

RS 2020/1 31 March 2021

# **THE TAKEOVER PANEL**

## **CONDITIONS TO OFFERS AND THE OFFER TIMETABLE**

### **RESPONSE STATEMENT BY THE CODE COMMITTEE**





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## 1. Introduction and summary

### (a) Background

1.1 On 27 October 2020, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a [Public Consultation Paper](#) (“**PCP 2020/1**” or the “**PCP**”) which proposed various amendments to the Takeover Code (the “**Code**”) in relation to conditions to offers and the offer timetable.

### (b) Summary of proposals

1.2 The proposals in PCP 2020/1 are summarised in broad outline in the following paragraphs. More detailed summaries of the proposals are provided at the beginning of each Section of this **Response Statement**.

1.3 **Section 2** of the PCP proposed:

- (a) the introduction of new defined terms for certain of the key dates in the timetable for a “contractual” offer; and
- (b) amendments to certain of the timetable rules of the Code.

1.4 **Section 3** of the PCP proposed that, if one or more conditions to an offer relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5.00 p.m. on the second day prior to “Day 39”, the Panel should normally suspend the offer timetable either:

- (a) at the joint request of the offeror and the offeree company; or
- (b) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to a “**material official authorisation or regulatory clearance**”.

1.5 **Section 4** of the PCP proposed the introduction of:

- (a) a requirement for an offeror to set a “long-stop date” for a contractual offer; and
- (b) requirements that, where an offer is implemented as a scheme of arrangement, the offeror must:
  - (i) prior to the court sanction hearing, confirm to the offeree company and the Panel that all relevant conditions to the offer have been either satisfied or waived; and

- (ii) at the court sanction hearing, undertake to the court to be bound by the terms of the scheme.
- 1.6 **Section 5** of the PCP proposed that the Code should apply consistent treatment to all official authorisations and regulatory clearances to which an offer is subject. In particular, Section 5 proposed:
  - (a) that all conditions and pre-conditions relating to an official authorisation or regulatory clearance, including conditions and pre-conditions relating to clearances required from the Competition and Markets Authority (the “**CMA**”) and the European Commission, should be subject to the requirement that they may only be invoked where the circumstances in question are of material significance to the offeror in the context of the offer; and
  - (b) the removal of the requirement for an offer to include a term that it must lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, in each case prior to a certain point in the offer timetable.
- 1.7 **Section 6** of the PCP proposed that an offeror should be required to serve an “**acceptance condition invocation notice**” if it wishes to invoke the acceptance condition so as to cause its offer to lapse on any date on or after “Day 21” but prior to the “**unconditional date**”.
- 1.8 **Section 7** of the PCP proposed that there should be a single date by which all of the conditions to an offer must be satisfied or waived, i.e. that the Code should no longer make a distinction between the latest date for the satisfaction of the acceptance condition (currently “Day 60”) and the latest date for the satisfaction of the other conditions to the offer (currently “Day 81”).
- 1.9 **Section 8** of the PCP proposed that offeree company shareholders who have accepted an offer should be able to withdraw their acceptances at any time, and not only from the date which is 21 days after the first closing date.
- 1.10 **Section 9** of the PCP proposed amendments to clarify that:
  - (a) subject to certain exceptions, the consent of the Panel is required in order for an offeror to invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn;
  - (b) language appropriately reflecting this requirement should be incorporated into each of the firm offer announcement and the offer document; and

- (c) the Panel will judge whether circumstances are of material significance to the offeror in the context of the offer by reference to the facts of each case at the time the relevant circumstances arise.

In addition, Section 9 explained certain amendments that the Panel Executive (the “**Executive**”) had advised the Code Committee were intended to be made to [Practice Statement No 5](#) (*Rule 13.5(a) – Invocation of conditions*).

- 1.11 **Section 10** of the PCP proposed amendments with regard to the circumstances in which the Panel may grant a dispensation from the restriction on a person triggering a mandatory offer where the making or implementation of that offer would be subject to a condition or consent relating to a material official authorisation or regulatory clearance.
- 1.12 **Section 11** of the PCP proposed certain miscellaneous amendments to the Code with regard to matters which were related to the main proposals in the PCP.

**(c) Responses to the consultation**

- 1.13 The consultation period in relation to PCP 2020/1 ended on 15 January 2021. Responses were received from ten respondents. The eight respondents who submitted comments on a non-confidential basis are listed in **Appendix A** and their responses have been published on the Panel’s [website](#). The Code Committee thanks the respondents for their comments.
- 1.14 The respondents were generally supportive of the proposals. The principal comments and suggestions made by respondents are summarised in Sections 2 to 11 below.

**(d) The Code Committee’s conclusions**

- 1.15 Having considered the responses to the consultation, the Code Committee has adopted the amendments proposed in the PCP, subject to certain modifications, as described in Sections 2 to 11 below.

**(e) National Security and Investment Bill**

- 1.16 A number of the respondents drew attention to the proposals by the government to introduce a new national security and investment regime (the “**NSI regime**”) by means of the [National Security and Investment Bill](#) (the “**NSI Bill**”), with some respondents commenting on the interaction of the proposed NSI regime and the provisions of the Code.
- 1.17 The Code Committee considers that the Panel would be likely to treat a clearance from the Secretary of State under the proposed new NSI regime as a “material official authorisation or regulatory clearance” for the purposes of the Code and that, accordingly, to the extent that any “review period” or “assessment period” has not ended by “Day 37” of a contractual offer, it will normally be possible for the offer timetable to be suspended under the new

**Rule 31.4** (*Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding*) pending the outcome of the review and/or assessment.

1.18 However, the Code Committee does not expect to make any specific amendments to the Code as a result of the enactment and implementation of the NSI Bill in its current form. The Code Committee notes that parties engaged in transactions subject to the Code invariably employ professional financial and legal advisers and considers that those advisers will ensure that their clients:

- (a) notify the Secretary of State in advance of any transaction which may fall within the scope of the NSI regime;
- (b) make any relevant offer (other than a mandatory offer) subject to a condition that the offeror has received national security clearance from the Secretary of State;
- (c) not complete a transaction which has been notified to the Secretary of State until either:
  - (i) a “final notification” (confirming that no further action will be taken) has been given; or
  - (ii) if a “final order” (requiring particular things to be done or not to be done) is given, the offeror has complied with the terms of the order; and
- (d) only trigger an obligation to make a mandatory offer where it is clear that there is no national security concern.

**(f) Code amendments**

1.19 The amendments to the Code which the Code Committee has adopted as a result of the consultation are set out in **Appendix B**. In Appendix B, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code. Unless otherwise stated, where new or amended provisions of the Code are set out in the main body of this Response Statement, they are marked to show changes from the provisions as they were proposed to be amended in the PCP.

1.20 Subsequent to the publication of the PCP, a number of amendments to the Code took effect on 31 December 2020, pursuant to **Instruments [2019/3](#), [2020/1](#) and [2020/2](#)**. To the extent that those amendments affected the provisions of the Code that will be amended as a result of this Response Statement, those amendments have been reflected in Appendix B.

**(g) Implementation and transitional arrangements**

1.21 The amendments to the Code set out in this Response Statement will take effect on Monday, 5 July 2021 (the “**implementation date**”).

1.22 The Code, as amended, will be applied in relation to all offers which are announced in accordance with **Rule 2.7** (*The announcement of a firm intention to make an offer*) on or after the implementation date, except where to do so would give the amendments retroactive effect. Any ongoing firm offers which straddle the implementation date, and any offers announced on or after the implementation date which are in competition with such ongoing offers, will continue to be subject to the unamended provisions of the Code.

1.23 Where parties have any doubt as to the consequences of the amendments to the Code set out in this Response Statement, in particular regarding the impact on any transaction which is in existence or contemplation, they should consult the Panel to obtain a ruling or guidance.

**(h) Practice Statement No 5**

1.24 The Executive has advised the Code Committee that it intends to publish a revised version of Practice Statement No 5 on the Panel’s website on the implementation date. A copy of the Practice Statement, incorporating the amendments set out in Appendix C of the PCP and certain additional amendments, is set out in **Appendix C**.

## 2. The offer timetable

### (a) Summary of proposals

#### 2.1 Section 2 of the PCP proposed:

- (a) the introduction of new defined terms for certain of the key dates in the timetable for a “contractual” offer; and
- (b) amendments to certain of the timetable rules of the Code.

#### 2.2 In summary, it was proposed to introduce:

- (a) a new **Rule 31.2(a)**, which would provide that an offer must be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses;
- (b) a new **Rule 31.1(a)**, which would provide that, except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60;
- (c) a new definition of “**Day 60**”, being the 60th day following the publication by the offeror of the initial offer document or such later date as is set pursuant to the proposed new **Rule 31.3** (*Extensions to Day 60*);
- (d) a new definition of the “**unconditional date**” of an offer, being Day 60 or any earlier date specified by an offeror as the latest date by which all of the conditions to the offer must be satisfied or waived;
- (e) a new definition of an “**acceleration statement**”, being a statement in which an offeror brings forward the unconditional date. It was also proposed to amend the current **Rule 31.5** (*No extension statements*) so as to apply to acceleration statements (see further below);
- (f) a new **Rule 31.1(b)**, which would provide that an offeror which wishes to specify in the initial offer document an unconditional date which is earlier than Day 60 must consult the Panel in advance and that, in such cases, the offeror will normally be treated as having made an acceleration statement; and
- (g) new definitions of “**Day 14**” and “**Day 21**”, being the 14th and 21st days, respectively, following the publication of the initial offer document, and new definitions of “**Day 39**”, “**Day 46**” and “**Day 53**”, which would be defined by reference to Day 60.

- 2.3 Under the proposed amendments to **Rule 31.5** (*Acceleration statements*), if an offeror makes an acceleration statement:
- (a) the new unconditional date must be not less than 14 days from the date of the acceleration statement;
  - (b) the offeror must waive any conditions relating to an official authorisation or regulatory clearance;
  - (c) the following will be disapplied:
    - (i) the requirement for the board of the offeree company to announce any material new information by no later than Day 39; and
    - (ii) the requirement for a publicly disclosed potential competing offeror to clarify its position by no later than Day 53; and
  - (d) the offeror will not be permitted to set the acceleration statement aside except:
    - (i) where the right to do so is specifically reserved and the specified circumstances subsequently arise; or
    - (ii) in wholly exceptional circumstances.
- 2.4 In addition, it was proposed to amend **Rule 32.1(c)** so as require an offeror which has made an acceleration statement to publish any revised offer document by no later than 14 days prior to the unconditional date set by the acceleration statement.
- 2.5 An illustrative offer timetable, highlighting the key differences between the current timetable and the new timetable following the proposed amendments, was set out in Appendix D to the PCP.

**(b) Respondents' comments and the Code Committee's response**

**Q1 Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?**

*(i) Introduction*

- 2.6 The respondents were generally supportive of the proposed amendments in relation to the offer timetable, although a number of queries were raised with regard to the practical application of the revised rules, in particular, in relation to acceleration statements made under the amended **Rule 31.5**.

(ii) *Earliest day on which the unconditional date can be set*

2.7 One respondent sought confirmation of its understanding that an offeror would not be permitted to set the unconditional date of its offer for a day earlier than Day 21 and suggested that this might be specified in the Code.

2.8 The Code Committee notes that, under the new **Rule 31.2** (*Period for which the offer must remain open for acceptance*), an offer must be open for acceptance until the later of:

(a) Day 21; and

(b) the date on which the offer:

(i) becomes or is declared unconditional (either on the unconditional date or any earlier day); or

(ii) lapses.

If the unconditional date were to be set for any day earlier than Day 21, and the offer were to lapse on that earlier date, the offer would not have remained open until Day 21, contrary to **Rule 31.2**. The Code Committee therefore confirms that the unconditional date of an offer cannot be earlier than Day 21 but does not consider that it is necessary for this to be stated in the Code.

(iii) *Latest date for revision of an offer*

2.9 The same respondent noted that, under the amended **Rule 32.1(c)**:

**“no revised offer document may be published after Day 46 or, where the offeror has made an acceleration statement, after the date which is 14 days prior to the unconditional date”.**

In addition, the respondent drew attention to paragraph 2.21 of the PCP, which stated as follows (emphasis added):

“The Code Committee also considers that, where an offeror wishes to specify an unconditional date in the initial offer document which is earlier than Day 60, the offeror should normally be treated as having made an acceleration statement. The Code Committee therefore considers that an offeror should be required to consult the Panel in advance of specifying an unconditional date of earlier than Day 60 in its initial offer document. The Code Committee proposes to introduce a new Rule 31.1(b) to this effect. However, the Code Committee would not expect the Panel to treat an offeror as having made an acceleration statement where the unconditional date was set only a small number of days earlier than Day 60 for practical reasons, for example, where Day 60 would fall on a weekend or public holiday.”

The respondent noted that, as a technical matter, if the Panel consented to an offeror not being treated as having made an acceleration statement in such circumstances, the offeror would, under **Rule 32.1(c)**, have until Day 46 to make a revised offer, which would be a

period of less than 14 days prior to the (foreshortened) unconditional date set in the initial offer document. The respondent suggested that the Code should be amended so as to enable the unconditional date to be treated as if it were Day 60 in such circumstances.

- 2.10 The Code Committee accepts that, if an offeror sets an unconditional date of, say, Day 58 in its initial document - for example, because Day 60 would fall on Christmas Day - and is not treated by the Panel as having made an acceleration statement, the offeror would, on the face of the rules, have until Day 46 (i.e. 14 days prior to Day 60) to make any revised offer. However, as a matter of practice, the Code Committee would expect the Panel to avoid this outcome by treating the unconditional date set in the initial offer document as if it were Day 60, and by re-setting Days 39, 46 and 53 accordingly, notwithstanding that this would not be specifically provided for in the Code.

*(iv) Acceleration statements and revised offers*

- 2.11 The proposed new **Rule 31.5(a)** provided that there must be a period of at least 14 days between the date of an acceleration statement and the unconditional date set by that acceleration statement. As mentioned, **Rule 32.1(c)**, as proposed to be amended, provided that, where an offeror has made an acceleration statement, no revised offer document may be published in the 14 days preceding the new unconditional date.

- 2.12 One respondent noted its understanding that an offeror could therefore make an acceleration statement which set an unconditional date for a date which was more than 14 days from the date of the acceleration statement and subsequently revise its offer after the date of the statement, provided that it did so at least 14 days prior to the new unconditional date. The respondent suggested that this could be specified in the Code.

- 2.13 The Code Committee agrees that, provided that it has not made a “no increase statement” to which **Rule 32.2** (*No increase statements*) applies, it would be possible for an offeror which has made an acceleration statement to revise its offer by a date no later than 14 days prior to the new unconditional date. However, the Code Committee does not consider that it is necessary for this to be stated in the Code.

*(v) Acceleration statements and waiving regulatory conditions*

- 2.14 The proposed new **Rule 31.5(b)** provided that an acceleration statement must state that the offeror has waived any and all unsatisfied conditions relating to any official authorisation or regulatory clearance.

- 2.15 One respondent sought guidance as to whether it would be sufficient for the offeror to make a general statement that it had waived the conditions to its offer to the extent that they related to an official authorisation or regulatory clearance or whether the acceleration statement would need to identify the specific conditions which had been waived.

2.16 The Code Committee considers that an acceleration statement should state that the offeror has waived both the conditions to the offer which relate to a specific official authorisation or regulatory clearance and any general regulatory condition(s), and that the offeror's advisers should ensure that it is clear which of the conditions to the offer have and have not been waived.

2.17 The same respondent sought confirmation that, if an offeror was allowed to set aside an acceleration statement, either in accordance with the terms of a specific reservation or in wholly exceptional circumstances, the offeror would not be able to "reactivate" any of the conditions which it had waived when it made its acceleration statement.

2.18 The Code Committee agrees that the waiver of any conditions to an offer will be an irrevocable act by the offeror.

(vi) *Acceleration statements and Days 39 and 53*

2.19 A number of respondents sought guidance as to the implications that the making of an acceleration statement by an offeror would have both on the requirement for the board of the offeree company to announce any material new information by no later than Day 39 and on the requirement for a potential competing offeror subject to **Rule 2.6(d)** or **Rule 2.6(e)** to clarify its position by Day 53.

2.20 In summary, the relevant provisions, as proposed in the PCP, are as follows:

- (a) the proposed new **Rule 31.8(a)** (i.e. the amended first sentence of the current **Rule 31.9** (*Offeree company announcements after Day 39*)) provided that:

**"The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information, including trading results, profit forecasts (including ordinary course profit forecasts), dividend forecasts, asset valuations, quantified financial benefits statements and proposals for dividend payments or for any material acquisition or disposal, after Day 39."**;

- (b) the proposed new **Rule 31.8(c)** (i.e. the amended third sentence of the current **Rule 31.9**) provided that:

**"If an announcement of the kind referred to in paragraph (a) is made after Day 39, the Panel will re-set Day 60, as appropriate."**;

- (c) **Rule 2.6(d)**, as proposed to be amended, provided that:

**"When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement of the first offer), the potential offeror must, by 5.00 pm on Day 53, either:**

(i) announce a firm intention to make an offer in accordance with Rule 2.7;  
or

(ii) announce that it does not intend to make an offer, in which case the announcement will be treated as a statement to which Rule 2.8 applies.”.

(The amended Rule 2.6(e) provided in similar terms in relation to a potential competing offer which has not been publicly identified);

(d) the proposed new Rule 31.5(c) provided that, where an offeror makes an acceleration statement:

“(i) Rule 31.8(a) will not apply and there will therefore be no restriction on the date by which the board of the offeree company may announce any material new information; and

(ii) Rules 2.6(d) and (e) will not apply and there will therefore be no requirement for a potential competing offeror to clarify its position by a particular date.”;

(e) the proposed new Rule 31.5(d)(i) (i.e. the current Rule 31.5(b)(i), as amended) provided that an offeror may set an acceleration statement aside:

“where the right to do so in certain circumstances is specifically reserved at the time the acceleration statement is made and those circumstances subsequently arise”;

(f) the proposed new Note 2 on Rule 31.5 (*Competitive situations*) (i.e. the current Note 3 on Rule 31.5, as amended) provided that:

*“If the circumstances specified in a reservation made in accordance with Rule 31.5(d)(i) relate to a competitive situation arising and such a situation arises, an offeror which wishes to set aside its acceleration statement must make an announcement to this effect as soon as possible (and in any event within 4 business days after the date of the firm announcement of the competing offer) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity.*

*(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether publicly identified or not. ...)*”; and

(g) the proposed new Note 3 on Rule 31.5 (*Rule 31.8 announcements*) (i.e. the current Note 4 on Rule 31.5, as amended) provided that:

*“An offeror may reserve the right to set aside an acceleration statement in the event of the offeree company making an announcement of the kind referred to in Rule 31.8 after Day 39 only if the acceleration statement is made after that day. ...”.*

2.21 In response to respondents’ queries in relation to Day 39, the Code Committee considers that:

- (a) if an offeror makes an acceleration statement before Day 39, **Rule 31.8(a)** should be disapplied, i.e. the board of the offeree company should not be restricted from announcing material new information at any time after Day 39, even if the offeror subsequently sets its acceleration statement aside on account of circumstances set out in a reservation to the acceleration statement subsequently occurring - for example, following the announcement of a competing possible offer (but see paragraph (d) below in relation to the announcement of a competing firm offer);
- (b) if an offeror makes an acceleration statement after Day 39, **Rule 31.8(a)** should continue to apply, i.e. Day 39 having passed, the board of the offeree company should be restricted from announcing any further material new information, except with the consent of the Panel;
- (c) if an offeror makes an acceleration statement after Day 39:
  - (i) the offeror should be able to reserve the right to set the acceleration statement aside in the event that the board of the offeree company announces material new information; and
  - (ii) if, with the consent of the Panel, the board of the offeree company did announce material new information after Day 39, and if the offeror relied on a relevant reservation so as to set the acceleration statement aside, Day 60 would normally be re-set as the 21st day after the date on which the material new information was announced (with Days 39, 46 and 53 being re-set accordingly); and
- (d) if a competing firm offer is announced, Day 60 will be re-set by reference to the publication of the competing offeror's offer document and the board of the offeree company will be restricted from announcing material new information after the re-set Day 39, except with the consent of the Panel.

2.22 In response to the query in relation to Day 53, the Code Committee considers that, if an offeror makes an acceleration statement after a potential competing offeror has made a statement that it does not intend to make an offer, the fact that **Rules 2.6(d)** and **(e)** are disapplied following the acceleration statement does not release the former potential offeror from the restrictions of **Rule 2.8** (*Statements of intention not to make an offer*).

2.23 In the light of the above, the Code Committee has modified the new **Rules 31.5(c)(i)** and **(ii)** proposed in the PCP, and has adopted them as new **Rules 31.5(c)** and **(d)**, as follows:

**“(c) If an offeror makes an acceleration statement: ~~(i) prior to Day 39, Rule 31.8(a) will not apply~~ be disapplied and there will therefore be no restriction on**

the date by which the board of the offeree company may announce any material new information;<sup>5</sup> and

(iid) If an offeror makes an acceleration statement, Rules 2.6(d) and (e) will not apply be disapplied and there will therefore be no requirement for a potential competing offeror to clarify its position by a particular date no later than Day 53.",

and the proposed **Rules 31.5(d) to (f)** have been adopted as new **Rules 31.5(e) to (g)**.

**(c) Code amendments**

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

- (a) adopted the new definitions of “**acceleration statement**”, “**Day 14**”, “**Day 21**”, “**Day 39**”, “**Day 46**”, “**Day 53**”, “**Day 60**” and “**unconditional date**”, as proposed in paragraph 2.32 of the PCP;
- (b) adopted the new **Rule 31.1** (*Day 60 and the unconditional date*) and the new **Rule 31.2(a)** (and deleted the first sentence of the current **Rule 31.6(a)**), as proposed in paragraph 2.33 of the PCP;
- (c) adopted the new **Rule 31.3** (*Extensions to Day 60*) and **Notes 1** (*Timetable for competing firm offers*) and **2** (*Day 46*) thereon (and deleted the second sentence of the current **Rule 31.6(a)**, **Rule 31.6(b)**, **Notes 1 to 4 on Rule 31.6** and **Note 5 on Rule 32.1**), as proposed in paragraphs 2.34 and 2.35 of the PCP;
- (d) adopted the amendments to **Rule 31.5** (*Acceleration statements*) and the **Notes** thereon, as proposed in paragraph 2.36 of the PCP, subject to the modifications set out in paragraph 2.23 above and the introduction of the new **Rule 31.5(h)** referred to in paragraph 6.20 below;
- (e) adopted the amendments to **Rule 32.1(c)** referred to in paragraph 2.37 of the PCP;
- (f) deleted the current **Note 2 on Rule 31.5** and **Note 2 on Rule 32.2** (both entitled “*Wholly exceptional circumstances*”), as proposed in paragraph 2.38 of the PCP;
- (g) made the consequential amendments to various provisions referred to in paragraph 2.39 of the PCP (save for an additional minor amendment to paragraph (a) of **Note 1 on Rules 35.1 and 35.2** (*When consent may be given*)); and
- (h) made minor amendments to the current **Rules 31.6(c) and (d)** and **Note 6 on Rule 31.6**, which have been renumbered as the new **Rules 31.7(a) and (b)** and the **Note on Rule 31.7**, as described paragraph 2.40 of the PCP,

as set out in Appendix B.

### 3. Suspending the offer timetable for official authorisations and regulatory clearances

#### (a) Summary of proposals

(i) *Suspension of the offer timetable if an official authorisation or regulatory clearance remains outstanding*

3.1 **Section 3(c)** of the PCP proposed that, if one or more conditions to an offer relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5.00 p.m. on the second day prior to Day 39, the Panel should normally suspend the offer timetable either:

- (a) at the joint request of the offeror and the offeree company; or
- (b) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to a “**material official authorisation or regulatory clearance**” (as proposed to be newly defined).

It was proposed that this would be set out in the new **Rule 31.4(a)**.

3.2 The ability to suspend the offer timetable pending the satisfaction of conditions relating to official authorisations and regulatory clearances would represent an expansion of the current provisions of the Code, whereby the Panel is able to suspend the offer timetable only pending a decision as to whether a Phase 2 CMA reference will be made or Phase 2 European Commission proceedings initiated. The amendments would enable the offer timetable to accommodate better than at present the increased number of official authorisations and regulatory clearances required in relation to an offer and the length of time required to obtain them. In particular, there would be no restriction on the date by which an offeree company may announce any material new information, and an offeror would not be required to make its final offer, in circumstances where a material official authorisation or regulatory clearance remained outstanding.

(ii) *Ending a timetable suspension*

3.3 **Section 3(e)** of the PCP proposed that, where an offer timetable is suspended under the new **Rule 31.4(a)**, it should automatically resume once the last condition relating to a relevant official authorisation or regulatory clearance has been either satisfied or waived. In such a case, the date on which this occurred would become the new “Day 32” of the offer timetable, i.e. the 28th day prior to the new Day 60 (see the new **Rule 31.4(b)**).

3.4 It was also proposed that the offeror and the offeree company should be able to agree to resume a suspended offer timetable, notwithstanding that one or more conditions relating to

an official authorisation or regulatory clearance remained outstanding, in which case the offer timetable would also resume on the new “Day 32” (see the new **Rule 31.4(c)**).

- 3.5 In addition, it was noted that it would also be open to an offeror to make an “acceleration statement” if it wished to set a new unconditional date of between 14 and 27 days from the date of that statement. As explained in Section 2 of the PCP, in order to make such an acceleration statement, the offeror would need to waive any outstanding conditions relating to an official authorisation or regulatory clearance (see the new **Rule 31.5(b)**).

*(iii) Competitive situations*

- 3.6 **Section 3(f)** of the PCP proposed that it should be made clear that, where there are two or more competing offers and the offer timetable is suspended under the new **Rule 31.4(a)**, the offer timetable will normally be suspended for all of the offerors and will normally only resume when it is resumed by the last offeror in accordance with the new **Rule 31.4(b)** or **(c)** (see the new **Note on Rule 31.4 (Competing offers)**).

*(iv) Pre-conditional offers*

- 3.7 **Section 3(g)** of the PCP proposed that, notwithstanding the proposed new ability to suspend the offer timetable pending the satisfaction or waiver of one or more conditions relating to an official authorisation or regulatory clearance, the Code should continue to permit an offeror to announce an offer subject to one or more pre-conditions relating to a material official authorisation or regulatory clearance.

**(b) Respondents’ comments and the Code Committee’s response**

<b>Q2</b>	<b>Should the Panel have the ability to suspend an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39, as proposed?</b>
<b>Q3</b>	<b>Should an offer timetable which has been suspended under the proposed new Rule 31.4(a) normally resume on the 28th day prior to Day 60 when the last relevant condition is satisfied or waived?</b>
<b>Q4</b>	<b>Do you have any comments on the proposals in relation to a suspended offer timetable resuming with the consent of the offeree company?</b>
<b>Q5</b>	<b>Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?</b>
<b>Q6</b>	<b>Should an offeror continue to be able to announce an offer subject to pre-conditions in accordance with Rules 13.3 and 13.4?</b>

*(i) Introduction*

- 3.8 The respondents were generally supportive of the amendments in relation to the proposed ability of the Panel to suspend the offer timetable if a condition relating to an official

authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39.

3.9 A number of queries were raised, particularly in the responses to Questions 2 and 5. No substantive issues were raised in the responses to Questions 3, 4 and 6.

(ii) *“Official authorisation or regulatory clearance”*

3.10 Two respondents requested guidance as to the scope of an official authorisation or regulatory clearance with regard to which the offer timetable could be suspended. In particular, it was queried whether a clearance from The Pensions Regulator would be regarded as a regulatory clearance for this purpose.

3.11 The Code Committee considers that, for the purposes of the Code, an official authorisation or regulatory clearance is an authorisation or clearance which is obtained from a governmental or regulatory body and which relates to the question of whether the offeror is permitted to acquire the offeree company or one or more of its assets. Accordingly, the Code Committee considers that a clearance from a competition regulator (such as the CMA) or a sector or industry regulator (such as the Financial Conduct Authority or the Prudential Regulation Authority) would be an official authorisation or regulatory clearance, as would, for example, a governmental approval in relation to national security.

3.12 However, the Code Committee does not regard a clearance from The Pensions Regulator to be an official authorisation or regulatory clearance. As is stated on its [website](#):

*“Clearance is the voluntary process for obtaining a clearance statement from the regulator. A clearance statement is not approval of a transaction such as an acquisition or merger; rather it gives assurance that we will not use our anti-avoidance powers in relation to that transaction.”*

Such a clearance does not therefore relate to the permissibility of the offeror acquiring the offeree company but to the question of what costs, if any, the offeror will be required to incur if it does acquire the offeree company. As such, the Code Committee considers that a condition in relation to a clearance by a regulator such as The Pensions Regulator would be regarded as a general protective condition.

(iii) *Latest time by which a request to suspend the offer timetable should be made*

3.13 One respondent suggested that the new **Rule 31.4** (*Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding*) should provide that a request by the offeror or the offeree company to suspend the offer timetable should be made to the Panel by no later than 5.00 p.m. on “Day 37”.

3.14 The Code Committee acknowledges that it would normally expect a request to suspend the offer timetable to be made by 5.00 p.m. on “Day 37”. However, there may be exceptional

circumstances where a request is received after that time. Accordingly, the Code Committee does not consider that it is necessary or appropriate for the Code to stipulate a strict deadline. The Code Committee notes that there is currently no deadline by which a timetable suspension must be requested under **Rule 31.6(a)(iii)** if a decision is outstanding as to whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings. In any event, the Code Committee would expect the parties to an offer to raise any potential suspension of the offer timetable with the Panel well in advance of “Day 37”.

(iv) *“Material” official authorisation or regulatory clearance*

3.15 As indicated above, the PCP proposed the introduction of a new definition of **“material official authorisation or regulatory clearance”**, as follows:

“An official authorisation or regulatory clearance is a material official authorisation or regulatory clearance if the Panel is satisfied that the failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).”

3.16 One respondent considered that it was potentially confusing that a failure to obtain a “material” official authorisation or regulatory clearance would not necessarily satisfy the requirement for permitting a condition to be invoked, as set out in **Rule 13.5(a)**, i.e. the requirement that the circumstances which have arisen are of “material significance” to the offeror in the context of the offer.

3.17 The Code Committee recognises the similarity in nomenclature but considers that this is adequately addressed in the new **Note** on the definition of **“material official authorisation or regulatory clearance”**, which provides as follows:

*“A determination by the Panel that an official authorisation or regulatory clearance is a material official authorisation or regulatory clearance should not be taken as an indication that the Panel would agree that the failure to obtain the authorisation or clearance would result in circumstances of material significance to the offeror in the context of the offer for the purposes of Rule 13.5(a).”*

3.18 Another respondent considered that, where the offer was subject to a condition relating to, for example, competition clearance by the CMA or the European Commission, there might be insufficient information available to the Panel on “Day 37” for it to assess whether the timetable should be suspended on grounds of materiality.

3.19 The Code Committee does not consider that, in order for the offer timetable to be suspended, it will be necessary for the Panel to make an assessment of matters such as the prospects of the clearance being obtained or the nature of the remedies which might be required of the offeror. In accordance with the new definition of a **“material official authorisation or regulatory clearance”**, it will be sufficient for it to be established that the failure to obtain the authorisation or clearance could give rise to circumstances which are of

material significance to the offeror in the context of the offer. In other words, as explained in paragraph 3.24 of the PCP, an authorisation or clearance will only be regarded as not being “material” if the failure to obtain it could not, in any circumstances, satisfy the “material significance” requirement in **Rule 13.5(a)**. Provided that at least one outstanding official authorisation or regulatory clearance to which a condition applies is regarded as “material” in this sense, the Panel will normally agree to suspend the offer timetable at the request of either the offeror or the offeree company.

(v) *Specific and general regulatory conditions*

3.20 One respondent noted that it is common practice for an offeror to include specific conditions in relation to the most important (or lengthiest) of the official authorisations or regulatory clearances which it requires but for the remainder to be the subject of a general regulatory condition. The respondent queried whether this practice would need to change in order to ensure that an authorisation or clearance would be regarded as a material official authorisation or regulatory clearance for the purpose of suspending the offer timetable.

3.21 The Code Committee would normally expect an offeror to make the authorisations and clearances which it requires, particularly those in relation to which it might wish to request a suspension of the offer timetable, subject to specific conditions. The identification of a particular authorisation or clearance will be a helpful factor in establishing that it is “material”. In addition, the Code Committee considers that the transparency provided by identifying specific authorisations and clearances required by an offeror is of assistance to offeree company shareholders and other market participants. However, the fact that an official authorisation or regulatory clearance is only the subject of a general condition will not necessarily lead to the conclusion that it is not “material”. As was noted by another respondent, there may be circumstances where the requirement for an authorisation or clearance could not have reasonably been foreseen, such that it was not made the subject of a specific condition.

3.22 In addition, the Code Committee reiterates the point made in paragraph 3.17(c) of the PCP that, in order for the offer timetable to be suspended, it would be sufficient in the first instance for the offeror to establish that at least one outstanding authorisation or clearance was “material”, and that the Panel would not at the outset be required to determine the materiality of each of the outstanding authorisations and clearances.

(vi) *Unilateral request for a timetable suspension*

3.23 One respondent considered that the fact that the Panel would normally suspend the offer timetable at the unilateral request of the offeree company could provide a tactical advantage to an offeree company subject to a hostile offer, which could portray the offer as

being subject to regulatory delays, even if the offeror was confident of satisfying its regulatory conditions before Day 60.

3.24 The Code Committee continues to believe that the Panel should normally suspend the offer timetable at the request of the offeree company if one or more conditions relating to a material official authorisation or regulatory clearance has not been satisfied by “Day 37”. If the offeror is not prepared to waive the condition(s) in question in order to avoid a suspension of the offer timetable, the Code Committee does not consider that the offeree company should be required to enter the final stages of the offer in the face of continuing uncertainty as to whether the offeror will be able to secure the relevant authorisations and clearances before Day 60.

*(vii) Suspending the offer timetable after “Day 37”*

3.25 It was noted in Section 3(d) of the PCP that there might be circumstances where neither the offeror nor the offeree company requests a suspension of the offer timetable on or before “Day 37” but it subsequently becomes clear that more time is required for the satisfaction of a regulatory condition. The Code Committee explained in paragraph 3.31 of the PCP that, in such circumstances, the Panel should normally only suspend the offer timetable or otherwise extend Day 60 with the agreement of both the offeror and the offeree company. It was recognised, however, that the Panel might exceptionally accede to a unilateral request by the offeror to suspend the offer timetable, or otherwise extend Day 60, after “Day 37”, for example, if the requirement for a material official authorisation or regulatory clearance was wholly unexpected and only became apparent in the later stages of the offer.

3.26 Two respondents asked whether the Panel would be likely to adopt a similar approach where the need for the authorisation or clearance was known but the regulatory process was unexpectedly delayed. One of these respondents observed that, if the Panel was not minded to adopt such an approach, it seemed likely that every offer would need to be the subject of a timetable suspension.

3.27 The Code Committee considers that each case will need to be considered on its particular merits. As noted in the PCP, the Panel will normally agree to extend Day 60 at any point in the offer timetable with the consent of the board of the offeree company (in accordance with what will become the new **Rule 31.3(b)**). In the context of a hostile offer, however, the Code Committee would expect the offeror to take a conservative view as to whether the regulator in question is likely to reach a final decision in relation to the authorisation or clearance within the expected timeframe and, in the event of any doubt, to seek a suspension of the offer timetable. The Code Committee acknowledges that the result of such an approach is that more offer timetables might be suspended than might otherwise be the case but considers that this is a proportionate outcome.

*(viii) Competitive situations*

- 3.28 In answer to Question 5, one respondent disagreed with the proposal that, where there are two or more competing offers and the offer timetable is suspended, the offer timetable should normally be suspended for each of the offerors, and that the offer timetable should normally only resume for all the offerors when it is resumed in relation to the last offeror. The respondent considered that this would put one of the competing offerors at a disadvantage, as compared with the current provisions of the Code, whereby an offeror may choose whether to adopt the timetable established by its competitor or to continue on its existing timetable.
- 3.29 The Code Committee notes that the current **Note 2 on Rule 31.6** (*Timetable for competing firm offers*) provides that:

*“If a competing firm offer has been announced, both offerors will normally be bound by the timetable established by the publication of the competing offer document.”*

Whilst it is correct that the existing offeror may choose not to extend its offer beyond the final closing date set in its initial offer document (by making a “no extension statement” under the current **Rule 31.5**), the underlying timetable set by the Code will become that established by its competitor. Accordingly, in the event of a competing offer being announced, there will be no obligation on the board of the offeree company to announce any material new information by no later than the 39th day of the existing offeror’s offer and, provided that it has not made a “no increase” or “no extension” statement, the existing offeror will be free to revise its offer after the 14th day prior to the final closing date set in its initial offer document. Similarly, under the current provisions of the Code, if the offer timetable is suspended pending a decision as to whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings in relation to one offeror, that suspension will apply equally to any other offeror, even if there are demonstrably no competition concerns in relation to that offeror.

- 3.30 The Code Committee notes that, in this regard, the only material difference between the existing framework and that proposed in the PCP is that, whereas under the current Code an offeror which wishes to foreshorten its timetable by making a “no extension statement” may retain the regulatory conditions to its offer, under the amended Code an offeror which wishes to bring forward the unconditional date of its offer by making an “acceleration statement” will be required to waive any unsatisfied conditions relating to any official authorisation or regulatory clearance. However, the Code Committee continues to believe that this requirement will operate in the best interests of shareholders in the offeree company, who should not be required to make an acceptance decision where the offeror has accelerated the offer timetable at a time when there continues to be uncertainty as to

whether the regulatory conditions to its offer will be satisfied, or whether those conditions might be successfully invoked, with the risk that the offer might lapse.

**(c) Code amendments**

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

- (a) adopted the new **Rule 31.4** (*Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding*) and the new **Note on Rule 31.4** (*Competing offers*) (and deleted the current **Note 5 on Rule 31.6** (*The CMA and the European Commission*)), as proposed in paragraphs 3.27, 3.35, 3.39, 3.44 and 3.48 of the PCP;
- (b) adopted the new definition of “**material official authorisation or regulatory clearance**” and the **Note** thereon, as proposed in paragraph 3.27 of the PCP; and
- (c) deleted **Notes 1(b) and (c) on Rules 35.1 and 35.2**, as proposed in paragraph 3.29 of the PCP,

as set out in Appendix B.

#### 4. Long-stop dates for contractual offers and requirement to take necessary procedural steps in relation to a scheme of arrangement

##### A. LONG-STOP DATES FOR CONTRACTUAL OFFERS

###### (a) *Summary of proposals*

4.1 **Section 4(b)** of the PCP proposed the introduction of a new **Rule 12** (*Long-stop date*), which would require an offeror to set a “long-stop date” for its offer (see the new **Rule 12.1(a)**). Except with the consent of the Panel, the long-stop date would be the latest date by which, in the event of a suspension of the offer timetable:

- (a) the acceptance condition would be required to be satisfied; and
- (b) all conditions relating to an official authorisation or regulatory clearance would be required to be either satisfied or waived,

failing which, the offer would lapse.

4.2 It was proposed that an offeror which announces an offer to which official authorisations or regulatory clearances are stated as pre-conditions should similarly be required to include a long-stop date, i.e. a latest date by which all of the pre-conditions would, except with the consent of the Panel, be required to be either satisfied or waived. A pre-conditional offer is not capable of acceptance as the offer is not made until the pre-conditions have been either satisfied or waived, and therefore the status of the acceptance condition would not be relevant to the withdrawal of a pre-conditional offer on its long-stop date.

4.3 In the case of an offer which is recommended by the board of the offeree company, the long-stop date will be agreed between the offeror and the offeree company. In the case of an offer which is not recommended by the board of the offeree company, it was proposed that the Panel should be consulted prior to the publication of the firm offer announcement as to the date of the long-stop date and that, in such circumstances, the Panel would normally require the long-stop date to be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied (see the new **Rule 12.1(b)**).

4.4 It was proposed that the new **Rule 12.2** (*When consent may be given under Rule 12.1*) should provide that the Panel would normally give its consent to an offer lapsing or being withdrawn on account of a condition or pre-condition relating to an official authorisation or regulatory clearance not having been satisfied or waived where the Panel is satisfied, as at the long-stop date, that the outstanding official authorisation or regulatory clearance is a “**material official authorisation or regulatory clearance**” (as proposed to be defined in Section 3 of the PCP) and provided that either:

- (a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or
- (b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see **Rule 13.5(a)** (*Invoking conditions and pre-conditions*)).

4.5 In addition, it was proposed that:

- (a) except with the consent of the Panel, a long-stop date would only be extendable by the offeror with the agreement of the offeree company (see the new **Rule 12.3** (*Extension of a long-stop date*)); and
- (b) if a question as to whether the Panel would give its consent to the lapsing of an offer remained outstanding on the long-stop date, the offeror would not normally be permitted to lapse or withdraw the offer pending the final determination of the issue (see the new **Note on Rule 12** (*Where a determination under Rule 12 remains outstanding on a long-stop date*)).

**(b) Respondents' comments and the Code Committee's response**

**Q7 Should an offeror be required to set a "long-stop date" for a contractual offer, as proposed?**

*(i) Introduction*

4.6 The respondents were supportive of the proposal to require an offeror to set a long-stop date for its offer, although a number of queries were raised with regard to the practical application of the new rules. In addition, as discussed further below, one respondent did not agree that the ability for an offeror to lapse or withdraw its offer on the long-stop date should be subject to the consent of the Panel.

*(ii) Timing of a long-stop date*

4.7 Two respondents requested guidance as to the evidence that an offeror making a unilateral offer would be expected to provide to the Panel in order to demonstrate, for the purposes of the new **Rule 12.1(b)**, that its proposed long-stop date reflects the offeror's reasonable expectations as to the time required to obtain the "slowest" official authorisation or regulatory clearance.

4.8 The Code Committee considers that an offeror should provide the Panel with an analysis, undertaken by an appropriate external adviser, of the likely timelines for the applicable

regulatory regimes. However, the Code Committee expects that the level of detail required will depend on the facts of each case, including the extent of the offeror's access to information on the offeree company, the nature of the relevant regulatory regimes and the transparency or otherwise of the regulatory timetables. The Panel will also be cognisant of legal privilege and other legal and regulatory constraints that may arise in connection with the sharing of detailed analysis.

- 4.9 Two respondents queried how the Panel would approach the setting of the long-stop date where an offeror making a unilateral offer expects to obtain a material official authorisation or regulatory clearance in "phase 1" but cannot rule out the possibility of a "phase 2" reference.
- 4.10 The Code Committee notes the requirement in the new **Rule 12.1(b)** that the long-stop date in these circumstances will normally be required to be no earlier than the date on which the slowest authorisation or clearance is reasonably expected to be satisfied. If the offeror reasonably expects to obtain clearance in "phase 1" and, accordingly, a "phase 2" reference is considered unlikely, the offeror will normally be permitted to set a long-stop date which accommodates the "phase 1" process but not a "phase 2" reference.

*(iii) Requirement for Panel consent in order to lapse or withdraw the offer on the long-stop date*

- 4.11 As noted above, one respondent disagreed with the proposal that the ability of an offeror to lapse or withdraw its offer on the long-stop date (other than on account of a failure to satisfy the acceptance condition) should be subject to the consent of the Panel. The respondent considered that an offeror should be able automatically to lapse or withdraw its offer if the offer has not become unconditional by the long-stop date. In particular, the respondent was concerned that, where an offeror is taking on debt to fund its offer, this funding will be available only up to a certain date and it may not be possible to extend that availability. In the respondent's opinion, any debate about whether the offeror has complied with its obligations under the Code in relation to the satisfaction of a condition should take place in the period leading up to the long-stop date, with the onus on the offeree company board to ensure that the matter is raised with the Panel in sufficient time to allow a ruling to be made and, if necessary, any review and appeal to be completed, prior to the long-stop date. The respondent considered that, if the offeree company board fails to ensure that the matter is resolved in time, the offeror should be entitled to lapse or withdraw its offer on the long-stop date.
- 4.12 The Code Committee continues to believe that the ability of an offeror to lapse or withdraw its offer on the long-stop date (other than on account of a failure to satisfy the acceptance condition) should be subject to the consent of the Panel on the terms set out in Section 4(b) of the PCP. It is a long-standing principle of the Code that, having announced a firm offer, an offeror should be required to follow through on that offer unless it is permitted to invoke a

condition. The Code Committee considers that giving an offeror the automatic ability to lapse or withdraw its offer if it has not become unconditional by the long-stop date would undermine this principle, as there would be a greater risk of an offeror seeking artificially to prolong its regulatory processes and to lapse or withdraw its offer on the long-stop date in circumstances where it would not have been entitled to invoke a condition (owing to the circumstances in question not being of material significance to the offeror in the context of the offer for the purposes of **Rule 13.5(a)**). The purpose of the requirement for the Panel's consent is to minimise the risk of such circumstances arising.

4.13 The Code Committee's expectation, as set out in paragraph 4.5 of the PCP, is that if, as at the long-stop date, a condition relating to an official authorisation or regulatory clearance has not been satisfied, an offeror will normally be able to lapse its offer. The only circumstances in which an offeror will not be able to lapse its offer on the long-stop date will be if:

- (a) sufficient acceptances have been received so as to enable the acceptance condition to be satisfied; and
- (b) the Panel either:
  - (i) is not satisfied that the outstanding authorisation or clearance is a material official authorisation or regulatory clearance; or
  - (ii) is satisfied that the outstanding authorisation or clearance is a material official authorisation or regulatory clearance, but the remedial action required to be taken in order to obtain the authorisation or clearance (A) is sufficiently clear and (B) does not satisfy the material significance requirement for the purposes of **Rule 13.5(a)**.

4.14 In other words, it is only in these specific circumstances that an offeror will not be permitted to lapse its offer on the long-stop date. Nonetheless, the ability to lapse will be subject to the consent of the Panel.

4.15 The Code Committee agrees with the respondent that parties should seek to raise any relevant issues with the Panel well in advance of the long-stop date. The Code Committee notes, however, that, other than in the case of a pre-conditional offer, the question of whether the offer should be permitted to lapse on account of an outstanding official authorisation or regulatory clearance will only be relevant if the offeror has received sufficient acceptances so as to enable the acceptance condition to be satisfied (in line with the new **Rule 12.1(a)(i)**). This will not be known until the long-stop date itself. Therefore, whilst the Code Committee expects that the parties will engage with the Panel in relation to the status of any outstanding authorisation or clearance prior to the long-stop date, it is

likely that a final determination will not be made by the Panel until shortly after the long-stop date has passed. The Code Committee therefore considers it likely that the new **Note on Rule 12** will be relevant in most contractual offers that reach their long-stop date and, accordingly, that offerors should take this into account when arranging their offer financing.

*(iv) Remedial action and the “material significance” requirement*

- 4.16 Two respondents requested guidance on how, for the purposes of the new **Rule 12.2**, the Panel would assess whether the remedial action required to be taken in order to obtain a material official authorisation or regulatory clearance is “sufficiently clear”, with the consequence that the offeror must demonstrate that the taking of the action would satisfy the “material significance” requirement in **Rule 13.5(a)** in order to be able to lapse or withdraw its offer on the long-stop date.
- 4.17 The Code Committee considers that the question of whether the necessary action is sufficiently clear will need to be judged on the facts of each case at the relevant point in time. In reaching its decision, the Panel will take into account all relevant factors, which could include (amongst others) the status of discussions with the relevant regulatory authority and the extent to which any remedies have been discussed and remain subject to consultation.
- 4.18 Another respondent considered that if the offeror has defined what it would consider to be of material significance in this context, and the remedial action that is required to be taken in order to obtain an authorisation or clearance falls within those parameters, this should support the offeror’s case for being allowed to lapse or withdraw its offer.
- 4.19 In this respect, the Code Committee notes that, as described in paragraph 9.47 of the PCP, an offeror may be able to increase the likelihood of its being permitted to invoke a condition by clearly disclosing in the announcement of the offer and in the offer document its intention to seek to invoke the condition if specified circumstances occur. This is also reflected in Practice Statement No 5 which includes, as one of the factors that the Executive will take into account when considering a request to invoke a condition, whether the condition was expressly drawn to offeree company shareholders’ attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it. However, all other relevant factors will also be taken into account.
- 4.20 Two respondents queried what would happen if the Panel determined that:
- (a) the remedial action required to be taken in order to obtain a material official authorisation or regulatory clearance was sufficiently clear; and
  - (b) the taking of such action did not satisfy the material significance requirement in **Rule 13.5(a)**,

but the action could not be completed before the long-stop date and the offeror was not willing to declare its offer unconditional without having completed the action (for example, because of the consequences under the relevant regulatory regime of doing so). The respondents queried whether the Panel would require the offeror to continue with its offer past the long-stop date where the offeror did not want to do so and, conversely, whether the offeror would be allowed to continue with its offer past the long-stop date where the offeree company board did not want it to do so.

4.21 Where the Panel determines under the new **Rule 12.1(a)(ii)** that the necessary remedial action:

- (a) is sufficiently clear; and
- (b) does not satisfy the material significance requirement in **Rule 13.5(a)**,

the Code Committee considers that the offeror will be expected immediately to waive the outstanding condition and declare its offer unconditional. Exceptionally, if the offeror is not willing to waive the outstanding condition, the Panel will consider what action to take at the time. This could include the offeror remaining subject to an ongoing obligation to use all reasonable efforts under the new **Rule 13.2** (*Requirement to use all reasonable efforts*) (currently **Rule 13.5(b)**) to satisfy the condition and declare its offer unconditional as soon as practicable thereafter.

4.22 In this respect the Code Committee notes that, under the term required by the new **Rule 12.1(a)**, the offer will lapse or be withdrawn on the long-stop date if either of the circumstances specified in the new **Rule 12.1(a)** apply. Therefore, by definition, if neither of these circumstances apply, the offer will continue and the long-stop date will cease to be relevant with the result that, in effect, the offer timetable will remain suspended under the new **Rule 31.4** (*Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding*) until such time as the outstanding regulatory condition is satisfied or waived (or until the offer lapses for some other reason). Once the outstanding regulatory condition is satisfied or waived, the offer timetable will normally resume, under the new **Rule 31.4(b)**, on the 28th day prior to Day 60, unless the offeror sets an earlier unconditional date by making an acceleration statement under the new **Rule 31.5** (*Acceleration statements*) or declares the offer unconditional.

4.23 The Code Committee notes that, as set out in paragraph 4.10 of the PCP and the new **Rule 12.1(a)(i)**, an offer will be required to lapse on the long-stop date if sufficient acceptances have not been received so as to enable the acceptance condition to be satisfied. Therefore, the Panel's consent under the new **Rule 12.1(a)(ii)** will be required only if the offeror has received sufficient acceptances on the relevant date. Given that in these circumstances offeree company shareholders holding at least a majority of the

company's shares will have indicated their support for the offer, the Code Committee considers that it would be surprising if the offeree company board opposed the offeror continuing with its offer (even if it would prefer that the offer be declared unconditional immediately).

- 4.24 From the offeror's perspective, the Code Committee appreciates that the offeror may have arranged debt funding for its offer and that this funding will be available for a defined period of time. However, where (i) sufficient offeree company shareholders have accepted the offer in order for the acceptance condition to be satisfied, (ii) the offeree company board wishes the offeror to proceed with its offer, and (iii) the Panel has determined that the offeror does not have a basis for lapsing or withdrawing its offer, the Code Committee considers that the offeror should not be permitted to lapse or withdraw its offer and, in these particular circumstances, may therefore be required to extend its financing (if it is not willing to waive the relevant condition).
- 4.25 Pending satisfaction of the outstanding regulatory condition, the offeror would, however, be entitled to seek to invoke another condition to its offer in the normal way. This would include invoking the acceptance condition (which will have been capable of being satisfied on the long-stop date but, on account of the new **Rule 10.2** (*Satisfaction of the acceptance condition*), will not actually have been satisfied), either:
- (a) following the serving of an acceptance condition invocation notice in accordance with the new **Rule 31.6** (*Acceptance condition invocation notice*); or
  - (b) on the eventual unconditional date (which will be either the 28th day following the satisfaction or waiver of the regulatory condition in line with the new **Rule 31.4(b)**, or such earlier date as may be set if the offeror serves an acceleration statement under the new **Rule 31.5**).
- 4.26 The Code Committee notes that, prior to the long-stop date, the offeror and the offeree company could agree to extend the long-stop date and thus defer the question of whether the Panel will consent to the lapsing of the offer under **Rule 12.1(a)(ii)** until such later date. Equally, if both parties agree that the offer should lapse or be withdrawn on the long-stop date, the Code Committee expects that this would be an influential factor in the Panel's determination.
- (v) *Extension of a long-stop date*
- 4.27 One respondent considered that in a competitive situation the first offeror should be able unilaterally to extend its long-stop date to the date of the second offeror's long-stop date, and potentially to a later date if the impact of the second offeror's offer was to extend the regulatory process and timetable for the first offeror.

- 4.28 The Code Committee notes that under the new **Rule 12.3** the Panel will have the ability to consent to a unilateral extension of a long-stop date by the offeror. The Code Committee considers that, if a competitive situation arises, this may constitute circumstances in which it is appropriate for the Panel to grant such consent, particularly where the request is to extend the first offeror's long-stop date so as to align it with that of the second offeror.
- 4.29 Another respondent suggested that the Panel should normally consent to a unilateral request from an offeror to extend its long-stop date under the new **Rule 12.3** provided the offeror is in compliance with its obligation under the new **Rule 13.2** to use all reasonable efforts to satisfy the conditions to its offer.
- 4.30 The Code Committee does not agree with this suggestion and considers that the offeror should aim to set a long-stop date that accommodates its reasonable expectation of the time required to satisfy the slowest official authorisation or regulatory clearance. The offeree company's consent will normally be required in order to extend the long-stop date, otherwise there would be a concern under **General Principle 6** that the offeree company was being hindered in the conduct of its affairs for an unreasonably prolonged period. If the offeree company does not so consent, the new **Rule 12.1(a)(i)** will apply on the long-stop date and the offer will be required to lapse if sufficient acceptances have not been received so as to enable the acceptance condition to be satisfied. If, however, sufficient acceptances have been received, the Code Committee considers that the Panel may consider whether to allow the offeror to continue with its offer, taking into account all relevant factors. In these circumstances, given that offeree company shareholders holding at least a majority of the company's shares will have indicated their support for the offer, the Code Committee considers that it would be surprising if the offeree company board continued to oppose the offeror continuing with its offer.
- 4.31 The same respondent considered that it should be made clear that the long-stop date cannot in any event be extended without the consent of the offeror.
- 4.32 The Code Committee agrees that this will be the case. However, as set out in paragraph 4.21 above, if the Panel does not consent to the offer lapsing or being withdrawn but the offeror is not willing to waive the outstanding condition and close its offer on the long-stop date, the Panel may consider that the offeror should be subject to an ongoing obligation to use all reasonable efforts to satisfy the condition and close its offer as soon as practicable. In these circumstances, the offeror would therefore be required to continue with its offer, notwithstanding that the long-stop date has passed. In addition, as set out in the new **Note on Rule 12**, if a question as to whether the Panel will give its consent under the new **Rule 12.1(a)(ii)** remains outstanding on the long-stop date, an offeror will not normally be permitted to lapse or withdraw its offer pending the final determination of the issue.

(vi) *Other*

- 4.33 Two respondents requested clarification that, whilst the new **Rule 12** deals specifically with the acceptance condition and conditions relating to an official authorisation or regulatory clearance, an offeror would be able to seek to invoke another condition on the long-stop date and that the Panel would not require an offeror to waive other conditions which were capable of invocation.
- 4.34 The Code Committee considers that an offeror may seek to invoke any condition and to lapse or withdraw its offer, with the Panel's consent if required under **Rule 13.5(a)**, in the normal way at any time prior to the long-stop date (including, if relevant, on the day of the long-stop date itself but prior to any particular time specified in the term). However, the Code Committee would expect an offeror to seek to satisfy any substantive conditions (as distinct from general protective conditions), such as a requirement to obtain the approval of the offeror's shareholders, in advance of the long-stop date.
- 4.35 If the offeror is not permitted to lapse or withdraw its offer on the basis set out in the new **Rule 12.1(a)** and is required to complete its offer, the offeror will be required immediately to waive all of the outstanding conditions to its offer and declare its offer unconditional. Exceptionally, if the offeror is not willing to waive an outstanding regulatory condition and the Panel determines that the offeror should remain subject to the obligation in the new **Rule 13.2** to use all reasonable efforts to satisfy the condition and declare its offer unconditional as soon as practicable thereafter, the other conditions to the offer will be permitted to remain outstanding and the offeror will, as described in paragraph 4.25, continue to be entitled to seek to invoke any such condition in the normal way.
- 4.36 One respondent asked for confirmation that the long-stop date could be included as a condition to the offer as well as a term.
- 4.37 The Code Committee does not consider it necessary for the long-stop date to be included as a condition to the offer as well as a term, but expects that the Panel would not object to it being so included provided the condition (and the circumstances in which it can or must be waived) appropriately reflects the provisions of the new **Rule 12.1**.

(vii) *Conclusion*

- 4.38 In summary, the Code Committee considers that there would normally be five potential outcomes as regards the long-stop date for a contractual offer:
- (a) at any time up to immediately prior to the long-stop date, the offeror and the offeree company could agree to extend the long-stop date, in which case the application of **Rule 12.1** will be deferred to the new long-stop date;

- (b) at the long-stop date, if sufficient acceptances have not been received so as to enable the acceptance condition to be satisfied, the offer will lapse under **Rule 12.1(a)(i)**;
- (c) at the long-stop date, if sufficient acceptances have been received so as to enable the acceptance condition to be satisfied, the Panel may nevertheless consent to the offer lapsing under **Rule 12.1(a)(ii)**;
- (d) at the long-stop date, if sufficient acceptances have been received so as to enable the acceptance condition to be satisfied and the Panel does not consent to the offer lapsing under **Rule 12.1(a)(ii)**, the offeror will normally be required immediately to waive the outstanding condition(s) and declare the offer unconditional; or
- (e) at the long-stop date, if sufficient acceptances have been received so as to enable the acceptance condition to be satisfied and the Panel does not consent to the offer lapsing under **Rule 12.1(a)(ii)** but, exceptionally, the offeror is not willing immediately to waive the outstanding condition(s) (for example, because remedial action must be taken before the relevant clearance can be obtained and the offeror is not willing to complete its offer without having done so), the Panel will consider what action to take at the time, which could include the offeror remaining subject to an ongoing obligation to satisfy the outstanding condition(s) and close its offer as soon as practicable.

4.39 For the reasons set out in paragraph 4.15, it is likely in the case of scenarios (c), (d) and (e) above that a final determination will not be capable of being made by the Panel until shortly after the long-stop date has passed. The Code Committee therefore considers it likely that the new **Note on Rule 12** will be relevant in most contractual offers that reach their long-stop date and, accordingly, that offerors should take this into account when arranging their offer financing.

4.40 In addition, in the case of scenario (e), the Code Committee notes that if the offer continues for a more substantial period of time following the long-stop date on the basis set out in paragraphs 4.21 to 4.24 above, this may require the offeror to extend its financing accordingly.

**(c) Code amendments**

4.41 In the light of the above, the Code Committee has adopted the new **Rule 12** as proposed in paragraph 4.20 of the PCP, subject to a minor drafting amendment to **Rule 12.1(a)(i)**, as set out in Appendix B.

**B. REQUIREMENT TO TAKE NECESSARY PROCEDURAL STEPS IN RELATION TO A SCHEME OF ARRANGEMENT**

**(a) Summary of proposals**

4.42 **Section 4(c)** of the PCP proposed the introduction of a new **Section 3(g) of Appendix 7**. This would provide that, where an offer is implemented as a scheme of arrangement, there would be requirements under the Code for the offeror:

- (a) prior to the court sanction hearing, to confirm to the offeree company and the Panel that all of the conditions to the offer have been either satisfied or waived, other than any conditions which are capable of satisfaction only upon or following the scheme being sanctioned (which conditions should normally be specified in the scheme circular); and
- (b) at the court sanction hearing, to undertake to the court to be bound by the terms of the scheme insofar as it relates to the offeror.

4.43 It was proposed that these requirements would not apply if a condition relating to a material official authorisation or regulatory clearance remained outstanding, provided that either:

- (a) it was not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or
- (b) if it was sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which were of material significance to the offeror in the context of the offer (see **Rule 13.5(a)**).

4.44 It was further proposed that, if a question as to whether the provisos referred to in the previous paragraph had been satisfied remained outstanding on the long-stop date of the scheme, the parties to the offer would be required to agree an extension to the long-stop date pending the final determination of the issue.

**(b) Respondents' comments and the Code Committee's response**

**Q8 Should there be a requirement for an offeror to take the procedural steps necessary for a scheme of arrangement to become effective, as proposed?**

*(i) Introduction*

4.45 All of the respondents supported or did not object to the proposal to introduce an obligation on the offeror to take the procedural steps necessary for a scheme of arrangement to become effective.

4.46 One respondent considered that offerors were in practice already subject to such an obligation and therefore questioned the need for the new **Section 3(g) of Appendix 7**, but did not object to its content.

(ii) *Timing of the court sanction hearing*

4.47 Two respondents queried what the Panel's approach would be if the offeree company sought to convene the court sanction hearing at a time when substantive conditions to the offer remained outstanding. Both respondents believed that it would be unfair if the offeree company was able to accelerate the timetable in this way ahead of the long-stop date.

4.48 One of the respondents focused in particular on regulatory clearances and noted that there are often a number of technical regulatory filings that must, as a matter of local law, be made before an offer can complete. The respondent considered that whilst it may be appropriate for the offeree company to seek a ruling from the Panel on whether certain authorisations and clearances are sufficiently material to justify the offeror not proceeding with the scheme at a time when the long-stop date is approaching, it would not be appropriate for the offeree company to bring forward that debate in advance of the agreed long-stop date when the offeror was simply seeking to comply with its regulatory obligations.

4.49 The other respondent, which was concerned with substantive conditions more generally, suggested that an exception to the prohibition on offer-related arrangements under **Rule 21.2** (*Offer-related arrangements*) should be introduced such that the offeree company could commit not to convene the court sanction hearing for a date prior to the long-stop date without the offeror's consent if substantive conditions remained outstanding. Alternatively, the respondent suggested that it should be made clear in **Section 3(g) of Appendix 7** that an offeror will not be required to take the necessary procedural steps if the offeree company convenes the court sanction hearing, without the offeror's consent, for a date that is earlier than the latest date on which the hearing would need to be held in order for the scheme to become effective by the long-stop date, where substantive conditions remain outstanding or where the Panel otherwise agrees.

4.50 The Code Committee notes that the obligations on an offeror under the new **Section 3(g) of Appendix 7** will apply except with the consent of the Panel. If the offeree company were to seek to convene the court sanction hearing, without the offeror's consent, for a date in advance of the latest date on which the court sanction hearing could reasonably be held in order for the scheme to become effective by the long-stop date and when a substantive condition (such as a regulatory condition) remained outstanding, the Code Committee would expect the Panel normally to consent to the offeror not taking the relevant procedural steps at that time. However, the Code Committee does not believe that it is necessary for this to be reflected in the Code. Similarly, the Code Committee does not believe it

necessary to introduce an exception to the prohibition on offer-related arrangements under **Rule 21.2**.

(iii) *Invocation of other conditions*

4.51 One respondent sought confirmation that an offeror would not be required to take the necessary procedural steps if, at the time at which the offeree company convened the court sanction hearing, a condition other than a condition relating to a material official authorisation or regulatory clearance remained outstanding and the Panel agreed that the offeror was entitled to invoke that condition. The respondent suggested that this should be made clear in the new **Section 3(g) of Appendix 7**.

4.52 The Code Committee agrees that this will be the case, as set out in paragraph 4.31 of the PCP, but does not consider it necessary for this to be set out in the Code.

(iv) *Extension of the long-stop date*

4.53 The respondent who disagreed that the ability of an offeror to lapse or withdraw a contractual offer on its long-stop date should be subject to the consent of the Panel (see paragraph 4.11 above) also disagreed with the proposal that, if a determination under the new **Section 3(g) of Appendix 7** remains outstanding on the long-stop date of a scheme, the parties will normally be required to agree an extension to the long-stop date pending the final determination of the issue. The respondent considered that market participants would understand the long-stop date of a scheme to be a hard deadline and that it would be inappropriate for the Panel to require an offeror to extend its financing beyond that date.

4.54 The Code Committee notes that the new **Note on Section 3(g) of Appendix 7** (*Where a determination under Section 3(g) remains outstanding on the long-stop date*), similar to the new **Note on Rule 12** in relation to contractual offers, is intended not as a basis for the Panel to require a lengthy extension to a long-stop date but rather to prevent an offeror from lapsing its offer whilst a dispute over the status of a condition relating to an outstanding official authorisation or regulatory clearance is resolved. The Code Committee considers that offerors should take this into account when arranging their financing and that the long-stop date of a scheme should be set accordingly.

4.55 The Code Committee does, however, consider that if the Panel determined under **Section 3(g) of Appendix 7** that:

- (a) the remedial action required to be taken in order to obtain a material official authorisation or regulatory clearance was sufficiently clear; and
- (b) the taking of such action did not satisfy the material significance requirement in **Rule 13.5(a)**,

but the action could not be completed before the long-stop date and the offeror was not willing allow the scheme to become effective until it had completed the action, the Panel may consider that the offeror should be subject to an ongoing obligation to satisfy the outstanding condition as soon as practicable. In this case, the only alternative open to the offeror would be to agree to extend the long-stop date for as long as is needed in order for the action to be completed and the condition satisfied (with the court sanction hearing being rearranged accordingly). Similar to the rationale set out in paragraph 4.24 above in relation to contractual offers, given that in these circumstances (i) offeree company shareholders will have approved the scheme, (ii) the offeree company board will not have withdrawn its support for the scheme, and (iii) the Panel will have determined that the offeror does not have a basis for lapsing or withdrawing its offer, the Code Committee considers that the offeror should not be permitted to cause the offer to lapse (and may therefore be required to extend its financing, if it is not willing to waive the relevant condition).

(v) *Conclusion*

4.56 In summary, the Code Committee considers that there would normally be four potential outcomes as regards the conclusion of a scheme of arrangement:

- (a) the offeror and the offeree company agree to extend the long-stop date, and thus to defer the court sanction hearing, in which case the application of **Section 3(g) of Appendix 7** will be deferred until the time of the deferred court sanction hearing;
- (b) the offeree company convenes the court sanction hearing but the Panel determines under **Section 3(g) of Appendix 7** that the offeror is not required to take the necessary procedural steps. Assuming that the court will therefore not sanction the scheme, the scheme will lapse on its long-stop date (or earlier, if the scheme included a condition relating to the timing of the court sanction hearing and this condition was not satisfied);
- (c) the offeree company convenes the court sanction hearing and the Panel determines under **Section 3(g) of Appendix 7** that the offeror is required to take the necessary procedural steps. Assuming that the court then sanctions the scheme, the scheme will become effective prior to the long-stop date at a time determined by the offeree company; or
- (d) the offeree company convenes the court sanction hearing and the Panel determines under **Section 3(g) of Appendix 7** that the offeror is required to take the necessary procedural steps, but, exceptionally, the offeror is not willing to allow the scheme to become effective before certain remedial action has been taken and the relevant clearance obtained. In this case, if the Panel considers that the offeror should be subject to an ongoing obligation to satisfy the outstanding condition(s) as soon as

practicable, the only alternative open to the offeror will be to agree to extend the long-stop date for as long as is needed in order for the action to be completed and the condition(s) satisfied (with the court sanction hearing being rearranged accordingly), and to take the necessary procedural steps at the time of the rearranged court sanction hearing.

4.57 The Code Committee notes that, as discussed in paragraphs 4.47 to 4.50 above, the offeree company could seek to accelerate the timetable by convening the court sanction hearing for a time when substantive conditions to the offer remain outstanding. As noted above, in these circumstances, the Panel is likely to conclude that the offeror is not required to take the necessary procedural steps if there is still a period of time remaining until the long-stop date, with the consequence that the offer would not lapse as a result (unless the scheme included a condition relating to the timing of the court sanction hearing and this condition was not satisfied). The offeror would remain subject to the obligation in the new **Rule 13.2** to use all reasonable efforts to satisfy the conditions to its offer and the offeree company would be able to rearrange the court sanction hearing for a later date, prior to the long-stop date, at which time **Section 3(g) of Appendix 7** would apply once again.

**(c) Code amendments**

4.58 In the light of the above, the Code Committee has adopted the new **Section 3(g) of Appendix 7** and the **Note** thereon as proposed in paragraph 4.33 of the PCP, as set out in Appendix B.

## 5. Consistent treatment for official authorisations and regulatory clearances

### (a) Summary of proposals

- 5.1 **Section 5** of the PCP proposed that the Code should apply consistent treatment to all official authorisations and regulatory clearances to which an offer is subject. These proposals were in addition to the proposal in Section 3 of the PCP to allow the suspension of an offer timetable in relation to official authorisations or regulatory clearances more generally (and not only in relation to a decision as to whether there is to be a “phase 2” investigation by the CMA or the European Commission).
- 5.2 **Section 5(c)** of the PCP proposed the removal of the requirement in the current **Rules 12.1(a)** and **(b)** for an offer to include a term that it must lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, in each case prior to a certain point in the offer timetable.
- 5.3 **Section 5(d)** of the PCP proposed that all conditions and pre-conditions relating to an official authorisation or regulatory clearance, including conditions and pre-conditions relating to clearances required from the CMA and the European Commission, should be subject to the requirement that they may only be invoked where the circumstances in question are of material significance to the offeror in the context of the offer.
- 5.4 **Section 5(e)** of the PCP proposed that the same approach should be applied to a pre-condition relating to a clearance by the CMA or the European Commission as is applied to a pre-condition relating to any other official authorisation or regulatory clearance.

### (b) Respondents' comments

<b>Q9</b>	<b>Should the requirement for an offer to include a “mandatory lapsing term” if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated be removed from the Code?</b>
<b>Q10</b>	<b>Should the exemption from the “material significance” requirement in Rule 13.5(a) for CMA and European Commission clearance conditions and pre-conditions be removed?</b>
<b>Q11</b>	<b>Should a pre-condition relating to a clearance from the CMA or the European Commission be treated in the same way as a pre-condition relating to any other official authorisation or regulatory clearance?</b>

- 5.5 All but one of the respondents supported the proposal that the Code should apply consistent treatment to all official authorisations and regulatory clearances to which an offer is subject and the amendments which would implement that proposal.
- 5.6 The remaining respondent expressed reservations regarding the removal of the exemption from the requirement for an offeror to satisfy the “material significance” threshold in

**Rule 13.5(a)** when seeking to invoke a condition in relation to clearance by the CMA or the European Commission. Whilst recognising the desire for consistency of treatment, the respondent was concerned that this would result in many more instances of the Panel being required to give rulings in relation to the invocation of regulatory conditions and to make difficult decisions with regard to matters of materiality and foreseeability. However, the respondent recognised that it represented a minority view on this point.

**(c) The Code Committee's response**

5.7 The Code Committee acknowledges the views expressed by the respondent referred to in the previous paragraph but continues to believe that it is logical and appropriate for the Code to apply consistent treatment to all official authorisations and regulatory clearances to which an offer is subject, and that the proposed amendments should therefore be adopted. The Code Committee recognises that the number of rulings that the Panel is required to make in this area may potentially increase. That said, the Code Committee notes that the number of previous cases in which a contractual offer has lapsed on a term or condition in relation to a CMA or European Commission clearance is extremely small.

**(d) Code amendments**

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

- (a) deleted **Rule 12.1** (*The CMA and the European Commission*) and the **Note on Rule 12.1** (*The effect of lapsing*), **Rule 12.2** (*Competition reference periods*) and the **Notes** thereon, and **Rule 13.2** (*The CMA and the European Commission*), as proposed in paragraphs 5.18 and 5.28 of the PCP;
- (b) adopted the amendments to **Rule 13.3** (*Acceptability of pre-conditions*) described in paragraphs 5.32 and 5.34 of the PCP; and
- (c) deleted the definitions of the “**CMA**”, “**Competition reference period**”, “**Phase 2 CMA reference**” and “**Phase 2 European Commission proceedings**”, **Note 2 on Rule 2.7** (*Conditions and pre-conditions*), and the further provisions of the Code referred to in paragraph 5.19 of the PCP, as proposed in paragraphs 5.19, 5.29 and 5.36 of the PCP,

as set out in Appendix B.

## 6. Acceptance condition invocation notices and announcements of acceptance levels

### (a) Summary of proposals

(i) Requirement for an “acceptance condition invocation notice” if an offeror wishes to lapse an offer on the acceptance condition on any date prior to the unconditional date

6.1 **Section 6** of the PCP proposed that an offeror should be required to serve an “**acceptance condition invocation notice**” (an “**ACIN**”) if it wishes to invoke the acceptance condition so as to cause its offer to lapse on any date on or after Day 21 but prior to the unconditional date (see the new **Rule 31.6(a)**).

6.2 It was proposed that the new **Rule 31.6(b)** should provide that an ACIN should:

- (a) be published at least 14 days prior to the relevant date specified in the ACIN;
- (b) be irrevocable;
- (c) specify the level of acceptances which must be received in order for the offer not to lapse on the relevant date; and
- (d) be sent to all offeree company shareholders and persons with information rights.

6.3 In addition, it was proposed that the new **Rule 31.6(c)** should provide that:

- (a) if the required level of acceptances was not received by 1.00 p.m. on the relevant date specified in an ACIN, the acceptance condition would be regarded as being incapable of satisfaction and the offer must lapse; and
- (b) if the required level of acceptances was received by 1.00 p.m. on the relevant date, the acceptance condition would not be regarded as having been satisfied at that time unless all other conditions to the offer had been either satisfied or waived.

(ii) *Removal of references to “closing dates”*

6.4 In addition, it was proposed to remove the references in the Code to the “**closing dates**” of an offer. This was on the basis that, if an offeror is not able to lapse its offer on the acceptance condition prior to the unconditional date unless it has served an ACIN, it will no longer be meaningful for an offeror to have the ability to set closing dates for the offer prior to the unconditional date.

(iii) *Announcements of acceptance levels*

6.5 It was further proposed to make amendments to the timing of the announcements of acceptance levels required to be made by an offeror under **Rule 17** (*Announcement of*

*acceptance levels*). Under the amended **Rule 17.1 (Timing)**, an offeror would be required to make an announcement in relation to acceptance levels at the following times:

- (a) on the day after Day 21 and every seven days thereafter, until the final week preceding the unconditional date;
- (b) after each day in the week up to and including the unconditional date;
- (c) after the day on which the offer is declared unconditional or lapses;
- (d) after the expiry of an ACIN; and
- (e) after any day on which, as at 5.00 p.m., acceptances plus other shares which count towards satisfaction of the acceptance condition go up or down through any of the following thresholds:
  - (i) the current threshold to which the acceptance condition is subject (typically 90% of the shares to which the offer relates);
  - (ii) 75% of the shares carrying voting rights in the offeree company; and
  - (iii) the minimum threshold to which, in accordance with its terms, the acceptance condition may be made subject (typically shares carrying more than 50% of the voting rights in the offeree company).

6.6 In addition, it was proposed that an offeror should be required to include the same information in relation to acceptance levels in any announcement which includes:

- (a) an ACIN;
- (b) an acceleration statement; or
- (c) a revision of the offer.

**(b) Requirement for an ACIN if an offeror wishes to lapse an offer on the acceptance condition on any date prior to the unconditional date**

**Q12 Should an offeror be required to serve an “acceptance condition invocation notice” in the form proposed if it wishes to lapse its offer on the acceptance condition prior to the unconditional date?**

(i) *Introduction*

6.7 All of the respondents supported or did not object to the proposal that an offeror should be required to serve an ACIN if it wishes to lapse its offer on the acceptance condition prior to

the unconditional date. A number of respondents raised queries or made suggestions in relation to the application of proposed new arrangements.

(ii) *Serving an ACIN upon publication of the offer document*

6.8 One respondent asked whether it would be permissible for an offeror to serve an ACIN at the time of the publication of its offer document, with the relevant date being set as Day 21.

6.9 The Code Committee confirms that there is nothing in the new **Rule 31.6** (*Acceptance condition invocation notice*) to prevent an offeror from serving an ACIN when it publishes its offer document, provided that the notice period is at least 21 days in order to ensure compliance with the new **Rule 31.2** (*Period for which the offer must remain open for acceptance*).

(iii) *Multiple ACINs*

6.10 One respondent asked whether it would be permissible for an offeror to serve more than one ACIN.

6.11 The Code Committee confirms that there is nothing in the new **Rule 31.6** to prevent an offeror from serving more than one ACIN during the course of an offer. For example, this might occur in a case where the offer timetable was suspended for a long period of time owing to delays in the satisfaction of regulatory conditions.

6.12 However, the Code Committee considers that an offeror should not be permitted to serve a new ACIN until after the relevant date set by an existing ACIN. In order to make this clear, the Code Committee has introduced a **Note** on the new **Rule 31.6**, as follows:

**“NOTE ON RULE 31.6**

**Prohibition on concurrent notices**

**An offeror which has published an acceptance condition invocation notice must not publish another such notice until after the relevant date specified in the first notice.**

(iv) *“Waiving down” the acceptance condition threshold*

6.13 Paragraph 6.20(a) of the PCP stated that:

“an acceptance condition invocation notice would be served by an offeror which, for whatever reason, wished to lapse its offer. In the (unlikely) event that the offeror wished to reduce the threshold level for acceptances prior to the relevant date, it would need to do so by no later than the date of the notice so that offeree company shareholders who wished to accept the offer would be doing so in the knowledge of the relevant threshold. It would not be possible for a regretful offeror to change its mind and “waive down” the threshold at the end of the notice period in an attempt to avoid the need for the offer to lapse.”

6.14 Two respondents sought clarification as to when an offeror would and would not be able to reduce the threshold level of acceptances for the purpose of the acceptance condition to its offer.

6.15 The Code Committee confirms that, in summary, an offeror will be free to “waive down” the threshold in its acceptance condition (without having given prior notice) at any time up to and including the unconditional date (including both where the offeror has previously made an acceleration statement and following the expiry of an ACIN) other than between the time at which it serves an ACIN and the expiry of that notice.

(v) *Distribution of ACINs and acceleration statements*

6.16 One respondent queried whether it was necessary to require an ACIN to be sent to all offeree company shareholders (see the new **Rule 31.6(b)(iv)** proposed in paragraph 6.22 of the PCP), noting that it was not proposed to require an acceleration statement to be sent to offeree company shareholders (see the amended **Rule 31.5** (*Acceleration statements*) proposed in paragraph 2.36 of the PCP). The respondent considered that there should be a consistent approach to the distribution of ACINs and acceleration statements and that, in each case, an announcement to the market would be sufficient. In addition, the respondent noted that it would be open to the board of an offeree company to send a copy of an ACIN to offeree company shareholders if it so wished, together with its recommendation as to the action (if any) that shareholders should take.

6.17 The Code Committee continues to believe that the fact that an offeror has served an ACIN will be important information for shareholders in the offeree company. On reflection, however, the Code Committee agrees both that:

- (a) there should be a consistent approach to the distribution of ACINs and acceleration statements; and
- (b) it is unnecessary to require either an ACIN or an acceleration statement always to be sent to offeree company shareholders in accordance with **Rule 30.2** (*Method of publication of documents, announcements and information*).

6.18 The Code Committee notes that the default position under the Code is that announcements should be published via a regulatory information service (or “RIS”) (see **Rule 30.1** (*Announcements to be published via a RIS*)), with the Panel reserving the right to require a copy of the announcement to be sent to offeree company shareholders, where appropriate (see **Rule 30.1(c)**). The Code Committee considers that it is increasingly the case that shareholders in companies to which the Code applies can be relied on to access information about an offer via a RIS or other secondary information provider and that it will

usually be unnecessary for shareholders to be sent a copy of an ACIN or acceleration statement directly, particularly in hard copy form.

- 6.19 In the light of the above, the Code Committee has adopted a revised version of the new **Rule 31.6(b)(iv)**, as follows:

**“(b) An acceptance condition invocation notice must:**

...

**(iv) ~~be sent to all offeree company shareholders and persons with information rights published in accordance with Rule 30.1.~~”**

- 6.20 In addition, the Code Committee has:

- (a) adopted a new **Rule 31.5(h)** and a new **Rule 32.2(d)** in order to make clear that an acceleration statement and a no increase statement respectively must be published in accordance with **Rule 30.1**; and
- (b) deleted the requirements in **Notes 3** and **4** (to become **Notes 2** and **3**) on each of **Rule 31.5** and **Rule 32.2** for an offeror to send a notice to offeree company shareholders when it relies on a relevant reservation to set aside an acceleration statement or a no increase statement,

as set out in Appendix B.

- (vi) *Withdrawals of acceptances following the expiry of an ACIN*

- 6.21 One respondent considered that the Code should restrict offeree company shareholders who had accepted an offer from withdrawing their acceptances for 14 days after the relevant date set by an ACIN if the offer did not lapse on that date. The respondent expressed concern at the prospect that a number of shareholders might, for reasons personal to them, accept the offer, ensuring that the offeror was unable to lapse the offer on the relevant date, and then immediately withdraw their acceptances.

- 6.22 As explained in Section 8 of the PCP, the Code Committee considers that offeree company shareholders who accept an offer should be free to withdraw their acceptances at any time prior to the satisfaction of the acceptance condition and, accordingly, does not consider it necessary or desirable to restrict a shareholder from withdrawing its acceptance following the relevant date specified in an ACIN.

- (vii) *Notice period for an ACIN or an acceleration statement*

- 6.23 One respondent considered that the removal of closing dates (as to which see further below) would reduce the ability for an offeror to lapse an offer, which ability was valued by offerors. The respondent considered that this could be mitigated if the notice period for

setting the relevant date in an ACIN, and for setting a new unconditional date in an acceleration statement, was reduced from the proposed period of 14 days to a period of seven days.

- 6.24 As explained in paragraph 6.11 of the PCP, the implementation of an acceptance decision by an offeree company shareholder may require various steps to be taken by a number of intermediaries. The Code Committee understands that seven days may not be a sufficient period of time for offeree company shareholders to make an informed decision as to whether to accept an offer and to implement that decision, and considers that a notice period of 14 days is the most appropriate where an offeror gives an ACIN or makes an acceleration statement.

**(c) Removal of references to “closing dates”**

<p><b>Q13 Do you have any comments on the proposals relating to the removal from the Code of references to “closing dates”?</b></p>
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*(i) Respondents’ comments*

- 6.25 All but two of the respondents supported or did not object to the proposals relating to the removal of interim “closing dates” from the offer timetable.
- 6.26 One of the two respondents who were not supportive, whilst acknowledging the logic of the proposal, was concerned that it would remove a “flexibility” for an offeror to lapse an offer in circumstances where it was unable to satisfy the “material significance” requirement in order to invoke a condition in accordance with the requirements of **Rule 13.5(a)**. The other respondent noted that removing the ability to have interim closing dates before Day 60, and the threat of lapsing an offer before that time, would remove one of the few levers available to an offeror to incentivise offeree company shareholders to accept its offer before that time.
- 6.27 One respondent noted that the potential for the removal of closing dates to disincentivise shareholders to accept an offer before the unconditional date had been discussed in paragraph 6.25 of the PCP, in which it was stated that:

“An offeror which wished to create a sense of “momentum” could ... make an announcement (to which it would be held) that if, on a specified date, acceptances of at least a specified level had been received, the offeror would at that time waive any conditions which remained unsatisfied and declare the offer unconditional.”.

The respondent sought clarification of certain matters in relation to the making of such an announcement.

6.28 Another respondent queried whether an offeror would need to consult the Panel before making such an announcement and, in particular, whether it would be permissible to include a qualified waiver of any outstanding conditions.

*(ii) The Code Committee's response*

6.29 As indicated in paragraph 6.23 of the PCP, since, in accordance with the new **Rule 31.6**, an offeror will need to serve an ACIN in order to lapse its offer on the acceptance condition prior to the unconditional date, it will no longer be meaningful for an offeror to have the ability to set closing dates prior to the unconditional date. It is therefore correct to say that the effect of the amendments will be to remove the ability of an offeror to lapse its offer on an interim closing date without prior notice, although it is noted that this ability has rarely been utilised in practice. It is similarly rare for an offeror to threaten to lapse its offer on the next closing date in order to incentivise shareholders to accept the offer (other than where the offeror makes a "no extension statement").

6.30 With regard to respondents' queries in relation to announcements of the type referred to in paragraph 6.25 of the PCP, the Code Committee considers that:

- (a) whilst there will be no express requirement in the Code for an offeror to consult the Panel before making such an announcement, prior consultation would clearly be advisable;
- (b) where an offeror has stated that, if acceptances of at least a specified level have been received on a specified date, it will declare the offer unconditional, the Panel would require the offeror to waive any outstanding conditions if the specified level of acceptances has been received on the specified date (but not if acceptances received by that date are less than that threshold);
- (c) subject to the precise wording of the announcement and any relevant condition, there would be nothing to prevent an offeror from seeking to invoke a condition to the offer, including a general protective condition, prior to the specified date;
- (d) an offeror would be able to "waive down" the acceptance condition threshold and declare its offer unconditional prior to or on the specified date (see also paragraph 6.15 above); and
- (e) it should be permissible for an offeror to make its intention to declare the offer unconditional subject to one or more qualifications relating to, for example, no "phase 2" reference having been made (provided that the offeror then clarified its position if the event in question subsequently arose).

**(d) Announcements of acceptance levels****Q14 Should an offeror be required to make announcements as to acceptance levels as proposed in the amended Rule 17.1?***(i) Introduction*

6.31 All but one of the respondents supported or did not object to the amendments to **Rule 17** in relation to the requirements for the announcement of acceptance levels by an offeror.

*(ii) "Rule 17 announcements" and withdrawal rights*

6.32 One respondent considered that the requirement in the proposed new **Rule 17.1(a)(i)** for the weekly disclosure of acceptance levels after Day 21, when combined with the increased withdrawal rights to be afforded to offeree company shareholders (as proposed in Section 8 of the PCP), would increase the scope for the level of acceptances disclosed in an announcement made under Rule 17 (a "**Rule 17 announcement**") to fluctuate, including fluctuations either side of key thresholds, such as the 50% threshold. Another respondent considered that the amended rules for acceptance levels and withdrawal rights were likely to create complexity for retail shareholders.

6.33 The Code Committee notes the concerns expressed by these respondents but considers that these issues already exist under the Code's current arrangements, where it is not unusual for Rule 17 announcements to be made after "Day 42" when withdrawal rights for offeree company shareholders will normally have taken effect.

*(iii) Announcements during a timetable suspension*

6.34 One respondent suggested that the requirement for acceptance levels to be disclosed on a weekly basis should be suspended for the duration of any suspension of the offer timetable under the new **Rule 31.4** (*Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding*).

6.35 The Code Committee agrees that the utility of a Rule 17 announcement during the course of a timetable suspension would be limited and has therefore adopted a new **Note 3 on Rule 17**, as follows:

**3. Suspension of offer timetable**

*The requirement to make announcements under Rule 17.1(a)(i) will not normally apply for the duration of any suspension of the offer timetable pursuant to Rule 31.4(a). The requirement under Rule 17.1(a)(i) will resume when the offer timetable resumes and the offeror must accordingly make an announcement including the details set out in Rule 17.2 by no later than 8.00 am on the business day following the date of the announcement made under Rule 31.4(d).*

(iv) *Revised offers*

- 6.36 One respondent queried the requirement in the proposed new **Rule 17.1(b)(iii)** that details of acceptance levels should be set out in an announcement of a revised offer. The respondent suggested that a Rule 17 announcement should instead be required to be made by no later than 8.00 a.m. on the next business day, noting that a revised offer might be required to be announced on short notice and that it would not be appropriate to delay the announcement whilst acceptance levels were ascertained from the offeror's receiving agent.
- 6.37 The Code Committee agrees with this suggestion and notes that this is the way in which the current **Rule 17.1** operates. The Code Committee has therefore not adopted the proposed **Rule 17.1(b)(iii)** but has instead adopted a new **Rule 17.1(a)(ii)** in relation to the announcement of acceptance levels following the revision of an offer (see paragraph 6.46 below). The proposed new **Rules 17.1(a)(ii) to (v)** have accordingly been renumbered and adopted as **Rules 17.1(a)(iii) to (vi)**.

(v) *Unconditional date*

- 6.38 As a minor drafting point, one respondent noted that the proposed new **Rule 17.1(a)(ii)** appeared to presume that the unconditional date of an offer would be a business day, which might not be the case.
- 6.39 The Code Committee has made a minor modification to the provision which has been adopted as the new **Rule 17.1(a)(iii)**. In addition, the Code Committee considers that the new **Rule 17.1(a)(iii)** should require daily disclosures of acceptance levels to be made not only in the week leading up to the unconditional date but also in the week leading up to the long-stop date and has modified the proposed provision accordingly (see paragraph 6.46 below).

(e) *Receiving agent's certificate*

- 6.40 Under the new **Rule 31.6(c)**, if an ACIN is served by an offeror and the required level of acceptances has not been received by 1.00 p.m. on the relevant date specified in the ACIN, the acceptance condition will be regarded as being incapable of satisfaction and the offer must lapse.
- 6.41 The Code Committee notes that, under the current **Note 7 on Rule 10** (*Offeror's receiving agent's certificate*), the offeror's receiving agent must issue a certificate to the offeror or its financial adviser as to the number of acceptances received before an offer may become or be declared unconditional as to acceptances (and that a copy of that certificate must be sent to each of the Panel and the offeree company's financial adviser as soon as possible after it is issued). In paragraph 7.27 of the PCP, it was proposed that the wording of what

will become **Note 7 on Rule 10.1** should be amended so as to refer to the receiving agent's certificate being issued "*before the acceptance condition can be satisfied*".

- 6.42 The calculation of the number of acceptances received by an offeror is equally important whether the offeror is seeking either to declare its offer unconditional on the basis that the acceptance condition has been satisfied or to lapse its offer on the basis that the acceptance condition has not been satisfied (or, where an ACIN has been served, that the acceptance condition is regarded as being incapable of satisfaction). In either case, the Code Committee considers that the number of acceptances received and counted towards the satisfaction of the acceptance condition should be calculated and certified to the same standard.
- 6.43 Accordingly, the Code Committee considers that **Note 7 on Rule 10.1** should provide that a receiving agent's certificate as to the number of acceptances received and counted towards the satisfaction of the acceptance condition should be required to be issued not only before the acceptance condition can be satisfied but also before an offer can lapse as a result of the acceptance condition not having being satisfied (on the unconditional date or the long-stop date) or being regarded as being incapable of satisfaction (on the relevant date specified in an ACIN).
- 6.44 In addition to the amendments proposed in paragraph 7.27 of the PCP, the Code Committee has therefore amended **Note 7 on Rule 10.1** as follows:

**"7. Offeror's receiving agent's certificate**

*Before the acceptance condition can be satisfied or the offer can lapse as a result of the acceptance condition not have been satisfied (or being regarded as incapable of satisfaction), the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the number of acceptances which have been received which comply with Note 4 on Rule 10.1 and the number of shares otherwise acquired, whether before or during an offer period, which comply with Note 5 on Rule 10.1 and, in each case, if appropriate, Note 6 on Rule 10.1, but which do not fall within Note 8 on Rule 10.1."*

- 6.45 In addition, the Code Committee has made minor related amendments to **Notes 4, 5, 6 and 8 on Rule 10.1**, the new **Note 2 on Rule 17** and the second paragraph of **Section 1 of Appendix 4**.

**(f) Code amendments**

- 6.46 In the light of the above, the Code Committee has:
- (a) adopted the new **Rule 31.6 (Acceptance condition invocation notice)** proposed in paragraph 6.22 of the PCP, subject to the revision to **Rule 31.6(b)(iv)** set out in paragraph 6.19 above and the adoption of the new **Note on Rule 31.6** set out in paragraph 6.12 above. In addition, the Code Committee has adopted the new **Rule**

**31.5(h)** and the new **Rule 32.2(d)**, and has amended **Notes 3** and **4** (to become **Notes 2** and **3**) on each of **Rule 31.5** and **Rule 32.2**, as referred to in paragraph 6.20 above;

- (b) adopted the amendments to the provisions of the Code which refer to **closing dates** of an offer, as proposed in paragraph 6.24 of the PCP;
- (c) adopted the amendments to **Rule 17.1**, as proposed in paragraph 6.31 of the PCP, subject to the modifications described in paragraphs 6.37 and 6.39 above and to the minor amendments of the new **Rule 17.1(a)(v)** set out below. **Rule 17.1**, as so modified, will therefore read as follows:

**"17.1 TIMING**

**(a) An offeror must make an announcement including the details set out in Rule 17.2 by 8.00 am at the latest on the business day following each of the following days:**

- (i) Day 21 and every seventh day thereafter;**
- (ii) any day on which an offer is revised;**
- (iii) ~~each of the five business days~~ day in the week leading up to, and including, the unconditional date or the long-stop date;**
- (~~iii~~iv) any day on which an acceptance condition invocation notice expires;**
- (iv) any ~~other~~ day on which the offer becomes or is declared unconditional or lapses; and**
- (v) any day on which, as at 5.00 pm, the total percentage of shares which the offeror may count towards satisfaction of the acceptance condition has increased or decreased to, or through, any of the following thresholds:**
  - (A) the percentage threshold to which the acceptance condition is currently subject;**
  - (B) 75% of the shares carrying voting rights in the offeree company; and**
  - (C) if the threshold in (A) can be reduced to a specified minimum threshold, that threshold.**

**(b) An offeror must also include the details set out in Rule 17.2 in any announcement which includes:**

- (i) an acceptance condition invocation notice; or**
- (ii) an acceleration statement; ~~or~~**
- (~~iii~~) ~~a revision of the offer.~~”;**

- (d) renumbered the “contents” requirements of the current **Rule 17.1** as new **Rule 17.2** (*Contents*) and renumbered **Note 2 on Rule 17.1** (*General statements about acceptance levels*) as the new **Rule 17.3**, as proposed in paragraph 6.32 of the PCP;
- (e) adopted the new **Note 3 on Rule 17** (*Suspension of offer timetable*), as set out in paragraph 6.35 above; and
- (f) adopted the amendments to **Note 7 on Rule 10.1** (*Offeror’s receiving agent’s certificate*) and the related amendments to **Notes 4, 5, 6 and 8 on Rule 10.1**, the new **Note 2 on Rule 17**, and the second paragraph of **Section 1 of Appendix 4**, as referred to in paragraphs 6.44 and 6.45 above,

as set out in Appendix B.

## 7. Single date for the satisfaction of all conditions

### (a) Summary of proposals

#### (i) Merger of Day 60 and Day 81

7.1 **Section 7** of the PCP proposed that there should be a single date by which all of the conditions to an offer must be satisfied or waived, i.e. that the Code should no longer make a distinction between the latest date for the satisfaction of the acceptance condition (currently Day 60) and the latest date for the satisfaction of the other conditions to the offer (currently Day 81).

7.2 It was proposed that the date by which the conditions must be satisfied should be Day 60, given that, if the proposals in Section 3 of the PCP were adopted, all conditions relating to a material official authorisation or regulatory clearance would have been satisfied or waived by Day 60 (as it would be possible for the Panel to suspend the offer timetable pending the satisfaction of any such conditions) and that all other conditions should be capable of being satisfied within this timeframe (see the new **Rule 31.1(a)**).

#### (ii) Satisfaction of the acceptance condition

7.3 In addition, it was proposed that, except with the consent of the Panel, the acceptance condition to an offer must not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived (see the new **Rule 10.2** (*Satisfaction of the acceptance condition*)).

7.4 It was proposed that the Panel should normally grant a dispensation from this requirement where another condition is not capable of being satisfied until after the acceptance condition has been satisfied (such as a condition relating to the admission to listing and/or admission to trading of the securities being offered as consideration) (see the new **Note on Rule 10.2** (*When a dispensation may be granted*)).

#### (iii) Period for which an offer must remain open for acceptance and closing the offer

7.5 In addition, it was proposed that:

- (a) an offeror should be required to give at least 14 days' notice whenever it intends to close an offer which has become unconditional (and not only in the circumstances referred to in the current **Rule 31.2** (*Further closing dates to be specified*)); and
- (b) where an offeror intends to close an offer which has become unconditional and which has been kept open until further notice, the offeror should also be required to send a notification to the remaining shareholders in the offeree company in accordance with

the requirements of **Rule 30.2** (*Method of publication of documents, announcements and information*).

(iv) *Offeree protection conditions*

7.6 In addition, it was proposed that **Rule 13.6** (*Invoking offeree protection conditions*) and the **Notes** thereon should be deleted. **Rule 13.6** provides that:

**“An offeree company should not invoke, or cause or permit the offeror to invoke any condition to an offer unless the circumstances which give rise to the right to invoke the condition are of material significance to the shareholders in the offeree company in the context of the offer.”.**

(b) ***Respondents’ comments and the Code Committee’s response***

(i) *Merger of Day 60 and Day 81*

**Q15 Should there be a single latest date (i.e. Day 60) for the satisfaction of (a) the acceptance condition and (b) the other conditions to an offer?**

7.7 All but one of the respondents supported or did not object to the proposal that there should be a single latest date for the satisfaction of all of the conditions to an offer.

7.8 One respondent noted that, in the case of a longer regulatory approval process, merging Day 60 and Day 81 (and therefore removing the ability for an offeror to declare its offer unconditional as to acceptances on Day 60 and then to seek an extension to Day 81 pending the satisfaction of any outstanding regulatory conditions) would lengthen the acceptance period (on account of the ability to suspend the offer timetable) and that this would increase the transaction risk for offerors.

7.9 The Code Committee acknowledges that the effect of the proposals, taken as a whole, may be that the acceptance period will be longer in certain circumstances than would otherwise be the case. However, the Code Committee believes that offeree company shareholders will benefit by not being “locked in” to the offer and unable to withdraw their acceptances for a potentially long period of time after an offer has become or been declared unconditional as to acceptances (during which period of time the offeror would still be able to seek to invoke the protective conditions to its offer).

(ii) *Satisfaction of the acceptance condition*

**Q16 Should the Code provide that the acceptance condition must not be capable of being satisfied until all of the other conditions have been satisfied or waived, subject to the ability of the Panel to grant dispensation where this is not possible?**

- 7.10 All but one of the respondents supported or did not object to the proposal that the acceptance condition should normally be the last condition to an offer to be satisfied, as reflected in the proposed new **Rule 10.2** and the **Note** thereon. The comments of the remaining respondent are summarised in paragraph 7.8 above.
- 7.11 As regards the potential ability for certain conditions to be satisfied after the acceptance condition is satisfied (where such conditions are incapable of being satisfied prior to the satisfaction of the acceptance condition), one respondent sought guidance as to whether the offeror would be required to specify relevant conditions as such in the firm offer announcement and the offer document. The respondent also sought guidance as to what period of time the Panel would be likely to permit for the satisfaction of such conditions.
- 7.12 The Code Committee notes that the new **Rule 10.2** requires that the acceptance condition must not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived, “except with the consent of the Panel”. Accordingly, an offeror will need to consult the Panel if it is proposed that any conditions will be satisfied after the satisfaction of the acceptance condition. The Code Committee would expect that consultation to cover matters such as the nature of the condition(s), the appropriate disclosure, and the expected timetable for the satisfaction of the condition(s). In general, the Code Committee would expect any such condition(s) to be specifically identified in the firm offer announcement and the offer document, although this will need to be determined on the circumstances of each particular case. For example, specific disclosure may not be necessary if the condition is purely “mechanical” and is expected to be satisfied only a very short period of time after the satisfaction of the acceptance condition.
- 7.13 The same respondent as referred to in paragraph 7.11 noted that the examples given in the proposed new **Note on Rule 10.2** were of conditions relating to the admission to listing or admission to trading of consideration securities. The respondent suggested that another example might be a condition relating to a divestment of an asset by the offeree company that was required to be inter-conditional with the completion of the offer.
- 7.14 As mentioned above, the treatment of individual conditions will depend on the circumstances of each particular case. However, the Code Committee considers that a dispensation might be granted in relation to a condition of the type referred to in the previous paragraph if, for example, as a matter of the structuring of the transaction, it was necessary for the sale of the asset by the offeree company to be completed immediately following the satisfaction of the acceptance condition.

(iii) *Period for which an offer must remain open for acceptance and closing the offer*

<p><b>Q17 Do you have any comments on the proposals in relation to the period for which an offer must remain open for acceptance and the closing of the offer?</b></p>
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7.15 All but one of the respondents supported or did not object to the proposals that:

- (a) an offeror should be required to give at least 14 days' notice before an offer which has become unconditional is closed for acceptance; and
- (b) an offeror that intends to close an offer which has become unconditional and which has been kept open until further notice should also be required to send a notice to the remaining shareholders in the offeree company.

(iv) *Offeree protection conditions*

**Q18 Should Rule 13.6 in relation to invoking offeree protection conditions be deleted as proposed?**

7.16 All but two of the respondents supported or did not object to the deletion of **Rule 13.6** in relation to "offeree protection conditions" and the **Notes** thereon.

7.17 One respondent agreed that **Note 2 on Rule 13.6** (*Availability of withdrawal rights*) would no longer be required following the amendments proposed to **Rule 34** (*Right of withdrawal*) in Section 8 of the PCP but considered that, on balance, both **Rule 13.6** itself and **Note 1 on Rule 13.6** (*When an offeree protection condition may be invoked*) should be retained. The respondent considered that, where offeree protection conditions are agreed between an offeror and the offeree company (for example, where the transaction is a "merger of equals" and mutuality of conditions is desired), the appropriate standard to apply to the invocation of those offeree protection conditions is the standard in **Rule 13.6** (as set out in paragraph 7.6 above). In addition, the respondent did not agree with the proposition that **Rule 13.6** and **Note 1** thereon would no longer be required as a result of the extension of withdrawal rights under **Rule 34**. For ease of reference, **Note 1 on Rule 13.6** provides that:

*"The circumstances in which the offeree company will be allowed to invoke, or cause or permit the offeror to invoke, a condition will not necessarily be restricted to those in which the Panel would permit an offeror to invoke a condition. In deciding whether an offeree company may invoke, or cause or permit the offeror to invoke, a condition, the Panel will take into account all relevant factors."*

7.18 The Code Committee accepts these points. Accordingly, **Note 2 on Rule 13.6** will be deleted but **Rule 13.6** and **Note 1** thereon will be retained. In addition, the consequential amendments to **Rule 24.7** and **Section 14 of Appendix 7** (both entitled "*Incorporation of obligations and rights*") proposed in paragraph 7.33 of the PCP have not been adopted.

(c) **Code amendments**

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

- (a) adopted the new **Rule 31.1(a)**, as proposed in paragraph 7.10 of the PCP (and as previously adopted in Section 2 above);
- (b) deleted **Rule 31.7** (*Time for fulfilment of all other conditions*) and the **Notes** thereon, as proposed in paragraph 7.10 of the PCP;
- (c) adopted the new **Rule 10.2** (*Satisfaction of the acceptance condition*) and the new **Note on Rule 10.2** (*When a dispensation may be granted*), as proposed in paragraph 7.14 of the PCP;
- (d) amended the current **Rule 31.4** (*Offer to remain open for 14 days after unconditional as to acceptances*) (which will become the new **Rules 31.2(b)** and **(c)**), deleted the current **Rule 31.2** (*Further closing dates to be specified*), and introduced the new **Rule 31.2(d)**, as proposed in paragraphs 7.22 and 7.23 of the PCP;
- (e) amended **Rule 9.5(d)**, as proposed in paragraph 7.24 of the PCP;
- (f) adopted the **consequential amendments** described in paragraph 7.27 of the PCP;
- (g) deleted **Note 2 on Rule 13.6** (*Availability of withdrawal rights*), as proposed in paragraph 7.32 of the PCP (but retained **Rule 13.6** (*Invoking offeree protection conditions*) and **Note 1 on Rule 13.6** (*When an offeree protection condition may be invoked*)); and
- (h) adopted the **consequential amendments** described in paragraph 7.33 of the PCP (other than the amendment to **Rule 24.7** described in paragraph 7.33(a) of the PCP and the amendment to **Section 14 of Appendix 7** described in paragraph 7.33(e) of the PCP),

as set out in Appendix B.

## 8. Withdrawal rights

### (a) Summary of proposals

8.1 **Section 8** of the PCP proposed that **Rule 34.1** (*When the right of withdrawal may be exercised*) should be amended so that offeree company shareholders who have accepted an offer would be able to withdraw their acceptances at any time, and not only from the date which is 21 days after the first closing date.

8.2 In addition, it was proposed:

- (a) to delete paragraph (b) of each of **Note 3 on Rule 31.5** and **Note 3 on Rule 32.2** (both entitled "*Competitive situations*"), on the basis that it would no longer be necessary for withdrawal rights to be reintroduced if a "no extension statement" (to become an "acceleration statement") or a "no increase statement" is set aside following a competitive situation arising;
- (b) to introduce a new sentence at the end of **Note 4 on Rule 10** (*Acceptances*), which would expressly state that an acceptance which has been withdrawn must not be counted towards an acceptance condition; and
- (c) to delete **Rule 17.2** (*Consequences of failure to announce*), and the reference to **Rule 17** in **Rule 24.7** (*Incorporation of obligations and rights*), on the basis that, following the adoption of the amendments proposed in Section 7 of the PCP, there would be a single date for the satisfaction of all conditions to an offer and it would not be appropriate for withdrawal rights to be reintroduced after an offer has become or been declared unconditional.

### (b) Respondents' comments and the Code Committee's response

**Q19 Do you have any comments on the proposed amendments to the Code in relation to withdrawal rights?**

8.3 All but two of the respondents supported or did not comment on the proposals to extend withdrawal rights for offeree company shareholders who accept an offer and the related amendments.

8.4 One respondent considered that an offeror should be able to place a degree of certainty on acceptances received during the first 21 days following the publication of the initial offer document and that withdrawal rights should not take effect until after that time. Another respondent considered that an extended period of withdrawal rights, when combined with more frequent disclosures of acceptance levels between Days 21 and 60, would increase

the scope for disclosed acceptances to fluctuate either side of key thresholds, such as the 50% threshold.

- 8.5 The Code Committee continues to believe that offeree company shareholders should be free to withdraw their acceptances of the offer at any time, should they so wish (and notes that acceptances generally remain at a low level as at Day 21, at least in a hostile offer). The Code Committee acknowledges that the combination of withdrawal rights and more frequent Rule 17 announcements could result in fluctuations in disclosed acceptance levels but considers the increased transparency to be a positive development for offeree company shareholders and other market participants.
- 8.6 Two respondents queried whether it was correct for **Rule 34.1** to state that the right of withdrawal would be exercisable until the time that the acceptance condition was satisfied. Given that the new **Rule 10.2** (*Satisfaction of the acceptance condition*) provided that the acceptance condition would normally only be satisfied when the other conditions to the offer had been satisfied, the respondents suggested that **Rule 34.1** should refer to withdrawal rights being exercisable until the offer was declared or became unconditional.
- 8.7 The Code Committee acknowledges that the acceptance condition will normally be the last condition to be satisfied and that, where this is the case, withdrawal rights will be exercisable until the offer becomes or is declared unconditional. However, as one of the respondents referred to in the previous paragraph recognised, the new **Note on Rule 10.2** (*When a dispensation may be granted*) anticipates that there may be circumstances in which certain conditions are only capable of being satisfied after the acceptance condition has been satisfied and in such circumstances withdrawal rights will cease upon the acceptance condition being satisfied and not only upon the offer becoming or being declared unconditional. The Code Committee has therefore not adopted the respondents' suggestion in relation to **Rule 34.1**. The Code Committee has, however, made a minor change to the presentation of **Rule 34.1** so that it will read as follows:

**"34.1 WHEN THE RIGHT OF WITHDRAWAL MAY BE EXERCISED**

**(a) An accepting shareholder must be entitled to withdraw an acceptance at any time, unless the offer is unconditional from the outset.**

**(b) ~~This~~ ~~The~~ entitlement to withdraw an acceptance must be exercisable until the earlier of:**

**(a) the time that the acceptance condition is satisfied; and**

**(b) the latest time for the receipt of acceptances on the unconditional date."**

**(c) Code amendments**

- 8.8 In the light of the above, the Code Committee has:

- (a) adopted the amendments to **Rule 34.1** (*When the right of withdrawal may be exercised*), as proposed in paragraph 8.8 of the PCP, subject to the modification set out in paragraph 8.7 above;
- (b) deleted paragraph (b) of each of **Note 3 on Rule 31.5** and **Note 3 on Rule 32.2** (*Competitive situations*), as proposed in paragraph 8.11 of the PCP; and
- (c) deleted **Rule 17.2** (*Consequences of failure to announce*) (and the reference to **Rule 17** in **Rule 24.7**), as proposed in paragraph 8.15 of the PCP,

as set out in Appendix B.

## 9. The invocation of conditions and pre-conditions to offers

### (a) Summary of proposals

#### (i) Introduction

9.1 **Section 9** of the PCP described the Panel's approach to the invocation of conditions and pre-conditions to an offer, including the requirement in **Rule 13.5(a)** for an offeror which wishes to invoke a condition or pre-condition to satisfy the Panel that the circumstances which have arisen are of "material significance" to it in the context of the offer.

#### (ii) Requirement for Panel consent in order to invoke a condition

9.2 **Section 9(c)** of the PCP proposed amendments to **Rule 13.5(a)** so that the provision would clearly provide that:

- (a) subject to certain exceptions, the consent of the Panel is required in order for an offeror to invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn;
- (b) language appropriately reflecting this requirement should be incorporated into each of the firm offer announcement and the offer document; and
- (c) the Panel will judge whether circumstances are of material significance to the offeror in the context of the offer by reference to the facts of each case at the time the relevant circumstances arise.

#### (iii) Conditions to which Rule 13.5(a) does not apply

9.3 **Section 9(d)** of the PCP proposed the introduction of:

- (a) a new **Rule 13.5(b)**, which would list the conditions and pre-conditions to which the material significance requirement in **Rule 13.5(a)** does not apply;
- (b) a new **Rule 13.5(c)**, which would require the firm offer announcement and the offer document to state which conditions and, in the case of a firm offer announcement, pre-conditions to the offer are not subject to **Rule 13.5(a)**; and
- (c) a new **Rule 13.5(d)**, which would require the firm offer announcement and the offer document to state that any condition or, in the case of a firm offer announcement, pre-condition to the offer that is subject to **Rule 13.5(a)** may be waived by the offeror.

In addition, it was proposed to move the current **Rule 13.5(b)** so as to become a new **Rule 13.2** (*Requirement to use all reasonable efforts*).

(iv) *Practice Statement No 5*

9.4 **Sections 9(f), 9(g) and 9(h)** of the PCP explained certain amendments that the Executive had advised the Code Committee it intended to make to [Practice Statement No 5](#) (*Rule 13.5(a) – Invocation of conditions*). In summary, the Executive intended to:

- (a) amend the categories of offer conditions identified in the Practice Statement;
- (b) introduce references to additional general factors that will be taken into account in considering whether a particular matter should give rise to the right to invoke a condition to an offer. The factors related to:
  - (i) whether the circumstances could not have reasonably been foreseen at the time of the firm offer announcement and, if they could, the likelihood of the circumstances occurring;
  - (ii) the actions taken by the offeror since the firm offer announcement and, in particular, since the occurrence of the circumstances on which the offeror is seeking to rely in order to invoke the condition; and
  - (iii) the views of the board of the offeree company;
- (c) introduce references to additional factors that will specifically be taken into account in considering whether a condition relating to the obtaining of an official authorisation or regulatory clearance may be invoked, as follows:
  - (i) the significance of the authorisation or clearance to the offeror;
  - (ii) what action, if any, the offeror would need to take in order to obtain the authorisation or clearance and the strategic consequences for the offeror if it were to take that action; and
  - (iii) the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance; and
- (d) introduce references to the following factors with regard to a condition relating to there being no Phase 2 CMA reference (or equivalent reference or process):
  - (i) whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company; and

- (ii) the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low.

**(b) Respondents' comments and the Code Committee's response**

- (i) Requirement for Panel consent in order to invoke a condition

**Q20 Do you have any comments on the proposed amendments to Rule 13.5(a) with regard to the invocation of conditions and pre-conditions?**

- 9.5 The respondents were supportive of or had no comments on the proposed amendments to **Rule 13.5(a)**.

- (ii) Conditions to which Rule 13.5(a) does not apply

**Q21 Do you have any comments on the proposed new Rule 13.5(b), with regard to the conditions and pre-conditions to which Rule 13.5(a) does not apply, or on the proposed new Rules 13.5(c) and (d), with regard to the disclosures to be made in the firm offer announcement and the offer document?**

- 9.6 The respondents were supportive of or had no substantive comments on the proposed new **Rules 13.5(b) to (d)**.

- 9.7 One respondent drew attention to the proposed **Rule 13.5(b)(iv)**, which provided that, where securities are offered as consideration, **Rule 13.5(a)** would not apply to a condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities. The respondent suggested that **Rule 13.5(a)** would, in addition, not apply to a legal or regulatory requirement relating to the issue by the offeror of the consideration securities. The respondent further suggested that the drafting of the new **Rule 13.5(b)(iv)** should be more consistent with the current **Rule 13.4(b)**, regarding the conditions to which a cash offer financed by the issue of new securities is required to be subject.

- 9.8 The Code Committee accepts these suggestions and has therefore adopted the new **Rule 13.5(b)(iv)** in a modified form, as follows:

**"(iv) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the issuance, listing and/or admission to trading of those securities (see also Rule 24.10 the Note on Rule 13.4);"**

In addition, the Code Committee has moved the provisions of paragraphs (i) and (ii) of **Rule 13.4(b)** into a new **Note on Rule 13.4** (*Conditions necessary for the issue, listing or admission to trading of new securities*), as set out in Appendix B.

- 9.9 Two respondents drew attention to the proposed **Rule 13.5(b)(vi)**, which provided that **Rule 13.5(a)** would not apply to a term relating to the long-stop date of a contractual offer. The respondents suggested that it would be helpful for the provision to be clearer that the ability to lapse or withdraw a contractual offer on its long stop-date (other than on account of a failure to satisfy the acceptance condition) would be subject to the consent of the Panel under the new **Rule 12.1** (*Inclusion of a long-stop date*) and to the satisfaction of the separate requirements in the new **Rule 12.2** (*When consent may be given under Rule 12.1*) that:

**“the outstanding official authorisation or regulatory clearance is a material official authorisation or regulatory clearance, and ... that either:**

**(a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or**

**(b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer”** (see Section 4B of this Response Statement).

- 9.10 The Code Committee accepts the respondents’ suggestion and has therefore adopted the new **Rule 13.5(b)(vi)** in a modified form, as follows:

**“(vi) a term relating to the long-stop date of a contractual offer (but see the separate requirements of Rules 12.1 and 12.2)”.**

- 9.11 In addition, the Code Committee has adopted the new **Rule 13.5(b)(vii)** in a modified form, as follows:

**“(vii) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (see Sections 3(b) and (c) of Appendix 7 and also the separate requirements of Section 3(g) of Appendix 7)”.**

- 9.12 One respondent drew attention to the proposed **Rule 13.5(b)(viii)**, which provided that, in addition to the conditions listed in the proposed **Rules 13.5(b)(i) to (vii)**, **Rule 13.5(a)** would not apply to:

**“any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances”.**

The respondent considered that the new **Rule 13.5(b)** should instead expressly set out all of the conditions to which **Rule 13.5(a)** would not apply.

- 9.13 The Code Committee does not believe that it is possible to provide a definitive list of all of the types of condition to which **Rule 13.5(a)** will not apply and the new **Rule 13.5(b)(viii)** is intended to provide the Panel with the flexibility to dispense with the “material significance” requirement (and the other requirements of **Rule 13.5(a)**) in appropriate circumstances.

For example, if the Panel agrees that there is a reason why a particular condition should not be capable of being waived by the offeror, that condition will not be subject to **Rule 13.5(a)**.

(iii) *Practice Statement No 5*

9.14 Three respondents commented on Practice Statement No 5 and the additional factors proposed to be referred to by the Executive with regard to a determination as to whether particular circumstances give rise to the right to invoke a condition.

9.15 Each of these respondents considered that an offeror should be permitted to invoke a regulatory condition if completion of the offer would be unlawful in the jurisdiction in question.

9.16 The Executive has informed the Code Committee that any such unlawfulness will be taken into account by the Executive under the new factor in paragraph 4.2(c) of the revised Practice Statement, which refers to:

“the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance”.

9.17 One respondent considered that an additional factor in relation to the invocation of a “no phase 2 reference” condition should be whether the offeror had disclosed that the making of a phase 2 reference would be material to it.

9.18 The Executive has informed the Code Committee that it does not consider it necessary to include such an additional factor, given that paragraph 4.1(b) of the revised Practice Statement already makes clear that the Executive will take into account:

“whether the condition was expressly drawn to offeree company shareholders’ attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it”.

9.19 Two respondents observed that an offeror might wish to invoke a “no phase 2 reference” condition on the grounds that a phase 2 reference might result in an offeror incurring material advisory and/or financing costs. One of these respondents noted that the incursion of those costs might not, of itself, be injurious to the offeror’s business.

9.20 The Executive has informed the Code Committee that the costs of a phase 2 reference will be taken into account under the factor set out in paragraph 4.3(a) of the revised Practice Statement, i.e.:

“whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company”.

9.21 One respondent considered that it would be futile not to allow an offeror to invoke a “no phase 2 reference” condition at the time of the reference if it was likely that the offeror would later be able to invoke the same condition on the long-stop date of its offer.

9.22 The Executive has informed the Code Committee that, in such circumstances, it would expect to take into account the factor set out in paragraph 4.3(b) of the revised Practice Statement, i.e.:

“the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low”.

**(c) Code amendments**

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

- (a) adopted the amendments to **Rule 13.5(a)** and the new **Rules 13.5(b) to (d)**, as proposed in paragraphs 9.26, 9.34 and 9.35 of the PCP, subject to the modifications to the new **Rule 13.5(b)** referred to in paragraphs 9.8, 9.10 and 9.11 above. In addition, minor amendments have been made to **Rule 13.4(b)**, and a new **Note on Rule 13.4** introduced, as referred to in paragraph 9.8 above;
- (b) adopted the new **Rules 2.7(c)(iv) to (vi)** and the new **Rules 24.3(d)(vii) to (ix)**, as proposed in paragraphs 9.27 and 9.36 of the PCP;
- (c) deleted the references to **Rule 13.5(a)** in **Rule 24.7** and **Section 14 of Appendix 7**, as proposed in paragraph 9.27 of the PCP; and
- (d) moved the current **Rule 13.5(b)** to become a new **Rule 13.2**, as proposed in paragraph 9.37 of the PCP,

as set out in Appendix B.

**(d) Revised Practice Statement No 5**

9.24 The Executive has advised the Code Committee that it intends to publish the revised Practice Statement No 5, incorporating the amendments set out in Appendix C of the PCP, on the implementation date. The final version of the revised Practice Statement, marked to show additional amendments made since the draft set out in the PCP, is set out in Appendix C.

## 10. Mandatory offers

### (a) Summary of proposals

10.1 **Section 10** of the PCP proposed amendments with regard to the circumstances in which the Panel may grant a dispensation from the restriction in the current **Rule 9.3(b)** on a person triggering a mandatory offer where the making or implementation of that offer would be subject to any condition or consent. It was proposed that the dispensation should be available where:

- (a) the condition or consent relates to a material official authorisation or regulatory clearance;
- (b) the triggering share purchase is itself subject to a condition relating to that material official authorisation or regulatory clearance in identical terms to the condition or pre-condition to the offer, and is not subject to any other conditions; and
- (c) the invocation of the condition to the share purchase agreement (and the condition or pre-condition to the offer) is subject to the consent of the Panel, applying the “material significance” requirement in **Rule 13.5(a)**.

10.2 It was proposed that the Code should be amended by:

- (a) moving the restriction set out in the current **Rule 9.3(b)** so as to become the new **Rule 9.4** (*Restriction on acquisitions*); and
- (b) in relation to the dispensation referred to in paragraph 10.1 above, replacing the current **Note 3(b) on Rule 9.3** with a new **Note on Rule 9.4** (*When a dispensation may be granted*).

### (b) Respondents’ comments

**Q22** Should the Panel be able to grant a dispensation from the restriction on a person triggering a conditional mandatory offer where the triggering share purchase would itself be subject to a condition relating to a material official authorisation or regulatory clearance, as proposed in the new Note on Rule 9.4?

10.3 The respondents were supportive of or had no comments on the proposed amendments.

10.4 One respondent queried whether the requirement for the share purchase agreement to be subject to a sole condition relating to the relevant authorisation or clearance, as referred to in paragraph 10.1(b) above, applied only to conditions for the benefit of the offeror, i.e. whether it would be permissible also to include conditions for the benefit of the selling shareholder.

**(c) The Code Committee's response**

10.5 The Code Committee confirms that, in accordance with paragraph (a) of the new **Note on Rule 9.4**, the share purchase agreement pursuant to which the mandatory bid-triggering shares are acquired must be subject to a condition relating to the relevant material official authorisation or regulatory clearance and to no other conditions, including conditions for the benefit of the selling shareholder. The entering into of the conditional share purchase agreement will, of itself, give rise to an obligation to make a mandatory offer and the Code Committee considers that the share purchase agreement should not be subject to any additional conditions that would reduce the chances of the offeror proceeding to make that offer.

**(d) Code amendments**

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

- (a) moved the provisions of **Rule 9.3(b)** to a new **Rule 9.4** (*Restriction on acquisitions*) and introduced a new **Note on Rule 9.4** (*When a dispensation may be granted*), as proposed in paragraph 10.14 of the PCP; and
- (b) deleted the provisions of **Note 3 on Rule 9.3**, and the references to that **Note 3** in **Note 9 on Rule 9.1**, as proposed in paragraphs 10.14 to 10.17 of the PCP,

as set out in Appendix B.

## 11. Miscellaneous amendments

### (a) Summary of proposals

11.1 **Section 11** of the PCP proposed certain miscellaneous amendments to the Code with regard to matters which were related to the main proposals in the PCP. In summary:

- (a) **Section 11(b)** proposed minor amendments in relation to **pre-conditional offers**;
- (b) **Section 11(c)** proposed amendments in relation to **announcements relating to unlisted offeree companies**;
- (c) **Section 11(d)** proposed amendments in relation to the **return of documents of title**; and
- (d) **Section 11(e)** proposed amendments in relation to **alternative offers**.

### (b) Respondents' comments and the Code Committee's response

**Q23 Do you have any comments on the miscellaneous amendments proposed in Section 11 of the PCP?**

#### (i) Introduction

11.2 The respondents were either supportive of or had no comments on the proposed amendments.

#### (ii) Return of documents of title

11.3 With regard to the proposal that the latest deadline for the return of documents of title should be reduced from 14 days to seven days, two respondents noted that there might be rare cases where it is not possible for documents to be returned during this time period, for example, where postal services are temporarily unavailable or where a particularly large number of shareholders in the offeree company hold their shares in certificated form.

11.4 The Code Committee acknowledges this.

#### (iii) Alternative offers

11.5 One respondent noted that, as explained in paragraph 11.17 of the PCP, the effect of the proposed amendments to **Rule 33** (*Alternative offers*) would be that, where alternative offers are made by an offeror, each alternative offer would be required to be kept open for acceptance until the end of the offer period and, if the offer becomes or is declared unconditional, for 14 days thereafter in accordance with the requirements of the new

**Rule 31.2** (*Period for which the offer must remain open for acceptance*), i.e. an offeror would not be able to close an alternative offer before such a date. The respondent sought confirmation of its understanding that an offeror would only be required to keep an alternative offer open for 14 days after the unconditional date - i.e. it would be able to shut off the alternative offer from that point even it kept the main offer open - and suggested that this should be set out in the new **Rule 31.2**.

- 11.6 The Code Committee confirms that the respondent's understanding is correct but does not consider that it is necessary for this to be set out in the Code.
- 11.7 The same respondent suggested that, in the light of the proposed amendments to **Rule 33** with regard to alternative contractual offers, it might be appropriate for the Code Committee to review **Section 9 of Appendix 7** (*Alternative consideration*), in relation to situations where alternative consideration is offered in the context of a scheme of arrangement. The respondent noted that this provision was introduced (following the consultation on [PCP 2007/1](#) (*Schemes of arrangement*)) in order to afford offeree company shareholders a similar level of protection in a scheme to that which they are afforded in a contractual offer, and that the latter level of protection was now proposed to be increased.
- 11.8 The Code Committee is grateful to the respondent for drawing this matter to its attention. Having reviewed **Section 9 of Appendix 7**, the Code Committee considers that **Section 9(a)** should be brought into line with **Section 9(b)** and has therefore made the following amendments:

**“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 proportions in which they receive different forms of consideration, the ability of shareholders to make such elections must not be closed off or withdrawn ~~before the shareholder meetings~~ any earlier than 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, one week prior to that later date.**

**(b) A shareholder who has elected to receive a particular form of consideration in respect of any of his-its shares must be entitled to withdraw his-that election. However, this right may be shut off not earlier than 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, not earlier than one week prior to that later date.”.**

**(c) Additional minor amendments**

- 11.9 The Code Committee has reintroduced the **Note** on the definition of “reverse takeover” in the Definitions Section of the Code, which was deleted by [Instrument 2020/2](#) as a result of an administrative error.

11.10 In addition, the Code Committee has taken the opportunity to make minor textual amendments to the **Note** on the definition of “**derivative**” in the Definitions Section of the Code and to **Note 8 on Rule 37.1** (*Inadvertent mistake*).

**(d) Code amendments**

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

- (a) amended the **Note** on the definition of “**derivative**”, as referred to in paragraph 11.10 above;
- (b) reintroduced the **Note** on the definition of “**reverse takeover**”, as referred to in paragraph 11.9 above;
- (c) amended **Rule 2.5(c)** (*Terms and pre-conditions in possible offer announcements*), as proposed in paragraph 11.7 of the PCP;
- (d) amended **Rules 5.2(a), (b) and (c)** (*Exceptions to restrictions*), as proposed in paragraph 11.4 of the PCP;
- (e) introduced a new **Note on Rule 24.1** (*Pre-conditional offers*), as proposed in paragraph 11.6 of the PCP;
- (f) introduced a new **Note on Rule 30.1** (*Unquoted public companies and relevant private companies*), introduced references to that new **Note** in each of **Note 3 on Rule 8** (*Method of disclosure*) and **Note 11 on Rule 8** (*Unquoted public companies and relevant private companies*), and deleted **Note 4 on Rule 17.1** (*Unlisted companies*), as proposed in paragraph 11.10 of the PCP;
- (g) amended **Rule 31.10, Rule 34.3** (which will become **Rule 34.2**) and **Section 11 of Appendix 7** (each entitled “*Return of documents of title*”), as proposed in paragraph 11.13 of the PCP;
- (h) amended **Rule 33** (*Alternative offers*), as proposed in paragraphs 11.17, 11.18, 11.21, 11.23, 11.24 of the PCP; deleted **Note 1 on Rule 17.1** (*Acceptances of cash underwritten alternatives*), **Note 3 on Rule 17.1** (*Alternative offers*), **Rule 24.14** (*Cash underwritten alternatives which may be shut off*), and the reference to **Rule 24.14** in **Section 16 of Appendix 7** (*Provisions disapplied in a scheme*), as proposed in paragraph 11.25 of the PCP; renumbered the current **Rule 24.17** (*Dividends*) as **Rule 24.14**, as proposed in paragraph 11.26 of the PCP; and amended **Section 9 of Appendix 7** (*Alternative consideration*), as set out in paragraph 11.8 above; and

- (i) amended **Note 8 on Rule 37.1** (*Inadvertent mistake*), as referred to in paragraph 11.10 above,

as set out in Appendix B.

**APPENDIX A****Non-confidential respondents to PCP 2020/1**

1. Chartered Governance Institute
2. Herbert Smith Freehills LLP
3. Institute of Chartered Accountants in England and Wales
4. Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales
5. Quoted Companies Alliance
6. RBC Capital Markets
7. Receiving Agents Group (a sub-committee of the Chartered Governance Institute's Registrars Group)
8. UK Finance

## APPENDIX B

### Amendments to the Code

#### DEFINITIONS

##### Acceleration statement

An acceleration statement is a statement in which an offeror brings forward the latest date by which all of the conditions to the offer must be satisfied or waived.

##### Acting in concert

...

##### **NOTES ON ACTING IN CONCERT**

...

##### **11. Indemnity and other dealing arrangements**

(a) ...

(b) ...

*Such dealing arrangements must be disclosed as required by Note 2 on Rule 2.4, Rule 2.7(c)(~~ix~~ii), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.*

*(c) Note 11(b) does not apply to irrevocable commitments or letters of intent, which are subject to Rule 2.7(c)(~~ix~~) and Rule 2.10.*

...

##### **CMA**

The Competition and Markets Authority

##### **Competition reference period**

~~Competition reference period means the period from the time when an announcement is made of a Phase 2 CMA reference or of the initiation of Phase 2 European Commission proceedings, until the time of:~~

~~(a) an announcement of clearance (including clearance subject to conditions) or prohibition by the CMA or the Secretary of State (as appropriate); or~~

~~(b) the issuance of a decision under Article 8(1), Article 8(2) or Article 8(3) of Council Regulation 139/2004/EC; or~~

~~(c) the expiry of the time limits set out in Article 10(3) of Council Regulation 139/2004/EC with no decision having been issued by the European Commission and the offer thereby being deemed compatible with the internal market under Article 10(6) of the Regulation.~~

...

##### **Day 14**

Day 14 means the 14th day following the date on which the initial offer document is published (see Rule 25.1(a)).

**Day 21**

Day 21 means the 21st day following the date on which the initial offer document is published (see Rule 31.2).

**Day 39**

Day 39 means the 21st day prior to Day 60 (see Rule 31.8).

**Day 46**

Day 46 means the 14th day prior to Day 60 (see Rule 32.1(c)).

**Day 53**

Day 53 means the seventh day prior to Day 60 (see Rules 2.6(d) and (e)).

**Day 60**

Day 60 means the 60th day following the publication of the initial offer document or such later date as is set pursuant to Rule 31.3.

**Dealings**

...

**NOTES ON DEALINGS****1. Indemnity and other dealing arrangements**

*Dealing arrangements of the kind referred to in Note 11 on the definition of acting in concert in relation to relevant securities which are entered into during the offer period by any offeror, the offeree company or a person acting in concert with any offeror or the offeree company must be disclosed as required by Rule 2.7(c)(~~ix~~xii), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.*

...

**Derivative**

...

**NOTE ON DEFINITION OF DERIVATIVE**

*The term "derivative" is intentionally widely defined to encompass all types of derivative transactions. However, it is not the intention of the Code to restrict transactions in, or require disclosure of, derivatives which are not connected with an offer or ~~potential~~ possible offer. The Panel will not normally regard a derivative which is referenced to a basket or index of securities, including relevant securities, as connected with an offer or ~~potential~~ possible offer if at the time of dealing the relevant securities in the basket or index represent less than 1% of the class in issue and, in addition, less than 20% of the value of the securities in the basket or index. In the case of any doubt, the Panel should be consulted.*

...

**Material official authorisation or regulatory clearance**

An official authorisation or regulatory clearance is a material official authorisation or regulatory clearance if the Panel is satisfied that the failure to obtain the authorisation or

clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

### **NOTE ON MATERIAL OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE**

A determination by the Panel that an official authorisation or regulatory clearance is a material official authorisation or regulatory clearance should not be taken as an indication that the Panel would agree that the failure to obtain the authorisation or clearance would result in circumstances of material significance to the offeror in the context of the offer for the purposes of Rule 13.5(a).

...

#### **Offer period**

...

Subject to Note 32, an offer period will end when an announcement is made that an offer has become or has been declared unconditional ~~as to acceptances~~, that a scheme of arrangement has become effective, that all announced offers have been withdrawn or have lapsed or following certain other announcements having been made (such as all publicly identified potential offerors having made a statement to which Rule 2.8 applies).

### **NOTES ON OFFER PERIOD**

...

#### **~~2.~~ Competition reference periods**

~~See Rule 12.2.~~

#### **~~32.~~ First closing date Unconditional offers**

~~Where an offer is unconditional from the outset, or becomes or is declared unconditional as to acceptances prior to the first closing date Day 21, the offer period will nevertheless continue until the first closing date Day 21.~~

...

#### **Phase 2 CMA reference**

~~A reference of an offer or possible offer to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.~~

#### **Phase 2 European Commission proceedings**

~~Proceedings initiated by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC in respect of an offer or possible offer.~~

...

#### **Reverse takeover**

...

### **NOTE ON REVERSE TAKEOVER**

The definition is of relevance only in circumstances where the offeror is a company that falls within section 3(a)(i) or (ii) of the Introduction.

...

### **Unconditional date**

The unconditional date is Day 60 or any earlier date specified by an offeror as being the latest date by which all of the conditions to the offer must be satisfied or waived.

## **Rule 2**

### **2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS**

...

**(c) The Panel must be consulted in advance if, ~~prior to announcing a firm intention to make an offer,~~ a potential offeror proposes to ~~announce~~ **include in a possible offer announcement any pre-conditions to the making of an announcement of a firm intention to make an offer.** Any such pre-conditional possible offer announcement must:**

**(i) clearly state whether or not the pre-conditions must be satisfied before a firm intention to make an offer can be ~~made~~ announced or whether they are waivable; and**

**(ii) include a prominent warning to the effect that the announcement does not amount to a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-conditions are satisfied or waived.**

...

### **2.6 TIMING FOLLOWING A POSSIBLE OFFER ANNOUNCEMENT**

...

**(d) When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement of the first offer), the potential offeror must, by 5.00 pm on ~~the 53rd day following the publication of the first offeror's initial offer document~~ Day 53, either:**

...

**(e) When an offeror has announced a firm intention to make an offer and the offeree company subsequently refers to the existence of a potential competing offeror which has not been identified, the potential competing offeror so referred to must, by 5.00 pm on ~~the 53rd day following the publication of the first offeror's initial offer document~~ Day 53, either:**

...

### **2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER**

...

**(b) Following an announcement of a firm intention to make an offer, the offeror must proceed to make the offer unless, in accordance with the provisions of Rule 13.5, it is permitted to invoke a pre-condition to the making of the offer or would be permitted to invoke a condition to the offer if the offer were made. However, with the**

consent of the Panel, an offeror need not make the offer if a competing offeror subsequently announces a firm intention to make a higher offer.

(c) When a firm intention to make an offer is announced, the announcement must include:

- (i) the terms of the offer;
- (ii) the identity of the offeror;
- (iii) all conditions or pre-conditions to which the offer or the making of an offer is subject;
- (iv) language which appropriately reflects that the offeror may only invoke any condition or pre-condition which is subject to Rule 13.5(a) with the consent of the Panel;
- (v) a statement as to which conditions and pre-conditions are not subject to Rule 13.5(a) (see Rule 13.5(c));
- (vi) a statement that any condition or pre-condition that is subject to Rule 13.5(a) may be waived by the offeror (see Rule 13.5(d));
- ~~(iv) the intentions of the offeror with regard to the business, employees and pension scheme(s) of the offeree company (see Note 1);~~
- (vii) details of any agreements or arrangements ... ;
- (viii) the intentions of the offeror with regard to the business, employees and pension scheme(s) of the offeree company (see Note 1);
- ~~(vix) details of any relevant securities of the offeree company in which the offeror or any person acting in concert with it has an interest ... ;~~
- ~~(vix) details of any irrevocable commitment ... ;~~
- ~~(vixi) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent ... ;~~
- ~~(ixxi) details of any dealing arrangement ... ;~~
- (xiii) a summary of the provisions of Rule 8 ... ;
- (xiv) a summary of any offer-related arrangement ... ;
- (xiv) a list of the documents published on a website... ; and
- ~~(xviii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend ... .~~

...

#### **NOTES ON RULE 2.7**

##### **1. Intentions of the offeror with regard to the business, employees and pension scheme(s)**

(a) For the purpose of Rule 2.7(c)(~~iv~~viii), the offeror must explain the long-term commercial justification for the offer and must state:

...

**~~2. Conditions and pre-conditions~~**

~~The Panel must be consulted in advance if a person proposes to include in an announcement:~~

~~(a) any pre-condition to which the making of an offer will be subject (see Rule 13.3);~~

~~(b) a condition or pre-condition relating to financing (see Rule 13.4); or~~

~~(c) any conditions which are not entirely objective (see Rule 13.1).~~

**32. Persons acting in concert with the offeror**

...

**43. Reservations to a previous statement in relation to the terms of a possible offer**

...

**2.10 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT**

...

**NOTES ON RULE 2.10**

**1. Disclosure in firm offer announcement**

*Where the details required to be announced under Note 3 on Rule 2.10 are, pursuant to Rule 2.7(c)(vix), included in an announcement of a firm intention to make an offer which is published no later than 12 noon on the business day following the date on which the irrevocable commitment or letter of intent is procured, no separate announcement is required under Rule 2.10(a) or (b).*

**Rule 4.5**

**4.5 RESTRICTION ON THE OFFEREE COMPANY ACCEPTING AN OFFER IN RESPECT OF TREASURY SHARES\***

**An offeree company may not accept an offer in respect of treasury shares until after the offer is unconditional as to acceptances.**

**Rule 5.2**

**5.2 EXCEPTIONS TO RESTRICTIONS**

**The restrictions in Rule 5.1 do not apply to an acquisition of an interest in shares carrying voting rights in a company by a person:**

**(a) at any time from a single shareholder if it is the only such acquisition within any period of 7 days (see also Rules 5.3 and 5.4). This exception will not apply when the person has announced a firm intention to make an offer and there is no pre-condition to which the making of an offer is subject; or**

(b) immediately before the person announces a firm intention to make an offer ~~(whether or not there is any pre-condition to which the making of an offer is subject)~~, provided that the offer will be publicly recommended by, or the acquisition is made with the agreement of, the board of the offeree company and the acquisition is conditional upon the announcement of the offer; or

(c) after the person has announced a firm intention to make an offer provided that, ~~at the time of the acquisition, there is no pre-condition to which the making of an offer is subject and:~~

...

(iii) ~~the first closing date Day 21~~ of that offer<sub>1</sub> or of any competing offer<sub>1</sub> has passed; or

(iv) that offer is unconditional ~~in all respects~~; or

## Rule 6

### RULE 6. ACQUISITIONS RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

...

#### NOTES ON RULE 6

...

#### ~~10. Competition reference period~~

~~When, under Rule 12.2(b)(ii), a new offer period begins at the time the competition reference period ends, the three month period referred to in Rule 6.1(a) will be deemed to be the competition reference period.~~

## Rule 8

### RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

...

#### NOTES ON RULE 8

...

#### 3. Method of disclosure

##### (a) Public disclosures

*Public disclosures under Rule 8 must be made to a RIS in typed format by electronic delivery and may be made by the person concerned or by an agent acting on its behalf. See also the Note on Rule 30.1 with regard to unquoted public companies and relevant private companies.*

...

## **11. Unquoted public companies and relevant private companies**

*The requirements to disclose dealings and positions under Rule 8 apply also in respect of the relevant securities of public companies whose securities are not admitted to trading and of relevant private companies. See also the Note on Rule 30.1.*

...

## **14. Irrevocable commitments and letters of intent**

*See Rule 2.7(c)(~~vii~~x) and Rule 2.10.*

## **Rule 9**

### **9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**

**Except with the consent of the Panel, when:**

...

**such person shall extend offers, on the basis set out in Rules 9.3, ~~9.4~~ and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any other class of transferable securities carrying voting rights. Offers for different classes of equity share capital must be comparable; the Panel should be consulted in advance in such cases.**

...

#### **NOTES ON RULE 9.1**

...

### **9. Triggering Rule 9 during an offer period\***

*If it is proposed to incur an obligation under this Rule during the course of a non-mandatory offer, the Panel must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule must be announced immediately. ~~If the cash is dependent upon a securities exchange, Note 3 on Rule 9.3 will be relevant.~~ (See also Rule 7.1.)*

~~Subject to Note 3 on Rule 9.3, w~~*Where no change in the consideration is involved it will be sufficient, following the announcement, simply to send a notification to offeree company shareholders and persons with information rights setting out the new number of shares in which the offeror and persons acting in concert with it are interested, of the fact that the acceptance condition (in the form required by Rule 9.3) is the only condition remaining and of the period for which the offer will remain open following the publication of the document.*

*An offer made in compliance with this Rule must remain open for not less than 14 days following the date on which the document is published and as required by Rules 31.42 and 33.1.*

...

## **10. Convertible securities, warrants and options**

...

Where there are conversion or subscription rights currently capable of being exercised, this Rule is invoked at a level of 30% of the existing voting rights. Where they are capable of being exercised during an offer period, Notes 2 and 3 on Rule 10.1 will be relevant.

...

### **9.3 RESTRICTION ON CONDITIONS AND CONSENTS**

*NB This Rule should be read in conjunction with Appendix 4.*

**Except with the consent of the Panel (see Note 3 the Note on Rule 9.4):**

**(a) an offers made under Rule 9 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 in the offeree company; and**

**(b) no acquisition of any interest in shares which would give rise to a requirement for an offer under this Rule may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.**

#### **NOTES ON RULE 9.3**

##### **1. When more than 50% is held**

*An offer made under this Rule 9 should normally be unconditional when the offeror and persons acting in concert with it hold shares carrying more than 50% of the voting rights before the offer is made.*

##### **2. Acceptance condition**

*Notes 2-7 on Rule 10.1 also apply to offers under Rule 9.*

*In the event that an offer under Rule 9 lapses because a purchase may not be counted as a result of Note 5 on Rule 10.1 and subsequently the purchase is completed, the Panel should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the percentage of shares in which the offeror and persons acting in concert with it are interested. (See also Rule 9.7.)*

...

##### **3. When dispensations may be granted**

*The Panel will not normally consider a request for a dispensation under this Rule other than in exceptional circumstances, such as:*

*(a) when the necessary cash is to be provided, wholly or in part, by an issue of new securities. The Panel will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the other conditions required by Rule 13.4(b) are not satisfied within the time required by Rule 31.7, and as a result the offer lapses, the offeror will immediately announce a firm intention to make a new cash offer in compliance with this Rule at the price required by Rule 9.5 (or, if greater, at the cash price offered under the lapsed offer); and*

*(b) when any official authorisation or regulatory clearance is required before the offer document is published. If authorisation or clearance is obtained, the offer document must be published immediately. If authorisation or clearance is not obtained, the same*

~~consequences will follow as if the merger were prohibited following a Phase 2 CMA reference or Phase 2 European Commission proceedings (see Rule 9.4).~~

~~When a dispensation is given, the offeror must endeavour to fulfil all the other conditions with all due diligence.~~

~~(See also Rule 9.7.)~~

#### **9.4 — THE CMA AND THE EUROPEAN COMMISSION**

~~Offers under this Rule must, if appropriate, contain the terms required by Rule 12.1(a) and (b).~~

##### **NOTES ON RULE 9.4**

##### **1. — If an offer lapses pursuant to Rule 12.1(a) or (b)**

~~If an offer under Rule 9 lapses pursuant to Rule 12.1(a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30% or to its original level before the obligation to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12.1(a) or (b) to proceed with all due diligence before the CMA or the European Commission. (See also Rule 9.7.) However, if, with the consent of the Panel and within a limited period, an offeror reduces the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30%, or to its original level before the obligation to offer was incurred if that was 30% or more, the Panel will regard the obligation as having lapsed.~~

##### **2. — Further acquisitions**

~~While the CMA or the European Commission is considering the case (following a Phase 2 CMA reference or the initiation of Phase 2 European Commission proceedings) where an obligation to make an offer under this Rule has been incurred, the offeror or persons acting in concert with it may not acquire any interest in further shares in the offeree company.~~

#### **9.4 RESTRICTION ON ACQUISITIONS**

**Except with the consent of the Panel, no acquisition of any interest in shares which would give rise to a requirement for an offer under Rule 9 may be made if the making or implementation of that offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or on any other conditions, consents or arrangements.**

##### **NOTE ON RULE 9.4**

##### **When a dispensation may be granted**

(a) The Panel will normally only grant a dispensation under Rule 9.4 if the share purchase agreement in relation to the acquisition of the interest in shares which would give rise to a requirement for an offer under Rule 9 is made subject to a condition relating to a material official authorisation or regulatory clearance, which is also included as a condition or pre-condition to the offer, and to no other conditions.

(b) An announcement in compliance with Rule 2.7 will be required to be made under Rule 2.2(b) immediately upon the entering into of the share purchase agreement, following

which the offeror must use all reasonable efforts to ensure the satisfaction of the condition(s) to the share purchase agreement (see Rule 13.2).

(c) The terms of the share purchase agreement must provide that the condition relating to the material official authorisation or regulatory clearance may only be invoked with the consent of the Panel, which consent will normally only be given if the circumstances which give rise to the right to invoke the condition are considered by the Panel to be of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

## 9.5 CONSIDERATION TO BE OFFERED

...

**(d) The cash offer or the cash alternative must remain open for not less than 14 days after the offer has become unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.42).**

...

## 9.6 OBLIGATIONS OF DIRECTORS

**(a) When directors (or their close relatives or the related trusts of any of them) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under Rule 9.1, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his its obligations under the Rule.**

**(b) ~~In addition, e~~ Except with the consent of the Panel, such directors should not resign from the board until ~~the first closing date of the offer Day 21~~ or the date when the offer becomes ~~wholly~~ unconditional, whichever is the later.**

## Rule 10

### RULE 10. THE ACCEPTANCE CONDITION\*

*NB This Rule should be read in conjunction with Appendix 4.*

#### **10.1 REQUIREMENT FOR 50% ACCEPTANCE CONDITION**

~~It must be a condition of a~~ Any offer for voting equity share capital or for other transferable securities carrying voting rights which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting rights of the offeree company **must include an acceptance condition that is not capable of being satisfied that the offer will not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights.**

#### **NOTES ON RULE 10.1**

...

#### **2. New shares**

*For the purpose of the acceptance condition, the offeror must take account of all shares carrying voting rights which are unconditionally allotted or issued before the offer becomes or is declared unconditional as to acceptances acceptance condition is satisfied, whether pursuant to the exercise of conversion or subscription rights or otherwise. If in any case, for*

example, as a result of a rights issue, shares have been allotted in renounceable form (even if provisionally), the Panel should be consulted.

...

#### 4. Acceptances

NB1 Attention is drawn to Note 6 below which will be relevant ~~if in determining whether an acceptance condition is to be fulfilled has been satisfied (or is capable of being satisfied) before the final closing date unconditional date.~~

...

An acceptance may not be counted towards ~~fulfilling the satisfaction of an acceptance condition unless:~~

(a) if it is to be effected by means of CREST without an acceptance form, the transfer to the relevant member's escrow account has settled in respect of the relevant number of shares on or before ~~the last time for acceptance set out in the offeror's relevant document or announcement unconditional date;~~ or,

if it is to be effected by means of an acceptance form, both:

(b) it is received by the offeror's receiving agent on or before ~~the last time for acceptance set out in the offeror's relevant document or announcement unconditional date~~ and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received or relevant escrow transfers identified; and

(c) the acceptance form is completed to a suitable standard (see below) and is:

...

(iii) from a registered holder or ~~his~~ ~~the registered holder's~~ personal representatives (but only up to the amount of the registered holding as at the ~~final time for acceptance unconditional date~~ and only to the extent that the acceptance relates to shares which are not taken into account under another sub-paragraph of this paragraph (c)); or

...

If the acceptance form is executed by a person other than the registered holder, appropriate evidence of authority (eg grant of probate or certified copy of a power of attorney) must be produced as required by the practice set out in the ICSA Manual.

An acceptance which has been withdrawn must not be counted towards satisfying an acceptance condition.

#### 5. Purchases

NB attention is drawn to Note 6 below which will be relevant ~~if in determining whether an acceptance condition is to be fulfilled has been satisfied (or is capable of being satisfied) before the final closing date unconditional date,~~ and also to Note 8 below which will be relevant if the offeror has borrowed any offeree company shares.

A purchase of shares by an offeror or its nominee (or in the case of a Rule 9 offer, a person acting in concert with the offeror, or its nominee) may be counted towards ~~fulfilling the satisfaction of an acceptance condition only if:~~

...

**6. ~~Offers becoming or being declared unconditional as to acceptances~~  
Satisfaction of the acceptance condition before the final closing date  
unconditional date**

*In determining whether an acceptance condition has been ~~fulfilled~~ satisfied (or is capable of being satisfied) before the ~~final closing date~~ unconditional date, all acceptances and purchases that comply with the requirements of Notes 4 and 5 on Rule 10.1 may be counted, other than those which fall within paragraph (c)(iii) of Note 4 or Note 8.*

**7. Offeror's receiving agent's certificate**

*Before an offer may become or be declared unconditional as to acceptances the acceptance condition can be satisfied or the offer can lapse as a result of the acceptance condition not have been satisfied (or being regarded as incapable of satisfaction), the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the number of acceptances which have been received which comply with Note 4 on Rule 10.1 and the number of shares otherwise acquired, whether before or during an offer period, which comply with Note 5 on Rule 10.1 and, in each case, if appropriate, Note 6 on Rule 10.1, but which do not fall within Note 8 on Rule 10.1.*

*Copies of the receiving agent's certificate must be sent to the Panel and the offeree company's financial adviser by the offeror or its financial adviser as soon as possible after it is issued.*

**8. Borrowed shares**

*Except with the consent of the Panel, shares which have been borrowed by the offeror may not be counted towards ~~fulfilling~~ satisfying an acceptance condition.*

**10.2 SATISFACTION OF THE ACCEPTANCE CONDITION**

**Except with the consent of the Panel, the acceptance condition must not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived.**

**NOTE ON RULE 10.2**

**When a dispensation may be granted**

*The Panel will normally grant a dispensation from the requirement in Rule 10.2 where another condition is not capable of being satisfied until after the acceptance condition has been satisfied (such as a condition relating to the admission to listing and/or admission to trading of the securities being offered as consideration).*

**Rule 11**

**11.1 WHEN A CASH OFFER IS REQUIRED**

...

**NOTES ON RULE 11.1**

...

**~~12.~~ Competition reference period**

~~If an offer is announced pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for cash during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of Rule 11.1(b).~~

## 11.2 WHEN A SECURITIES OFFER IS REQUIRED

...

### NOTES ON RULE 11.2

...

#### 7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 2, 5, 6, 7, 8, 10 and 11 on Rule 11.1 which may be relevant.

~~In addition, if an offer is announced pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for securities during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of this Rule.~~

## Rule 12

### RULE 12. THE CMA AND THE EUROPEAN COMMISSION

#### ~~12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER~~

~~(a) Where an offer comes within the statutory provisions for a possible Phase 2 CMA reference, it must be a term of the offer that:~~

~~(i) in the case of a contractual offer, the offer will lapse if there is a Phase 2 CMA reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or~~

~~(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if there is a Phase 2 CMA reference before the shareholder meetings (as defined in Appendix 7).~~

~~(b) Where an offer would give rise to a concentration with an EU dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that if Phase 2 European Commission proceedings are initiated:~~

~~(i) in the case of a contractual offer, the offer will lapse if this occurs before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or~~

~~(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if this occurs before the shareholder meetings (as defined in Appendix 7).~~

~~(c) Except in the case of an offer under Rule 9, the offeror may, in addition, make the offer conditional on a decision being made that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings. In such a case, the condition may state that the decision must be on terms satisfactory to the offeror.~~

#### NOTE ON RULE 12.1

***The effect of lapsing\****

*The offer document must make it clear that the reference to the offer lapsing means not only that the offer will cease to be capable of further acceptance but also that shareholders and the offeror will thereafter cease to be bound by prior acceptances.*

*\*This Note is disapplied in a scheme.*

**12.2 COMPETITION REFERENCE PERIODS**

~~(a) When there is a Phase 2 CMA reference or Phase 2 European Commission proceedings are initiated, the offer period will end except in the following circumstances:~~

~~(i) when the offer was announced subject to a pre-condition as permitted under Rule 13.3(b); or~~

~~(ii) in the case of an offer being implemented by way of a scheme of arrangement, where the Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings does not cause the offer to lapse as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.~~

~~(b) If the offer period ends in accordance with Rule 12.2(a):~~

~~(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:~~

~~(A) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);~~

~~(B) acquire any interest in shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer;~~

~~(C) acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with it, would be interested and the shares in respect of which it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;~~

~~(D) make any statement which raises or confirms the possibility that an offer might be made for the offeree company;~~

~~(E) take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the offeror and its immediate advisers; or~~

~~(F) purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company;~~

~~(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):~~

~~(A) any cleared offeror or potential offeror must, normally within 21 days of the offer's being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in accordance with Rule 2.7 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies; and~~

~~(B) a new offer period will begin and, if no announcement of a new offer is made within the 21 day period referred to above, will end when each cleared offeror or potential offeror has announced that it does not intend to make an offer; and~~

~~(iii) where the competition reference period ends when either the CMA or the Secretary of State issues a prohibition decision or when the European Commission issues a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.~~

## **NOTES ON RULE 12.2**

### **1. — Certain restrictions disapplied while clearance is being sought**

~~The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).~~

~~NB Rule 2.2(e) will continue to apply in these circumstances.~~

### **2. — After a reference or initiation of proceedings**

~~Following the ending of an offer period on a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.7 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 21.3 and 38.2).~~

### **3. — Offers announced subject to a pre-condition as permitted under Rule 13.3(b)**

~~When an offer was announced subject to a pre-condition as permitted under Rule 13.3(b) and either a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period will not end. However, during the competition reference period, the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so.~~

### **4. — Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority**

~~Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.~~

### **5. — Significant asset purchases**

~~In assessing whether assets are significant for the purpose of Rule 12.2(b)(i)(F), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.~~

## RULE 12. LONG-STOP DATE\*

### 12.1 INCLUSION OF A LONG-STOP DATE

(a) The offeror must include a term in the firm offer announcement and in the offer document that the offer will not proceed, will lapse or will be withdrawn on a specific date (a "long-stop date"):

(i) if sufficient acceptances have not been received so as to enable to acceptance condition to be satisfied (other than in the case of a pre-conditional offer); or

(ii) with the consent of the Panel, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived.

(b) If the offer is not recommended by the board of the offeree company, the Panel must be consulted prior to the publication of the firm offer announcement as to the date of the long-stop date. In such circumstances, the Panel will normally require the long-stop date to be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied.

### 12.2 WHEN CONSENT MAY BE GIVEN UNDER RULE 12.1

The Panel will normally give its consent under Rule 12.1(a)(ii) if it is satisfied, as at the long-stop date, that the outstanding official authorisation or regulatory clearance is a material official authorisation or regulatory clearance, and provided that either:

(a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or

(b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

### 12.3 EXTENSION OF A LONG-STOP DATE

Except with the consent of the Panel, the long-stop date may only be extended by the offeror with the agreement of the offeree company.

#### NOTE ON RULE 12

Where a determination under Rule 12 remains outstanding on the long-stop date

If a question as to whether the Panel will give its consent under Rule 12.1(a)(ii) remains outstanding on the long-stop date, the offeror will not normally be permitted to lapse or withdraw the offer pending the final determination of the issue.

\*Rule 12 is disapplied in a scheme. See Appendix 7.

## Rule 13

### RULE 13. PRE-CONDITIONS IN FIRM OFFER ANNOUNCEMENTS AND OFFER CONDITIONS AND PRE-CONDITIONS TO AN OFFER

...

### ~~13.2 THE CMA AND THE EUROPEAN COMMISSION~~

~~Neither a condition included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) will be subject to the provisions of Rules 13.1 or 13.5(a).~~

### 13.2 REQUIREMENT TO USE ALL REASONABLE EFFORTS

Following the announcement of a firm intention to make an offer, an offeror must use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.

### 13.3 ACCEPTABILITY OF PRE-CONDITIONS

(a) The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the making of an offer will be subject.

(b) Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition:

~~(a) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings;~~

~~(b) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings or, if there is such a reference or initiation of proceedings, a decision by the relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror); or~~

~~(c) involves another material an official authorisation or regulatory clearance relating to the offer and either:~~

~~(i) the offer is publicly recommended by the board of the offeree company agrees to the pre-condition; or~~

~~(ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable is a material official authorisation or regulatory clearance.~~

~~(See Note 2 on Rule 2.7.)~~

### 13.4 FINANCING CONDITIONS AND PRE-CONDITIONS

(a) ...

(b) Where the offer is for cash, or includes an element of cash, and the offeror proposes to finance the cash consideration by an issue of new securities, the offer must be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading (see Note). ~~Conditions which will normally be considered necessary for such purposes include:~~

~~(i) the passing of any resolution necessary to create or allot the new securities and/or to allot the new securities on a non-pre-emptive basis (if relevant); and~~

~~(ii) — where the new securities are to be admitted to listing or to trading on any investment exchange or market, any necessary listing or admission to trading condition (see also Rule 24.10).~~

Any sSuch conditions must not be waivable and the Panel must be consulted in advance.

(c) ...

(d) ...

#### **NOTE ON RULE 13.4**

#### **Conditions necessary for the issue, listing or admission to trading of new securities**

Conditions which will normally be considered necessary for the purposes of issuing new securities or having them listed or admitted to trading include:

(a) a condition relating to the passing of any resolution necessary to create or allot the new securities and/or to allot the new securities on a non-pre-emptive basis (if relevant); and

(b) where the new securities are to be admitted to listing or to trading on any investment exchange or market, any condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities (see also Rule 24.10).

#### **13.5 INVOKING CONDITIONS AND PRE-CONDITIONS**

(a) ~~An offeror should not~~ may only invoke any a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn ~~unless with the consent of the Panel. The firm offer announcement and the offer document must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise. The acceptance condition is not subject to this provision.~~

~~(b) Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.~~

(b) The following will not be subject to Rule 13.5(a):

(i) the acceptance condition (see Rules 9.3 and 10.1);

(ii) a condition relating to the approval of a scheme of arrangement by the offeree company's shareholders or to the sanctioning of the scheme by the court;

(iii) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);

(iv) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the issuance, listing and/or admission to trading of those securities (see the Note on Rule 13.4);

(v) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association (or equivalent), for the offeror's shareholders to approve the implementation of the offer;

(vi) a term relating to the long-stop date of a contractual offer (but see the separate requirements of Rules 12.1 and 12.2);

(vii) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (see Sections 3(b) and (c) of Appendix 7 and also the separate requirements of Section 3(g) of Appendix 7); and

(viii) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.

(c) The firm offer announcement and the offer document must state which conditions and, in the case of a firm offer announcement, pre-conditions are not subject to Rule 13.5(a).

(d) The firm offer announcement and the offer document must state that any condition or, in the case of a firm offer announcement, pre-condition that is subject to Rule 13.5(a) may be waived by the offeror.

## 13.6 INVOKING OFFEREE PROTECTION CONDITIONS

...

### NOTES ON RULE 13.6

**1. — When an offeree protection condition may be invoked**

...

**2. — Availability of withdrawal rights\***

*If the offeree company is not permitted to invoke, or to cause or permit the offeror to invoke, a condition, the Panel may instead determine in the light of all relevant facts that accepting shareholders should have the right to withdraw their acceptances on such terms as the Panel considers appropriate and, if so, the effect of this on the Code timetable. The ability of the Panel to require the introduction of withdrawal rights in such circumstances and to amend the Code timetable, and also the fact that the offer may cease to be unconditional as to acceptances as a result of such withdrawal rights being introduced, should be incorporated into the terms of the offer.*

*\*This Note is disapplied in a scheme.*

## Rule 17

### RULE 17. ANNOUNCEMENT OF ACCEPTANCE LEVELS\*

#### 17.1 TIMING AND CONTENTS

(a) An offeror must make an announcement including the details set out in Rule 17.2 Bby 8.00 am at the latest on the business day following the day on which an offer is due to expire, or becomes or is declared unconditional as to acceptances, or

is revised or extended, an offeror must make an appropriate announcement each of the following days:

- (i) Day 21 and every seventh day thereafter;
- (ii) any day on which an offer is revised;
- (iii) each day in the week leading up to, and including, the unconditional date or the long-stop date;
- (iv) any day on which an acceptance condition invocation notice expires;
- (v) any day on which the offer becomes or is declared unconditional or lapses; and
- (vi) any day on which, as at 5.00 pm, the total percentage of shares which the offeror may count towards satisfaction of the acceptance condition has increased or decreased to, or through, any of the following thresholds:
  - (A) the percentage threshold to which the acceptance condition is currently subject;
  - (B) 75% of the shares carrying voting rights in the offeree company; and
  - (C) if the threshold in (A) can be reduced to a specified minimum threshold, that threshold.

(b) An offeror must also include the details set out in Rule 17.2 in any announcement which includes:

- (i) an acceptance condition invocation notice; or
- (ii) an acceleration statement.

## 17.2 CONTENTS

(a) The An announcement made pursuant to Rule 17.1 must state:

- (ai) the number of shares for which acceptances of the offer have been received, specifying the extent to which acceptances have been received from persons acting in concert with the offeror or in respect of shares which were subject to an irrevocable commitment or a letter of intent procured by the offeror or any person acting in concert with the offeror;
- (bii) details of any relevant securities of the offeree company in which the offeror or any person acting in concert with it has an interest or in respect of which ~~he~~ either of them has a right to subscribe, in each case specifying the nature of the interests or rights concerned (see Note 5 on Rule 8). Similar details of any short positions (whether conditional or absolute and whether in the money or otherwise), including any short position under a derivative, any agreement to sell or any delivery obligation or right to require another person to purchase or take delivery, must also be stated;
- (eiii) details of any relevant securities of the offeree company in respect of which the offeror or any person acting in concert with it has an outstanding irrevocable commitment or letter of intent (see Note 3 on Rule 2.10); and

(div) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent, save for any borrowed shares which have been either on-lent or sold,

and must specify the percentages of each class of relevant securities represented by these figures. (See also Rule 31.2.)

(b) Any announcement made pursuant to this Rule 17.1 must include a prominent statement of the total numbers of shares which the offeror may count towards the satisfaction of its acceptance condition and must specify the percentages of each class of relevant securities represented by these figures. The Panel should be consulted if the offeror wishes to make any other statement about acceptance levels in any announcement made pursuant to this Rule 17.1.

### **17.3 GENERAL STATEMENTS ABOUT ACCEPTANCE LEVELS**

If, during an offer, any statement, either oral or in writing, is made by an offeror or its advisers about the level of acceptances of the offer or the number or percentage of shareholders who have accepted the offer, an immediate announcement must be made in conformity with Rule 17.2.

#### **NOTES ON RULE 17.4**

##### **~~1. Acceptances of cash underwritten alternatives~~**

~~Acceptances of cash underwritten alternatives do not come within this Rule.~~

##### **~~2. General statements about acceptance levels~~**

~~If, during an offer, any statements, either oral or in writing, are made by an offeror or its advisers about the level of acceptances of the offer or the number or percentage of shareholders who have accepted the offer, an immediate announcement must be made in conformity with this Rule.~~

##### **~~3. Alternative offers~~**

~~An announcement under this Rule is also required on the business day following the day on which an alternative offer is due to expire, even if the offer itself is not due to expire at that time.~~

##### **~~4. Unlisted companies~~**

~~In the case of companies whose securities are not admitted to listing or admitted to trading, it will normally be permissible to send a notification to all shareholders and persons with information rights instead of making an announcement.~~

##### **~~51. Statements about withdrawals~~**

~~When the offeree company is proposing to draw attention to withdrawals of acceptance, the Panel must be consulted before any announcement is made.~~

##### **~~62. Incomplete acceptances and offeror purchases~~**

~~Acceptances not complete in all respects and purchases must only be included in the statement required under this Rule of the total number of shares which the offeror may count towards the satisfaction of its acceptance condition where they could be counted towards fulfilling satisfying an acceptance condition under Notes 4, 5 and 6 on Rule 10.1.~~

### 3. Suspension of offer timetable

The requirement to make announcements under Rule 17.1(a)(i) will not normally apply for the duration of any suspension of the offer timetable pursuant to Rule 31.4(a). The requirement under Rule 17.1(a)(i) will resume when the offer timetable resumes and the offeror must accordingly make an announcement including the details set out in Rule 17.2 by no later than 8.00 am on the business day following the date of the announcement made under Rule 31.4(d).

#### ~~17.2 CONSEQUENCES OF FAILURE TO ANNOUNCE~~

~~(a) If an offeror, having announced the offer to be unconditional as to acceptances, fails by 3.30 pm on the relevant day to comply with any of the requirements of Rule 17.1, immediately thereafter any acceptor will be entitled to withdraw his acceptance. Subject to Rule 31.6, this right of withdrawal may be terminated not less than 8 days after the relevant day by the offeror confirming, if such is the case, that the offer is still unconditional as to acceptances and complying with Rule 17.1.~~

~~(b) For the purpose of Rule 31.4, the offer must remain open for acceptance for not less than 14 days after the date of such confirmation and compliance.~~

#### Rule 18

#### **RULE 18. THE USE OF PROXIES AND OTHER AUTHORITIES IN RELATION TO ACCEPTANCES\***

...

(a) the proxy may not vote, the rights may not be exercised and no other action may be taken unless the offer is wholly unconditional or, in the case of voting by the proxy, the resolution in question concerns the last remaining condition of the offer (other than any condition covered by Rule 24.10) and the offer will become wholly unconditional (save, where relevant, for the satisfaction of any condition covered by Rule 24.10) or lapse depending upon the outcome of that resolution;

#### Rule 19.7

#### ~~19.7 INFORMATION PUBLISHED FOLLOWING THE ENDING OF AN OFFER PERIOD PURSUANT TO RULE 12.2~~

~~The requirements of the Code relating to the publication of information do not normally apply once an offer period has ended pursuant to Rule 12.2(a). However, if thereafter the merger is allowed and, as a result, the offeror announces a further offer, the Panel may require that statements (including valuations of assets) made during the competition reference period be substantiated or, if this is not possible, withdrawn. Consequently, the parties to an offer must take care to ensure that any statements made during the competition reference period are capable of substantiation.~~

## Rule 20

### 20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS AND PERSONS WITH INFORMATION RIGHTS

...

#### NOTES ON RULE 20.1

...

#### 4. Investment analyst publications

...

~~(c) When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). Firms to which this Note applies must, however, consult the Panel about the publication of information 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.~~

...

### 20.5 ADVERTISEMENTS

...

#### (c) The categories are as follows:

...

(iii) advertisements which contain only factual information in relation to an offer (for example, reminders as to ~~closing dates and times~~ the unconditional date or the value of an offer) and not any argument or opinion in relation to an offer;

## Rule 21

### 21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

...

#### NOTES ON RULE 21.1

...

#### 2. Material amount

...

~~(c) Subject to Note 4,~~ Relative values of 10% or more will normally be regarded as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.

...

#### **~~4. The CMA and the European Commission~~**

~~When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). 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.~~

#### **~~54. Service contracts~~**

...

#### **~~65. Established share option schemes~~**

...

#### **~~76. Pension schemes~~**

...

#### **~~87. Inducement fees~~**

...

### **21.2 OFFER-RELATED ARRANGEMENTS**

...

#### **NOTES ON RULE 21.2**

##### **1. Competing offerors**

...

(b) any inducement fee is capable of becoming payable only if an offer becomes or is declared ~~wholly~~ unconditional.

...

### **21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS**

...

#### **NOTES ON RULE 21.3**

...

#### **~~5. The CMA and the European Commission~~**

~~When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). The Panel will, however, continue to apply Rule 21.3 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.~~

**65. Information given to a purchaser of assets**

...

**Rule 24****24.1 THE OFFER DOCUMENT**

...

**NOTE ON RULE 24.1****Pre-conditional offers**

Where an offeror announces a firm intention to make an offer subject to one or more pre-conditions in accordance with Rule 13.3, the Panel will normally require the offer document to be published within 28 days of the last remaining pre-condition being either satisfied or waived.

...

**24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER**

...

(d) the offer document (including, where relevant, any revised offer document) must include:

...

(v) the terms of the offer, including the consideration offered for each class of security, the total consideration offered and particulars of the way in which the consideration is to be paid in accordance with Rule 31.89 or, in the case of a scheme of arrangement, Section 10 of Appendix 7;

(vi) all conditions to which the offer is subject;

(vii) language which appropriately reflects that the offeror may only invoke any condition which is subject to Rule 13.5(a) with the consent of the Panel;

(viii) a statement as to which conditions are not subject to Rule 13.5(a) (see Rule 13.5(c));

(ix) a statement that any condition that is subject to Rule 13.5(a) may be waived by the offeror (see Rule 13.5(d));

~~(vix)~~ particulars of all documents required, and procedures to be followed, for acceptance of the offer ... ;

~~(vixi)~~ the middle market quotations for the securities to be acquired ... ;

~~(ixii)~~ details of any agreements or arrangements ... ;

(xiii) details of any irrevocable commitment ... ;

(xiv) in the case of a securities exchange offer, full particulars of the securities being offered ... ;

(xiiiv) a summary of the provisions of Rule 8 ... ;

(xviii) the national law which will govern contracts ... ;

(xivii) the compensation (if any) offered for ... ;

(xviii) any post-offer undertaking ... ;

(xvix) a summary of any offer-related arrangement ... ;

(xvix) a list of the documents which the offeror has published on a website ... ; and

(xvixi) any profit forecast or quantified financial benefits statement ... ;

...

## 24.7 INCORPORATION OF OBLIGATIONS AND RIGHTS\*

The offer document must state the time allowed for acceptance of the offer and any alternative offer and must incorporate language which appropriately reflects Notes 4–8 on Rule 10.1 and those parts of Rules 13.5(a), 13.6 (if applicable), 17 and 31–34 which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.

### NOTES ON RULE 24.7

#### 1. *Incorporation by reference*

A suitable cross reference to Notes 4–6 and Note 8 on Rule 10.1 is regarded as being sufficient appropriately to reflect those Notes but cross references to other provisions of the Code are not permitted.

#### 2. *Rule 31.67(db)*

Rule 24.7 does not apply to the requirement, imposed by Rule 31.67(db), that an announcement as to whether the offer is unconditional ~~as to acceptances~~ or has lapsed should be made by 5.00 pm on ~~the final closing date~~ unconditional date. Accordingly this requirement should not be reflected in the terms of the offer.

...

## 24.14 ~~CASH UNDERWRITTEN ALTERNATIVES WHICH MAY BE SHUT OFF\*~~

~~The procedure for acceptance of a cash underwritten alternative which is capable of being shut off must be prominently stated in relevant documents and acceptance forms. In particular, it must be made clear (in the offer document, the acceptance form and any subsequent documents) whether shareholders must lodge their certificates by the closing date of the cash underwritten alternative, in addition to their completed acceptance forms, in order to receive cash.~~

~~\*This Rule is disapplied in a scheme.~~

...

**24.174 DIVIDENDS**

...

**Rule 25****25.1 THE OFFEREE BOARD CIRCULAR**

(a) Except with the consent of the Panel, the board of the offeree company must, ~~within 14 days of the publication of the offer document~~ by no later than Day 14, send a circular to shareholders in the offeree company and persons with information rights, in accordance with Rule 30.2.

...

**25.9 EMPLOYEE REPRESENTATIVES' OPINION AND PENSION SCHEME TRUSTEES' OPINION**

...

(b) Where any such opinion is received but not in good time before publication of the offeree board circular, the offeree company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared ~~wholly~~ unconditional.

**Rule 26****RULE 26. DOCUMENTS TO BE PUBLISHED ON A WEBSITE**

...

**26.2 DOCUMENTS TO BE PUBLISHED ON A WEBSITE FOLLOWING THE ANNOUNCEMENT OF A FIRM OFFER**

The following documents must be published on a website promptly following the publication of the announcement of a firm intention to make an offer (or, if later, the date of the relevant document) and in any event by no later than 12 noon on the following business day:

...

(e) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer (Rule 2.7(c)(vii)).

...

**NOTES ON RULE 26****1. *Period for which documents etc. to be made available***

*Each document, announcement or information required to be published on a website under Rule 26 must continue to be made available on a website free of charge until the end of the*

~~offer (including any related competition reference period). Documents, announcements and information published following the end of the offer period which do not relate directly to the offer will not be required to be published on the website.~~

## Rule 27.2

### 27.2 SUBSEQUENT DOCUMENTS

...

**(b)** In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

...

**(vi)** any agreements or arrangements which relate to the invocation of the conditions to its offer (Rule 24.3(d)(~~ix~~**xii**));

**(vii)** irrevocable commitments and letters of intent (Rule 24.3(d)(**xiii**));

**(viii)** post-offer undertakings (Rule 24.3(d)(**xviii**));

**(ix)** any offer-related arrangements etc. permitted under, or excluded from, Rule 21.2 (Rule 24.3(d)(~~xvix~~));

**(x)** profit forecasts and quantified financial benefits statements (Rule 24.3(d)(~~xviii~~**xi**));

## Rule 30.1

### 30.1 ANNOUNCEMENTS TO BE PUBLISHED VIA A RIS

...

#### **NOTE ON RULE 30.1**

#### **Unquoted public companies and relevant private companies**

(a) The Panel will normally grant a dispensation from the requirement for announcements to be published via a RIS where the relevant securities in the offeree company are not admitted to trading, provided that the offeree company agrees to publish all relevant announcements on its website. Any such dispensation will not apply to the announcements which commence and end the offer period, which must be published in accordance with Rule 30.1(a).

(b) In such circumstances, the Panel will also normally grant a dispensation from the requirements of Note 3 on Rule 8, such that public disclosures made under Rule 8 may be made to the offeree company and published on its website rather than being made via a RIS.

## Rule 31

## RULE 31. TIMING OF THE OFFER\*

*\*This Rule is disapplied in a scheme. See Appendix 7.*

**31.1 DAY 60 AND THE UNCONDITIONAL DATE**

**(a) Except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60.**

**(b) An offeror which wishes to specify an unconditional date in the initial offer document which is earlier than Day 60 must consult the Panel in advance and will normally be treated as having made an acceleration statement.**

**31.12 ~~FIRST CLOSING DATE~~ PERIOD FOR WHICH THE OFFER MUST REMAIN OPEN FOR ACCEPTANCE**

**(a) An offer must initially be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses at least 21 days following the date on which the offer document is published.**

**31.2 FURTHER CLOSING DATES TO BE SPECIFIED**

~~In 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. In the latter case, or if the offer will remain open for acceptances beyond the 70th day following the publication of the offer document, at least 14 days' notice must be given, before the offer is closed, to those shareholders who have not accepted by sending a notification to offeree company shareholders and persons with information rights.~~

**31.3 NO OBLIGATION TO EXTEND**

~~There is no obligation to extend an offer if the acceptance condition has not been satisfied by the first or any subsequent closing date.~~

**31.4 OFFER TO REMAIN OPEN FOR 14 DAYS AFTER UNCONDITIONAL AS TO ACCEPTANCES**

**(b) In addition, Aafter an offer has becomes or is declared unconditional as to acceptances, the offer it must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired (see Rules 33.1 and 33.2) and the offeror must give at least 14 days' notice before the offer is closed.**

**(c) Subject to paragraph (a), Wwhen, however, an offer is unconditional as to acceptances from the outset, a 14 day extension is not required but not subject to an acceptance condition it is not required to remain open for acceptance in accordance with paragraph (b), provided that the position should be is set out clearly and prominently in the offer document.**

**(d) When an offer becomes or is declared unconditional and remains open for acceptance until further notice, a notification must be sent to offeree company shareholders and persons with information rights at least 14 days before the offer is closed.**

### **31.3 EXTENSIONS TO DAY 60**

**The Panel will normally only extend Day 60 beyond the 60th day following the publication of the initial offer document:**

- (a) if a competing firm offer has been announced (see Note 1); or**
- (b) if the board of the offeree company consents to an extension; or**
- (c) as provided for in Rule 31.4 (Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding); or**
- (d) as provided for in Rule 31.8 (Offeree company announcements after Day 39); or**
- (e) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.1.**

#### **NOTES ON RULE 31.3**

##### **1. Timetable for competing firm offers**

*If a competing firm offer has been announced, Day 60 for both offerors will normally be set by reference to the publication of the later offer document. In addition, the Panel may extend Day 60 to allow for any auction procedure under Rule 32.5. See also the Note on Rule 31.4.*

##### **2. Day 46**

*If the Panel extends Day 60 after Day 46 has passed, the offeror will normally be able to revise its offer by no later than the new Day 46, provided that it is not prevented from doing so by the terms of an acceleration statement or a no increase statement.*

*The Panel will not normally extend Day 60 under Rule 31.3(b) after Day 46 has passed where competing offers have been made.*

### **31.4 SUSPENSION OF OFFER TIMETABLE IF AN OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE REMAINS OUTSTANDING**

**(a) If one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5.00 pm on the second day prior to Day 39, the Panel will normally suspend the offer timetable:**

- (i) at the joint request of the offeror and the offeree company; or**
- (ii) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to a material official authorisation or regulatory clearance.**

**(b) A suspended offer timetable will resume on the date on which the last condition relating to a relevant official authorisation or regulatory clearance is satisfied or waived, which will normally become the 28th day prior to Day 60.**

**(c) With the consent of the offeree company, a suspended offer timetable may be resumed without the offeror being required to waive any unsatisfied condition relating to an official authorisation or regulatory clearance, in which case the offer timetable will normally resume on the 28th day prior to Day 60.**

**(d) Where an offer timetable resumes in accordance with paragraph (b) or (c), the offeror must make an immediate announcement confirming the new Day 60.**

**NOTE ON RULE 31.4****Competing offers**

If there are two or more competing offers and the offer timetable is suspended under Rule 31.4(a), the offer timetable will normally be suspended for all the offerors and will normally only resume when it is resumed by the last offeror in accordance with Rule 31.4(b) or (c). Alternatively, an offeror may bring forward the unconditional date of its offer by making an acceleration statement.

**31.5 ~~NO EXTENSION~~ ACCELERATION STATEMENTS**

~~(a) A “no extension statement” is a statement that an offer will not be extended beyond a specified date unless it is unconditional as to acceptances.~~

(a) Where an offeror makes an acceleration statement, the new unconditional date must be not less than 14 days from the date on which the acceleration statement is made.

(b) An acceleration statement must state that the offeror has waived any and all unsatisfied conditions relating to any official authorisation or regulatory clearance.

(c) If an offeror makes an acceleration statement prior to Day 39, Rule 31.8(a) will be disapplied and there will therefore be no restriction on the date by which the board of the offeree company may announce any material new information.

(d) If an offeror makes an acceleration statement, Rules 2.6(d) and (e) will be disapplied and there will therefore be no requirement for a potential competing offeror to clarify its position by no later than Day 53.

~~(be) If an offeror (or its directors, officials or advisers) makes a no extension an acceleration statement, and that statement is not withdrawn immediately if incorrect, the offeror will not be allowed subsequently to extend its offer beyond the stated date set the statement aside, except:~~

- ~~(i) where the right to do so in certain circumstances is specifically reserved at the time the no extension acceleration statement is made and those circumstances subsequently arise; or~~
- ~~(ii) in wholly exceptional circumstances.~~

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

(g) If any of an offeror’s directors, officials or advisers makes a statement that a new unconditional date will be set, and that statement is not withdrawn immediately if incorrect, the offeror will be required to make an acceleration statement.

(h) An acceleration statement must be published in accordance with Rule 30.1.

~~(d) The provisions of Rule 31.4 will apply in any event.~~

**NOTES ON RULE 31.5**

*(See also Rule 31.6)*

## **1. Reservation of the right to set a ~~no extension~~ an acceleration statement aside**

(a) ~~A no extension~~ An acceleration statement must not be subject to a reservation to set the statement aside which depends solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands.

(b) The first document published in connection with an offer in which mention is made of the ~~no extension~~ acceleration statement must contain prominent reference to any reservation to set it aside (precise details of which must also be included in the document). Any subsequent mention by the offeror of the ~~no extension~~ acceleration statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details.

(c) Notes 32 and 43 describe examples of specific types of reservation to set a ~~no extension~~ an acceleration statement aside. However, other types of reservation may also be made (for example, a reservation relating to the recommendation of an increased or improved offer by the board of the offeree company), provided that they comply with the requirements of this Note 1.

## **2. Wholly exceptional circumstances**

~~If the right to set aside a no extension statement has not been specifically reserved, the offeror will be allowed to extend its offer only in wholly exceptional circumstances (except as required by Rule 31.4).~~

## **32. Competitive situations**

~~If the circumstances specified in a reservation made in accordance with Rule 31.5(6e)(i) relate to a competitive situation arising and such a situation arises, an offeror which wishes to set aside its ~~no extension~~ acceleration statement must:~~

~~(a) make an announcement to this effect as soon as possible (and in any event within 4 business days after the ~~day~~ date of the firm announcement of the competing offer) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity; and~~

~~(b) give any shareholders who accepted the offer after the date of the ~~no extension~~ acceleration statement a right of withdrawal for a period of 8 days following the date on which the announcement is made.~~

~~(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether publicly identified or not. Other circumstances, however, may also constitute a competitive situation.)~~

## **43. Rule 31.98 announcements**

~~An offeror may reserve the right to set aside a ~~no extension~~ an acceleration statement in the event of the offeree company making an announcement of the kind referred to in Rule 31.98 after the ~~39th day~~ following the publication of the initial offer document Day 39 only if the ~~no extension~~ acceleration statement is made after that day. If such an announcement is subsequently made by the offeree company and the offeror wishes to set aside its ~~no extension~~ acceleration statement, the offeror must make an announcement to this effect as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity.~~

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

~~(a) — Except 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 published. The Panel's consent will normally only be given:~~

~~(i) — if a competing firm offer has been announced (see Note 2); or~~

~~(ii) — if the board of the offeree company consents to an extension; or~~

~~(iii) — if there is a significant delay in the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings (see Note 5); or~~

~~(iv) — as provided for in Rule 31.9; or~~

~~(v) — if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10; or~~

~~(vi) — when withdrawal rights are introduced under Rule 13.6.~~

~~(b) — Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders and persons with information rights.~~

~~(c) — For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in respect of which all relevant electronic instructions or documents (as required by Notes 4 and 5 on Rule 10) are received by its receiving agent before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 1.00 pm on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended). In the event of an extension with the consent of the Panel in circumstances other than those set out in paragraphs (a)(i) to (iv) above, acceptances or purchases in respect of which relevant electronic instructions or documents are received after 1.00 pm on the relevant date may only be taken into account with the agreement of the Panel, which will only be given in exceptional circumstances.~~

~~(d) — Except with the consent of the Panel, on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended) an announcement should be made by 5.00 pm as to whether the offer is unconditional as to acceptances or has lapsed. Such announcement should include, if possible, the details required by Rule 17.1 but in any event must include a statement as to the current position in the count. The requirement to make an announcement by 5.00 pm should not be reflected in the terms of the offer pursuant to Rule 24.7, but, if there is any question of a delay in the announcement, the Panel should be consulted as soon as practicable. Only in exceptional circumstances will the Panel agree to an offeror's request that this announcement may be made after 5.00 pm.~~

**NOTES ON RULE 31.6**

**1. — Consequential changes to the offer timetable**

*Where the Panel consents to an extension in accordance with any of Rules 31.6(a)(i) to (iv), it will normally also grant an extension to or, if appropriate, re-set "Day 39" (see Rule 31.9), "Day 46" (see Rule 32.1(c)) and "Day 53" (see Rules 2.6(d) and (e)).*

## **2. — Timetable for competing firm offers**

~~If a competing firm offer has been announced, both offerors will normally be bound by the timetable established by the publication of the competing offer document. In addition, the Panel will extend “Day 60” in accordance with any auction procedure established by the Panel in accordance with Rule 32.5.~~

## **3. — No extension under Rule 31.6(a)(ii) after “Day 46” of a competing firm offer**

~~Where competing firm offers have been made, the Panel will not normally give its consent to an extension of “Day 60” under Rule 31.6(a)(ii) unless its consent is sought before the 46th day following the publication of the competing offer document (see also Rule 32.5).~~

## **4. — Extension of “Day 60” after “Day 46”**

~~The Panel will normally grant an extension to “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) of an offeror’s timetable where the board of the offeree company consents to such an extension. Therefore, provided that such consent is obtained, and subject to no unreserved “no extension statement” (see Rule 31.5) or “no increase statement” (see Rule 32.2) having been made, the offeror will normally be able to revise its offer, notwithstanding that the original “Day 46” has passed.~~

~~Where an offeror has made an offer and it has been announced that a potential offeror might make a competing offer (see Rules 2.6(d) and (e)), the Panel will normally, at the request of the first offeror and with the consent of the board of the offeree company, consent to an extension of “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) as described above. In such cases, the Panel will normally also require a corresponding extension to, or re-setting of, “Day 53”, being the date by which the potential competing offeror is required to confirm its position in accordance with Rule 2.6(d) or (e) (as applicable).~~

## **5. — The CMA and the European Commission**

~~In the case of an extension in accordance with Rule 31.6(a)(iii), the Panel will normally extend “Day 39” to the second day following the announcement of the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings.~~

## **6. — Where a Code matter remains outstanding on the final closing date**

~~When there is a Code matter outstanding on the final closing date, it may be inappropriate for the offer to become or be declared unconditional as to acceptances or to lapse at that time. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.6(a), consent to the offer being extended, but with no extension of the time by which all relevant electronic instructions or documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule 31.6(c) and Rule 34.1.~~

## **31.6 ACCEPTANCE CONDITION INVOCATION NOTICE**

**(a) If an offeror intends to invoke the acceptance condition so as to cause the offer to lapse on a date which is:**

- (i) on or after Day 21; and**
- (ii) earlier than the unconditional date,**

**it must publish a notice of its intention to do so, specifying the relevant date (an “acceptance condition invocation notice”).**

**(b) An acceptance condition invocation notice must:****(i) be published at least 14 days prior to the relevant date;****(ii) be irrevocable;****(iii) specify the level of acceptances which must be received in order for the offer not to lapse on the relevant date, which level cannot be changed prior to or on the relevant date; and****(iv) be published in accordance with Rule 30.1.****(c) If the required level of acceptances has not been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will be regarded as being incapable of satisfaction and the offer must lapse.****(d) If the required level of acceptances has been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will not be regarded as having been satisfied at that time unless all other conditions to the offer have been either satisfied or waived (see Rule 10.2).****NOTE ON RULE 31.6****Prohibition on concurrent notices**

*An offeror which has published an acceptance condition invocation notice must not publish another such notice until after the relevant date specified in the first notice.*

**31.7 TIME FOR FULFILMENT OF ALL OTHER CONDITIONS**

~~Except with the consent of the Panel, all conditions 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. The Panel's consent will normally only be granted if the outstanding condition involves a material official authorisation or regulatory clearance relating to the offer and it had not been possible to obtain an extension under Rule 31.6.~~

**NOTES ON RULE 31.7****1. The effect of lapsing**

*The Note on Rule 12.1 also applies to this Rule.*

**2. Extensions**

*Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders and persons with information rights.*

**31.7 PROCEDURAL MATTERS ON THE UNCONDITIONAL DATE****(a) For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in respect of which all relevant electronic instructions or documents (as required by Notes 4 and 5 on Rule 10.1) are received by its receiving agent before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 1.00 pm on the unconditional date. In the event of an extension to Day 60 in circumstances other than those set out in paragraphs (a) to (d) of Rule 31.3,**

acceptances or purchases in respect of which relevant electronic instructions or documents are received after 1.00 pm on the relevant date may only be taken into account with the agreement of the Panel, which will only be given in exceptional circumstances.

(b) Except with the consent of the Panel, on the unconditional date an announcement should be made by 5.00 pm as to whether:

(i) the offeror has received sufficient acceptances for the acceptance condition to be satisfied; and, if so

(ii) all other conditions to the offer have been either satisfied or waived.

Such announcement should include, if possible, the details required by Rule 17.2 but in any event must include a statement as to the current position in the count. The requirement to make an announcement by 5.00 pm should not be reflected in the terms of the offer pursuant to Rule 24.7, but, if there is any question of a delay in the announcement, the Panel should be consulted as soon as practicable. Only in exceptional circumstances will the Panel agree to an offeror's request that this announcement may be made after 5.00 pm.

#### **NOTE ON RULE 31.7**

##### **Where a Code matter remains outstanding on the unconditional date**

*When there is a Code matter outstanding on the unconditional date, the offer will not normally be permitted to become or be declared unconditional or to lapse pending the final determination of the issue. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.3, consent to the offer being extended, but with no extension of the time by which all relevant electronic instructions or documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule 31.7(a) and Rule 34.1.*

#### **31.89 SETTLEMENT OF CONSIDERATION**

Except with the consent of the Panel, the consideration must be sent to accepting shareholders within 14 days of the later of:

(a) the first closing date of the offer, Day 21;

(b) the date the offer becomes or is declared wholly unconditional; ~~or~~ and

(c) the date of receipt of an acceptance complete in all respects.

#### **NOTE ON RULE 31.89**

##### **Extensions**

*Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders.*

#### **31.98 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39**

(a) The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information, including trading results, profit forecasts (including ordinary course profit forecasts), dividend forecasts, asset valuations, quantified financial benefits statements and proposals for dividend payments or for any material acquisition or

disposal, after the 39th day following the publication of the initial offer document Day 39.

(b) Where a matter which might give rise to such an announcement being made after the 39th day Day 39 is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement.

(c) If an announcement of the kind referred to in this Rule paragraph (a) is made after the 39th day Day 39, the Panel will normally be prepared to consent to an extension to "Day 46" (see Rule 32.1(c)), "Day 53" (see Rules 2.6(d) and (e)) and/or re-set "Day 60" (see Rule 31.65(a)) as appropriate.

~~(See also Note 5 on Rule 31.6.)~~

### 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 seven 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

### 32.1 PUBLICATION OF REVISED OFFER DOCUMENT

...

(c) The offer must be kept open for at least 14 days following the ~~date on which publication of~~ the revised offer document is published. Therefore, no revised offer document may be published ~~in the 14 days ending on the last day the offer is able to become unconditional as to acceptances~~ after Day 46 or, where the offeror has made an acceleration statement, after the date which is 14 days prior to the unconditional date.\* ~~(See also Rule 31.6 and the Notes on Rule 31.6.)~~

#### NOTES ON RULE 32.1

...

#### 3. When revision is not permissible\*

~~Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is published, an offeror will generally not be able to revise its offer, and An offeror must not place itself in a position where it would be required to revise its offer; in the 14 days ending on the last day its offer is able to become unconditional as to acceptances (see also Rule 31.6 and the Notes on Rule 31.6). Nor must an offeror place itself in a position where it would be required to revise its offer~~

(a) after the date referred to in Rule 32.1(c); or

(b) if it has made a no increase statement as defined in Rule 32.2.

\*~~The first sentence Paragraph (a) of Note 3 on Rule 32.1 is disappled in a scheme. See Section 7 of Appendix 7.~~

...

## **5. — Extension of “Day 60” after “Day 46”**

~~The Panel will normally grant an extension to “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) of an offeror’s timetable where the board of the offeree company consents to such an extension. Therefore, provided that such consent is obtained, and subject to no unreserved “no extension statement” (see Rule 31.5) or “no increase statement” (see Rule 32.2) having been made, the offeror will normally be able to revise its offer, notwithstanding that the original “Day 46” has passed.~~

~~Where an offeror has made an offer and it has been announced that a potential offeror might make a competing offer (see Rules 2.6(d) and (e)), the Panel will normally, at the request of the first offeror and with the consent of the board of the offeree company, consent to an extension of “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) as described above. In such cases, the Panel will normally also require a corresponding extension to, or re-setting of, “Day 53”, being the date by which the potential competing offeror is required to confirm its position in accordance with Rule 2.6(d) or (e) (as applicable).~~

## **32.2 NO INCREASE STATEMENTS**

...

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

**(d) A no increase statement must be published in accordance with Rule 30.1.**

### **NOTES ON RULE 32.2**

#### **1. Reservation of the right to set a no increase statement aside**

...

~~(c) Notes 32 and 43 describe examples of specific types of reservation to set a no increase statement aside. However, other types of reservation may also be made (for example, a reservation relating to the recommendation of an increased or improved offer by the board of the offeree company), provided that they comply with the requirements of this Note 1.~~

#### **2. — Wholly exceptional circumstances**

~~If the right to set aside a no increase statement has not been specifically reserved, the offeror will be allowed to increase or amend its offer only in wholly exceptional circumstances. The agreement of the board of the offeree company or the fact that the offer is wholly unconditional will not be regarded as wholly exceptional circumstances.~~

### **32. Competitive situations**

~~If the circumstances specified in a reservation made in accordance with Rule 32.2(b)(i) relate to a competitive situation arising and such a situation arises, an offeror which wishes to set aside its no increase statement must:~~

~~(a) — make an announcement to this effect as soon as possible (and in any event within 4 business days after the day date of the firm announcement of the competing offer) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity; and~~

~~(b) give any shareholders who accepted the offer after the date of the no increase statement a right of withdrawal for a period of 8 days following the date on which the announcement is made.\*~~

...

~~\*Paragraph (b) of Note 3 is disapplied in a scheme.~~

#### **43. Rule 31.98 announcements~~‡~~\***

~~An offeror may reserve the right to set aside a no increase statement in the event of the offeree company making an announcement of the kind referred to in Rule 31.98 after the 39th day following the publication of the initial offer document Day 39 only if the no increase statement is made after that day. If such an announcement is subsequently made by the offeree company and the offeror wishes to set aside its no increase statement, the offeror must make an announcement to this effect as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity.~~

~~‡\*This Note is disapplied in a scheme.~~

#### **54. Schemes of arrangement**

...

#### **65. Dividends**

...

### **32.6 THE OFFEREE BOARD'S OPINION AND THE OPINIONS OF THE EMPLOYEE REPRESENTATIVES AND THE PENSION SCHEME TRUSTEES**

...

#### **(b) Where ...**

**(i) ...**

**(ii) ...**

any such opinion must be appended to the circular. Where any such opinion is received but not in good time before publication of the offeree board circular, the offeree company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional.

## **Rule 33**

### **RULE 33. ALTERNATIVE OFFERS\***

#### **33.1 TIMING AND REVISION**

~~In general, †The provisions of Rules 31 and 32 apply equally to alternative offers, including cash alternatives.~~

**NOTES ON RULE 33.1****1. — Elections****33.2 “MIX AND MATCH” ELECTIONS**

~~For the purpose of this Rule, a~~An arrangement under which shareholders elect, subject to the election of other shareholders, to vary the proportion in which they are to receive different forms of consideration is not regarded as an alternative offer. Any such arrangement must remain open so that shareholders may make elections until the date on which the offer becomes or is declared unconditional and may be closed without notice thereafter. on any closing date; tThis must be clearly stated in the offer document.

**2. — Shutting off**

~~Normally, except as permitted by Rule 33.2, if an offer has become or is declared unconditional as to acceptances, all alternative offers must remain open in accordance with Rule 31.4.~~

~~In accordance with Rule 31.3, if on a closing date an offer is not unconditional as to acceptances, an alternative offer (except a cash alternative provided to satisfy the requirements of Rule 9) may be closed without prior notice. However, if, on the first closing date on which an offer is capable of being declared unconditional as to acceptances, the offer is not so declared and is extended, all alternative offers must, except as permitted by Rule 33.2, remain open for 14 days thereafter but may then be closed without prior notice.~~

**33.2 SHUTTING OFF CASH UNDERWRITTEN ALTERNATIVES**

~~Where the value of a cash underwritten alternative provided by third parties is, at the time of announcement, more than half the maximum value of the offer, an offeror will not be obliged to keep that alternative open in accordance with Rules 31.4 or 33.1 if it has sent a notification to offeree company shareholders and persons with information rights that it reserves the right to close it on a stated date, being not less than 14 days after the date on which the notification is published, or to extend it on that stated date. Notice under this Rule may not be given between the time when a competing offer has been announced and the end of the resulting competitive situation. (See also Rule 24.14.)~~

**NOTES ON RULE 33.2****1. — Further notifications**

~~Where a notification has been published pursuant to this Rule and the alternative is not closed on the stated date but extended, the offeror must send a further notification to shareholders and persons with information rights if it wishes to take advantage of this Rule.~~

**2. — Rule 9 offers**

~~This Rule will not apply to a cash alternative provided to satisfy the requirements of Rule 9.~~

**33.3 REINTRODUCTION OF ALTERNATIVE OFFERS**

~~Where a firm statement has been made that an alternative offer will not be extended or reintroduced and that alternative has ceased to be open for acceptance, neither that alternative, nor any substantially similar alternative, may be reintroduced. Where, however, such a statement has not been made and an alternative offer has closed for acceptance, an offeror will not be precluded from reintroducing that alternative at a later date. Reintroduction would constitute a revision of the offer and~~

~~would, therefore, be subject to the requirements of, and only be permitted as provided in, Rule 32.~~

*\*This Rule is disappplied in a scheme. See Appendix 7.*

## Rule 34

### 34.1 WHEN THE RIGHT OF WITHDRAWAL MAY BE EXERCISED

~~(a) An accepting shareholder must be entitled to withdraw his an acceptance from the date which is 21 days after the first closing date of the initial offer at any time, if the offer has not by such date become or been declared unconditional as to acceptances unless the offer is unconditional from the outset.~~

~~(b) This The entitlement to withdraw an acceptance must be exercisable until the earlier of:~~

~~(aj) the time that the offer becomes or is declared unconditional as to acceptances the acceptance condition is satisfied; and~~

~~(bii) the final latest time for lodgement the receipt of acceptances on the unconditional date which can be taken into account in accordance with Rule 31.6.~~

### ~~34.2 OFFEREE PROTECTION CONDITIONS~~

~~An accepting shareholder must be entitled to withdraw his acceptance if so determined by the Panel in accordance with Rule 13.6.~~

### 34.32 RETURN OF DOCUMENTS OF TITLE

If a shareholder withdraws his an 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~~ seven days) and the receiving agent should immediately give instructions for the release of securities held in escrow.

## Rule 35

### 35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or made but has not become or been declared ~~wholly~~ unconditional and has been withdrawn or has lapsed ~~otherwise than pursuant to Rule 12.1~~, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses:

...

### 35.2 PARTIAL OFFERS

The restrictions in Rule 35.1 will also apply following a partial offer:

(a) which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared ~~wholly-unconditional~~. When such an offer has become or been declared ~~wholly-unconditional~~, the period of 12 months runs from that date; and

(b) for more than 50% of the voting rights of the offeree company which has not become or been declared ~~wholly-unconditional~~.

...

#### NOTES ON RULES 35.1 and 35.2

##### 1. When consent may be given

~~(a) — The Panel will normally only give its consent under this Rule 35.1 if:~~

~~(ia) the board of the offeree company so agrees. Such consent will not normally be given within three months of the lapsing of an earlier offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement relation to which the offeror made a no increase statement or an acceleration statement without a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree company;~~

~~(iib) a third party announces a firm intention to make an offer for the offeree company;~~

~~(iic) the offeree company announces a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover; or~~

~~(ivd) the Panel determines that there has been a material change of circumstances.~~

~~(b) — The Panel may also give consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material official authorisations or regulatory clearances relating to an offer within the Code timetable. The Panel should be consulted by an offeror or potential offeror as soon as it has reason to believe that this may become the position.~~

~~(c) — The restrictions in Rules 35.1(d) and (e) will not normally apply to the extent that the offer lapsed as a result of the offeror failing to obtain a material official authorisation or regulatory clearance relating to the offer within the usual Code timetable, but the offeror is continuing to seek clearance or a decision from the relevant official or regulatory authorities with a view subsequently to making a new offer with the consent of the Panel in accordance with Note (b) on Rule 35.1.~~

~~NB Rule 2.2(e) will continue to apply in these circumstances.~~

...

#### 35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE

Except with the consent of the Panel, if a person, together with any person acting in concert with ~~him~~ that person, holds shares carrying more than 50% of the voting rights of a company, neither that person nor any person acting in concert with ~~him~~ that person may, within 6 months of the closure of any previous offer made by ~~him~~ that person to the shareholders of that company which became or was declared ~~wholly-unconditional~~, make a second offer to any shareholder in that company, or acquire any interest in shares in that company, on more favourable terms than those made available under the previous offer (see also Rule 6.2(a)). For this purpose the value of a securities exchange offer shall be calculated as at the date the offer

closed. In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16.1).

#### **35.4 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED**

Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any person acting in concert with that offeror, may acquire any interest in shares in the offeree company on more favourable terms than those made available under its lapsed offer until each of the competing offers has either become or been declared unconditional ~~in all respects~~ or has itself lapsed. For these purposes, the value of the lapsed offer shall be calculated as at the day the offer lapsed.

#### **NOTE ON RULES 35.3 and 35.4**

##### ***Determination of price***

...

(b) *that call option is exercised:*

(i) ...

(ii) *before any competing offer has either become or been declared unconditional ~~in all respects~~ or has itself lapsed (in the case of Rule 35.4),*

#### **Rule 36.4**

#### **36.4 OFFER FOR BETWEEN 30% AND 50%**

When an offer is made which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional ~~as to acceptances~~ unless acceptances are received for not less than that number.

#### **Rule 37.1**

#### **37.1 POSSIBLE REQUIREMENT TO MAKE A MANDATORY OFFER**

...

#### **NOTES ON RULE 37.1**

...

#### **8. *Inadvertent mistake***

*Note 4 of the Notes on the ~~the~~ Dispensations from Rule 9 may be relevant in appropriate circumstances.*

## Rule 38

### 38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

...

#### **NOTE ON RULE 38.2**

##### ***Competition reference periods***

*During a competition reference period the restrictions in this Rule will also apply to an offeror subject to the reference and to any person acting in concert with it.*

### 38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES

An 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~~.

#### **NOTES ON RULE 38.3**

##### ***1. — Withdrawal rights under Rule 13.6***

*If withdrawal rights are introduced under Rule 13.6, the acceptances in relation to any securities assented to the offer after it was unconditional as to acceptances by an exempt principal trader connected with the offeror must be withdrawn and such securities may not be re-assented to the offer unless, following the period agreed by the Panel for withdrawal rights to run, the offer becomes or is declared unconditional as to acceptances.*

##### ***2. — 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”).

...

### 9 OFFEREE BOARD OBLIGATIONS

There is no ...

Once an offer is wholly unconditional, ...

## Appendix 4

## APPENDIX 4

## RECEIVING AGENTS' CODE OF PRACTICE

*NB 1 This Appendix should be read in conjunction with Rules 9.3 and 10.1 and, in particular, Notes 4 — 8 on Rule 10.1.*

...

## 1 INTRODUCTION

...

It is essential when determining the result of an offer under the Code that appropriate measures are adopted such that all parties to the offer may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates areas of doubt. This Code of Practice is designed to ensure that those acceptances and purchases which may be counted towards ~~fulfilling~~ satisfying the acceptance condition and thus included in the certificate required by Note 7 on Rule 10.1 are properly identified to enable the receiving agent to provide the certificate ~~required by Note 7 on Rule 10~~. Receiving agents are also required to establish appropriate procedures such that acceptances and purchases can be checked against each other and between different categories so that no shareholding will be counted twice.

...

## 3 THE PROVISION OF THE OFFEREE COMPANY'S REGISTER

...

(c) From the date following the day on which a firm intention to make an offer is announced, the CREST operator will, after the appropriate request, make available to the offeror's receiving agent copies of all RURs generated in relation to the offeree company.

As far as certificated holdings are concerned, the registrar must provide updates, on a daily basis, to the register within two business days after notification of the transfer and, in addition, copies of all documents, including CREST stock deposits, which would lead to a change in the last copy register provided to the offeror must be provided as rapidly. On the day which is two days prior to the unconditional date (the "final register day<sup>2</sup>") any such information received by the offeree company's registrar but not yet provided to the offeror's receiving agent must be made available electronically, where possible, or for collection by the offeror's receiving agent, at the latest, by noon on the day preceding the ~~final closing date<sup>1</sup> of the offer unconditional date~~.

From the final register day<sup>2</sup> until the time that the ~~offer becomes or is declared unconditional as to acceptances~~ acceptance condition is satisfied or the offer lapses, the offeree company's registrar should continue to update the register on a daily basis so that all transfers and other documents which have been received by the offeree company's registrar by 1.00 pm on the ~~final closing date<sup>1</sup> of the offer unconditional date~~ are processed by 5.00 pm that day at the latest. In addition, copies of these documents should be sent immediately and electronically, where possible, to the offeror's receiving agent insofar as not previously notified.

(d) Arrangements should be made to ensure that the offeror's receiving agent has access to the offeree company's registrar at all times, which includes weekends and Bank Holidays, during the period between the final register day\* and the time the offer becomes or is declared unconditional as to acceptances acceptance condition is satisfied or the offer lapses, in order that any queries arising from acceptances and purchases can be investigated and accurate decisions taken.

\*~~† See definitions at end of Appendix~~

...

## 5 COUNTING OF ACCEPTANCES

The offeror's receiving agent must ensure that all acceptances counted as valid meet the requirements set out in Note 4 on Rule 10.1 and, if appropriate, Note 6 on Rule 10.1.

## 6 COUNTING OF PURCHASES

The offeror's receiving agent must ensure that all purchases counted as valid meet the requirements (subject to Note 8 on Rule 10.1) set out in Note 5 on Rule 10.1 and, if appropriate, Note 6 on Rule 10.1.

## 7 ~~OFFERS BECOMING OR BEING DECLARED UNCONDITIONAL AS TO ACCEPTANCES SATISFACTION OF THE ACCEPTANCE CONDITION BEFORE THE UNCONDITIONAL DATE FINAL CLOSING DATE†~~

~~Prior to an offer becoming or being declared unconditional as to acceptances Before the acceptance condition can be satisfied before the final closing date† unconditional date~~, the offeror's receiving agent must ensure that the requirements of Note 6 on Rule 10.1 have been satisfied.

~~† See definitions at end of Appendix~~

## 8 DISCLAIMERS IN RECEIVING AGENTS' CERTIFICATES

...

"In issuing this certificate we have, where necessary, relied on the following matters:

...

(iii) confirmation from the offeror of the validity of shares recorded as registered holdings and purchases in the context of Note 8 on Rule 10.1.

...

## **DEFINITIONS**

~~\*final register day — the day two days prior to the final closing date† of an offer.~~

~~†final closing date — the 60th day or other date beyond which the offeror has stated that its offer will not be extended.~~



(B) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

### **NOTE ON SECTION 3**

#### **Where a determination under Section 3(g) remains outstanding on the long-stop date**

If a question as to whether the proviso to Section 3(g) has been satisfied remains outstanding on the long-stop date, the parties to the offer will normally be required to agree an extension to the long-stop date pending the final determination of the issue.

...

## **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 proportions in which they receive different forms of consideration, the ability of shareholders to make such elections must not be closed off or withdrawn ~~before the shareholder meetings~~ any earlier than 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, one week prior to that later date.

(b) A shareholder who has elected to receive a particular form of consideration in respect of any of ~~his~~ its shares must be entitled to withdraw ~~his~~ that election. However, this right may be shut off not earlier than 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, not earlier than one week prior to that later date.

...

## **11 RETURN OF DOCUMENTS OF TITLE**

If an offer being implemented by way of a scheme lapses or is withdrawn, or if a shareholder withdraws ~~his~~ its 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~~ seven days of such lapsing or withdrawal) and the receiving agent should immediately give instructions for the release of securities held in escrow.

...

## **14 INCORPORATION OF OBLIGATIONS AND RIGHTS**

In addition to the relevant requirements of Rules 24 and 25, the scheme circular must incorporate language which appropriately reflects those parts of Rule ~~13.5(a)~~ and 13.6 (if applicable) and of this Appendix 7 which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.

...

## **16 PROVISIONS DISAPPLIED IN A SCHEME**

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

...

- ~~(d) the Note on Rule 12.1 (the effect of lapsing);~~
- (d) Rule 12 (long-stop date);**
- ~~(e) Note 2 on Rule 13.6 (availability of withdrawal rights);~~
- (fe) Rules 17.1 and 17.2 (announcement of acceptance levels);**
- (gf) Rule 18 (the use of proxies and other authorities in relation to acceptances);**
- ~~(hg) Rule 24.7 (incorporation of obligations and rights) and Rule 24.14 (cash underwritten alternatives which may be shut off);~~
- (ih) Rule 24.10 (admission to listing and admission to trading conditions);**
- (ji) Rules 31.1 to 31.10 (timing of the offer);**
- (kj) Rule 32.1(c), Notes 3 (first sentence paragraph (a)) and 4 on Rule 32.1, paragraph (b) of Note 3 on Rule 32.2 and Note 43 on Rule 32.2 (revision);**
- ~~(lk) Rules 33.1 to 33.3 (alternative offers); and~~
- (ml) Rule 34 (right of withdrawal).**

## Appendix 8

### APPENDIX 8

#### AUCTION PROCEDURE FOR THE RESOLUTION OF COMPETITIVE SITUATIONS

##### DEFINITIONS AND INTERPRETATION

...

##### Day 46

~~The 46th day following the publication by Day 46 (as defined in the Definitions Section of the Code) of the second competing offeror's offer of its offer document or, if the second competing offeror is proceeding by means of a scheme of arrangement, such date as the Panel shall determine.~~

## APPENDIX C

### Revised Practice Statement No 5

#### RULE 13.5(a) – INVOCATION OF CONDITIONS

##### 1. Introduction

- 1.1 It is standard market practice in the UK for offers (other than mandatory offers, where the provisions of Rule 9 of the Takeover Code apply) to be stated as being conditional upon the satisfaction, or waiver, of a number of conditions.
- 1.2 In a typical offer, the conditions can be broken down into four broad categories as follows:
- (a) the acceptance condition (i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer) or, in the case of a scheme of arrangement, the shareholder approval condition and the court sanction condition;
  - (b) conditions designed to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association, relating to the listing and/or admission to trading of the consideration securities or to the approval of the implementation of the offer by the offeror's shareholders;
  - (c) specific or general conditions relating to the obtaining of an official authorisation or regulatory clearance and bespoke conditions relating to the (non-)occurrence of a specific event or circumstances in relation to the offeree company; and
  - (d) other conditions, principally general protective conditions (including a "material adverse change" condition).

##### 2. Application of Rule 13

- 2.1 The principal provision of the Code applicable to conditions is Rule 13.
- 2.2 Rule 13.1 provides that offer conditions must not normally be in subjective terms.
- 2.3 Rule 13.5(a) provides that:
- "An offeror may only invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel. The firm offer announcement and the offer document must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise."**
- 2.4 Rule 13.5(b) provides that the following will not be subject to Rule 13.5(a):
- (a) the acceptance condition;
  - (b) a condition relating to the approval of a scheme of arrangement by the offeree company's shareholders or to the sanctioning of the scheme by the court;
  - (c) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);

- (d) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the issuance, listing and/or admission to trading of those securities;
- (e) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association (or equivalent), for the offeror's shareholders to approve the implementation of the offer;
- (f) a term relating to the long-stop date of a contractual offer (but see the separate requirements of Rules 12.1 and 12.2);
- (g) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (but see the separate requirements of Section 3(g) of Appendix 7); and
- (h) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.

### **3. “Material significance”**

- 3.1 The purpose of Rule 13.5(a) is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of Rule 13.5(a) was considered by the Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was a “material adverse change” condition. The Panel concluded that the necessary test of “material significance” was not met and in its decision stated that:

“... meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous ... to something that would justify frustration of a legal contract.”

- 3.2 The Panel Executive is aware that certain practitioners interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer. The Executive does not consider this interpretation to be correct.
- 3.3 In applying Rule 13.5(a) in the light of the Panel's decision set out in Panel Statement 2001/15, the Executive's practice is as follows:
- (a) as set out in Rule 13.5(a), the appropriate test for the invocation of a condition is whether the relevant circumstances upon which the offeror is seeking to rely are of material significance to it in the context of the offer. This must be judged by reference to the facts of each case at the time the relevant circumstances arise and taking account of the views of all relevant parties;
  - (b) in the case of a condition referred to in paragraph 1.2(d) above, whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and
  - (c) whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.

### **4. Factors to be taken into account**

- 4.1 In considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive's practice to take into account all relevant factors, including:
- (a) whether the condition was the subject of negotiation with the offeree company;

- (b) whether the condition was expressly drawn to offeree company shareholders' attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it;
  - (c) whether the condition was included to take account of the particular circumstances of the offeree company;
  - (d) whether the circumstances could not have reasonably been foreseen at the time of the firm offer announcement and, if they could, the likelihood of the circumstances occurring;
  - (e) the actions taken by the offeror since the firm offer announcement and, in particular, since the occurrence of the circumstances on which the offeror is seeking to rely in order to invoke the condition; and
  - (f) the views of the board of the offeree company.
- 4.2 In considering whether a condition relating to the obtaining of an official authorisation or regulatory clearance may be invoked, additional factors to be taken into account will include:
- (a) the significance of the authorisation or clearance to the offeror;
  - (b) what action, if any, the offeror would need to take in order to obtain the authorisation or clearance and the strategic consequences for the offeror if it were to take that action; and
  - (c) the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance.
- 4.3 In the case of a condition relating to there being no Phase 2 CMA reference (or equivalent reference or process), the factors that will be taken into account will also include:
- (a) whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company; and
  - (b) the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low.

## 5. Pre-conditions

This Practice Statement applies in the same way to the invocation of pre-conditions permitted under Rule 13.3.