RS 11 Issued on 27 August 2002

THE PANEL ON TAKEOVERS AND MERGERS

DUAL LISTED COMPANY TRANSACTIONS AND FRUSTRATING ACTION

STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE EXTERNAL CONSULTATION PROCESS ON PCP 11

1. Introduction

1.1 On 26 April, the Code Committee of the Takeover Panel ("the Code Committee") published a Public Consultation Paper ("PCP 11") entitled "Dual Listed Company Transactions and Frustrating Action".

1.2 The purpose of this paper is to provide details of the Code Committee's response to the external consultation process on PCP 11.

2. Number of responses received

A total of 9 responses were received from a range of parties, including institutional shareholder bodies and practitioners.

3. Significant conflicts of views

3.1 A significant majority of respondents supported the proposal to bring DLC transactions within the Code. All but one of those in favour preferred the approach referred to as Option Two in PCP 11 (i.e. to bring such transactions within the Code from the start). However, two respondents were concerned by the proposal, principally on the basis that the new approach will represent a departure from the current principle which is that the Code does not apply to DLC transactions on the basis that they do not involve a change of control in the relevant Code company. Instead, one respondent suggested that DLC transactions should only be subject to the Code where the transaction would be equivalent to a reverse takeover for the Code company.

3.2 There was unanimous support for the proposal to amend Rule 21.2 of the Code in order to clarify the nature of the arrangements to which the Rule applies and to extend the scope of the Rule to cover DLC transactions.

4. The Code Committee's conclusions

4.1 General

4.1.1 After careful consideration, the Code Committee has decided to adopt Option Two and implement the Code changes recommended in PCP11, subject to some minor changes to the definition of "offer" being made for the reasons explained in paragraphs 4.1.2 and 4.1.3 below.

4.1.2 One respondent questioned whether the use of the term "dual *listed* company transactions" in the definition might lead to confusion as to the extent of the application of the Code given that the Code applies to unlisted plcs and certain other unlisted companies. This respondent suggested that the definition of offer should instead refer to "dual *holding* company transactions" to make clear that the Code may also apply to a transaction where the Code company or its merger partner is not listed. The Code Committee has adopted this suggestion although it anticipates that dual holding company structures will normally be used where both companies have and will retain separate stock market listings. For consistency with PCP 11, the term DLC has been used throughout this paper.

4.1.3 On reflection, the Code Committee does not consider that it is necessary to refer to "control" in the revised "offer" definition just because DLC transactions are being referred to: other types of transaction included in the definition can constitute "offers" without involving a change of control. Accordingly, the revised definition does not include the words "… regardless of whether control (as defined) is to be obtained or consolidated …" after the words "… and dual [holding] company transactions …" as was proposed in PCP 11.

4.2 Q1: Do you agree that DLC transactions should be subject to the Code?

4.2.1 As noted above, there was overwhelming support for the proposal to bring DLC transactions within the Code. However, one respondent argued that the

Code should only apply to a DLC transaction where the shareholders in the Code company would, as a result of the transaction, have less than half of the voting rights of the merged entity; and then, that only the requirements to obtain independent advice under Rule 3 and to provide information to a competing offeror in accordance with Rule 20.2 should apply. Under this proposal, the application of the Code would, therefore, be extended from the current position only to a very limited extent. In essence, the argument being put forward was that the Code should not apply to DLC transactions on the basis that they do not generally involve an actual change of control of the Code company.

4.2.2 The Code Committee takes the view that the Code should apply to DLC transactions on the grounds that they are a means of effecting a merger which would otherwise be structured as a Code offer. That argument is all the stronger when an offer which is subject to the Code is, or is likely to be, in competition with a DLC transaction. The interests of shareholders in the Code company may be prejudiced if there is no equality of treatment between the two transactions. If the concerns identified in relation to equality of treatment are to be met, then all relevant Rules need to be applied to DLC transactions and not just those outlined in paragraph 4.2.1 above.

4.2.3 The Code Committee does, however, acknowledge that there may be cases where there is no doubt that the substance of a DLC transaction is the acquisition by a Code company of a non-Code company (see paragraphs 5.5.4 and 5.5.5 of PCP 11). In such circumstances, the Panel may be willing to agree that the Code should not apply to the DLC transaction.

4.2.4 The same respondent that raised the argument set out in paragraph 4.2.1 also raised the concern that, if DLC transactions are brought within the Code as suggested by PCP11, then it would be unclear where the conceptual boundaries of the Code have been set. Another respondent raised a similar issue when pointing out that the proposed extension of Code jurisdiction to DLC structures may well lead to parties requesting in the future that any transaction in competition with a Code transaction should be conducted under

the auspices of the Code. This respondent noted that the Code does not generally apply to a sale of all of the assets of a Code company nor to a sale of all, or any, of a Code company's subsidiaries nor to a proposal to wind a company up and return cash to shareholders.

4.2.5 The Code Committee does not agree that the proposed Code amendments will result in it being unclear where the boundaries of the Code have been set. The purpose of the changes is, for the reasons stated, to bring DLC transactions within the ambit of the Code. The Code Committee is not seeking to extend the Code's jurisdiction to other types of transactions which are not currently covered by the Code, nor can this be read into the new definition of "offer" set out in the Appendix.

4.3 Q2: Do you agree that Option Two is preferable to Option One?

There was overwhelming support for Option Two in preference to Option One.

4.4 Q3: If you prefer Option One do you agree with the approach being suggested by the Code Committee as regards the application of the Code under Option One?

Given the support for Option Two, few respondents commented on this question. Those respondents that did comment supported the approach being suggested by the Code Committee.

4.5 Q4: If you prefer Option Two do you agree with the approach being suggested by the Code Committee as regards the application of the Code under Option Two?

4.5.1 There was widespread support for the approach suggested by the Code Committee as regards the application of the Code under Option Two. Some respondents, whilst supportive of the general approach, raised concerns in relation to the additional regulatory burden that will result for companies if the

proposals are adopted and there was a suggestion that the Panel should be prepared to apply the Code flexibly.

4.5.2 As noted in paragraph 7.3.1 of PCP11, the general principle is that the normal Code Rules will apply in the context of a DLC transaction. Certain Rules, for example those relating to the offer timetable, will have to be applied flexibly, as is the case in relation to schemes of arrangement. An overview of the way in which the Panel is likely to apply certain key Rules to a DLC transaction is set out in paragraph 7.3.1 of PCP 11. Further, the Panel will have discretion as noted in paragraph 4.2.3 above.

4.6 Q5: Do you agree that Rule 21.2 should be amended as above?

4.6.1 There was universal support for the proposed changes to Rule 21.2. One respondent argued, however, that if Rule 21.2 is to be extended to cover DLC transactions, then it should also cover a whole range of other transactions and situations where such arrangements are agreed (e.g. a takeover of a US company by a Code company, where substantial break fees may be payable in the event of a change of control).

4.6.2 Another respondent argued that the changes do not go far enough and that all poison pill type activities should be outlawed.

4.6.3 The Code Committee notes the above but does not consider that it is appropriate or practical to extend the application of Rule 21.2 to non-Code transactions or to apply the restrictions in Rule 21.1 to periods arising before the board of a Code company has reason to believe that a bona fide offer may be imminent. This is principally because the Code is designed to ensure good business standards and fairness to shareholders in the context of Code transactions, but not outside such situations. Also, UK listed companies are subject to the continuing obligations imposed by the Listing Rules and these rules impose practical limitations on what agreements can be entered into by listed companies without shareholder consent. The Code Committee,

therefore, does not agree with an extension of the Code in the manner suggested.

5. Amendments to the Code

The Appendix to this document sets out in full the text of the revised definition of “offer” and the revised Note 1 on Rule 21.2 as amended by the further changes discussed in this statement.

APPENDIX

DEFINITIONS

Offer

Offer includes, wherever appropriate, takeover and merger transactions however effected, including reverse takeovers, partial offers, Court schemes, offers by a parent company for shares in its subsidiary and dual holding company transactions. In some circumstances, the Code may have relevance to unitisation proposals which are in competition with an offer to which the Code applies; the Panel should, therefore, be consulted when such proposals are under consideration.

Rule 21.2 INDUCEMENT FEES

NOTES ON RULE 21.2

1. Arrangements to which the Rule applies

An inducement fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail (e.g. the recommendation by the offeree company board of a higher competing offer).

This Rule will also apply to any other favourable arrangements with an offeror or potential offeror which have a similar or comparable financial or economic effect, even if such arrangements do not actually involve any cash payment.

Such arrangements will include, for example, break fees, penalties, put or call options or other provisions having similar effects, regardless of whether such arrangements are considered to be in the ordinary course of business. In cases of doubt the Panel should be consulted.