplied. The Code Committee therefore proposes to include Note 5 on Rule 32.2 in the List of Disapplied Provisions.

Q.28 Do you agree that Note 5 on Rule 32.2 should be disapplied in a scheme?

8. Competitive situations (Rule 32.5)

(a) Introduction

8.1 The question of how the Code applies to a scheme of arrangement becomes more complicated in a competitive situation, that is: (i) if a contractual offer is made in competition with an existing scheme; (ii) if a scheme is proposed in competition with an existing contractual offer; or (iii) if a second scheme is proposed in competition with an existing scheme.

8.2 The principal provisions of the Code which relate to competitive situations are as follows:

(a) Note 4 on Rule 31.6, the first sentence of which provides that "*where a competing offer has been announced, both offerors will normally be bound by the timetable established by the posting of the competing offer document*"; and

(b) Rule 32.5, which provides that where a competitive situation continues to exist in the later stages of the offer period, the Panel will normally impose an auction procedure on or after the 46th day following the posting of the competing offer document.

8.3 The Code Committee believes that an auction procedure in accordance with Rule 32.5 will normally be the most appropriate way by which to resolve a competitive situation which continues to exist in the later stages of an offer period involving a scheme. However, the date upon which the auction procedure should commence in a situation involving a scheme of arrangement may not always be obvious, as discussed below.

(b) Contractual offer made in competition with an existing scheme

8.4 If a contractual offer is made in competition with an existing scheme of arrangement then, in accordance with Note 4 on Rule 31.6, both offerors will normally be bound by the timetable established by the posting of the competing offer document such that (i) the competing offer should not be revised after "Day 46" of the new timetable, other than in accordance with any auction procedure established under Rule 32.5, and (ii) the auction procedure provided for by Rule 32.5 will normally commence on Day 46 of the new timetable.

8.5 The Code Committee believes that the application of the Code timetable in a situation where a contractual offer is made in competition with an existing scheme is straightforward and does not believe that any amendment to the Code in this regard is required.

(c) Scheme proposed in competition with an existing contractual offer

8.6 If a scheme of arrangement is proposed in competition with an existing contractual offer, the posting of the scheme circular does not establish a standard Code timetable in the same way that the posting of a contractual offer document would and there are no dates in a scheme which are directly equivalent to "Day 46" and "Day 60" of a contractual offer. Therefore, although it is clearly preferable for the date on which final revisions to the competing offers are

announced, and on which any auction procedure provided for by Rule 32.5 commences, to be a date prior to the date of the shareholder meetings, the precise date on which these events should occur in such circumstances is not obvious.

8.7 The Code Committee considers that, for the purposes of Rule 32.5, the 14th day prior to the date originally set for the shareholder meetings to approve the competing scheme should normally be treated as the equivalent of the 46th day following the posting of the competing offer document. The Code Committee believes that such an approach should not normally act to the detriment of the first offeror, who will have the choice of whether or not to extend its offer timetable accordingly. Nor does the Code Committee believe, subject to paragraph 8.8 below, that the interests of the first offeror will be adversely affected if the date set for the shareholder meetings to approve the second offeror's scheme is earlier than the 60th day following the posting of the scheme circular, such that any auction procedure under Rule 32.5 might commence on an earlier date than if the second offeror had proceeded by way of a contractual offer.

8.8 The Code Committee is aware, however, that a situation could arise in which it would be inappropriate to adopt the approach described in paragraph 8.7 above. For example, if the shareholder meetings in relation to the competing scheme were set for a date which was earlier than the 60th day following the posting of the first offeror's offer document, the Panel might consider it unfair on the first offeror to impose an auction procedure on a date which would be earlier than Day 46 of its original offer timetable.

8.9 The Code Committee therefore believes that, where a scheme is proposed in competition with a contractual offer, the Code should not prescribe the precise date on which final revisions to the competing offers must be announced, and on which the auction procedure under Rule 32.5 will commence, but that the precise date should be left to be determined by the Panel at the relevant time in the light of all the prevailing circumstances.

(d) Scheme proposed in competition with an existing scheme

8.10 The Code Committee is aware of only one instance of a scheme having been proposed in competition with an existing scheme, namely the competing offers by Tata Steel UK Limited ("Tata") and CSN Acquisitions Limited ("CSN") for Corus Group plc ("Corus"). In that case, CSN was permitted by the Panel Executive to announce a firm intention to make an offer for Corus and, subject to the satisfaction of a pre-condition that the Tata scheme had lapsed, for CSN to implement its offer by way of a scheme.

8.11 Since the implementation of the CSN scheme was subject to a pre-condition, no timetable was established by CSN's anouncement for the posting of CSN's scheme circular. This was because, where an offer is announced subject to a pre-condition, the Panel Executive will normally grant an extension to the 28 day period for posting under Rule 30.1 until shortly after the pre-condition is waived or satisfied. However, in order to ensure that Corus shareholders had sufficient information on the proposed CSN offer in deciding whether to approve the Tata scheme at the shareholder meetings, the Panel Executive concluded that CSN should be required, promptly after the announcement, to post to Corus shareholders a document (the "information document") containing all the information required under Rule 24 and, at the time of posting that document, to put on display the documents referred to in Rule 26.

8.12 In addition, since CSN had proposed that the implementation of its offer by way of a scheme would only commence once the scheme to implement the Tata offer had lapsed, there was no obvious last date for the announcement of revised competing offers and for the commencement of an auction procedure under Rule 32.5. Following discussions with the competing offerors and the offeree company, the Panel Executive ruled that this date would be the 46th day following the posting of CSN's information document.

8.13 The Corus case demonstrates well the need for the Panel to be able to apply the Code flexibly to a novel situation involving a scheme of arrangement. In the light of that case, the Code Committee believes that, where a scheme is proposed in competition with an existing scheme, the Code should not prescribe the precise date on which final revisions to the competing schemes must be announced, and on which the auction procedure under Rule 32.5 will commence, but that the precise date should be left to be determined by the Panel at the relevant time in the light of all the prevailing circumstances.

(e) Proposed amendment

8.14 In view of the above, the Code Committee proposes to introduce a new Note 3 on Rule 32.5, as follows:

> "*3. Schemes of arrangement*
>
> *Where the competing offer is a scheme of arrangement, the parties must consult the Panel as to the applicable timetable. The Panel will then determine the date on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all the relevant circumstances.*".

Q.29 Do you agree with the Code Committee's conclusions in relation to competitive situations involving a scheme and with the introduction of a new Note 3 on Rule 32.5 as proposed?

9. Switching

(a) Introduction

9.1 On occasion, an offeror may wish to change the structure of the transaction pursuant to which it proposes to acquire the offeree company. In other words, the

offeror may wish to "switch" either (i) from a scheme of arrangement to a contractual offer, or (ii) from a contractual offer to a scheme of arrangement.

9.2 There are a number of reasons why an offeror proceeding by way of a scheme may wish to switch to a contractual offer. For example, since a contractual offer is commonly perceived as being a more flexible structure than a scheme, an offeror may wish to switch from a scheme to a contractual offer if a competitive situation arises. In addition, since the acceptance condition to a contractual offer can generally be set at any level above 50%, an offeror initially proceeding by way of a scheme may wish to switch to a contractual offer if it considers that it would have a greater chance of succeeding in its proposed acquisition of the offeree company by doing so. An offeror may also wish to switch from a scheme to a contractual offer if the offeree board withdraws its recommendation of the scheme.

9.3 Similarly, although less common, an offeror proceeding by way of a contractual offer may wish to switch to a scheme. For example, if it was known that 11% of offeree company shareholders opposed a contractual offer, such that the offeror would be unable to utilise the "squeeze out" procedure under company law, the offeror (with the consent of the offeree board) might wish to switch to a scheme in order to increase the chances of its acquiring 100% of the offeree company's issued share capital.

9.4 An inevitable consequence of a switch is that the conditionality of the transaction will change. Since an acceptance condition to a contractual offer operates quite differently from the shareholder approval conditions to a scheme of arrangement, the two types of condition may not be capable of direct comparison. For example, although the resolution put to a court-convened shareholders' meeting must be passed by a majority in number representing three-fourths in value of the relevant class of members of the offeree company, only the shares of members "present

and voting either in person or by proxy" are included in the denominator[6] and any shares held by the offeror or any person acting in concert with it are generally excluded from the vote. In contrast, if, in a voluntary contractual offer, the acceptance condition is set at 75%, any shares held by the offeror in the offeree company will be counted towards the satisfaction of the acceptance condition for the purposes of Rule 10 and all the shares in issue and carrying voting rights are included in the denominator. Therefore, although subject to a 75% approval threshold, the likelihood of a scheme becoming unconditional – i.e. its "deliverability" - is inevitably not the same as the likelihood of a contractual offer with a 75% acceptance condition becoming unconditional.

9.5 The Code Committee recognises the desire of offerors to retain the flexibility to switch offer structures and does not consider that such switches should be prohibited by the Code. However, the Code Committee has given consideration to a number of issues in relation to switching, as discussed below.

(b) Reserving the right to switch

9.6 Where an offeror is proceeding by way of a scheme of arrangement, it is common for the announcement and the scheme circular to reserve the right for the offeror to switch to a contractual offer. It is far less common for an offeror proceeding by way of a contractual offer to reserve the right to switch to a scheme.

9.7 In the course of its review, the Code Committee considered whether an offeror should be permitted to switch only if it had reserved the right to do so from the outset. The Code Committee believes that the interests of offeree shareholders should not normally be adversely affected if an offeror switches its offer structure without having specifically reserved the right to do so. Indeed, the Code Committee believes that the introduction into the Code of a provision permitting an offeror to switch only if it has reserved the right to do so would simply result in

[6] Companies Act 1985, section 425(2)

"boilerplate" provisions being included in all offer announcements and documentation, regardless of the actual likelihood of a subsequent switch.

9.8 The Code Committee has therefore concluded that there is no need for the Code to require an offeror to reserve the right to switch and that an offeror's ability to switch should not be dependent on its having made such a reservation.

(c) Requirement for Panel consent to a switch

9.9 The Code Committee has also considered whether an offeror should have an unrestricted ability to switch between offer structures in all circumstances or whether a switch should be subject to the Panel's consent.

9.10 As discussed below, the Code Committee believes that there may be certain circumstances in which a switch in the structure of an offer might be detrimental to the interests of offeree shareholders. On this basis, the Code Committee has concluded that an offeror's ability to switch from a scheme to a contractual offer, or from a contractual offer to a scheme, should not be unrestricted, but should be subject to the prior consent of the Panel. The Code Committee proposes to include a provision in the Schemes Appendix to this effect, as set out in paragraph 9.44 below.

(d) When consent to a switch might be withheld

9.11 The Code Committee believes that, in considering whether to consent to a proposed switch, the Panel should primarily have regard to the effect that the switch is likely to have on the interests of offeree shareholders. For example, if the switch would be likely to reduce the chances of the offer becoming unconditional, such that the offeror might avoid an obligation which it would otherwise have to implement the offer, the Code Committee believes that this would be unlikely to be in the interests of offeree shareholders. The Code

Committee believes that the views of the offeree board and its Rule 3 adviser as to the effect of the proposed switch on the interests of offeree shareholders will be an important factor in the Panel's determination as to whether to grant its consent.

9.12 The Code Committee believes that the number of situations in which the Panel will withhold its consent to a proposed switch is likely to be limited since, based on the Panel's past experience, the Code Committee believes (i) that the purpose of a proposed switch will normally be to make the offer more rather than less likely to become unconditional following the switch, and (ii) that an increase in deliverability will not normally be detrimental to the interests of offeree company shareholders.

9.13 As indicated in paragraph 9.4, in any given situation, it may be difficult to compare the deliverability of a transaction before and after a proposed switch. Nevertheless, the Code Committee believes that certain switches would be unlikely to reduce deliverability, for example a switch from a scheme to a contractual offer with a 50% acceptance condition or a switch from a contractual offer with a 90% acceptance condition to a scheme.

9.14 On the other hand, the Code Committee believes that certain other switches would be more likely to reduce deliverability, for example a switch from a scheme to a contractual offer with a 90% acceptance condition or a switch from a contractual offer with a 50% acceptance condition to a scheme. The Code Committee considers that such switches would require closer scrutiny by the Panel.

9.15 The Code Committee notes that there may be circumstances in which the offeror, in effect, has no option but to switch the structure of its transaction. For example, if an offeror implementing its offer by way of a scheme were to lose the recommendation of the offeree board, the offeror would be required to switch to a contractual offer if it wished to continue with the transaction. If it wished to retain the certainty that it would acquire the entire issued share capital of the

offeree company in the event of the offer's success, the offeror might seek the Panel's consent to the contractual offer being subject to a 90% acceptance condition. Notwithstanding that the transaction might appear to be less deliverable following the switch, the Code Committee believes that the Panel would nevertheless be likely to consent to such a switch in these circumstances.

9.16 In certain circumstances, the actions of the offeree board may cause the scheme to lapse (see paragraph 2.26 above) without the offeror having sufficient notice to enable it to effect a switch in the structure of the transaction from a scheme to a contractual offer before the scheme has lapsed. In such circumstances, the question may arise as to whether the offeror should be precluded, under Rule 35.1, from continuing to pursue its interest in the offeree company by making a new contractual offer.[7] The Code Committee understands that, in circumstances such as these, i.e. where it is the actions of the offeree board which have caused the scheme to lapse without significant prior notice, the Panel would be likely to grant its consent to the announcement of a new offer by the offeror.

(e) The announcement of a switch

9.17 Rule 2.5(b) sets out the details which must be included in the announcement of a firm intention to make an offer. The manner in which the announcement must be published is set out in Rule 2.9. In addition, Rule 2.6(b) provides that promptly after the publication of such an announcement, the offeree company must send a copy of it (or a summary) to its shareholders and to the Panel, and that the offeror and the offeree company must make the announcement (or summary) readily available to their employee representatives or, if none, to the employees themselves.

[7] Rule 35.1 prevents an offeror from announcing a new offer within 12 months from the date on which its original offer is withdrawn or lapses, except with the consent of the Panel.

9.18 The Code Committee believes that, where an offeror has obtained the Panel's consent to a switch in the structure of its offer, the Code should require the switch to be announced. The Code Committee has concluded that the announcement should be published in accordance with the requirements of Rule 2.9, and that it should include the following:

(a) details of all changes to the terms and conditions of the offer as a result of the switch;

(b) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);

(c) an explanation of the offer timetable applicable following the switch (as determined by the Panel); and

(d) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or its associates will remain valid following the switch.

9.19 The Code Committee proposes to include a provision in the Schemes Appendix to this effect, as set out in paragraph 9.44 below.

9.20 In addition, the Code Committee has considered whether the announcement of a switch (or a summary) should be circulated in the same way as an announcement made under Rule 2.5 (or a summary) is required to be circulated under Rule 2.6(b). The Code Committee has concluded that, on the basis that Rule 2.6(b) applies only to the initial announcement made under Rule 2.5, and does not apply to the announcement of a revised offer, there is no need for the Code to include a provision equivalent to Rule 2.6(b) in relation to the announcement of a switch.

(f) Timetable issues

9.21 Since the timing of a scheme is different from that of a contractual offer, a switch from one to the other will inevitably have consequences for the timetable applicable to the offers of both the switching offeror and that of any competing offeror.

9.22 In the course of its review, the Code Committee considered a number of situations in which a switch might occur and the possible timetable implications.

9.23 The Code Committee concluded that it is difficult to predict all the circumstances in which a switch may occur and the likely effect on the applicable offer timetable. The Code Committee therefore considers that it would not be feasible to legislate specifically for each possible situation. The Code Committee believes that the Panel should retain the flexibility to determine the offer timetable that should apply in a particular situation following a switch at the time when it grants its consent to the switch, having taken into account all relevant factors. The Code Committee believes that the factors which the Panel may take into account when determining the offer timetable that should apply following a switch include the following:

(a) the time required to enable shareholders in the offeree company to reach a properly informed decision;

(b) the time which has elapsed since the switching offeror's original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree board to be hindered in the conduct of its affairs;

(c) the views of the offeree board and the switching offeror; and

(d) the likely effect of the new offer timetable on any competing offeror.

9.24 The Code Committee proposes to include provisions in the Schemes Appendix to reflect the above conclusions, as set out in paragraph 9.44 below.

(g) Switching in the later stages of the offer

9.25 Rule 32.1(b) provides that no revised offer document may be posted in the 14 days ending on the last day a contractual offer is able to become unconditional as to acceptances. As indicated in paragraph 7.6 above, the Code Committee has concluded that any revision to a scheme should normally be made no later than the date which is 14 days prior to the date of the shareholder meetings.

9.26 The Code Committee has considered whether the restrictions on an offeror's ability to make revisions in the later stages of the offer might imply that the Panel should withhold its consent to a switch (i) from a contractual offer to a scheme after "Day 46", or (ii) from a scheme to a contractual offer after the 14th day prior to the date of the shareholder meetings.

9.27 As explained in paragraph 3.37 above, a primary reason that the Code imposes maximum time periods in a contractual offer is to ensure that the offeree board is not put "under siege" for longer than is reasonable. The Code Committee therefore believes that the Panel would be unlikely to withhold its consent to a switch simply on the basis that it would occur in the later stages of the offer since:

(a) a switch from a contractual offer to a scheme would only be possible with the consent of the offeree board, who would therefore not be under siege; and

(b) a switch from a scheme to a contractual offer would be likely either (i) to be recommended by the offeree board (in which case the offeree board would not be under siege), (ii) to result from a competitive situation

arising (in which case a new offer timetable would then apply), or (iii) to result from the withdrawal of the offeree board's recommendation of the scheme.

(h) "No increase statements"

9.28 Rule 32. 2 provides as follows:

> "**32.2 NO INCREASE STATEMENTS**
>
> **If statements in relation to the value or type of consideration such as "the offer will not be further increased" or "our offer remains at xp per share and it will not be raised" ("no increase statements") are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (eg the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.**".

9.29 Note 1 on Rule 32.2 elaborates on Rule 32.2, as follows:

> "*1. Firm statements*
>
> *In general, an offeror will be bound by any firm statement as to the finality of its offer. In this respect, the Panel will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, ie the offer is "final" or will not be "increased", "amended", "revised", "improved", "changed", and similar expressions will all be treated in the same way. Any statement of intention will be regarded for this purpose as a firm statement; the expression "present intention" should not be used as it may be misleading to shareholders.*".

9.30 Further detail as regards reservations of the right to set a no increase statement aside is provided in Note 2 on Rule 32.2, the first sentence of which states as follows:

> "*A no increase statement may be set aside only if the offeror has specifically reserved the right at the time the statement was made to set it aside in the circumstances which subsequently arise; this applies whether or not the offer was recommended at the outset.*".

A reservation of the right to set a no increase statement aside should not, therefore, be general in nature but should stipulate the particular circumstances in which the statement may be set aside.

9.31 In the course of its review, the Code Committee considered whether an offeror which makes a no increase statement should be permitted subsequently to switch offer structures and, if so, in what circumstances.

9.32 On the one hand, it might be argued that an offeror which makes a no increase statement, but which does not reserve the right to set it aside if particular circumstances arise, should be precluded from making a subsequent switch in the structure of its offer. The basis for this argument would be that Rule 32.2 provides that the terms of an offer may not be amended "in any way" following an unreserved no increase statement, even if the amendment would not result in an increase of the value of the offer.

9.33 On the other hand, it might be argued that an offeror which makes a no increase statement should not be precluded from making a subsequent switch in the structure of its offer, even if it has not specifically reserved the right to do so in particular circumstances. The basis for this argument would be that the intention of Rule 32.2 is to restrict an amendment to the commercial terms of an offer following a no increase statement, and that a switch from a contractual offer to a scheme (or vice versa) would only affect the manner in which the offer was to be implemented and would not, of itself, affect the value or specie of the consideration offered.

9.34 On balance, the Code Committee has concluded that a switch in the structure of an offer should not normally, of itself, be regarded as an amendment which would be precluded by an earlier no increase statement in relation to the value or type of consideration offered, and that it is therefore not necessary for an offeror making such a no increase statement specifically to reserve the right to switch its offer structure.

9.35 For the avoidance of doubt, however, the Code Committee believes that a firm statement as to the finality of an offer, of the type described in Note 1 on Rule 32.2, may, on its terms, preclude a subsequent switch.

9.36 In the light of the above, the Code Committee proposes to introduce a new Note 6 on Rule 32.2, as set out in paragraph 9.45 below.

(i) New conditions

9.37 Rule 32.4 provides that an offeror may introduce new conditions "**only to the extent necessary to implement an increased or improved offer**".

9.38 In the course of its review, the Code Committee considered whether Rule 32.4 would restrict the substitution of the acceptance condition to a contractual offer for the conditions relating to the approval of a scheme by offeree shareholders (or vice versa) in the event that an offeror wished to switch the structure of its offer.

9.39 The Code Committee has concluded that, for the avoidance of doubt, Rule 32.4 should be amended so as specifically to refer to the introduction of new conditions to the extent necessary to implement a switch to or from a scheme of arrangement to which the Panel consents, as proposed in paragraph 9.46 below.

(j) Unacceptable statements

9.40 Rule 19.3 states as follows:

> "**Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.**".

9.41 On 21 July 2004, the Panel Executive issued Practice Statement No. 7 regarding its interpretation of Rule 19.3. The second and third paragraphs of Practice Statement No. 7 state as follows:

> "The Executive emphasises that Rule 19.3 is not limited to statements about increases in the financial value of an offer. The Rule extends to any statement which may mislead shareholders or the market or which may create uncertainty (whether or not such statement is factually accurate).
>
> In addition, the Executive interprets the example set out in Rule 19.3 of a statement that an offeror "may improve its offer" as also encompassing statements about offer amendments of a non-financial nature, for example possible changes to the structure of an offer, to the conditionality of an offer or to the non-financial terms of an offer.".

9.42 The Code Committee agrees with the Panel Executive that Rule 19.3 is not limited to statements about increases in the financial value of an offer and that it extends also to statements relating to changes designed to improve the chances of success of an offer, for example changes to the structure, the conditionality or the non-financial terms of the offer. The first sentence of Rule 19.3 makes it clear that the Rule applies to any statement which "while not factually inaccurate … may create uncertainty" and the Code Committee believes that a statement by an offeror suggesting, for example, that it might switch the structure of its offer, but without committing itself to doing so, might create such uncertainty.

9.43 In the light of the above, the Code Committee has concluded that Rule 19.3 should be amended as set out in paragraph 9.47 below.

(l) Proposed amendments

9.44 In the light of its conclusions in relation to switching, as described above, the Code Committee proposes to include the following Section 8 in the Schemes Appendix:

"**8 SWITCHING**

(a) With the consent of the Panel, the offeror may switch from a scheme of arrangement to a contractual offer or from a contractual offer to a scheme of arrangement.

(b) The Panel will determine the offer timetable that will apply following any switch to which it consents.

(c) The offeror must announce a switch in accordance with the requirements of Rule 2.9. The announcement must include:

(i) details of all changes to the terms and conditions of the offer as a result of the switch;

(ii) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);

(iii) an explanation of the offer timetable applicable following the switch (as determined by the Panel); and

(iv) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or its associates will remain valid following the switch.

NOTE ON SECTION 8

Determination of the offer timetable following a switch

Factors which the Panel may take into account when determining the offer timetable that will apply following a switch include:-

(a) the time required to enable shareholders in the offeree company to reach a properly informed decision;

(b) the time which has elapsed since the switching offeror's original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree board to be hindered in the conduct of its affairs;

(c) the views of the offeree board and the switching offeror; and

(d) the likely effect of the new offer timetable on any competing offeror.".

9.45 In the light of the conclusion reached at paragraph 9.34 above, the Code Committee is proposing to introduce a new Note 6 on Rule 32.2 into the Code, as follows:

"*6. Schemes of arrangement*

A switch to or from a scheme of arrangement will not normally, of itself, be regarded as an amendment which would be precluded by an earlier no increase statement in relation to the value or type of consideration offered. Therefore, it is not necessary for an offeror making such a statement specifically to reserve the right to switch its offer structure.".

9.46 In the light of the conclusion reached in paragraph 9.39 above, the Code Committee is proposing to amend Rule 32.4 as follows:

"**32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED OFFERS OR FOR SWITCHES**

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increased or improved offer, or a switch to or from a scheme of arrangement, the offeror may introduce new conditions (eg obtaining shareholders' approval or the admission to listing or admission to trading of new securities).".

9.47 In the light of the conclusion reached in paragraph 9.43 above, the Code Committee is proposing to amend Rule 19.3 as follows:

"**19.3 UNACCEPTABLE STATEMENTS**

Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer, or that it may make a change to the structure, conditionality or the non-financial terms of its offer, without committing itself to doing so and specifying the improvement or change. In the case of any doubt as to the application of this Rule to a proposed statement, parties to an offer or potential offer and their advisers should consult the Panel.".

Q.30 Do you agree with the Code Committee's conclusions in relation to switching?

10. Alternative consideration and withdrawal rights (Rules 33 and 34)

(a) Minimum period for which elections for alternative consideration should be capable of being made

10.1 In order that offeree company shareholders have sufficient time to reach a properly informed decision, Rule 31.1 provides that "**[a]n offer must initially be open for at least 21 days following the date on which the offer document is posted**".

10.2 Rule 33.1 provides that Rule 31 applies equally to alternative offers. An alternative contractual offer must therefore be open for at least 21 days.

10.3 Although, in a scheme, there will be no "alternative offer" as such, offeree shareholders may be given the opportunity to elect for alternative consideration to the principal consideration available under the scheme, for example loan notes or offeror securities. In such a case, in addition to the proxy forms relating to the shareholder meetings, offeree shareholders will also be sent a form of election relating to the alternative consideration.

10.4 The Code Committee believes that, in order to afford offeree shareholders a similar level of protection in a scheme to that which they are afforded in a contractual offer, the Schemes Appendix should provide that, if a scheme permits shareholders to elect to receive any alternative form of consideration (or to elect to vary the proportion in which they are to receive different forms of consideration), such elections must be capable of being made at least until the date of the shareholder meetings to approve the scheme. The Code Committee believes that such a requirement should not impose additional burdens as its understanding is that, in practice, elections are normally permitted until shortly before the court sanction hearing.

10.5 The Code Committee therefore proposes to include Rule 33 in the List of Disapplied Provisions and to include the following provision as Section 9(a) of the Schemes Appendix:

> "**9 ALTERNATIVE CONSIDERATION**
>
> **(a) If a scheme of arrangement permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportion in which they receive different forms of consideration, such elections must be capable of being made at least until the date of the shareholder meetings.**".

Q.31 Do you agree that Rule 33 should be disapplied in a scheme and that an election for alternative consideration should be capable of being made at least until the date of the shareholder meetings?

10.6 In addition, the Code Committee proposes to include Note 3 on Rule 11.1 (which provides that an obligation to make cash available under Rule 11.1 will be satisfied if an appropriate cash offer or cash alternative is open for acceptance at the relevant time, even if it closes for acceptance immediately thereafter) in the List of Disapplied Provisions and to include a Note on Section 9 of the Schemes Appendix, as follows:

"*NOTE ON SECTION 9*

Rule 11.1

The obligation to make cash available under Rule 11.1 will be considered to have been met if, at the time the acquisition was made, shareholders were able to elect for cash consideration at a price per share not less than that required by Rule 11.1, even if such an election subsequently ceases to be available.".

Q.32 Do you agree with the proposed Note on Section 9 of the Schemes Appendix in relation to Rule 11.1?

(b) Withdrawal rights

10.7 The first sentence of Rule 34 provides that "**[a]n acceptor must be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by such date become or been declared unconditional as to acceptances**". Since a scheme of arrangement is not "accepted", shareholders generally retain control of their shares in the offeree company until the scheme becomes effective and there is therefore no need for a right of withdrawal. Rule 34 is therefore inapplicable in a scheme and the Code Committee proposes to include Rule 34 in the List of Disapplied Provisions.

10.8 However, shareholders who elect for alternative consideration under a scheme will typically not retain control of their shares in the offeree company. A form of election relating to alternative consideration in a scheme will typically provide as follows:

- an election will not be valid unless the completed form is returned to the receiving agents by a certain date. This date will usually be a few days prior to the expected date of the court sanction hearing, although it is normally expressed as a calendar date, rather than a formula date (such as "x days prior to the court sanction hearing");

- shareholders electing for the alternative consideration who hold shares in certificated form are required to return the form together with their share certificates or other documents of title, whilst shareholders who hold uncertificated shares in CREST are required to transfer their shares into an escrow account; and

- the election is usually expressed to be irrevocable.

10.9 Therefore, in contrast with the position of an offeree shareholder who has accepted a contractual offer (who will be able to withdraw his acceptance from the date which is 21 days after the first closing date) a shareholder who elects for alternative consideration in a scheme will be unable either to:

(a) accept a competing contractual offer, should one emerge (since he will have either lodged his share certificates with the receiving agent or transferred his shares into escrow). This is in contrast with the position of shareholders who do not elect for the alternative consideration, who will retain control of their shares and thus be free to accept a competing contractual offer (regardless of how they may have voted on the resolutions at the shareholder meetings to approve the scheme); or

(b) withdraw his election at any time (since the election is typically irrevocable). This is in contrast with the position in a contractual offer where a shareholder may withdraw his acceptance from the date which is 21 days after the first closing date.

10.10 In addition, where the expected timetable set out in the scheme circular is extended, a shareholder who has elected for the alternative consideration may be "locked in" to the scheme for a longer period than he might initially have anticipated.

10.11 The Code Committee considers that the inability of offeree shareholders who have elected for alternative consideration in a scheme to withdraw that election is unsatisfactory and believes that a right of withdrawal of such an election should be introduced for such shareholders. The Code Committee notes that the introduction of such a right would not affect the outcome of the scheme, although it might lead to a change in the nature of the consideration to be paid to a particular shareholder.

10.12 The Code Committee believes that an offeree shareholder who elects for an alternative form of consideration in a scheme should be placed in no worse a position than a shareholder who does not make such an election. The Code Committee has therefore concluded that an offeree shareholder should be entitled to withdraw an election for alternative consideration from the outset of a scheme.

10.13 However, the Code Committee believes that the right of withdrawal should be capable of being shut off up to a week prior to the date on which the court sanction hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, up to a week prior to that later date. The Code Committee believes that this should provide the offeree company's receiving agent with sufficient time prior to the court sanction hearing to identify the number of shares which are subject to the scheme relating to the main consideration and the number of shares in respect of which shareholders have made an election for the alternative consideration.

10.14 The Code Committee therefore proposes to include the following provision in relation to withdrawal rights as Section 9(b) of the Schemes Appendix:

> "**(b) A shareholder who has elected to receive a particular form of consideration in respect of any of his shares must be entitled to withdraw his election. However, the right of withdrawal may be shut off up to one week prior to the date on which the court sanction**

> **hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, up to a week prior to that later date.**".

Q.33 Do you agree that Rule 34 should be disapplied in a scheme and that a right of withdrawal should be introduced for offeree shareholders who elect for alternative consideration in a scheme as proposed?

10.15 In addition, the Code Committee proposes to include Note 2 on Rule 13.5 (which relates to the withdrawal of acceptances of a contractual offer in certain circumstances) and Rule 24.13 (which relates to the procedure for the acceptance of a cash underwritten alternative to a contractual offer) in the List of Disapplied Provisions.

Q.34 Do you agree that Note 2 on Rule 13.5 and Rule 24.13 should be disapplied in a scheme?

(c) Return of documents of title

10.16 In the case of an unsuccessful contractual offer, Rule 31.10 states as follows:

> "**If an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned within 14 days of the lapsing of the offer and the receiving agent should immediately give instructions for the release of securities held in escrow.**".

10.17 The Code Committee has considered whether the Code should include a similar provision in relation to a scheme so as specifically to require documents of title to be returned and/or shares to be released from escrow if the scheme lapses or if a shareholder exercises his right to withdraw an election for a particular form of consideration. The Code Committee has concluded that the Code should include such a provision.

10.18 However, the Code Committee considers that, in relation to all offers, whether implemented by way of a scheme or a contractual offer, the period of 14 days

provided by Rule 31.10 for the return of documents of title and other documents lodged with forms of acceptance is unnecessarily long. The Code Committee believes that the Code should require documents to be returned to offeree shareholders as soon as practicable (and in any event within the 14 day period which Rule 31.10 currently prescribes).

10.19 Further, the Code Committee believes that a new provision should be introduced into Rule 34 incorporating a requirement in relation to the return of documents to offeree shareholders who exercise their right to withdraw from a contractual offer.

10.20 In the light of the above, the Code Committee proposes:

(a) to amend Rule 31.10 as follows:

"**If an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned as soon as practicable (and in any event within 14 days of the lapsing of the offer) and the receiving agent should immediately give instructions for the release of securities held in escrow.**".

(b) to include Rule 31.10 in the List of Disapplied Provisions and to include the following provision in the Schemes Appendix:

"**11 RETURN OF DOCUMENTS OF TITLE**

"**If a scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.**"; and

(c) to amend Rule 34 as follows:

"**(a) An acceptor must be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer,**

if the offer has not by such date become or been declared unconditional as to acceptances. This entitlement to withdraw must be exercisable until the earlier of:

(~~a~~i) the time that the offer becomes or is declared unconditional as to acceptances; and

(~~b~~ii) the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6.

(b) An acceptor must be entitled to withdraw his acceptance if so determined by the Panel in accordance with Rule 13.5.

(c) If a shareholder withdraws his acceptance, all documents of title and other documents lodged with the form of acceptance must be returned as soon as practicable following the receipt of the withdrawal (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.".

Q.35 Do you agree with the proposed amendments in relation to the return of documents of title?

11. Mandatory offers (Rule 9)

11.1 Rule 9 specifies the circumstances in which a person is required to extend a mandatory offer to a company's shareholders and the terms upon which such a mandatory offer must be made. Rule 9 derives from General Principle 1, which provides that "**if a person acquires control of a company, the other holders of securities must be protected**".

11.2 Rule 9.3(a) provides that a mandatory offer "**must be conditional only upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding shares carrying more than 50% of the voting rights**".

11.3 In the course of its review, the Code Committee considered whether or not an offeror should be permitted to satisfy a mandatory offer obligation by means of a scheme of arrangement. Such a scheme would, of course, not be conditional upon a "50%" acceptance condition, as required by Rule 9.3(a), but would instead be conditional upon the approval of the scheme by the requisite majority of each relevant class of offeree company shareholders and upon the sanctioning of the scheme by the court.

11.4 On the one hand, it might be argued that a mandatory offeror should be allowed to enjoy the benefits of a scheme, provided that this is not detrimental to the interests of offeree shareholders, and that the Code should therefore permit a mandatory offer to be implemented by way of a scheme, subject to a requirement that the offeror should be required to make a contractual offer should the scheme not become effective for any reason. This would be similar to the approach taken by Note 3(a) on Rule 9.3, pursuant to which the Panel may consent to a mandatory offer being conditional upon the offeror financing the cash consideration by an issue of new securities, provided that, if the offer lapses as a result of the financing condition not being satisfied, the offeror will immediately make a new offer in cash in compliance with Rule 9.

11.5 On the other hand, it might be argued that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme of arrangement on the basis that, since a scheme of arrangement is binding on all shareholders upon becoming effective, a mandatory offer implemented by way of a scheme would deny shareholders the opportunity, which they would otherwise have under a contractual offer (assuming that the offeror was unable to apply the "squeeze out" procedure under company law), of remaining as a minority in the offeree company. It might be argued that such an outcome would be undesirable and that a person who triggers a mandatory offer obligation should bear the consequences of doing so, including potentially being the controller of a company with minority shareholders. In addition, it might be argued that a person who

acquires control of a company should be required to make a mandatory offer at the earliest opportunity and that this would not be the case if a contractual mandatory offer was made only after a scheme of arrangement had failed to become effective.

11.6 On balance, the Code Committee is persuaded by the arguments in paragraph 11.5 above and has concluded that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme. The Code Committee therefore proposes to include the following provision in the Schemes Appendix:

> "**2 MANDATORY OFFERS**
>
> **An obligation to make a mandatory offer under Rule 9 may not be satisfied by way of a scheme of arrangement.**".

Q.36 Do you agree that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme?

11.7 In view of its conclusion that an obligation to make a mandatory offer may not be satisfied by way of a scheme, the Code Committee believes that a voluntary offeror proceeding by way of a scheme should be permitted to trigger an obligation to make a mandatory offer only if it has obtained the Panel's consent to switch the structure of its transaction to a contractual offer. For the avoidance of doubt, the Code Committee proposes to include a Note on Section 2 of the Schemes Appendix to this effect, as follows:

> "*NOTE ON SECTION 2*
>
> *Triggering Rule 9*
>
> *Where an offeror is proceeding by way of a scheme of arrangement, the offeror and persons acting in concert with it may acquire an interest in shares which causes it to have to extend a mandatory offer under Rule 9 only if the offeror has obtained the Panel's prior consent to switch to a contractual offer (see Section 8 of this Appendix 7).*".

Q.37 Do you agree that an offeror proceeding by way of a scheme should only trigger a mandatory offer if it has obtained the Panel's prior consent to switch to a contractual offer?

12. Appropriate offers or proposals and comparable offers (Rules 15 and 14)

(a) Rule 15

12.1 Rule 15 provides that, where the offeree company has outstanding convertible securities, options or subscription rights ("Rule 15 securities"), the offeror must make "an appropriate offer or proposal" to the holders of the Rule 15 securities to ensure that their interests are safeguarded.

12.2 Rule 15(d) states that "**[t]he offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders' meeting.**". Rule 15(d) therefore prohibits an offer or proposal in relation to Rule 15 securities from being subject to an acceptance condition but permits such an offer or proposal to be effected by way of a scheme, which would necessarily be conditional upon the approval of the requisite majority of each class in question.

12.3 The Code Committee understands that, in order to ensure that holders of Rule 15 securities are not denied the exit opportunity required by the Rule, the Panel Executive's practice is to regard a proposal put by way of a scheme as being "appropriate" (as required by Rule 15(a)) only if accompanied by a commitment that, in the event that the scheme fails to become effective by virtue of not being approved by the holders of the Rule 15 securities or sanctioned by the court, the offeror will make a contractual offer to the holders of the Rule 15 securities which will not be conditional on any particular level of acceptances.

12.4 The Code Committee agrees with this practice and considers that the application of Rule 15 in this way should be codified. The Code Committee therefore proposes to amend Rule 15(d) as follows:

> "**(d) The offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders' meeting provided that, if the scheme is not approved at that meeting, or is not sanctioned by the court, the offeror shall immediately make an offer or proposal to stockholders which is not conditional on any particular level of acceptances.**".

(b) Rule 14

12.5 Rule 14.1 states as follows:

> "**14.1 COMPARABLE OFFERS**
>
> **Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not; the Panel should be consulted in advance. An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances in respect of that class unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in Rule 15.**".

12.6 The reference in the second sentence of Rule 14.1 to a "particular level of acceptances" applies to a contractual offer but is not relevant to a scheme of arrangement, which will be conditional upon the approval of the members of the relevant class. The Code Committee considers that a comparable offer for non-voting equity should only be conditional on shareholder approval (as will be the case in a scheme) if the offer for the voting equity is conditional on the success of the offer for the non-voting equity. To clarify this, the Code Committee proposes to amend the second sentence of Rule 14.1 as follows:

> "… **An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances or approval in respect of that class unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital.**".

Q.38 Do you agree with the proposed amendments to Rule 15(d) and Rule 14.1?

13. Voting by an exempt principal trader (Rules 38.3 and 38.4)

13.1 Rule 38.3 provides that "**[a]n exempt principal trader connected with the offeror must not assent offeree company securities to the offer or purchase such securities in assented form until the offer is unconditional as to acceptances**". On its terms, Rule 38.3 is inapplicable in a scheme of arrangement.

13.2 Rule 38.4 provides that "**[s]ecurities owned by an exempt principal trader connected with an offeror or the offeree company must not be voted in the context of an offer**". Rule 38.4 was not drafted with resolutions to approve a scheme in mind but was intended to apply to resolutions in the context of an offer such as those proposed under Notes 2 or 4 on Rule 16 (special deals with favourable conditions) or Rule 21 (restrictions on frustrating action), or in relation to a transaction classified as a Class 1 transaction under the Listing Rules of the FSA - i.e. resolutions which go to the success or failure of the offer.

13.3 The Code Committee understands that the Panel Executive's recent practice in relation to a resolution put to offeree company shareholders to approve a scheme of arrangement has been as follows:

(a) an exempt principal trader ("EPT") connected with the offeror whose offer is being implemented by way of a scheme is not normally permitted to vote in favour of the scheme, but is normally permitted to vote against it;

(b) an EPT connected with a competing offeror (or potential offeror) is not normally permitted to vote against the scheme, but is normally permitted to vote in favour of it; and

(c) an EPT connected with the offeree company is permitted to vote in favour of or against the scheme.

13.4 In other words, the Panel Executive's practice is normally to consent to an EPT which is connected with an offeror voting on a resolution to approve or give effect to a scheme in the manner which is presumed to be contrary to the assumed interests of the corporate finance client with which it is connected. The Code Committee considers that such consent is a necessary element as there may be circumstances in which the interests of the relevant client are not obvious. For example, an offeror might wish the resolution to be defeated if it no longer wished to acquire the offeree company but was unable to invoke any other conditions to the scheme.

13.5 The Code Committee agrees with the Panel Executive's practice and proposes that it should be codified. The Code Committee therefore proposes to include a provision in the Schemes Appendix in relation to voting by connected EPTs as follows:

"**12 VOTING BY CONNECTED EXEMPT PRINCIPAL TRADERS**

Except with the consent of the Panel, securities owned by an exempt principal trader connected with an offeror or the offeree company must not be voted on a resolution put to shareholders in the offeree company to approve or to give effect to a scheme of arrangement. The Panel will normally grant its consent in the following circumstances:

(a) an exempt principal trader connected with an offeror whose offer is being implemented by way of a scheme will normally be

permitted to vote against the scheme but will not normally be permitted to vote in favour of it;

(b) an exempt principal trader connected with a competing offeror (or potential offeror) will normally be permitted to vote in favour of such a scheme but will not normally be permitted to vote against it; and

(c) an exempt principal trader connected with the offeree company will normally be permitted to vote in favour of or against the scheme.".

13.6 In addition, the Code Committee proposes to add a new Note to each of Rules 38.3 and 38.4, cross-referring to the Schemes Appendix, as set out in Appendix B.

Q.39 Do you agree with the proposed amendments in relating to voting by connected exempt principal traders?

14. Financial information and documents on display (Rules 24.2 and 26)

14.1 Rule 24.2 sets out the financial and other information on the offeror, the offeree company and the offer to be included in the offer document. Rules 24.2(a) and (b) set out the information required where the offeror is a company incorporated under the Companies Act 1985 and its shares are admitted to the Official List or to trading on AIM and where the consideration offered includes securities (in which case Rule 24.2(a) applies) or where the consideration is cash only (in which case Rule 24.2(b) applies). Significantly more information is required under Rule 24.2(a) than under Rule 24.2(b) on the basis that, in the case of an offer to which Rule 24.2(a) applies, some or all of the consideration under the offer is in the form of offeror securities, the value of which offeree shareholders will need to evaluate. Where the offeror is not a company covered by Rules 24.2(a) or (b), and regardless of the nature of the consideration, Rule 24.2(c) applies. Rule 24.2(c)(i) requires not only the information required under Rule 24.2(a) to be included in the offer document, but also "such further information as the Panel may require in the particular circumstances of the case". Note 2 on Rule 24.2 indicates in more

detail what further information will normally be required. In addition, paragraphs (ii) and (iii) of Rule 24.2(c) require the disclosure of details of certain persons who have made an investment in the offeror for the purposes of the offer or who have a pre-existing interest in the offeror such that they have or will have a direct or indirect interest in the offeree company.

14.2 If successful, an offer implemented by way of a scheme of arrangement will result in the offeror acquiring 100% of the issued share capital of the offeree company, following which there will, therefore, be no minority shareholders in the offeree company. Further, where an offer is implemented by way of a scheme in which the consideration is solely in cash (a "cash scheme"), there is no possibility for offeree shareholders to be required to accept offeror securities as consideration.

14.3 The Code Committee therefore considers that, in a cash scheme, the main concern of offeree shareholders is likely to be certainty of funds, which is addressed in Rules 2.5(c) and 24.7, and that the inclusion of financial information on the offeror in the scheme circular will normally be of limited value to them. The Code Committee therefore believes that, where the offer is to be implemented by way of a cash scheme, the Panel should be able to grant a dispensation from the requirement to include in the scheme circular the information described in paragraph (b) of Rule 24.2 or, if the offeror falls within paragraph (c) of Rule 24.2, the information specified in paragraph (a) of Rule 24.2.

14.4 However, the Code Committee does not propose to amend the Code to give the Panel an explicit ability to grant a dispensation from compliance with paragraphs (ii) and (iii) of Rule 24.2(c), or with the "further information" requirements of paragraph (i) of Rule 24.2(c). This is because the Code Committee believes that, in certain circumstances, offeree shareholders may need such information in order to reach a properly informed decision on the offer, even if the consideration is solely in cash.

14.5 Where an offer is being implemented by way of a cash scheme, the Code Committee also believes that there will be little value to offeree shareholders in requiring, as required by Rule 24.2(f), a description of how the offer is to be financed, the source of the finance (including the names of the principal lenders or arrangers of such finance) and whether the financing arrangements of the offer depend to any significant extent on the business of the offeree company. The Code Committee therefore believes that the Code should permit the Panel to grant a dispensation from the requirements of Rule 24.2(f) in such circumstances.

14.6 However, the Code Committee considers that none of the dispensations referred to above should be granted by the Panel unless all other related offers (including any comparable offer pursuant to Rule 14 and any appropriate offer or proposal pursuant to Rule 15) are also structured so that there is no possibility of any person remaining or becoming a minority shareholder in the offeree company.

14.7 Furthermore, where a cash scheme is revised to include securities as consideration, or if the transaction ceases to be structured as a scheme, the Code Committee believes that the provisions of Rules 24.2(b), (c)(i) and (f) should then apply as usual and that the relevant information should be included in the relevant supplementary scheme circular or offer document, as appropriate.

14.8 The Code Committee also considers that the above arguments apply equally where a contractual offer is structured such that the consideration is solely in cash and the Panel is satisfied that the possibility of any person remaining or becoming a minority shareholder in the offeree company is negligible (such as a cash offer with a non-waivable 90% acceptance condition where the offeror has given an undertaking to invoke its statutory “squeeze out” rights). It therefore further proposes that the Panel should be able, if so requested, to disapply Rules 24.2(b), (c)(i) (to the extent it refers to Rule 24.2(a)) and (f) in such cases.

14.9 In view of the amendments proposed above, the Code Committee is also proposing to amend paragraph (f) of Rule 26 so that it is clear that it is only necessary to make available for inspection any material contracts which have been required (pursuant to Rule 24.2 or Rule 25.6) to be summarised in the offer documentation.

14.10 To reflect its conclusions above, the Code Committee proposes to introduce a new note, Note 6 on Rule 24.2, and to amend paragraph (f) of Rule 26. These amendments are set out below:

(a) Rule 24.2:

"*NOTES ON RULE 24.2*

…

6. Certain cash offers and schemes of arrangement

The Panel may be prepared to disapply Rules 24.2(b), (c)(i) (to the extent it refers to Rule 24.2(a)) and (f) where the consideration is solely in cash and where the Panel is satisfied that the possibility of any person remaining or becoming a minority shareholder in the offeree company is negligible.

In the case of a scheme of arrangement where the consideration is solely in cash, the Panel will normally consent to a relaxation of the requirements of Rule 24.2(b) or Rule 24.2(c)(i) (to the extent it refers to Rule 24.2(a)), as appropriate, such that no financial information on the offeror need be included in the scheme circular. However the Panel's consent will normally only be granted if all related offers (including any comparable offer pursuant to Rule 14 and any appropriate offer or proposal pursuant to Rule 15) are structured so that no person will remain or become a minority shareholder in the offeree company. Where Rule 24.2(c) applies, compliance with the "further information" requirements of paragraph (i) and with paragraphs (ii) and (iii) of Rule 24.2(c) will still be required.

In the same circumstances, the Panel will normally be prepared to disapply the requirements of Rule 24.2(f).

In the event that the scheme is revised so as to include securities as consideration, or if the transaction ceases to be structured as a scheme, the provisions of Rules 24.2(b), (c)(i) and (f) will apply and the relevant information must be included in the supplementary scheme circular or offer document, as appropriate.

The Panel must be consulted in advance in any case for which a dispensation from any of the requirements of Rule 24.2(b), (c)(i) or (f) is sought."; and

(b) Rule 26:

"**(f) ~~all~~ any material contract~~s~~ described in the offer document or offeree board circular (as appropriate) in compliance with Rules 24.2(a), (c) ~~and~~ or Rule 25.6(a);**".

Q.40 Do you agree with the proposed Note 6 on Rule 24.2 and the proposed amendment to paragraph (f) of Rule 26?

15. Formula offers (Appendix 2)

15.1 The requirements of Appendix 2 of the Code, the Formula Offers Guidance Note, apply where an offer is made for the share capital of an investment trust and the consideration is calculated by reference to a formula asset value ("FAV") related to the net assets of the offeree company.

15.2 The first sentence of Section 3 of the Formula Offers Guidance Note states that "**[i]n all circumstances, the consideration payable under the formula should be determined as at the day the offer becomes or is declared unconditional as to acceptances**". Since the concept of "unconditional as to acceptances" is not relevant in a scheme of arrangement, the question arises as to the date on which the FAV should be determined in a formula offer implemented by way of a scheme.

15.3 The Code Committee understands that, in a scheme, the consideration payable to offeree company shareholders will need to have been determined by the time of

the court sanction hearing. The Code Committee therefore believes that the Code should require the consideration payable under the formula to be determined on a date which is a fixed number of days prior to the court sanction hearing. The Code Committee proposes to introduce a provision to this effect into Section 3 of Appendix 2 and to define the date by which consideration will need to be determined in either a contractual offer or a scheme as the "FAV calculation date". The Code Committee proposes that the term "FAV calculation date" should also be introduced into Sections 8 and 9 of Appendix 2, as set out in paragraph 15.6 below.

15.4 The Code Committee would normally expect the FAV calculation date in a scheme to be no more than seven days prior to the date of the court sanction hearing. The Code Committee believes that the Panel should be consulted if it is proposed that the FAV calculation date should be earlier than this.

15.5 The second sentence of Section 3 of Appendix 2 states that "**[t]he formula should then cease to operate, shareholders accepting the offer after that date receiving the consideration thus determined.**". The Code Committee considers that the second sentence of Section 3 is potentially confusing in that all shareholders who accept a contractual offer will receive the consideration payable under the formula, not only those shareholders who accept the offer after the formula has crystallized. In addition, the phrase "accepting the offer" has no meaning in the context of a scheme. The Code Committee therefore believes that the second sentence of Section 3 of Appendix 2 should be deleted.

15.6 In view of the above, the Code Committee proposes to make the following amendments to the Formula Offers Guidance Note in Appendix 2 of the Code:

"**3 DATE ON WHICH THE FORMULA CRYSTALLIZES**

In all circumstances, the consideration payable under the formula should be determined as at the day the offer becomes or is declared

unconditional as to acceptances or, in the case of a scheme of arrangement, as at a date which is a fixed number of days prior to the court sanction hearing (in either case, the "FAV calculation date"). ~~The formula should then cease to operate, shareholders accepting the offer after that date receiving the consideration thus determined.~~

NOTE ON SECTION 3

Schemes of arrangement

In the case of a scheme, the FAV calculation date should normally be set for a date no earlier than seven days prior to the date of the court sanction hearing. The Panel should be consulted if this is impracticable.

…

8 "FLOOR AND CEILING" CONDITIONS

There is no objection to the incorporation of conditions in a formula offer which provide for the offer to lapse in the event that the formula asset value (calculated on the FAV calculation date~~day the offer becomes or is declared unconditional as to acceptances~~) falls outside specified limits or if movements in certain securities markets' indices exceed specified limits.

9 OFFEREE BOARD OBLIGATIONS

There is no obligation on the board of the offeree company to provide information relating to the calculation of the formula price until a successful offeror has taken control. Nevertheless, where an offer has a "floor and ceiling" condition related to the formula asset value, the board of the offeree company must announce, within 7 days ~~of~~ after the FAV calculation date~~offer becoming or being declared unconditional as to acceptances~~, whether the formula calculated on the FAV calculation date ~~day the offer became or was declared unconditional as to acceptances~~ fell within the specified limits.".

Q.41 Do you agree with the proposed amendments to the Formula Offers Guidance Note in Appendix 2 of the Code?

16. Disapplied provisions

16.1 In addition to the provisions specifically referred to elsewhere in this PCP, there are a number of other provisions of the Code which the Code Committee believes are inapplicable in a scheme of arrangement and which the Code Committee proposes to include in the List of Disapplied Provisions in the Schemes Appendix. These are as follows:

(a) Rule 4.5 (restriction on the offeree company accepting an offer in respect of treasury shares);

(b) Rule 10 (the acceptance condition);

(c) Rule 18 (the use of proxies and other authorities in relation to acceptances);

(d) Rule 24.6 (incorporation of obligations and rights);

(e) the first sentence of Note 3 on Rule 32.1; and

(f) Rules 36.4, 36.5 and 36.7 (partial offers).

16.2 The full list of disapplied provisions proposed to be included in section 13 of the Schemes Appendix is set out in Appendix A below.

Q.42 Do you agree with that the provisions listed in paragraph 16.1 should be disapplied in a scheme?

17. Assessment of the impact of the proposals

17.1 The Code Committee believes that the proposals in this PCP constitute proportionate measures for improving transparency and certainty regarding the application of the Code to schemes of arrangement.

17.2 Schemes are transactions to which the Code already applies and the primary intention of the proposals is to clarify how it applies, in many cases reflecting what is already done in practice. The Code Committee therefore believes that most, if not all, of the proposals would not have significant cost implications for parties to a scheme of arrangement, their advisers and other market participants. Whilst practitioners will incur some short-term familiarisation costs, the Code Committee does not believe that these should be substantial or recurring.

17.3 On the other hand, the Code Committee believes that the proposals will result in material long-term benefits for parties to schemes of arrangement, their advisers and other market participants, in that the proposals should provide greater transparency and certainty as to the application of the Code to schemes, whilst retaining the Panel's ability to act flexibly in appropriate circumstances. This should provide for greater efficiency in the regulation of schemes, both for the Panel and for the parties concerned.

APPENDIX A

Proposed Schemes Appendix

"**APPENDIX 7**

SCHEMES OF ARRANGEMENT

DEFINITIONS AND INTERPRETATION

Court sanction hearing

The hearing of the court at which a petition to sanction a scheme of arrangement is presented.

Offer documents and offeree board circulars

In the case of a scheme of arrangement, references in the Code to an offer document or to the first major circular from the offeree board (and related expressions) shall be construed as references to the scheme circular and references to a revised offer document or to a subsequent offeree board circular (and related expressions) shall be construed as references to any supplementary scheme circular.

Shareholder meetings

The meeting of shareholders in the offeree company (or meetings of relevant classes of shareholders) convened by the court to consider a resolution to approve a scheme of arrangement and any extraordinary general meeting of the offeree company (and related class meetings) convened to consider any resolution to approve or give effect to a scheme.

1 APPLICATION OF THE CODE TO SCHEMES OF ARRANGEMENT

The provisions of the Code apply to a scheme of arrangement, except as set out in this Appendix 7.

2 MANDATORY OFFERS

An obligation to make a mandatory offer under Rule 9 may not be satisfied by way of a scheme of arrangement.

NOTE ON SECTION 2

Triggering Rule 9

Where an offeror is proceeding by way of a scheme of arrangement, the offeror and persons acting in concert with it may acquire an interest in shares which causes it to have to extend a mandatory offer under Rule 9 only if the offeror has obtained the Panel's prior consent to switch to a contractual offer (see Section 8 of this Appendix 7).

3 DATE OF SHAREHOLDER MEETINGS

The shareholder meetings must normally be convened for a date which is at least 21 days after the date of the scheme circular.

4 HOLDING STATEMENTS

(a) If a statement of the kind described in Note 1 on Rule 19.3 is made during an offer period involving a scheme of arrangement, the Panel will normally require the statement to be clarified by a date, to be specified by the Panel, in advance of the date of the shareholder meetings.

(b) Where appropriate, however, taking into account all relevant circumstances, including:

> **(i) the interests of offeree shareholders and the desirability of clarification prior to the shareholder meetings; and**
>
> **(ii) the time which the offeror or potential offeror has had to consider its position,**

the Panel may permit clarification after the date of the shareholder meetings but before the date of the court sanction hearing.

5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME

(a) As soon as practicable after the results of the shareholder meetings are known, the offeree company must make an announcement stating whether or not the resolutions were passed by the requisite majorities (and, if not, whether or not the scheme has lapsed) and giving details of the voting results in relation to the meetings, including:

> **(i) in the case of the extraordinary general meeting of the offeree company convened to consider any resolution to approve or give effect to the scheme, if a poll was taken, the number of shares of each class which were voted for and against the resolutions and the percentage of the shares voted which those numbers represent;**
>
> **(ii) in the case of the court-convened meeting:**

(aa) the number of shareholders of each class who voted for and against the resolution to approve the scheme and the percentage of voting shareholders which those numbers represent;

(bb) the number of shares of each class which were voted for and against the resolution to approve the scheme and the percentage of the shares voted which those numbers represent; and

(cc) the percentage of the issued shares of each class which the shares voted for and against the resolutions represent.

(b) As soon as practicable following the court sanction hearing, the offeree company must make an announcement stating the decision of the court and including details of whether the scheme will proceed or has lapsed.

(c) As soon as practicable after the scheme of arrangement finally becomes effective, the offeree company or the offeror must make an announcement stating that the scheme has become effective.

6 CHANGES TO THE EXPECTED SCHEME TIMETABLE

(a) Any adjournment of a shareholder meeting or court sanction hearing, or a decision by the offeree board to propose such an adjournment, must be announced promptly by the offeree company in accordance with the requirements of Rule 2.9. If the meeting or hearing is adjourned to a specified date, the announcement should set out the relevant details. If the meeting or hearing is adjourned without at the same time specifying a date for the adjourned meeting, a further announcement should be made in accordance with the requirements of Rule 2.9 once the new date has been set.

(b) Similarly, any other change to the expected timetable of events set out in the scheme circular must be announced promptly by the offeror or offeree company (as appropriate) in accordance with the requirements of Rule 2.9.

(c) In all cases, the Panel should be consulted as to whether notice of an adjournment or other change to the expected timetable should, in addition, be posted to offeree company shareholders.

7 REVISION

Any revision to a scheme of arrangement should normally be made by no later than the date which is 14 days prior to the date of the shareholder meetings. The consent of the Panel must be obtained if it is proposed to make any revision to a scheme after that date.

8 SWITCHING

(a) With the consent of the Panel, the offeror may switch from a scheme of arrangement to a contractual offer or from a contractual offer to a scheme of arrangement.

(b) The Panel will determine the offer timetable that will apply following any switch to which it consents.

(c) The offeror must announce a switch in accordance with the requirements of Rule 2.9. The announcement must include:

(i) details of all changes to the terms and conditions of the offer as a result of the switch;

(ii) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);

(iii) an explanation of the offer timetable applicable following the switch (as determined by the Panel); and

(iv) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or its associates will remain valid following the switch.

NOTE ON SECTION 8

Determination of the offer timetable following a switch

Factors which the Panel may take into account when determining the offer timetable that will apply following a switch include:-

(a) the time required to enable shareholders in the offeree company to reach a properly informed decision;

(b) the time which has elapsed since the switching offeror's original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree board to be hindered in the conduct of its affairs;

(c) the views of the offeree board and the switching offeror; and

(d) the likely effect of the new timetable on any competing offeror.

9 ALTERNATIVE CONSIDERATION

(a) If a scheme of arrangement permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportion in which they receive different forms of consideration, such elections must be capable of being made at least until the date of the shareholder meetings.

(b) A shareholder who has elected to receive a particular form of consideration in respect of any of his shares must be entitled to withdraw his election. However, the right of withdrawal may be shut off up to one week prior to the date on which the court sanction hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, up to a week prior to that later date.

NOTE ON SECTION 9

Rule 11.1

The obligation to make cash available under Rule 11.1 will be considered to have been met if, at the time the acquisition was made, shareholders were able to elect for cash consideration at a price per share not less than that required by Rule 11.1, even if such an election subsequently ceases to be available.

10 SETTLEMENT OF CONSIDERATION

Except with the consent of the Panel, the consideration must be posted within 14 days of the scheme of arrangement finally becoming effective.

11 RETURN OF DOCUMENTS OF TITLE

If scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.

12 VOTING BY CONNECTED EXEMPT PRINCIPAL TRADERS

Except with the consent of the Panel, securities owned by an exempt principal trader connected with an offeror or the offeree company must not be voted on a resolution put to shareholders in the offeree company to approve or to give effect to a scheme of arrangement. The Panel will normally grant its consent in the following circumstances:

(a) an exempt principal trader connected with an offeror whose offer is being implemented by way of a scheme will normally be permitted to vote against the scheme but will not normally be permitted to vote in favour of it;

(b) an exempt principal trader connected with a competing offeror (or potential offeror) will normally be permitted to vote in favour of such a scheme but will not normally be permitted to vote against it; and

(c) an exempt principal trader connected with the offeree company will normally be permitted to vote in favour of or against the scheme.

13 PROVISIONS DISAPPLIED IN A SCHEME

The following provisions of the Code do not apply to a scheme of arrangement:

(a) Rule 4.5 (restriction on the offeree company accepting an offer in respect of treasury shares);

(b) Rule 10 (the acceptance condition);

(c) Note 3 on Rule 11.1 (when the obligation to offer cash is satisfied);

(d) the Note on Rule 12.1 (the effect of lapsing);

(e) Note 2 on Rule 13.5 (availability of withdrawal rights);

(f) Rules 17.1 and 17.2 (announcement of acceptance levels);

(g) Rule 18 (the use of proxies and other authorities in relation to acceptances);

(h) Rules 24.6 (incorporation of obligations and rights) and Rule 24.13 (cash underwritten alternatives which may be shut off);

(i) Rules 31.1 to 31.10 (timing of the offer);

(j) Rule 32.1(b), Notes 3 (first sentence) and 4 on Rule 32.1, paragraph (b) of Note 3 on Rule 32.2 and Note 5 on Rule 32.2 (revision);

(k) Rules 33.1 to 33.3 (alternative offers);

(l) Rule 34 (right of withdrawal); and

(m) Rules 36.4, 36.5 and 36.7 (partial offers).

APPENDIX B

Proposed amendments to the Code

INTRODUCTION

3 COMPANIES, TRANSACTIONS AND PERSONS SUBJECT TO THE CODE

…

(b) Transactions

In cases falling within paragraphs (a)(i) or (ii) above, the Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of statutory merger or ~~Court-approved~~ scheme of arrangement (as defined in the Definitions Section). …

DEFINITIONS

Competition reference period

…

NOTE ON DEFINITION OF COMPETITION REFERENCE PERIOD

In the case of a scheme of arrangement, a competition reference period will commence following a reference or initiation of proceedings only if the scheme then lapses on a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

Irrevocable commitments and letters of intent

Irrevocable commitments and letters of intent include irrevocable commitments and letters of intent:

(a) to accept or not to accept (or to procure that any other person accept or not accept) an offer; or

(b) ~~and also irrevocable commitments and letters of intent~~ to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree company (or of its shareholders) in the context of ~~the~~ an offer, including a resolution to approve or to give effect to a scheme of arrangement.

Offer

…

In the case of a scheme of arrangement, the offeror shall be treated as if it were making a contractual offer to those shareholders of the offeree company who are parties to the scheme in respect of the shares subject to the scheme and references to an "offer" shall be construed accordingly.

Offeree company

…

In the case of a scheme of arrangement, a reference to the offeree company should normally be construed as a reference to the company which is proposing the scheme.

Offeror

…

In the case of a scheme of arrangement, a reference to an offeror should normally be construed as a reference to the person who it is proposed will acquire all or part of the issued share capital of the offeree company under the scheme.

Offer period

…

In the case of a scheme of arrangement, the offer period will continue until it is announced that the scheme has finally become effective or that it has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.

Scheme of arrangement or scheme

A transaction effected by means of a scheme of arrangement under section 425 of the Companies Act 1985.

Rule 2.9

2.9 PUBLICATION OF AN ANNOUNCEMENT ABOUT AN OFFER OR POSSIBLE OFFER

…

NOTES ON RULE 2.9

…

2. Rules 6, 7, 9, 11, 17, 30, 31, 32, Appendix 1.6, ~~and~~ Appendix 5 and Appendix 7

Announcements made under Rules 6.2(b), 7.1, 9.1(Note 9), 11.1(Note 6), 17.1, 30.1(a), 30.2(a), 31.2, 31.6(a)(Note 1(b)), 31.6(c), 31.7(Note 2), 31.8(Note), 31.9, 32.1, 32.6(a), Appendix 1.6, ~~and~~ Appendix 5.5, Appendix 7.6 and Appendix 7.8 must also be published in accordance with the requirements of this Rule.

Rule 12

12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER

(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that it will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later. In the case of a scheme of arrangement, the scheme should provide that it will lapse if there is a reference before the date of the shareholder meetings (as defined in Appendix 7).

(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that it will lapse if either:—

(i) the European Commission initiates proceedings under Article 6(1)(c); or

(ii) following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission,

in either case before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later. In the case of a scheme of arrangement, the scheme should provide that it will lapse if the European Commission initiates proceedings under Article 6(1)(c), or if there is a subsequent reference to the Competition Commission following a referral by the European Commission under Article 9.1, before the date of shareholder meetings (as defined in Appendix 7).

…

12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIOD

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end. However, in the case of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings, and a competition reference period will commence, only if the scheme then lapses on a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked. A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.

Rule 14

14.1 COMPARABLE OFFERS

Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not; the Panel should be consulted in advance. An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances or approval in respect of that class unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in Rule 15.

Rule 15

RULE 15. APPROPRIATE OFFER FOR CONVERTIBLES ETC.

…

(d) The offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders' meeting provided that, if the scheme is not approved at that meeting, or is not sanctioned by the court, the offeror shall immediately make an offer or

proposal to stockholders which is not conditional on any particular level of acceptances.

Rule 19.3

RULE 19.3 UNACCEPTABLE STATEMENTS

Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer, or that it may make a change to the structure, conditionality or the non-financial terms of its offer, without committing itself to doing so and specifying the improvement or change. In the case of any doubt as to the application of this Rule to a proposed statement, parties to an offer or potential offer and their advisers should consult the Panel.

NOTES ON RULE 19.3

1. Holding statements

…

In the case of a scheme of arrangement, see Section 4 of Appendix 7.

Rule 19.4

19.4 ADVERTISEMENTS

…

(viii) advertisements which are notices relating to ~~Court~~ a schemes of arrangement; or

Rule 20.1

20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS

…

NOTES ON RULE 20.1

…

4. Information issued by associates (eg brokers)

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. Associates must, however, consult the Panel about the issue of circulars as described in this Note during the reference or proceedings. The Panel will normally apply the restrictions in this Note in the period of one month before the relevant authority is expected to make its recommendation or issue its decision as the case may be.

Rule 20.2

20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS

…

NOTES ON RULE 20.2

…

5. The Competition Commission and the European Commission

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. The Panel will, however, continue to apply Rule 20.2 during the reference or proceedings and, therefore, for the purposes of this Rule alone, will normally deem the referred offeror to be a bona fide potential offeror.

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

…

NOTES ON RULE 21.1

…

4. The Competition Commission and the European Commission

When an offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may ends in accordance with Rule 12.2. The Panel will, however, normally consider that General Principle 3

and Rule 21.1 apply during the competition reference period, but on a more flexible basis. For example, issues of shares, which do not increase the equity share capital or the share capital carrying voting rights as at the end of the offer period by, in aggregate, more than 15%, would normally not be restricted; and for the purpose of Note 2, a 15% rather than a 10% test would normally be applied.

Rule 24.2

24.2 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

…

NOTES ON RULE 24.2

…

6. Certain cash offers and schemes of arrangement

The Panel may be prepared to disapply Rules 24.2(b), (c)(i) (to the extent it refers to Rule 24.2(a)) and (f) where the consideration is solely in cash and where the Panel is satisfied that the possibility of any person remaining or becoming a minority shareholder in the offeree company is negligible.

In the case of a scheme of arrangement where the consideration is solely in cash, the Panel will normally consent to a relaxation of the requirements of Rule 24.2(b) or Rule 24.2(c)(i) (to the extent it refers to Rule 24.2(a)), as appropriate, such that no financial information on the offeror need be included in the scheme circular. However the Panel's consent will normally only be granted if all related offers (including any comparable offer pursuant to Rule 14 and any appropriate offer or proposal pursuant to Rule 15) are structured so that no person will remain or become a minority shareholder in the offeree company. Where Rule 24.2(c) applies, compliance with the "further information" requirements of paragraph (i) and with paragraphs (ii) and (iii) of Rule 24.2(c) will still be required.

In the same circumstances, the Panel will normally be prepared to disapply the requirements of Rule 24.2(f).

In the event that the scheme is revised so as to include securities as consideration, or if the transaction ceases to be structured as a scheme, the provisions of Rules 24.2(b), (c)(i) and (f) will apply and the relevant information must be included in the supplementary scheme circular or offer document, as appropriate.

The Panel must be consulted in advance in any case for which a dispensation from any of the requirements of Rule 24.2(b), (c)(i) or (f) is sought.

Rule 26

RULE 26. DOCUMENTS TO BE ON DISPLAY

…

(f) ~~all~~ any material contracts described in the offer document or offeree board circular (as appropriate) in compliance with Rules 24.2(a), (c) ~~and~~ or Rule 25.6(a);

Rule 30.2

30.2 THE OFFEREE BOARD CIRCULAR

…

NOTE ON RULE 30.2

Where there is no separate offeree board circular

In the case of a scheme of arrangement, or in the case of a recommended contractual offer where the offeree board's circular is combined with the offer document, there will be only a single document and the reference to the offeree board's circular being posted and made readily and promptly available after publication of the offer document is therefore inapplicable. Other than this, the requirements of Rule 30.2 will apply as usual to the single document.

Rule 31.6

31.6 FINAL DAY RULE (FULFILMENT OF ACCEPTANCE CONDITION, TIMING AND ANNOUNCEMENT)

…

NOTES ON RULE 31.6

1. Extension of offer under Rule 31.6(a)

(a) It should be noted …

(b) Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

Rule 31.7

31.7 TIME FOR FULFILMENT OF ALL OTHER CONDITIONS

…

NOTES ON RULE 31.7

1. The effect of lapsing

…

2. Extensions

Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

Rule 31.8

31.8 SETTLEMENT OF CONSIDERATION

…

NOTE ON RULE 31.8

Extensions

Any extension to which the Panel consents must be announced by the offeror in accordance with Rule 2.9. The Panel should be consulted as to whether notice of the extension should also be posted to offeree company shareholders.

Rule 31.10

31.10 RETURN OF DOCUMENTS OF TITLE

If an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned as soon as practicable (and in any event within 14 days of the lapsing of the offer) and the receiving agent

should immediately give instructions for the release of securities held in escrow.

Rule 32.2

32.2 NO INCREASE STATEMENTS

…

NOTES ON RULE 32.2

…

4. Recommendations

Subject to Note 2 above, the offeror can choose not to be bound by a no increase statement which would otherwise prevent the posting of an increased or improved offer recommended ~~for acceptance~~ by the board of the offeree company.

…

6. Schemes of arrangement

A switch to or from a scheme of arrangement will not normally, of itself, be regarded as an amendment which would be precluded by an earlier no increase statement in relation to the value or type of consideration offered. Therefore, it is not necessary for an offeror making such a statement specifically to reserve the right to switch its offer structure.

Rule 32.4

32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED OFFERS OR FOR SWITCHES

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increased or improved offer, or a switch to or from a scheme of arrangement, the offeror may introduce new conditions (eg obtaining shareholders' approval or the admission to listing or admission to trading of new securities).

Rule 32.5

32.5 COMPETITIVE SITUATIONS

…

NOTES ON RULE 32.5

…

3. Schemes of arrangement

Where the competing offer is a scheme of arrangement, the parties must consult the Panel as to the applicable timetable. The Panel will then determine the date on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all the relevant circumstances.

Rule 34

RULE 34. RIGHT OF WITHDRAWAL

(a) An acceptor must be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by such date become or been declared unconditional as to acceptances. This entitlement to withdraw must be exercisable until the earlier of:

(a i) the time that the offer becomes or is declared unconditional as to acceptances; and

(b ii) the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6.

(b) An acceptor must also be entitled to withdraw his acceptance if so determined by the Panel in accordance with Rule 13.5.

(c) If a shareholder withdraws his acceptance, all documents of title and other documents lodged with the form of acceptance must be returned as soon as practicable following the receipt of the withdrawal (and in any event within 14 days) and the receiving agent should immediately give instructions for the release of securities held in escrow.

Rule 38

38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES

…

NOTES ON RULE 38.3

1. Withdrawal rights under Rule 38.5

…

2. Schemes of arrangement

See Section 12 of Appendix 7.

38.4 VOTING

…

NOTE ON RULE 38.4

Schemes of arrangement

See Section 12 of Appendix 7.

Appendix 2

APPENDIX 2

FORMULA OFFERS GUIDANCE NOTE

…

3 DATE ON WHICH THE FORMULA CRYSTALLIZES

In all circumstances, the consideration payable under the formula should be determined as at the day the offer becomes or is declared unconditional as to acceptances or, in the case of a scheme of arrangement, as at a date which is a fixed number of days prior to the court sanction hearing (in either case, the "FAV calculation date"). ~~The formula should then cease to operate, shareholders accepting the offer after that date receiving the consideration thus determined.~~

NOTE ON SECTION 3

Schemes of arrangement

In the case of a scheme, the FAV calculation date should normally be set for a date no earlier than seven days prior to the date of the court sanction hearing. The Panel should be consulted if this is impracticable.

…

8 "FLOOR AND CEILING" CONDITIONS

There is no objection to the incorporation of conditions in a formula offer which provide for the offer to lapse in the event that the formula asset value (calculated on the FAV calculation date~~day the offer becomes or is declared unconditional as to acceptances~~) falls outside specified limits or if movements in certain securities markets' indices exceed specified limits.

9 OFFEREE BOARD OBLIGATIONS

There is no obligation on the board of the offeree company to provide information relating to the calculation of the formula price until a successful offeror has taken control. Nevertheless, where an offer has a "floor and ceiling" condition related to the formula asset value, the board of the offeree company must announce, within 7 days ~~of~~ after the FAV calculation date~~offer becoming or being declared unconditional as to acceptances~~, whether the formula calculated on the FAV calculation date ~~day the offer became or was declared unconditional as to acceptances~~ fell within the specified limits.

…

APPENDIX C

List of questions

Q.1 **Do you agree with the proposed definition of "scheme of arrangement or scheme"?**

Q.2 **Do you agree with the proposed new second paragraph of the definition of "offer"?**

Q.3 **Do you agree with the proposed new second paragraphs of the definitions of "offeree company" and "offeror"?**

Q.4 **Do you agree with the proposed definition of "offer documents and offeree board circulars"?**

Q.5 **Do you agree with the proposed definitions of "shareholder meetings" and "court sanction hearing"?**

Q.6 **Do you agree with the proposed amendments to the definition of "irrevocable commitments and letters of intent"?**

Q.7 **Do you agree with the introduction of the proposed new second paragraph into the definition of "offer period"?**

Q.8 **Do you agree that Rule 30.1 should apply in a scheme in the same way as in a contractual offer?**

Q.9 **Do you agree with the proposed new Note on Rule 30.2?**

Q.10 **Do you agree that Rule 31.1 should be disapplied in a scheme?**

Q.11 **Do you agree that, in a scheme, the shareholder meetings should normally be convened for a date which is at least 21 days after the date of the scheme circular?**

Q.12 **Do you agree that details relating to the adjournment of a shareholder meeting or court sanction hearing and any other change to the expected timetable of events should be required to be announced as proposed?**

Q.13 **Do you agree that the Panel should be consulted as to whether notice of an adjournment or other change to the expected scheme timetable should be posted to shareholders?**

Q.14 Do you agree that new Notes on Rules 31.6, 31.7 and 31.8 in relation to the announcement of an extension of a contractual offer should be introduced as proposed?

Q.15 Do you agree that Rule 31.3 should be disapplied in a scheme?

Q.16 Do you agree that Rule 31.4 should be disapplied in a scheme?

Q.17 Do you agree that, where there is no competitive situation, the Code should not impose maximum time periods in a scheme for the holding of shareholder meetings and/or the fulfilment of other scheme conditions?

Q.18 Do you agree with the proposed provision relating to the settlement of consideration in a scheme?

Q.19 Do you agree that Rule 31.9 should be disapplied in a scheme?

Q.20 Do you agree with the proposed provisions in relation to announcements following key events in a scheme?

Q.21 Do you agree with the proposed amendments to Rule 12.1?

Q.22 Do you agree with the proposed amendment of Rule 12.2 and with the consequential amendments?

Q.23 Do you agree with the proposed provision relating to holding statements made during an offer period involving a scheme?

Q.24 Do you agree with the proposed provision in relation to the revision of a scheme?

Q.25 Do you agree that Note 4 on Rule 32.1 should be disapplied in a scheme?

Q.26 Do you agree that paragraph (b) of Note 3 on Rule 32.2 should be disapplied in a scheme?

Q.27 Do you agree with the proposed amendment to Note 4 on Rule 32.2?

Q.28 Do you agree that Note 5 on Rule 32.2 should be disapplied in a scheme?

Q.29 Do you agree with the Code Committee's conclusions in relation to competitive situations involving a scheme and with the introduction of a new Note 3 on Rule 32.5 as proposed?

Q.30 Do you agree with the Code Committee's conclusions in relation to switching?

Q.31 Do you agree that Rule 33 should be disapplied in a scheme and that an election for alternative consideration should be capable of being made at least until the date of the shareholder meetings?

Q.32 Do you agree with the proposed Note on Section 9 of the Schemes Appendix in relation to Rule 11.1?

Q.33 Do you agree that Rule 34 should be disapplied in a scheme and that a right of withdrawal should be introduced for offeree shareholders who elect for alternative consideration in a scheme as proposed?

Q.34 Do you agree that Note 2 on Rule 13.5 and Rule 24.13 should be disapplied in a scheme?

Q.35 Do you agree with the proposed amendments in relation to the return of documents of title?

Q.36 Do you agree that a mandatory offeror should not be permitted to satisfy its obligations under Rule 9 by way of a scheme?

Q.37 Do you agree that an offeror proceeding by way of a scheme should only trigger a mandatory offer if it has obtained the Panel's prior consent to switch to a contractual offer?

Q.38 Do you agree with the proposed amendments to Rule 15(d) and Rule 14.1?

Q.39 Do you agree with the proposed amendments in relating to voting by connected exempt principal traders?

Q.40 Do you agree with the proposed Note 6 on Rule 24.2 and the proposed amendment to paragraph (f) of Rule 26?

Q.41 Do you agree with the proposed amendments to the Formula Offers Guidance Note in Appendix 2 of the Code?

Q.42 Do you agree with that the provisions listed in paragraph 16.1 should be disapplied in a scheme?

APPENDIX D

List of persons consulted

Law firms

Freshfields Bruckhaus Deringer (Mark Rawlinson)

Herbert Smith (James Palmer)

Linklaters (David Cheyne)

Slaughter and May (Stephen Cooke)

Investment banks

Citigroup (Philip Robert-Tissot/Christopher Daniels)

UBS (Tom Cooper/Jonathan Rowley)

Others

Office of Fair Trading

The Registrars Group of the Institute of Chartered Secretaries and Administrators