RS3 Issued on 4 December 2001

THE PANEL ON TAKEOVERS AND MERGERS

EQUALITY OF INFORMATION TO COMPETING OFFERORS

STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE EXTERNAL CONSULTATION PROCESS ON PCP 3

1. Introduction

1.1 In September 2001 the Code Committee of the Takeover Panel published a Public Consultation Paper (PCP 3) entitled "Equality of information to competing offerors - Revision proposals relating to Rule 20.2 of the Takeover Code".

1.2 The purpose of this paper is to provide details of the Code Committee's response to the external consultation process on PCP 3.

2. Number of responses received

Responses were received from a range of persons including major industry bodies.

3. Significant conflicts of views

Most respondents broadly welcomed the proposals. There were some different views expressed on how the proposals should be implemented.

4. The Code Committee's conclusions

(a) Question 1: Do you agree with the amendment to the Code set out in paragraph 2.1.6 of the Consultation Paper? (Conditions attached to the passing of information)

4.1 Certain respondents believed that conditions relating to the non-solicitation of customers and employees should be permitted. As mentioned in the Consultation Paper itself, the Code Committee recognises the concerns that offeree companies may have about information provided under the Rule being used in order to solicit customers or employees. Balanced against this, however, is the need to ensure that offeree companies do not attempt to impose on potential offerors unduly onerous non-solicitation obligations which might deter such potential offerors from making an offer. With these issues in mind and in the light of the arguments made by certain respondents, the Code Committee is of the view that offerees providing information pursuant to a request under Rule 20.2 should be allowed to impose reasonable conditions relating to the non-solicitation of customers and employees. It is important that such conditions should be drafted so as to protect the legitimate interests of the company concerned and not for the purpose of deterring a potential offeror from making an offer. The Code Committee has concluded therefore that Note 2 should be amended as set out in paragraph 4.3 below to address this.

4.2 The view was expressed that the new Note 2 should clarify what is meant by "confidentiality". It was argued that, as presently drafted, it could extend to cover the existence or the progress of the talks and could conceivably be used by an offeree company to prevent a potential offeror from contacting offeree shareholders. The Code Committee agrees that this would not be desirable and could have the effect of deterring potential offerors from making offers. It is therefore of the view that the new Note should be clarified by the addition of the words *"of the information passed"* after *"any conditions other than those of confidentiality"*.

4.3 Accordingly, the Code Committee has concluded that the first paragraph of the final version of the new Note should read as follows:-

"2. Conditions attached to the passing of information

The passing of information pursuant to this Rule should not be made subject to any conditions other than those relating to: the confidentiality of the information passed; reasonable restrictions forbidding the use of the information passed to solicit customers or employees; and, the use of the information solely in connection with an offer or potential offer. Any such conditions imposed should be no more onerous than those imposed upon any other offeror or potential offeror."

(b) Question 2: Do you agree with the amendment to the Code set out in paragraph 2.2.3 of the Consultation Paper? (Hold harmless letters)

4.4 Several respondents believed that, as drafted in the Consultation Paper, paragraph 2 of the proposed new Note 2 could be construed to apply only to hold harmless letters in favour of accountants. It was not the Code Committee's intention that this be the case. It has, therefore, as set out in paragraph 4.6, clarified the proposed wording of the Note in order to make it clear that the Note will extend to hold harmless letters requested by other professional advisers.

4.5 The second sentence of paragraph 2 of the proposed new Note 2, as drafted in the Consultation Paper, stated:

"Nevertheless, where it is proposed to require an offeror or potential offeror to sign such a [hold harmless] letter or give another undertaking to a third party in respect of information passable pursuant to this Rule, the Panel should be consulted".

Respondents questioned what was intended by the words *"another undertaking"* and felt that this introduced uncertainty as to how the Note might be interpreted. They also questioned the need for the Panel to be consulted where hold harmless letters or other undertakings were required, with views being expressed that this would introduce uncertainty as to what might be permissible in hold harmless letters. In the light of the views expressed in this regard, with which the Code Committee agrees, the final wording of the Note has been amended to remove the proposed second sentence.

4.6 The wording for paragraph 2 of the new Note 2 will therefore read as follows:-

"A requirement that a party sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any other offeror or potential offeror has been required to sign a letter in similar form."

(c) Question 3: Do you agree with the amendment to the Code set out in paragraph 3 of the Consultation Paper? (The Rule applies regardless of whether the original offeror has been publicly identified)

4.7 The purpose of the proposal set out in paragraph 3 of the Consultation Paper was to codify two particular matters. The first of these related to the situation where the existence of an offeror or potential offeror has been publicly announced. There is no need for that offeror or potential offeror to be named in order for Rule 20.2 to apply. Secondly, as set out in the Panel's 1999-2000 Annual Report, the Executive may also require information to be passed under the Rule to an offeror or potential offeror who has been informed authoritatively of the existence of the first potential offeror.

4.8 Whilst respondents broadly agreed with the proposals, several suggested that the Rule should give some guidance as to how the words *"authoritatively informed"* would be interpreted. At present, information is passable when an offeror or potential offeror seeking to invoke Rule 20.2 has been informed by, for example, a person who has actual knowledge of the existence of another potential offeror or who is connected with the offeree company or such other potential offeror and could therefore be said to be an authoritative source of information. Such a person would include advisers to, or employees of, either the offeree company or such potential offeror. The Code Committee sees no need to expand on what is meant by *"authoritatively informed"* and is of the view that to do so could restrict the flexibility of the Executive in applying Rule 20.2 in such a way as to achieve its underlying purpose.

4.9 The additional wording proposed in the Consultation Paper stated **"or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of the first potential offeror"**[emphasis added]. As drafted the new wording would not extend to make information passable to a first potential offeror who has been authoritatively informed of the existence of a second, or subsequent, potential offeror whose existence has not been publicly announced. The Code Committee agrees with the views of certain respondents that the wording should be amended, as set out in paragraph 4.4, to refer to the existence of **"another potential offeror"** [emphasis added].

4.10 Some respondents questioned whether an offeror or potential offeror, who had already received information from an offeree company, would be entitled to invoke Rule 20.2 in respect of additional information provided to a subsequent offeror or potential offeror. At present, except for the first offeror or potential offeror who has entered into a binding agreement to the contrary with the offeree company, an offeror or potential offeror would be entitled to invoke the Rule in respect of additional information provided to a subsequent offeror or potential offeror. In the case of a subsequent potential offeror whose existence has not been publicly announced, the previous offeror seeking to invoke Rule 20.2 would have to have been authoritatively informed of its existence. The Code Committee is of the view that the first sentence of Rule 20.2 is clear in this regard and that the amendment proposed in paragraph 4.9 above will help to clarify the position where the existence of a subsequent potential offeror has not been publicly announced.

4.11 The second sentence of Rule 20.2 would therefore read as follows:-

"This requirement will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror, whether named or unnamed, to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror."

(d) Question 4: Do you agree with the amendment to the Code set out in paragraph 4.1.4? (Which party to a reverse takeover or merger should be regarded as the offeree for the purposes of Rule 20.2?)

4.12 The Consultation Paper proposed that a new Note 4 to the Rule be included which would state that information would be passable on either party to a reverse takeover or a merger where the percentage shareholdings of the offeror and offeree companies' respective shareholders in the enlarged entity would be exactly equal on completion of the transaction.

4.13 Some respondents who agreed in principle with the proposals were concerned that the new Note 4 should be drafted so as to give the Executive some discretion as to when and how the Note should apply to make parties to a reverse takeover or merger subject to Rule 20.2. They felt that not to do so would allow the parties to the transaction easily to circumvent the purpose of the new Note 4 by means of small adjustments to the percentage holdings of offeror and offeree shareholders in the combined group. Respondents suggested variously that the Executive should take into account factors such as the composition of the board of the combined group, the way in which the transaction is presented and whether the combined group qualified for merger accounting.

4.14 As mentioned in paragraph 4.1.3 of the Consultation Paper, the Code Committee does not wish to allow for greater discretion on the part of the Executive. It is of the view that such discretion would make the implementation and interpretation of the Rule extremely complicated and that this in turn would lead to uncertainty on the part of persons involved in takeovers as to how the Rule should be implemented. The Code Committee understands the concerns raised but still holds this view and has, accordingly, decided that the new Note 4 should be included without amendment.

4.15 The question was also raised as to whether it was intended that the new Note 4 should apply where some or all of the share capital issued by the offeror is not offered by way of consideration to target shareholders but is issued for the purpose of raising cash, for example a rights issue. Such respondents suggested that wording be added to the Note to clarify this. The proposed new Note is intended to cover the situation where shares are issued as consideration to target shareholders in such proportions that the technical offeror could properly be regarded as the offeree for the purposes of Rule 20.2 because target shareholders will come to exert effective voting control over it. The purpose of the Note, as well as the purpose of Rule 20.2 itself, would not be achieved were the Note to require that issues of shares to persons other than target company shareholders should be taken into account. The Code Committee is accordingly of the view that the additional wording suggested by the relevant respondents is unnecessary.

4.16 The view was also expressed that consideration should be given to including within the new Note 4 reference to the Panel's treatment of mergers effected by a newco offer for both companies. At present, the smaller of the two companies involved in the transaction would generally be treated as the offeree for the purposes of Rule 20.2. Where the holdings of the two companies' shareholders in the newco offeror would be exactly equal, then, under the new Note 4, both companies would be treated as offerees for the purposes of Rule 20.2. The Code Committee believes that this is sufficiently clear and does not propose that Note 4 should legislate specifically for such newco offers.

4.17 Some respondents also queried whether a smaller offeror, subject to the Code, making an offer for a larger non-Code company (e.g. a company incorporated abroad) would become subject to Rule 20.2 if, as a result of the transaction, it were obliged to increase its existing issued voting equity share capital by 100% of more. Such respondents believed that the new Note should address this. Such a transaction does not qualify as a Code offer and the smaller Code company would not be subject to Rule 20.2 merely by virtue of making an offer for the non-Code company. The Code Committee beleives that this is the correct approach, that therefore no amendment to the Code is necessary and that no further clarification is required.

4.18 Rule 20.2, amended as discussed in this statement, is set out in full in the Appendix to this statement.

Appendix

RULE 20. EQUALITY OF INFORMATION

20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS

Any information, including particulars of shareholders, given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. This requirement will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror, whether named or unnamed, to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror.

NOTES ON RULE 20.2

1. General enquiries

The less welcome offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor.

2. Conditions attached to the passing of information

The passing of information pursuant to this Rule should not be made subject to any conditions other than those relating to: the confidentiality of the information passed; reasonable restrictions forbidding the use of the information passed to solicit customers or employees; and, the use of the information solely in connection with an offer or potential offer. Any such conditions imposed should be no more onerous than those imposed upon any other offeror or potential offeror.

A requirement that a party sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any other offeror or potential offeror has been required to sign a letter in similar form.

3. Management buy-outs

If the offer or potential offer is a management buy-out or similar transaction, the information which this Rule requires to be given to competing offerors or potential offerors is that information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror. The Panel expects the directors of the offeree company who are involved in making the offer to co-operate with the independent directors of the offeree company and its advisers in the assembly of this information.

4. Mergers and reverse takeovers

Where an offer or possible offer might result in an offeror needing to increase its existing issued voting equity share capital by 100% or more, an offeror or potential offeror for either party to such an offer or possible offer will be entitled to receive information which has been given by such party to the other party.

5. The Competition Commission and the European Commission

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