PCP 2010/2 Issued on 1 June 2010

THE TAKEOVER PANEL

CONSULTATION PAPER ISSUED BY THE CODE COMMITTEE OF THE PANEL

REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS

The Code Committee of the Takeover Panel (the "**Code Committee**") invites comments on this Public Consultation Paper ("**PCP**"). Comments should reach the Code Committee by 27 July 2010.

Comments may be sent by e-mail to:
supportgroup@thetakeoverpanel.org.uk

Alternatively, please send comments in writing to:

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London EC4M 7DY

Telephone: +44 (0) 20 7382 9026
Fax: +44 (0) 20 7236 7005

All responses to formal consultation will be made available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure. Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this PCP.

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1. Introduction and summary

(a) Background

1.1 On 24 February 2010, the Code Committee announced the initiation of a consultation to review certain aspects of the Takeover Code (the "**Code**"). The announcement was made in the light of widespread commentary and public discussion on various aspects of the regulation of takeover bids for UK companies, following the takeover of Cadbury plc by Kraft Foods Inc. in the first quarter of 2010. In particular, in a speech made to the Saïd Business School, University of Oxford, on 9 February, Roger Carr, the former chairman of Cadbury plc, identified a number of possible changes to takeover regulation which he put forward for further debate.

1.2 Following the Code Committee's announcement on 24 February, the Panel Executive (the "**Executive**"), on behalf of the Code Committee, informally consulted various interested parties in relation to the matters which might be considered within the Code Committee's review. In addition, a number of suggestions were put forward, both privately and publicly, including in speeches made by the then Secretary of State for Business, Innovation and Skills, Lord Mandelson, on 1 March and by the then Financial Services Secretary, Lord Myners, on 8 March. The Code Committee's review was also welcomed by the House of Commons Business, Innovation and Skills Committee in its report on mergers, acquisitions and takeovers which was published on 6 April.

(b) The Takeover Panel

1.3 The Takeover Panel (the "**Panel**") is an independent body whose main functions are to issue and administer the Code and to supervise and regulate takeovers and other matters to which the Code applies in accordance with the rules set out in the Code. The Panel was set up as a non-statutory body in 1968, since when its composition and powers have evolved as circumstances have changed. On 20 May 2006, the Panel was designated by the Secretary of State for Trade and Industry as the supervisory authority to carry out certain regulatory functions in relation to takeovers under the European Directive on Takeover Bids (2004/25/EC) (the "**Directive**"). Its statutory functions under UK law are set out in and under Chapter 1 of Part 28 of the Companies Act 2006. The rules set out in the Code also have statutory effect in the Isle of Man, Jersey and Guernsey, by virtue of legislation applying in those jurisdictions.

1.4 The Code is designed principally to ensure that shareholders in an offeree company (i.e. the "target") are treated fairly, and are not denied an opportunity to decide on the merits of a takeover bid, and that shareholders in an offeree company of the same class are afforded equivalent treatment by an offeror (i.e. the "bidder"). The Code also provides an orderly framework within which takeover bids may be conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, most significantly that of the Financial Services Authority (the "**FSA**"), the integrity of the financial markets.

1.5 The financial and commercial merits of takeovers are not the responsibility of the Panel. These are matters for the companies concerned and their shareholders. Nor is the Panel responsible for competition policy or wider questions of public interest, which are the responsibility of Government and other bodies, for example, the Competition Commission, the Office of Fair Trading or the European Commission.

1.6 The rules of the Code are based upon six General Principles. These General Principles are the same as the general principles set out in Article 3 of the Directive. They are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied in accordance with their spirit in order to achieve their underlying purpose.

(c) The Code Committee

1.7 The Code Committee carries out the rule-making functions of the Panel and is solely responsible for keeping the Code under review and for proposing, consulting on, making and issuing amendments to the substantive provisions of the Code set out in its Introduction, the General Principles, the 38 Rules (and the Notes on the Rules) and the seven Appendices. The members of the Code Committee are drawn from investor, corporate, practitioner and other interested constituencies.

1.8 The Code Committee is concerned to ensure that the Code continues to take account of changing market circumstances and practices. Matters leading to possible amendment of the Code arise in a number of ways, including as a result of specific cases which the Panel has considered, market developments and particular concerns raised by those operating within the financial markets. The Code Committee welcomes both suggestions from interested parties for possible amendments to the Code and the valuable responses to consultation which it receives.

1.9 Before it introduces or amends any rules of the Code, the Code Committee is normally required, in accordance with its procedures for amending the Code, to publish the proposed rules and amendments for public consultation and to consider responses arising from the public consultation process.

(d) Nature of this review

1.10 As indicated above, the Code Committee has initiated the current review in the light of recent widespread commentary on, and discussion of, takeover bids and following the receipt of various suggestions for possible amendments to the Code and other aspects of takeover regulation.

1.11 In particular, the Code Committee is aware that a number of commentators have expressed concern that it may be too easy for a "hostile" offeror (i.e. an offeror whose offer is not recommended by the board of the offeree company) to obtain control of more than 50% of the voting rights of an offeree company and that the outcomes of takeover bids, particularly hostile offers, are unduly influenced by the actions of "short term" investors (for example, persons who become interested in the shares of the offeree company only after the possibility of an offer has been publicly announced). Such commentators have suggested that certain changes could be introduced, in order to make it more difficult for hostile offerors to succeed and to reduce the influence of short term investors in determining the outcome of takeover bids.

1.12 The Code Committee is, however, aware that other commentators have argued that the acquisition and disposal of shares (and other interests) in offeree companies during the course of takeover bids, including on a short term basis, is a legitimate commercial activity and, in particular, that the Code should not be used as a means of deterring this activity.

1.13 The Code Committee notes that, of the 472 offers formally announced in the four years ended 31 March 2010:

- 72 (15.3%) were not recommended by the board of the offeree company at the time of the announcement under Rule 2.5 of the offeror's firm intention to make an offer;

- 55 (11.7%) were not recommended at the time that the offer document was published; and

- 40 (8.5%) remained unrecommended at the end of the offer period, of which 27 (5.7%) were successful and 13 (2.8%) lapsed.

1.14 As indicated above, whilst it seeks to provide an orderly framework in which takeover bids must be made, the Panel does not take, and has never taken, a view on the advantages and disadvantages of takeovers generally or on the commercial or financial merits of particular offers or types of offer.

1.15 The Code Committee has not reached any conclusions on the suggestions for changes to the regulation of takeover bids discussed in this PCP and continues to maintain an open mind on the issues raised. Given the significance and nature of the issues that have been raised, the Code Committee has chosen to break with its usual practice of setting out specific proposals and proposing drafting amendments to the Code. Instead, on this occasion, the Code Committee is seeking to provide a forum in which suggestions for possible change may be debated.

1.16 Accordingly, in respect of each issue discussed, the Code Committee has aimed to set out the background to the issue, the arguments in favour of and against the possible change, and the potential consequences that would need to be considered if the change were to be introduced. In each case, the Code Committee has then gone on to consider whether or not the possible change would be a matter solely for the Code Committee or whether, for example, a change in company law might be considered appropriate, either instead or in addition.

(e) Summary of issues

1.17 The main issues covered in this PCP are as follows:

(a) section 2 considers the suggestion that the "50% plus one" minimum acceptance condition threshold required to be achieved for an offer to succeed is set at too low a level and should be raised to, for example, 60% or two-thirds of the voting rights in the offeree company;

(b) section 3 considers the suggestion that voting rights should be withheld from shares in an offeree company acquired during the course of an offer period, such that those shares would be "disenfranchised" for the purposes of the takeover bid;

(c) section 4 considers the suggestion that the 1% trigger threshold for the disclosure of dealings and positions in relevant securities under the disclosure regime in Rule 8 should be reduced to 0.5%. It also considers the suggestion that offeree company shareholders who accept an offer should be required to disclose that they have done so and raises the issue of the splitting up of dealing, voting and acceptance decisions and whether the Code's disclosure requirements should be amended to address this;

(d) section 5 considers the suggestion that offerors should be required to provide more information in relation to the financing of takeover bids and their implications and effects. It also considers the suggestion that the boards of offeree companies should be required to set out their views on an offeror's intentions for the offeree company in greater detail;

(e) section 6 considers the suggestion that shareholders in an offeree company should be given independent advice on an offer, separate from that given to the offeree company's board of directors. It also considers the suggestions that "success fees" should be restricted and that details of the fees and payable to advisers, and costs generally, in relation to a takeover bid should be disclosed publicly;

(f) section 7 considers the suggestion that some protections similar to those afforded by the Code to offeree company shareholders should be afforded to shareholders in an offeror company;

(g) section 8 considers the suggestion that the Code's "put up or shut up" regime should be re-examined and whether "put up or shut up" deadlines should be standardised, applied automatically or shortened, and whether the board of an offeree company should be able to seek a "private" "put up or shut up" deadline. It also considers the regulation of possible offer announcements, "pre-conditional" offers, the possibility of reducing the 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document, and whether the Panel should have the ability to shorten the offer timetables of second and subsequent competing offerors;

(h) section 9 considers concerns raised in relation to inducement fee arrangements and other deal protection measures which might give undue power to offerors to frustrate offers by potential competitors; and

(i) section 10 considers the suggestion that safeguards should be reintroduced by the Panel in relation to substantial acquisitions of shares.

1.18 For ease of reference, a list of the questions that are put for consultation is set out in the Appendix to this PCP.

(f) Invitation to comment and next steps

1.19 The Code Committee would welcome comments on the issues described in this PCP. In formulating their answers to the specific questions set out below, respondents are invited to consider, in particular, the following:

(a) whether they consider that change in the particular area under discussion would be desirable;

(b) if it would be desirable for there to be change in a particular area, whether they consider that it should be principally a matter for the Panel to introduce such change (bearing in mind the current function and purpose of the Code) or whether such change should be principally for Government or for another regulatory authority to introduce; and

(c) if, for whatever reason, changes were to be introduced by the Panel (for example, either because they were desirable in themselves or as a consequence of changes introduced by Government or another regulatory authority), what the nature of those changes should be.

1.20 Comments should reach the Code Committee by 27 July 2010 and should be sent in the manner set out at the beginning of the PCP.

1.21 If, following this consultation, it is concluded that there is a case for change in a particular area by means of amendments to the Code, the Code Committee anticipates issuing one or more further consultation papers in due course, setting out the detail of the proposed amendments.

1.22 If it is concluded that any change in a particular area would be a matter for the Government or another regulatory authority, the Code Committee will pass on the views of respondents in that area to the Government and/or the relevant regulatory authority.

2. Acceptance condition thresholds

2.1 Some commentators have suggested that the "50% plus one" minimum acceptance condition threshold required to be achieved for an offer to succeed is set at too low a level and should be raised to, for example, 60% or two-thirds of the voting rights in the offeree company.

(a) Background

(i) Voluntary offers

2.2 Under Rule 10, a "voluntary offer" (i.e. an offer that is not a "mandatory offer" required by Rule 9.1) is required to be conditional upon the offeror acquiring (by way of acceptances of the offer, purchases or other acquisitions) shares which, together with shares already held, carry a minimum of "50% plus one" of the voting rights of the offeree company. In practice, almost all voluntary offers are subject to a condition that the offeror must acquire 90% of the shares to which the offer relates and 90% of the voting rights of the offeree company, with the offeror reserving the ability to "waive down" the 90% thresholds to the "50% plus one" threshold required by Rule 10. This is because, under section 979 of the Companies Act 2006, an offeror which satisfies these 90% tests will then be able to serve compulsory acquisition notices on any dissenting shareholders. If the offeror receives acceptances in respect of more than 50% of the company's voting rights but less than 90% of the shares to which the offer relates, and the offer is then declared "unconditional as to acceptances", shareholders who do not accept the offer will be entitled to remain as minority shareholders in the offeree company (unless and until the 90% tests are satisfied).

2.3 Rule 10 applies only where a takeover bid is being effected by means of a "contractual offer" and does not apply where the takeover is proposed to be effected by means of a scheme of arrangement. In the case of a scheme of arrangement, section 899 of the Companies Act 2006 requires that the scheme must be approved by "a majority in number representing 75% in value" of the relevant class of the company's shareholders present and voting, either in person or by proxy, at a meeting of shareholders convened by the court.

(ii) *Mandatory offers*

2.4 The second sentence of General Principle 1 provides that:

> "… **if a person acquires control of a company, the other holders of securities must be protected.**".

As explained further below, whilst a person will undoubtedly have the ability to control a company, including the ability to determine the composition of its board of directors, if the person acquires "50% plus one" of the company's voting rights, effective control of the company will almost always pass at some point below 50%. The Code therefore deems effective control of a company to pass when a person acquires interests in shares carrying 30% or more of the voting rights of the company. The Code's definition of "control" provides as follows:

> "Control means an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights … of a company, irrespective of whether such interest or interests give de facto control.".

2.5 The protection that the Code affords to shareholders upon the passing of control (as so defined) is the requirement that the new controller must make an offer, in cash, to the remaining shareholders in the company at not less than the highest price paid for shares or other interests in shares by the new controller, or any person acting in concert with it, during the previous 12 months. Under Rule 9.1, a mandatory offer is required, broadly, where:

(a) a person acquires interests in shares which result in him, together with persons acting in concert with him, being interested in shares carrying 30% or more of the voting rights of a company; or

(b) a person who, together with persons acting in concert with him, is interested in shares carrying more than 30% of the voting rights of a company (but does not hold shares carrying more than 50% of the voting rights) acquires further interests in shares.

A person who holds more than 50% of the voting rights of a company may acquire further interests in shares without being required to make a mandatory offer and is therefore said to have "buying freedom".

2.6 In PCP 2009/2 (Miscellaneous Code amendments), the Code Committee explained that the philosophy underlying the mandatory offer rule is that a general offer should be made to shareholders when a person acquires control of a company for two reasons, as follows:

"(a) first, the company now has a new controller where before it was controlled by another person or was not controlled at all and shareholders should be given an opportunity to dispose of their shares as, for a variety of reasons, they may not wish to remain interested in the company under a new controller; and

(b) secondly, the new controller is likely to have paid a premium price to the shareholders from whom he has acquired shares and a general offer at the highest price paid by the new controller is required so that all shareholders have the opportunity to share the premium.".

2.7 Under Rule 9.3, a mandatory offer must be conditional <u>only</u> upon the offeror and persons acting in concert with it acquiring (by way of acceptances of the offer, purchases or other acquisitions) shares which, together with shares already held, carry "50% plus one" of the voting rights of the offeree company. As such, the "50% plus one" acceptance condition threshold referred to in Rule 9.3 is both a minimum and a maximum. Under Rule 9.4, it must also be a term of the offer that it will lapse in the event of a reference to the Competition Commission or the initiation of a phase II investigation by the European Commission under the EC Merger Regulation.

(iii) Rationale for the "50% plus one" threshold

2.8 The rationale for the "50% plus one" acceptance condition threshold in each of Rule 10 and Rule 9.3 is that a general offer made to all of a company's shareholders should be allowed to complete only in circumstances where it is clear that the result of the offer will be that "statutory control" of the company, in terms of the ability to pass ordinary resolutions, has passed to the offeror (or, in the case of Rule 9.3, the offeror and persons acting in concert with it). Under section 282 of the Companies Act 2006, ordinary resolutions, which include resolutions to appoint or replace the directors of the company, are passed by shareholders representing a simple majority of the total voting rights of shareholders who vote (in person or by proxy) on the resolution. Whilst certain matters, such as amendments to the company's articles of association, may require the passing of a special resolution by a 75% majority of the votes cast, a person who holds "50% plus one" of the voting rights will be able to pass an ordinary resolution and thereby to control the day-to-day operation of the company's business.

(b) Arguments in favour

2.9 Those in favour of raising the acceptance condition threshold requirements have argued that it is "too easy" for an offeror to achieve the "50% plus one" threshold. It has been argued that this is particularly the case in view of the fact that shares held by all shareholders who accept the offer must be counted towards achievement of the threshold, including those held by shareholders who may have joined the register only after the announcement of the offer and who may have acquired their shares with the specific purpose of accepting them to the offer, with a view to making a short term profit.

2.10 For example, Lord Mandelson has argued that there is a case for "raising the voting threshold for securing a change of ownership to two thirds". In his speech on 1 March, Lord Mandelson said that:

> "In the case of Cadbury and Kraft it is hard to ignore the fact that the fate of a company with a long history and many tens of thousands of employees was decided by people who had not owned the company a few weeks earlier, and probably had no intention of owning it a few weeks later.".

2.11 In summary, it is argued that the Code should aim to ensure that the outcome of a takeover bid is determined primarily by the long term shareholders of the offeree company, who will have a greater commitment to, and a better understanding of, the company, its management and its employees than those shareholders who are driven by short term trading strategies. On the basis that the latter group of shareholders is more likely to want the offer to succeed, in order that they can then crystallise a short term profit, it is argued that one way of achieving this aim would be to raise the acceptance condition threshold in order to maximise the chances that an offer will only in fact succeed if a majority of the long term shareholders are in favour of it.

2.12 In addition, proponents of raising the minimum acceptance condition threshold have noted the requirement for a scheme of arrangement to be agreed to by 75% of the votes cast, as described in paragraph 2.3 above.

(c) Arguments against

2.13 The primary argument against raising the minimum acceptance condition threshold is that the "50% plus one" threshold reflects the fact that a person who holds "50% plus one" of the voting rights in a company will, by virtue of his ability to pass ordinary resolutions, have control of that company, including the ability to determine the composition of its board of directors and thereby to control the day-to-day operation of the company's business. As a result, it is argued that it would be undesirable for the threshold at which "statutory control" passes under company law to be different from the threshold at which a person is able to acquire control of a company by means of a contractual offer subject to the provisions of the Code. Accordingly, opponents of the suggestion have argued against raising the minimum acceptance condition threshold for takeover offers unless the threshold required for the passing of an ordinary resolution under company law is raised to the same level.

2.14 It would, of course, be possible for the acceptance condition threshold for voluntary offers to be raised without the threshold for passing an ordinary resolution also being raised. However, if this were to happen, it could lead to a situation where an offer could fail, contrary to the wishes of the holders of a majority of the company's voting rights. Although those who support a reduction in the influence of short term investors in determining the outcome of offers might see nothing unsatisfactory in such an outcome, it would have to be recognised that, in such circumstances, the position of the incumbent board might be unsustainable, given that the shareholders who accepted the offer would collectively be in a position to replace them (perhaps with new directors who might be willing to recommend a new offer on the same terms, thereby increasing the chances of its success).

2.15 In addition, it is argued that it would be inappropriate for the Panel to presume to judge the relative qualities, motives or desirability of different shareholders in an offeree company.

2.16 As regards the comparison of contractual offers with schemes of arrangement, it has been argued that the acceptance condition for contractual offers and the voting requirements in a scheme of arrangement are not comparable for the following reasons:

(a) as noted above, the "75%" requirement in a scheme relates only to shares held by persons voting, in person or by proxy, at the shareholder meeting and not to the entirety of the voting rights of the company. It is therefore possible, in theory (and subject to satisfaction of the "majority in number" test), for a scheme of arrangement to be approved by shareholders representing a minority of the total number of shares in the offeree company carrying voting rights; and

(b) a scheme of arrangement is binding on all shareholders of the relevant class, regardless of whether they voted in favour of the scheme. However, in a contractual offer, shareholders who do not accept the offer will be liable to have their shares compulsorily acquired only if the 90% tests described in paragraph 2.2 above are met.

2.17 In addition, if the acceptance condition threshold were to be raised not only for voluntary offers but also for mandatory offers, it would become more difficult for shareholders in an offeree company to take advantage of the opportunity that the mandatory offer rule is designed to provide of disposing of their shares following the passing of control (as defined by the Code) of the company to a new controller. This is because, if the acceptance condition required by Rule 9.3 is not satisfied, the offer will lapse and the ownership of any shares assented to the offer will not pass to the offeror.

(d) Consequential amendments and other considerations

2.18 If the acceptance condition threshold(s) in Rule 10 and/or Rule 9.3 were to be raised, the Code Committee believes that various issues would need to be considered in further detail, including those set out below:

(a) *recommended offers/offeree board consent*: whether the higher acceptance condition threshold would apply to all offers or only to offers which were not recommended by the board of the offeree company. If the former, whether an offeror should be permitted to set its acceptance condition threshold at "50% plus one" with the consent of the board of the offeree company;

(b) *equality of treatment of competing offerors*: if an offeror's acceptance threshold could be set at "50% plus one" with the consent of the offeree company board, whether other competing offerors should be permitted to set their acceptance condition thresholds at the same level if the board consented to any one of them doing so;

(c) *mandatory offers*: whether or not the acceptance condition threshold for mandatory offers should be raised. If the minimum acceptance condition threshold for voluntary offers were to be raised, but not the acceptance condition threshold for mandatory offers, it is possible that more offerors than at present might wish to trigger an obligation to make a mandatory offer in order to take advantage of the lower threshold;

(d) *acquisitions by the offeror*: subject to the provisions of Rule 5, the Code does not currently restrict a mandatory offeror from acquiring interests in shares during the course of its offer, nor is a mandatory offeror who fails to satisfy the acceptance condition required to "sell down" any shares purchased during the course of its mandatory offer. If the acceptance condition threshold was raised above "50% plus one", it is arguable that buying restrictions or other amendments would need to be introduced into the Code in order to avoid a situation whereby it would be possible for a mandatory offeror to purchase (and retain) shares in the offeree company above the "50% plus one" threshold required for "statutory control" but not to receive sufficient acceptances to take it through the higher acceptance condition threshold. Otherwise, it would be possible for an offer to lapse, but for "statutory control" to have passed to the offeror and for shareholders who had accepted the offer (as opposed to those who had sold their shares) to have been denied the opportunity of disposing of their shares to the new controller of the company;

(e) *buying freedom*: whether a person who is interested in shares carrying more than 30% of a company's voting rights should be free to acquire additional interests in shares without being required to make a mandatory offer only if he holds shares carrying voting rights equivalent to the amended minimum acceptance condition threshold, i.e. whether the threshold at which a person attains "buying freedom" should be raised from 50% to, for example, two-thirds of a company's voting rights. If so, whether this would be consistent with any ability of the board of the offeree company to consent to a lower acceptance condition threshold in a particular offer (see paragraph 2.18(a));

(f) *offer-related resolutions*: whether the threshold for the passing of other resolutions required by the Code (for example under Rule 16 in relation to special deals and management incentivisation and under Rule 21.1 in relation to "frustrating action") should be conformed with any new acceptance condition threshold;

(g) *“whitewash” resolutions*: whether the voting requirements for the passing of a “whitewash” resolution in relation to the acquisition of newly issued shares which would otherwise result in a mandatory offer obligation being triggered should be amended (such resolutions are currently required to be approved by independent shareholders by means of a simple majority vote);

(h) *partial offers and tender offers*: whether the requirements for partial offers under Rule 36 and tender offers under Appendix 5 would need to be amended, insofar as they refer to shares carrying more than 50% of the voting rights of the company; and

(i) *other Code provisions*: whether other provisions of the Code which are dependent on shareholders holding 50% of the voting rights agreeing to a particular course of action would need to be amended (for example, Note 5 on the Notes on Dispensations from Rule 9, which provides that the Panel may grant a dispensation from the mandatory offer requirement if shareholders with 50% or more of the voting rights state that they would not accept an offer, or if 50% of the voting rights are already held by one shareholder).

(e) Scope and jurisdiction

2.19 The Code Committee believes that it would be within the scope of its jurisdiction to raise the acceptance condition thresholds for contractual takeover offers above the current levels. However, the Code Committee considers that, before introducing any change to the acceptance condition threshold for contractual offers, it would be important for further consideration to be given to the consequences of there being a difference between the acceptance condition threshold and the relevant thresholds for the passing of shareholder resolutions under company law and other relevant regulations.

Q1 **What are your views on raising the minimum acceptance condition threshold for voluntary offers above the current level of "50% plus one" of the voting rights of the offeree company?**

Q2 **What are your views on raising the acceptance condition threshold for mandatory offers above the current level of "50% plus one" of the voting rights of the offeree company?**

Q3 **If you believe that an increase in the acceptance condition thresholds for voluntary and/or mandatory offers would be desirable, at what level do you believe they should be set and why?**

Q4 **What are your views on the consequences of raising the acceptance condition thresholds?**

3. The "disenfranchisement" of shares acquired during an offer period

3.1 Some commentators have suggested that voting rights should be withheld from shares in an offeree company acquired during the course of an offer period, such that those shares would be "disenfranchised" for the purposes of the takeover bid.

(a) Background

3.2 The first sentence of the definition of an "offer period" in the Definitions section of the Code provides as follows:

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

3.3 The Code does not currently make any distinction between persons who are already shareholders in the offeree company at the time when an offer period commences and persons who come to acquire shares in the offeree company during the course of the offer period. For example, a person who becomes a shareholder ten days prior to a closing date of the offer is treated no differently from a person who acquired his shares ten years previously. In particular, all shares carrying voting rights are treated as being relevant for the purposes of the acceptance conditions under Rules 10 and 9.3.

3.4 The Code Committee notes that there is no requirement in a "contractual offer" for shareholders in the offeree company who wish to accept the offer to vote in favour of the offer in order for it to succeed. In a contractual offer, shareholders are invited by the offeror to accept the offer and the transfer of title in any shares accepted to the offer is subject to the satisfaction of the acceptance condition (as discussed in section 2) and to the satisfaction or waiver of any other conditions to which the offer is subject. In contrast, a takeover offer which is being effected by means of a scheme of arrangement is required under company law to be approved by way of a resolution voted on by the relevant class(es) of offeree company shareholders. However, as noted in section 2 above, a scheme of arrangement is binding on all shareholders (however they voted and whether they voted or not).

(b) Arguments in favour

3.5 Similar to the arguments put forward in paragraph 2.11 above in relation to raising the acceptance condition threshold, it has been argued that the purpose of "disenfranchising" shares in the offeree company that are acquired during the offer period is to ensure that the outcome of takeover bids is determined by the core shareholder base, not by short term speculative investors who may acquire shares in order to facilitate the takeover. It is argued that ensuring that only those who are registered shareholders at the start of the offer period are eligible to "vote" on the takeover proposal would allow long term shareholders to accept the offer based on the long term interests of the company, without being "squeezed out" by speculators.

3.6 In addition, it is argued that the "disenfranchisement" of shares acquired during an offer period might have the effect of reducing acquisitions of offeree company shares by short term shareholders, by virtue of the fact that any shares acquired would not count towards satisfaction of the acceptance condition, and that reduced demand would lead to shares in the offeree company trading at lower prices (and at a larger discount to the offer price). As a result, existing shareholders would be deterred from engaging in "top-slicing" (i.e. selling a proportion of their shareholding as a hedge against the possibility of the bid failing) and a higher proportion of the register would remain in the hands of long term shareholders, who might be prepared to forego the short term gain available under the offer in favour of the prospect of long term value creation.

(c) Arguments against

3.7 An important argument against the "disenfranchisement" of shares in the offeree company that are acquired during the offer period is that this would appear to be contrary to General Principle 1 (which is identical to Article 3(1)(a) of the Directive), the first sentence of which provides that:

> "**All holders of the securities of an offeree company of the same class must be afforded equivalent treatment**".

3.8 It is arguable that there is no objective justification (i.e. unrelated to the offer or possible offer) for treating short term shareholders less favourably than long term shareholders of the same class and that it is not for the Code to "disenfranchise" shares acquired during the offer period in the absence of amendments being made to company law (and, potentially, to the Directive). In addition, it is argued that it would be inappropriate for the Panel to presume to judge the relative qualities, motives or desirability of different shareholders in an offeree company. However, as explained in paragraphs 3.14 to 3.16 below, concerns relating to General Principle 1 might be capable of being avoided through the introduction of qualifying ownership periods.

3.9 As a practical consequence, the "disenfranchisement" of shares acquired during an offer period would mean that the decision as to the success or failure of the offer would pass to an ever-diminishing pool of shareholders in the offeree company (assuming that, during the course of the offer period, there continued to be disposals of shares by persons who were shareholders in the offeree company when the offer period commenced). This might mean that undue influence could be exercised by one, or a few, significant shareholders who had not disposed of their shares in the offeree company during the course of the offer period.

3.10 A "disenfranchisement" provision could also have the effect that, contrary to the argument put forward in paragraph 3.6 above, hostile offers might, in fact, become more likely to succeed, and to succeed at lower prices. This is on the basis that, if new shareholders were to have no influence on the outcome of an offer, demand for the company's shares would reduce, resulting in lower trading prices and hence a higher perceived offer premium and less pressure on the offeror to increase its offer price, such that offers might succeed at lower offer prices than might otherwise have been the case.

3.11 Furthermore, it is not necessarily the case that persons who acquire shares in the offeree company during the course of an offer period are more likely to want the offer to succeed. For example, if a long term shareholder in the offeree company considers that an offer undervalues the company, it might wish to acquire further shares in order to ensure that those shares were not accepted to the offer. Equally, short term shareholders may buy into an offeree company in receipt of an offer that they regard as too low in order to hold out for a higher price or even to maintain the company's independence.

3.12 It might also be argued that any provision for "disenfranchisement" would be relatively easy to avoid. For example, a person could enter into an agreement or arrangement with an existing shareholder under which the economic interest in, and control over, the shares was transferred to that person without the legal title in the shares being transferred and without the shares becoming "disenfranchised".

(d) Consequential amendments and other considerations

3.13 The Code Committee believes that the issues that would need to be addressed if the suggested "disenfranchisement" of shares acquired during an offer period were to be adopted, include the following:

(a) *meaning of "disenfranchisement"*: a fundamental issue that would need to be resolved is what is meant when it is said that voting rights should be withheld from shares acquired during the offer period. For example, would voting rights be "deemed" to be removed from such shares only for the purposes of the acceptance condition of a "contractual offer" or would voting rights be removed as a matter of law for all purposes, including resolutions to approve a scheme of arrangement and other shareholder resolutions, whether or not they related to the offer (for example, resolutions put at an AGM that happened to fall during an offer period)?

(b) *numerator and denominator for the acceptance condition*: consideration would need to be given as to how any "disenfranchised" shares would be treated for the purposes of the acceptance condition.

Take the example of an offeree company with 1,000,000 ordinary shares in issue, 100,000 of which had been sold by shareholders who were on the shareholder register when the offer period commenced, and had therefore become "disenfranchised", and 900,000 of which had been retained by shareholders who were on the shareholder register when the offer period commenced. Assuming, for the sake of this example, that the acceptance condition threshold were to remain at "50% plus one", consideration would need to be given to whether, in order for the offer to become unconditional as to acceptances, the number of the shares that would need to be accepted to the offer would be, for example:

(i) 500,001 of the 900,000 shares, in order to ensure that the offer would result in "statutory control" passing to the offeror once voting rights were restored to the "disenfranchised" shares. If this were the case, the more liquid the offeree company's shares were, the more difficult it would be for the acceptance condition to be satisfied;

(ii) 450,001 of the 900,000 shares, on the basis that this figure would represent "50% plus one" of the voting rights held by long term shareholders. If this were the case, there would be a risk that an offer could become unconditional as to acceptances but that the offeror would not have "statutory control" of the offeree company once voting rights were restored to the "disenfranchised" shares; or

(iii) both 500,001 of the 1,000,000 total shares in issue <u>and</u> 450,001 of the 900,000 shares held by long term shareholders. Given the unattractiveness of an offer completing when an offeror had not obtained "statutory control", one solution might be to introduce a dual-limbed acceptance condition threshold, such that an offer would be required to be accepted by both "50% plus one" of the total number of voting shares in the offeree company (i.e. pre-"disenfranchisement") and "50% plus one" of the shares held by shareholders who were on the shareholder register on both the date on which the offer period commenced and the relevant closing date;

(c) *acquisitions and disposals by existing shareholders*: the consequences of acquisitions and disposals of shares by persons who were shareholders in the offeree company prior to the commencement of the offer period would need to be considered. For example, if a person who held 100 shares when the offer period commenced disposed of 40 shares and then acquired a further 10 shares, would 40 shares (the gross number disposed of) be "disenfranchised" or only 30 shares (the net number)?

(d) *mandatory offers*: whether the "disenfranchisement" provision would apply to the acceptance condition for mandatory offers under Rule 9.3 in the same way as to the acceptance condition for voluntary offers under Rule 10. On the one hand, it might be argued that making the acceptance condition of a mandatory offer more difficult to satisfy might deny shareholders in the offeree company the opportunity of disposing of their shares to the new controller by way of accepting the offer. On the other hand, it might be argued that the mandatory offer rule is not intended to protect persons who were not shareholders in the offeree company at the time that control (as defined by the Code) of the company passed;

(e) *recommended v. hostile offers*: whether the "disenfranchisement" provision would apply in all offers or only in offers which were not recommended by the board of the offeree company and, if the latter, how this would be implemented (recognising that a hostile offer may and, in practice, often does, become recommended before the end of the offer period);

(f) *acquisitions by the offeror*: whether shares acquired by the offeror (and persons acting in concert with it) during the offer period would count towards satisfaction of the acceptance condition or whether they would be deemed to have been "disenfranchised". If the shares were deemed not to have voting rights, consideration would need to be given to whether or not acquisitions of shares during the offer period would count towards the 30% threshold for the purposes of triggering an obligation to make a mandatory offer under Rule 9.1 (and on the basis of what denominator the 30% threshold would be calculated during an offer period);

(g) *lifting of restrictions*: at what point should voting rights be deemed to be restored to the "disenfranchised" shares? What would the consequences be if an offer lapsed and the same offeror subsequently made a new offer, i.e. would shares which were disenfranchised for the purposes of the first offer (including any shares acquired by the offeror itself) nevertheless be treated as having voting rights for the purposes of the new offer?

(h) *securities borrowing and lending*: what would be the consequences for the practice of securities borrowing and lending, given that securities borrowing and lending transactions involve the transfer of title in securities from the "lender" to the "borrower". For example, following the recall of lent securities by a lender, would the securities delivered to the lender by the borrower (which are equivalent to but not necessarily the same as the securities originally borrowed) be "disenfranchised"?

(i) *contracts for differences*: what would be the consequences for shares which were held by a securities house in order to hedge its economic exposure to CFD positions written to clients. For example, if a securities house continued to hold shares in the offeree company throughout the offer period, but in order to hedge its exposure to positions written to a succession of different clients, would the hedge shares continue to have voting rights or would they be "disenfranchised"?

(j) *disclosures under Rule 8*: if a provision for the "disenfranchisement" of shares were to be adopted, it is likely that significant changes would need to be made to the Code's disclosure regime, particularly since one of the key objectives of the disclosure regime is to identify the location of voting rights. For example, if shares acquired during the offer period were to be excluded from the acceptance condition denominator, consideration would need to be given as to how market participants would be able to calculate whether they were interested in 1% or more of the shares that continued to have voting rights when the denominator would change whenever a long term shareholder sold shares. In addition, it would presumably be necessary for disclosers to make clear how many of the shares in which they were interested had and had not been "disenfranchised". Similar issues might arise in relation to disclosures under the FSA's Disclosure and Transparency Rules; and

(k) *monitoring and enforcement*: consideration would need to be given to how to ensure that "disenfranchised" shares were not in fact counted towards the acceptance condition. This might be particularly difficult, given that a large proportion of shares in UK companies are held in the names of nominee companies and that the beneficial ownership of a shareholding might change without there being a change in the registered holder of the shares.

(e) Qualifying periods

3.14 The Code Committee notes that the Panel has historically been concerned that voting rights should not be withheld from recently acquired shares. For example Note 1 on Rule 22 provides that:

> "*Provisions in Articles of Association which lay down a qualifying period after registration during which the registered holder cannot exercise his votes are highly undesirable.*".

3.15 It might be argued, however, that, if the objective is to ensure that short term shareholders in a company do not exert undue influence, this should be the case at all times and not only when the company is the subject of a takeover bid. In this regard, some commentators have suggested that, rather than "disenfranchising" shares that are acquired during the course of an offer period, it might be preferable to provide, either in a company's articles of association or as a matter of company law, that all ordinary shares in a company, whenever they are acquired, carry no voting rights until the shareholder has held them for a continuous period of, say, 12 months (or that a shareholder who has held his shares for such a continuous period of time should be afforded additional voting rights).

3.16 The Code Committee understands that such a provision would be unlikely to contravene the "equivalent treatment" requirements of General Principle 1 and Article 3(1)(a) of the Directive if the provision applied equally to all shareholders and operated regardless of whether the company was the subject of a takeover bid.

Nevertheless, the Code Committee believes that certain of the arguments against, and the consequences of, introducing a "disenfranchisement" provision identified above would still need to be addressed, including, for example, those relating to:

(a) the likelihood that there would be variability in the number of voting rights in a company, such that the "50% plus one" threshold of "statutory control" would change from time to time;

(b) the fact that a high proportion of shares in UK companies are held in nominee names, such that a change in the beneficial ownership of a shares may not be accompanied by a change in the registered shareholder; and

(c) the likely ease with which the intended effect of such a provision could be avoided.

(f) Scope and jurisdiction

3.17 As indicated above, the requirement under General Principle 1, and Article 3(1)(a) of the Directive, that offeree company shareholders of the same class should be afforded "equivalent treatment" calls into question the Code Committee's ability to amend Rule 10 and/or Rule 9.3 so as provide that shares acquired during an offer period should not be counted towards the satisfaction of an acceptance condition of a contractual offer.

3.18 The Code Committee believes that the question of whether shares which are acquired during an offer period should carry voting rights for the purposes of a resolution to approve a scheme of arrangement or any other resolutions required by UK company law falls outside of the Code Committee's scope would therefore fall to be considered by the Government.

3.19 The introduction of provisions that required shares to be held for a certain period of time before they qualified for voting rights, either in a company's articles of association or as a matter of company law, would be outside the Panel's scope. However, if such provisions were to be introduced, the Code Committee believes that it might be necessary or desirable for amendments to be made to certain provisions of the Code.

Q5 What are your views on the suggestion that shares acquired during the course of an offer period should be "disenfranchised"?

Q6 If you are in favour of "disenfranchisement", what are your views on how such a proposal should be implemented? In particular, what are your views on the various consequential issues identified in section 3 of the PCP?

Q7 What are your views on the suggestion that shares in a company should not qualify for voting rights until they have been held by a shareholder for a defined period of time and regardless of whether the company is in an offer period?

4. Disclosures in relation to shares and other securities

4.1 Some commentators have suggested that the 1% trigger threshold for the disclosure of dealings and positions in relevant securities under the disclosure regime in Rule 8 should be reduced to 0.5%.

4.2 Other commentators have suggested that offeree company shareholders who are subject to the Code's disclosure regime and who accept an offer should be required to disclose publicly that they have done so and, similarly, that shareholders who vote in favour of or against a resolution to approve a scheme of arrangement to implement a takeover should be required to disclose publicly how they voted.

4.3 This section 4 also raises the issue of the splitting up of dealing, voting and acceptance decisions and whether the Code's disclosure requirements should be amended to address this.

(a) Lowering the disclosure trigger threshold

(i) Background

4.4 As described in paragraph 1.4 of PCP 2009/1 (Extending the Code's disclosure regime), the key objectives of the Code's disclosure regime are to:

"(a) *provide transparency as to where voting control of relevant securities lies*: the Code seeks to identify the persons who control the voting rights attaching to relevant securities of the offeree company and, in the case of a securities exchange offer, the offeror;

(b) *identify concert parties*: the Code seeks to identify … persons with significant interests in relevant securities who may be dealing with a view to assisting a party to an offer and who may therefore be acting in concert with an offeror or the offeree company; and

(c) *provide market transparency*: the Code requires persons with significant interests in relevant securities to disclose publicly certain information in relation to their dealings, including the prices at which they have dealt, thereby enabling offeree company shareholders and the market generally to understand the possible impact of such dealings on the market prices of relevant securities.".

4.5 Since 2004, significant amendments have been made to the Code's disclosure regime, the most recent amendments having come into effect on 19 April 2010. In summary, Rule 8 requires the parties to an offer, persons acting in concert with them and persons with significant interests in relevant securities to disclose publicly details of their interests, short positions and dealings in the relevant securities of the offeree company and any offeror company (other than an offeror which is offering solely cash consideration), including interests, short positions and dealings by virtue of derivative instruments such as contracts for differences.

4.6 Under Rule 8.3, the requirements of the Code's disclosure regime apply to any person who is interested in 1% or more of any class of relevant securities of the offeree company or of any offeror company (other than a cash offeror). As compared with other disclosure regimes, the 1% trigger threshold is already considerably lower than the thresholds set out in the EU Transparency Directive (5%), the FSA's Disclosure and Transparency Rules (3%) and the disclosure regimes of most other jurisdictions.

4.7 The Code Committee last reviewed the level of the disclosure trigger threshold in 2007, in the context of its review of the extension of the Code's disclosure regime to contracts for differences and other derivative instruments. At that time, the Code Committee concluded that the disclosure threshold should remain at 1%.

4.8 So far as the offeree company is concerned, the Code Committee notes that, under section 793 of the Companies Act 2006, regardless of whether the company is in an offer period, a public company may require a person to confirm whether or not he is interested in the company's shares and, if he is so interested, to provide details of his interest.

(ii) Arguments in favour

4.9 It might be argued that, notwithstanding the significant amendments made to the Code's disclosure regime in recent years, there remains scope for yet greater transparency as to who controls or is otherwise interested in the securities of the offeree company and, in the case of a securities exchange offer, the offeror. An offer period is a particularly sensitive time in a company's life and the outcome of a takeover bid may turn on a fine margin, which may well be less than 1% of the voting rights. In this context, it might be argued that interests of between, say, 0.5% and 0.99% in the relevant securities of a party to an offer ought to be regarded as significant for the purposes of the Code's disclosure regime. Indeed, it is often asserted that a number of investors ensure that their interests in a company's securities remain just below 1% specifically in order to avoid falling within Rule 8.3. That said, if the disclosure trigger threshold were to be reduced, a number of such persons would presumably then reduce their interests to just below the new threshold in order to avoid being required to make disclosures.

4.10 Whilst a lowering of the disclosure trigger threshold would no doubt lead to additional costs being incurred by market participants with relatively small interests in relevant securities, it might be argued that these costs would be outweighed by the benefits to offeree company shareholders, the parties to the offer and market participants generally, who would be able better to understand, in particular, where voting control of the relevant securities of each of the parties to an offer lies.

4.11 In addition, the amendments which would be required to be made to Rule 8.3 in order to reduce the disclosure threshold trigger would not be technically difficult to achieve and it might be argued that, for most of the market participants who would be affected, the systems costs of implementing such amendments would not be unduly onerous. This is on the basis that such persons will already have systems in place in order to comply with the current 1% threshold.

(iii) Arguments against

4.12 The primary argument against lowering the disclosure trigger threshold in Rule 8.3 would be that the 1% threshold already provides sufficient transparency as to the interests, short positions and dealings of persons with significant interests in relevant securities.

4.13 A risk of lowering the disclosure threshold below its current level would be that, rather than being enhanced, transparency might in fact be obfuscated, in that the amended regime might generate a "blizzard" of disclosures. However, it is difficult for the Code Committee to assess the extent of this risk.

4.14 In addition, the Code Committee notes that a disclosure regime with a lower trigger threshold would inevitably become increasingly difficult to monitor and enforce, since the regime would be likely to apply to a greater number of investors in, particularly, smaller companies, including overseas investors and "retail" investors, who would be likely to have less sophisticated compliance systems in place and less experience in complying with the Code's disclosure regime.

4.15 A further argument against immediate change is that, as indicated above, significant amendments were made to the Code's disclosure regime as recently as 19 April 2010. Following these amendments, the Code now requires "opening position disclosures" and "dealing disclosures" to be made in respect of the relevant securities of each of the parties to an offer (other than a cash offeror) by any person who is interested in 1% or more of any class of relevant securities of any party to an offer (other than a cash offeror). It might be regarded as preferable to allow these amendments to "bed down" before giving detailed consideration as to whether to reduce the disclosure trigger threshold.

(b) The disclosure of offer acceptance/voting decisions

(i) Arguments in favour

4.16 The Code Committee understands that the primary argument in favour of requiring offer acceptance decisions (including, presumably, a decision to withdraw an acceptance) and voting decisions in relation to schemes of arrangement to be disclosed is that such a requirement would provide greater transparency in relation to the decisions taken by institutions who manage shareholdings in offeree companies on behalf of beneficial owners, thereby increasing the accountability of those institutions to the beneficial owners. In particular, the Code Committee understands that concern has been expressed that institutional shareholders might publicly give the impression that they do not intend to accept an offer but accept it nevertheless, although the Code Committee is not aware of any specific case in which this has occurred.

4.17 In addition, it might be argued that additional transparency as to the extent to which an offer has been accepted might, particularly in the later stages of an offer, be material information to offeree company shareholders and other market participants, in terms of understanding the likelihood of the acceptance condition being satisfied.

(ii) Arguments against

4.18 The primary argument against introducing any such disclosure requirement into the Code is that it is clearly not the Panel's function to regulate the relationship between institutional shareholders and beneficial owners. On this basis, any change in this area should be introduced on a general basis, as a matter of best practice or of legal or regulatory requirement and should not apply only in the limited circumstances of takeover bids.

4.19 In addition, it might be argued that a takeover offer should be treated as a "secret ballot" and that a shareholder's decision as to whether or not to accept an offer should not be required to be disclosed, at least until the outcome of the offer has been publicly announced.

4.20 It might also be argued that, if it is considered that additional transparency is required in relation to the extent to which acceptances of any offer have been lodged in aggregate, this would be better provided not by way of disclosures by individual shareholders but in other ways, for example, by requiring more frequent announcements by an offeror of its acceptance level under Rule 17.1, either throughout the course of a contractual offer or in its later stages. However, it is accepted that this would not address the accountability issue raised in paragraph 4.16 above.

(iii) Consequential amendments and other considerations

4.21 The Code Committee considers that the additional matters that would need to be considered in relation to any requirement to disclose offer acceptance and/or scheme voting decisions would include the following:

(a) *timing*: if an offer acceptance, or the exercise of a vote on a scheme resolution, were to be treated in the same way as a dealing under Rule 8, this would suggest that any such public disclosure should be made by 3.30 pm on the following business day. However, it might be argued by those who consider the secrecy of an offer acceptance condition to be paramount that public disclosure should be delayed until some time after an offer had become or been declared unconditional as to acceptances (or had lapsed) in the case of a contractual offer or had become effective (or had been withdrawn) in the case of a scheme of arrangement; and

(b) *contracts for differences*: whether such a provision could be applied to persons who are interested in shares by virtue of contracts for differences and other derivative instruments. Consideration might need to be given as to whether, for example, persons with long interests in shares by virtue of contracts for differences should be required to disclose the identities of the securities houses with which their positions were held and whether the exemption from disclosure afforded to the client-serving desks of securities houses with recognised intermediary status should be disapplied for the purpose of disclosing decisions regarding offer acceptance and scheme votes.

(c) The splitting up of dealing, voting and offer acceptance decisions

4.22 A separate issue in relation to the Code's disclosure regime to which the Code Committee intends to give further consideration relates to the "splitting up" by shareholders of certain of the rights attaching to shares in an offeree or offeror company.

4.23 Broadly, the Code assumes that a person who controls a shareholding, whether that person is the beneficial owner of the shares in question or someone who manages the shareholding on the beneficial owner's behalf, will have discretion over all investment decisions relating to the shareholding, including decisions regarding dealing, voting and offer acceptance. However, the Code Committee understands that the Executive is encountering an increasing number of cases where these decisions are split between two or more different persons. For example, the Code Committee understands that a beneficial owner may delegate dealing and offer acceptance decisions to a fund manager but retain voting decisions for itself, delegate such decisions to a third party voting service or agree with the fund manager that votes will always be exercised in accordance with the recommendation of a proxy advisory service.

4.24 It might be argued that the obligations imposed by Rule 8 on parties who may have discretion over one or more (but not all) of the dealing, voting and offer acceptance decisions should be clarified. For example, it might be made clearer in the relevant provisions of the Code itself whether each of the parties involved should make a separate disclosure, whether disclosures by different parties in relation to the same shares should be somehow linked to each other, or whether a party who deals in relevant securities should communicate this fact to the parties who have the voting and offer acceptance decisions.

4.25 The Code Committee invites preliminary views from respondents as to whether the application of the Code's disclosure regime to circumstances where the rights attaching to shares have been split up should be clarified and, if so, how the Code's disclosure regime should operate in such circumstances.

(d) Scope and jurisdiction

4.26 The Code Committee believes that any lowering of the trigger threshold for disclosures under Rule 8.3 would be solely a matter for the Committee.

4.27 The Code Committee believes that it would be within its scope to require details of offer acceptance decisions and of voting on schemes of arrangement to implement a takeover bid to be disclosed by shareholders in the offeree company. However it is arguable that the introduction of any requirement for voting decisions more generally to be disclosed might best be left to the Government, for example, pursuant to the powers included in section 1277 of the Companies Act 2006.

4.28 The Code Committee considers that it would solely be a matter for it to introduce provisions requiring offerors to make more frequent offer acceptance announcements in the later stages of an offer.

4.29 The Code Committee also believes that any clarification of the disclosure requirements of Rule 8 in circumstances where the rights attached to shares have been split up would be solely for it to make.

Q8 What are your views on the suggestion that the threshold trigger at which independent market participants become subject to the Code's disclosure regime, currently 1%, might be lowered to 0.5%?

Q9 What are your views on the suggestion that there should be additional transparency in relation offer acceptance decisions and of voting decisions in relation to schemes of arrangement? If you are in favour of this suggestion, please explain your reasons and how you think such additional transparency should be achieved?

Q10 What are your views on the suggestion that the application of the Code's disclosure regime to situations where the rights attaching to shares have been "split up" might be clarified?

5. The contents of offer documents and offeree board circulars

5.1 Some commentators have suggested that offerors should be required to provide more information in relation to the financing of takeover bids and their implications and effects. For example, on 1 March, Lord Mandelson said that he believed that there was a case for:

> "Requiring bidders to set out publicly how they intend to finance their bids not just on day one, but over the long term, and their plans for the acquired company, including details of how they intend to make cost savings.".

5.2 In addition, it has been suggested that the boards of offeree companies should be required to set out their views on an offeror's intentions for the offeree company in greater detail.

(a) Financial information

5.3 The Code already includes provisions requiring offerors to disclose detailed financial information, including information in relation to the financing of the offer and the expected financial benefits.

(i) The financing of the offer and other financial information

5.4 Under Rule 24.2(f) an offeror is required to describe in its offer document how the offer is to be financed and the source of the finance. The full text of Rule 24.2(f) is set out below:

> "**(f) all offer documents must contain a description of how the offer is to be financed and the source of the finance. The principal lenders or arrangers of such finance must be named. Where the offeror intends that the payment of interest on, repayment of or security for any liability (contingent or otherwise) will depend to any significant extent on the business of the offeree company, a description of the**

> **arrangements contemplated will be required. Where this is not the case, a negative statement to this effect must be made**".

5.5 Under Rules 24.2(a), (b) and (c)(i) certain financial information in relation to the offeror is required to be included in the offer document. In summary, where the offeror is a company incorporated in the UK and its shares are admitted to the Official List or to trading on AIM, more detailed financial information is required to be disclosed in circumstances where the consideration being offered includes securities (Rule 24.2(a)) than in circumstances where the consideration is cash only (Rule 24.2(b)). Where the offeror is not a company incorporated in the UK whose shares are admitted to the Official List or to trading on AIM then, regardless of whether the consideration is securities or cash, Rule 24.2(c)(i) requires the offer document to include the information described in Rule 24.2(a) and such further information as the Panel may require in the particular circumstances of the case.

(ii) Merger benefits statements

5.6 Under Note 8 on Rule 19.1, certain requirements must be observed if a party to an offer makes a quantified statement about the expected financial benefits of a proposed takeover. In PCP 2010/1 (Profit forecasts, asset valuations and merger benefits statements), the Code Committee consulted on a proposal to amend Note 8 on Rule 19.1. If the proposal were to be adopted, Note 8 on Rule 19.1 would become Rule 28.10 and Rule 28.10(a) would read as follows:

> "**28.10 QUANTIFIED EFFECTS STATEMENTS**
>
> **(a) If a party to an offer makes a quantified effects statement, it must publish at the same time:**
>
> > **(i) the bases of the belief (including sources of information) supporting the statement;**
> >
> > **(ii) reports by financial advisers and accountants that the statement has been made with due care and consideration;**

(iii) an analysis and explanation of the constituent elements sufficient to enable the relative importance of these elements to be understood; and

(iv) a base figure for any comparison drawn.”.

(iii) Suggestion

5.7 To date, the approach adopted by the Panel has been that the principal purpose of the disclosure of financial information under Rule 24.2 is to enable offeree company shareholders to evaluate the financial position of the offeror, particularly in circumstances where they might become shareholders in the offeror. Rule 24.2(b) therefore requires less financial information to be included in the offer document than Rule 24.2(a). In addition, Note 6 on Rule 24.2 provides that, where the consideration offered is solely cash and the offer is structured so that no person will remain or become a minority shareholder in the offeree company (for example, where a cash offer is to be effected by means of a scheme of arrangement), the disclosures that would otherwise be required under Rules 24.2(b), (c)(i) and (f) may largely be dispensed with.

5.8 Separately, the requirements of Note 8 on Rule 19.1 in relation to quantified statements as to the effects of an offer need only be complied with in a securities exchange offer and will not normally apply in the case of a recommended offer, unless a competing offer is made and the statement is repeated or otherwise becomes a material issue.

5.9 The Code Committee believes that consideration might be given as to whether the same disclosure requirements should apply to financial information on an offeror (including information relating to the financing of the offer) and to quantified effects statements, regardless of whether:

(a) the consideration being offered is cash or securities;

(b) the offer could result in minority shareholders remaining in the offeree company; or

(c) the offer is hostile or recommended, or whether a competitive situation has arisen.

(iv) Arguments in favour

5.10 It might be argued that such information is relevant to a wider range of persons than simply offeree company shareholders who might wish to exchange their offeree company shares for offeror securities or remain as shareholders in the offeree company after it has come under the control of the offeror. For example, persons who might be interested in such information might include the following:

(a) *shareholders in the offeree company who will receive cash*: offeree company shareholders might be interested in such information, even in circumstances where the offeror is offering solely cash. For example, shareholders may wish to scrutinise the financing documents summarised in Rule 24.2(f) and put on display in accordance with Rule 26(j) in order better to understand the scope that an offeror may have for increasing its offer;

(b) *directors of the offeree company*: similarly, it might be argued that such information might be relevant to the board of the offeree company in formulating its opinion on the offer and the effects of its implementation, as required by Rule 25.1;

(c) *employees*: it might be argued that such information would be of particular relevance to employees. The Code Committee notes that the importance of employees being kept fully informed, and of the opinion of employee representatives being made known, is already recognised in certain provisions of the Code, for example:

(i) Rules 2.6(b)(ii) and 30.1(b) require the offeror and the offeree company to make, respectively, the formal offer announcement and the offer document readily available to their employee representatives or, where there are no such representatives, to the employees themselves;

(ii) Rule 30.2(a)(ii) requires the board of the offeree company to make the circular containing its opinion readily available to its employee representatives or, where there are no such representatives, to the employees themselves; and

(iii) Rule 30.2(b) requires the board of the offeree company to append to its circular a separate opinion from the representatives of its employees on the effects of the offer on employment (provided such opinion is received in good time before publication of that circular); and

(d) *competing offerors*: notwithstanding that the disclosure of such information by an offeror is not primarily intended to be for the benefit of competing offerors or potential offerors, it might be argued that such information would be of interest to them, and that there should be a "level playing field" in terms of the disclosure requirements placed on offerors in a competitive situation.

(v) Arguments against

5.11 The main arguments against change in this area are that the information disclosure requirements in the Code are primarily for the benefit of shareholders in the offeree company and that information in relation to the offeror's finances, or the effects of the merger, is likely to be of little interest to such shareholders (or to anyone else) when the consideration offered is solely cash and, especially, where there is no possibility of minority shareholders remaining in the offeree company if the offer is successful.

(b) The offeror's intentions and the views of the offeree board

5.12 As mentioned above, it has been suggested that offerors should be required to disclose their intentions in relation to the offeree company in greater detail and that the boards of offeree companies should be required to set out their views on the offerors' intentions in greater detail.

5.13 Rule 24.1 requires an offeror to describe in the offer document its intentions for the offeree company, the offeror itself (if it is a company) and for the employees of the respective companies. The full text of Rule 24.1 is set out below:

> "**24.1 INTENTIONS REGARDING THE OFFEREE COMPANY, THE OFFEROR COMPANY AND THEIR EMPLOYEES**
>
> **An offeror will be required to cover the following points in the offer document:-**
>
> **(a) its intentions regarding the future business of the offeree company;**
>
> **(b) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company's places of business;**
>
> **(c) its intentions regarding any redeployment of the fixed assets of the offeree company;**
>
> **(d) the long term commercial justification for the proposed offer; and**
>
> **(e) its intentions with regard to the continued employment of the employees and management of the offeree company and of its**

subsidiaries, including any material change in the conditions of employment.

Where the offeror is a company and insofar as it is affected by the offer, the offeror must also cover (a), (b) and (e) with regard to itself.".

Rule 24.1 came into effect in its present form on 20 May 2006 and aspects of Rule 24.1 implement Article 6(3)(i) of the Directive.

5.14 Rule 25.1 requires the board of the offeree company to give a reasoned opinion on an offer to the offeree company's shareholders. The full text of Rules 25.1(a) and (b) is set out below:

"**25.1 VIEWS OF THE BOARD ON THE OFFER, INCLUDING THE OFFEROR'S PLANS FOR THE COMPANY AND ITS EMPLOYEES**

(a) The board of the offeree company must send its opinion on the offer (including any alternative offers) to the offeree company's shareholders and persons with information rights. It must, at the same time, make known to its shareholders the substance of the advice given to it by the independent advisers appointed pursuant to Rule 3.1.

(b) The opinion referred to in (a) above must include the views of the board of the offeree company on:

(i) the effects of implementation of the offer on all the company's interests, including, specifically, employment; and

(ii) the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the offeree company's places of business, as set out in the offer document pursuant to Rule 24.1,

and must state the board's reasons for forming its opinion.".

Rules 25.1(a) and (b) came into effect in their present form on 20 May 2006 and aspects of those Rules implement Article 9(5) of the Directive. They also reflect the provisions of General Principle 2, which provides, amongst other things, that "the board of the offeree company must give its views on the effects of implementation of the bid on employment and the locations of the company's places of business".

5.15 Those in favour of more detailed disclosures might argue that, whilst Rules 24.1 and 25.1 were expanded as a result of the implementation of the Directive, the parties to an offer have continued, in practice, to disclose no more than the bare minimum amount of information required. If there is a view that statements made in compliance with Rules 24.1 and 25.1 should be more detailed, it might be argued that it would be more appropriate for the Executive to issue a Practice Statement on this subject than for amendments to be made to Rules 24.1 and 25.1. On the other hand, those against change in this area might argue that the level of disclosure under Rules 24.1 and 25.1 is, in practice, adequate.

(c) The opinion of the offeree board

5.16 Rule 25.1(a) requires the board of the offeree company to give its opinion on an offer to the company's shareholders. However, although this opinion must include the board's views on the matters set out in Rule 25.1(b), the Code does not specify the matters to which the board of the offeree company must have regard in deciding whether or not to recommend that offeree company shareholders should accept the offer. The Code Committee understands that, in practice, the board of the offeree company and its advisers will normally focus on the value of the offer in considering whether the offer is "fair and reasonable" so far as the interests of the shareholders in the offeree company are concerned. It has been suggested that amendments might be made so as to make clear that the Code does not place any limitations on the considerations to which the board of the offeree company may have regard in deciding whether or not to recommend acceptance of an offer.

5.17 It has also been noted that, under section 172 of the Companies Act 2006, directors have a duty to promote the success of the company for the benefit of its shareholders as a whole, having regard, amongst other matters, to:

> "(a) the likely consequences of any decision in the long term;
>
> (b) the interests of the company's employees;
>
> (c) the need to foster the company's business relationships with suppliers, customers and others;
>
> (d) the impact of the company's operations on the community and the environment;
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct; and
>
> (f) the need to act fairly as between members of the company.".

5.18 The Code Committee also notes that the Association of British Insurers, in its letter dated 19 March 2010 to Lord Mandelson said that:

> "… we agree that getting a high price in a takeover may not be the perfect proxy for the fiduciary duty of directors to consider the best outcome for the company in the long term. A board should not feel obliged to recommend a bid as long as it is able to provide a cogent and convincing explanation of its position for which shareholders can hold it accountable.".

(d) Employee representatives

5.19 The Code Committee understands that, since the introduction on 20 May 2006 of Rule 30.2(b), there have only been very few cases in which an opinion from the representatives of the offeree company's employees have been appended to an offeree board circular.

5.20 As a separate matter, the Code Committee understands that it is sometimes asserted that the provisions of the Code forbid or restrict offerors and offeree companies from passing non-public information on an offer to employee representatives in meetings held during an offer period. The Code Committee understands that, subject to the acceptance of well-established conditions regarding confidentiality, the Code does not forbid or restrict the passing of non-public information by the parties to the offer to offeree or offeror company employee representatives acting in their capacity in meetings held during the offer period. If employee representatives are interested in shares in the offeree company, the provisions of Rule 20.1, which provides for equality of information to shareholders, may be applicable and the Panel should be consulted. However, the Code Committee understands that, in such circumstances, the Panel will only be concerned if the employee representatives are interested in a significant number of shares.

(e) Scope and jurisdiction

5.21 The Code Committee believes that the adoption of any of the suggestions discussed in this section 5 would be solely a matter for the Committee itself, in the form of amendments to the Code.

Q11 What are your views on the suggestion that the same requirements as to the disclosure of financial information on an offeror, the financing of the offer, and information on quantified effects statements should apply regardless of whether:

(a) the consideration being offered is cash or securities;

(b) the offer could result in minority shareholders remaining in the offeree company; or

(c) the offer is hostile or recommended, or whether a competitive situation has arisen?

Q12 What are your views on:

(a) disclosures made by offerors of their intentions in relation to the offeree companies under Rule 24.1; and

(b) the views of the boards of offeree companies on offerors' intentions given under Rule 25.1?

If you consider that greater detail is required, how do you consider that this would be best achieved?

Q13 What are your views on the matters to which the board of the offeree company should have regard in deciding whether or not to recommend acceptance of an offer?

6. Advice, advisers and advisory fees

(a) Independent advice

6.1 On 18 March 2010, Lord Myners said that he:

> "… would particularly encourage the giving of serious consideration to a requirement that shareholders in the target company (as opposed to the board of directors) should be entitled to receive independent advice on any proposed purchase of the company from a qualified party having no financial interest in the outcome.".

6.2 In addition, some commentators have suggested that the Code should restrict the board of an offeree company from entering into a fee arrangement with a Rule 3 adviser which is dependent on the outcome of the takeover bid, for example, a "success fee" arrangement that provides that the adviser's fee will only become payable, or that a higher fee will become payable, in the event that the transaction completes.

6.3 It has further been suggested that the Code should require details of the fees and costs payable to advisers in relation to a takeover bid to be disclosed publicly.

(i) Current provisions of the Code

6.4 As described in section 5 above, Rule 25.1(a) provides that:

> "**The board of the offeree company must send its opinion on the offer (including any alternative offers) to the offeree company's shareholders and persons with information rights. It must, at the same time, make known to its shareholders the substance of the advice given to it by the independent advisers appointed pursuant to Rule 3.1.**".

6.5 Rule 3.1 forms one of the fundamental protections for offeree company shareholders. It provides as follows:

"**3.1 BOARD OF THE OFFEREE COMPANY**

The board of the offeree company must obtain competent independent advice on any offer and the substance of such advice must be made known to its shareholders.".

6.6 The independence of a Rule 3 adviser, both actual and perceived, is crucial to the operation and effectiveness of the Code. Rule 3.3, and Note 1 on Rule 3.3, provide further in relation to the concept of independence, as follows:

"**3.3 DISQUALIFIED ADVISERS**

The Panel will not regard as an appropriate person to give independent advice a person who is in the same group as the financial or other professional adviser (including a corporate broker) to an offeror or who has a significant interest in or financial connection with either an offeror or the offeree company of such a kind as to create a conflict of interest (see also Appendix 3).

NOTES ON RULE 3.3

1. Independence of adviser

The Rule requires the offeree company's adviser to have a sufficient degree of independence from the offeror to ensure that the advice given is properly objective. Accordingly, in certain circumstances it may not be appropriate for a person who has had a recent advisory relationship with an offeror to give advice to the offeree company. In such cases the Panel should be consulted. The views of the board of the offeree company will be an important factor.".

6.7 In addition, the Code recognises that entering into certain types of "success" fee arrangement might result in an adviser to the board of the offeree company not being regarded as independent for the purposes of Rule 3.1. This concern normally arises in the context of a hostile offer, where "success" is taken to mean the failure of the offer (or failure below an unrealistically high price). Similar concerns may also arise if the adviser's fee is contingent upon the success of a particular recommended offer, for example, if it would not be paid if a higher offer from a third party emerged. Note 3 on Rule 3.3 therefore provides as follows:

> "*3. Success fees*
>
> *Certain fee arrangements between an adviser and an offeree company may create a conflict of interest which would disqualify the adviser from being regarded as an appropriate person to give independent advice to the offeree company. For example, a fee which becomes payable to an offeree company adviser only in the event of failure of an offer will normally create such a conflict of interest. In cases of doubt the Panel should be consulted.*".

6.8 However, the Code Committee understands that Note 3 on Rule 3.3 is not normally interpreted as applying to fees which become payable:

(a) if any offer completes (and not only if a particular offer completes); or

(b) only if any offer completes at above a certain price.

(ii) Arguments in favour

6.9 The arguments in favour of the suggestions described at paragraphs 6.1 and 6.2 above would appear to include the arguments that there might be a risk:

(a) that advice received by the boards of offeree companies might not be given with shareholders' best interests in mind;

(b) that advisers to boards of offeree companies might not be sufficiently independent; or

(c) that advice given by advisers to the boards of offeree companies might be unduly influenced by the way in which fee arrangements are structured. For example, in the context of a recommended, non-competitive situation, where part or all of the fee will only be payable if the transaction completes, it might be argued that there is a risk that the adviser will always prefer the transaction to succeed, whatever the price, since any fee is better than none.

(iii) Arguments against

6.10 Opponents of the suggestions described at paragraphs 6.1 and 6.2 above argue that Rule 3 meets the objective of ensuring that independent advice is made available to the shareholders in an offeree company, noting that, even though the independent advice is given to the board of the offeree company, and is not addressed directly to offeree company shareholders, the substance of the advice must be made known to offeree company shareholders under Rule 3.1 and Rule 25.1(a).

6.11 In addition, it is argued that there might also be significant difficulties in requiring a financial adviser to provide advice to, and accept liability to, all of the shareholders in an offeree company, particularly as the adviser will not have knowledge of the financial situation of each individual shareholder. Currently, Rule 24.2(d)(i) requires an offer document to include a heading encouraging offeree company shareholders to consult an independent financial adviser if they are in any doubt about the offer.

6.12 It is also arguable that the financial adviser to the offeree board is best placed to advise on the offer, given that it will have access to the fullest information on the offeree company, i.e. that held by the directors of the offeree company, which will go beyond that which is available in the public domain. By contrast, certain parties argue that an adviser providing advice to offeree company shareholders may be restricted to public information and thus have a less comprehensive basis on which to form its advice.

6.13 As regards the question of the independence of Rule 3 advisers, it is important to note that it is for the Panel, and not the board of the offeree company, to determine whether a proposed adviser satisfies the requirements of Rule 3.3 (albeit that the board's views will be taken into account). In addition, it is not acceptable for an adviser who does not satisfy the requirements of independence to argue that it should be permitted to give Rule 3 advice, subject to disclosing its relationship with the offeror or any other conflict of interest (on the basis of the argument that shareholders could conclude for themselves whether the advice given was likely to be impartial). Furthermore, the Code provides that the views of any director who has a conflict of interest should be excluded from the board's opinion and that, in circumstances where there is a divergence of views amongst board members, or between the board and the Rule 3 adviser, this must be stated and an explanation given.

6.14 The Code Committee is aware that, in certain jurisdictions, it is common for a "fairness opinion" to be obtained by offeree companies in relation to takeover bids. The Code Committee understands that such a fairness opinion is provided not to shareholders but to the board of the offeree company and that the purpose of such an opinion is normally to assist the board in demonstrating that it has fulfilled its fiduciary duties to shareholders. The Code Committee understands that a fairness opinion may often be given by an adviser who has not had any previous role in the transaction in question, but that it may equally be given by an incumbent adviser (who might or might not satisfy the requirements of independence under Rule 3). Given the requirement for independent advice under Rule 3, a requirement under the Code for a separate fairness opinion would, it might be argued, merely duplicate the current requirements of Rule 3, whilst adding to the costs that an offeree company would be required to incur in relation to an offer (assuming that the costs of obtaining the advice would not be passed on to individual shareholders in the offeree company).

6.15 The Executive has undertaken a review of 16 overseas jurisdictions[1] in order to ascertain whether, in those jurisdictions, there is either a requirement (legal or regulatory) for the board of an offeree company to obtain, or an established practice of the board of an offeree company obtaining, independent advice in relation to a takeover bid and, if so, whether that advice is required to be, or is, given to the board of the offeree company or to shareholders themselves. The review found that in 11 of the 16 jurisdictions examined there was either a requirement for the board of an offeree company to obtain, or an established practice of the board of an offeree company obtaining, independent advice in relation to takeover bids (albeit that in certain of those jurisdictions the requirements or practice applied to certain specific transaction structures or circumstances rather than to all takeover bids whatever the structure or circumstances). The review found that in those 11 jurisdictions the substance of the independent advice is commonly made known to shareholders by means of the offer documentation, either by requirement or, more usually, practice, but that in each of those 11 jurisdictions the independent advice is addressed to the board of the offeree company and is not addressed to its shareholders, and is therefore equivalent to (and often more narrow in scope than) the independent advice required to be obtained under Rule 3.

6.16 As regards "success fees", it might be argued that an arrangement which provides that part or all of a fee will become payable only upon the completion of an offer is a legitimate commercial arrangement and that the risk of a conflict of interest arising is not so great that such arrangements should disqualify an adviser from giving independent advice, particularly given the reputational risk to an adviser of recommending a transaction that is not in the best interests of offeree company shareholders. In addition, it might be argued that such fee arrangements in fact operate in the interests of offeree company shareholders, particularly where the inclusion of a ratchet mechanism may act as an incentive for the adviser to

[1] Australia, Belgium, Canada, France, Germany, Hong Kong, India, Italy, Luxembourg, the Netherlands, Portugal, Singapore, South Africa, Spain, Sweden and the US

negotiate a higher offer price and that arrangements which provide that advisers will not be paid if the transaction does not complete provide offeree company boards with the means of limiting costs in the event of an abortive transaction. It is also arguable that a prohibition on success-based fee structures might, in fact, lead to an overall increase in advisory fees for offeree company boards as a whole.

(b) Disclosure of advisory fees and costs

6.17 As mentioned above, it has further been suggested that the Code should require details of the fees and costs payable to advisers in relation to a takeover bid to be disclosed publicly.

(i) Arguments in favour

6.18 Arguments in favour of requiring advisers' fees to be disclosed under the Code include the following:

(a) that fee agreements are material contracts entered into in connection with the offer, and that the Panel should require them to be disclosed as such;

(b) that shareholders should be entitled to be provided with information as to how much of the company's money is being spent by the directors in relation to the offer, and that advisory fees are likely to account for a significant proportion of that expenditure; and

(c) that the disclosure of an adviser's fees may give an indication of the degree to which the adviser may have an incentive to persuade its client to pursue a particular course of action (or may demonstrate that there is no such incentive).

(ii) Arguments against

6.19 Arguments against requiring advisers' fees to be disclosed under the Code include the following:

(a) sensitive information about offer tactics would be revealed if, for example, details of a success fee ratchet mechanism were to be disclosed; and

(b) if the purpose of disclosing the fees of the offeree company's financial advisers is to cleanse any perceived conflict of interest, this is unnecessary since, as described above, there already exist strict requirements for independence under Rule 3.3.

(iii) Consequential amendments and other considerations

6.20 If the suggestion that advisory fees and costs in relation to an offer should be disclosed were to be adopted, the Code Committee believes that a number of issues would need to be considered further, including the following:

(a) *fees to be disclosed*: what fees and costs would fall to be disclosed and to what level of detail? For example, disclosure could be required of:

(i) fees payable to financial advisers (either individually or in aggregate) including, potentially, information as to the scope of any incentive, ratchet or "success" arrangements;

(ii) fees payable to all advisers (including, for example, lawyers, accountants and other professionals), whether separately or in aggregate; or

(iii) the total costs of the transaction (including, for example, printing and financing costs); and

(b) *timing*: whether any provision should require the disclosure of, for example, estimated fees and costs at the outset of an offer and/or whether it should require the disclosure of a final figure once the offer has completed or lapsed.

(c) Scope and jurisdiction

6.21 The Code Committee believes that the adoption of any of the suggestions discussed in this section 6 would be solely a matter for the Committee itself, in the form of amendments to the Code.

6.22 In this section 6, the Code Committee has focused on the fees payable to advisers to the offeree company, given that the Code is primarily concerned with the protection of offeree company shareholders. However, if it were to be concluded that the Code should afford protections to offeror company shareholders (see section 7 below), similar consideration might need to be given to the issue of the fees payable to the advisers to offerors.

Q14 What are your views on the suggestion that there should be a requirement for independent advice on an offer to be given to offeree company shareholders separately from the advice required to be given to the board of the offeree company?

Q15 What are your views on the suggestion that the board of any offeree company should be restricted from entering into fee arrangements with advisers which are dependent on the successful completion of the offer?

Q16 What are your views on the suggestion that the fees incurred in relation to an offer should be required to be publicly disclosed?

Q17 If you are in favour of the disclosure of fees, how do you think that any provision should operate? For example:

(a) **to which fees (and other costs) should any provision apply and on what basis?**

(b) **at what point(s) of the transaction should any disclosure be made?**

7. Protection for offeror company shareholders

7.1 Some commentators have suggested that some protections similar to those afforded by the Code to offeree company shareholders should be afforded to shareholders in an offeror company.

7.2 For example, in his speech on 1 March, Lord Mandelson said that he thought that there was "a case for requiring all companies making significant bids in this country to put their plans to their own shareholders for scrutiny". Similarly, in his speech on 8 March, Lord Myners stated as follows:

> "At the moment, the Takeover Code is, for good reason, focused on protecting the interests of shareholders in the target company requiring all shareholders to be treated equally, given necessary information and advice. The Code says little about the interests of the bidder company, and yet academic and anecdotal evidence … suggests that where a takeover leads to very bad outcomes it is normally at the expense of the bidding company and its shareholders.
>
> A thorough review of takeover practice in the UK would require critical focus on this issue, supplementing the current protections offered by the Code to shareholders in the target company.".

(a) Background

(i) Companies and transactions to which the Code applies

7.3 Broadly, the Code applies by reference to the offeree company's country of registration, regardless of the nationality of the offeror and regardless of the offeror's legal form. For example, the Code will apply to an offer for an offeree company that is subject to the Code, regardless of whether the offeror is a company registered in the UK, an overseas company or an individual.

(ii) Companies and transactions to which the Code does not apply

7.4 The Code does not apply where a takeover bid is made by an offeror company that is registered in a jurisdiction in which the Code applies if the offeree company is not itself subject to the Code. For example, the Code would not apply if a public company registered in the UK were to make a takeover bid for a company registered in the US; instead, US laws and regulations for the protection of shareholders in the US offeree company would apply.

(iii) Significant transactions under the Listing Rules

7.5 A transaction that comprises a takeover by a company that has a premium listing in the UK may be subject to the requirements of Chapter 10 of the FSA's Listing Rules. Under Chapter 10 of the Listing Rules, a transaction proposed to be undertaken by a company that has a premium listing is classified by assessing the size of the transaction relative to that of the company, using percentage ratios resulting from applying the class test calculations set out in Annex 1 to Chapter 10. Depending on the classification of the transaction, certain requirements may apply. For example, where the transaction is classified as a "class 1 transaction", the transaction will be subject to the prior approval of the company's shareholders in a general meeting.

(iv) Circumstances in which the Code does protect offeror company shareholders

7.6 As indicated above, the Code is designed principally for the protection of shareholders in the offeree company and is not designed for the protection of shareholders in an offeror company. An exception to this is set out in Rule 3.2. Under Rule 3.2, the board of an offeror company, if it is a company to which the Code would apply if it were an offeree company, is required to obtain independent advice where the offer is a "reverse takeover" or where the directors have a conflict of interest. Another, related, exception is Note 4 on Rule 20.2

which provides that, where an offer might result in an offeror needing to increase its existing voting equity share capital by 100% or more, an offeror for either the offeree company or the first offeror will be entitled to receive information which they have given to each other.

(v) *Overseas jurisdictions*

7.7 The Code Committee understands that it is sometimes asserted that, in many overseas jurisdictions, protections are afforded to shareholders in offeror companies, for example by imposing requirements on the board of an offeror company to obtain independent advice or a "fairness opinion" in relation to a takeover bid. The Executive has undertaken a review of the regulations of 16 overseas jurisdictions[2] in order to ascertain whether, in those jurisdictions, there is either a requirement (legal or regulatory) for the board of an offeror company to obtain, or an established practice of the board of an offeror company obtaining, independent advice in relation to a takeover bid for the protection of shareholders in the offeror company. The review found that there was a requirement for the board of an offeror to obtain independent advice in only one of those jurisdictions, namely Hong Kong, and that requirement (equivalent to Rule 3.2) applies only in the case of a "reverse takeover". In a small number of other jurisdictions, most notably the US and, to a lesser extent, Canada, the Code Committee understands that the boards of offeror companies might, in practice, choose to obtain a fairness opinion, albeit that there is no requirement for them to do so.

(b) ***Arguments in favour***

7.8 The argument in favour of shareholders in offeror companies being afforded additional protections is that a takeover offer may be as significant to offeror company shareholders as it is to shareholders in the offeree company. Indeed, it may even be more so. For example, following a cash offer, offeree company

[2] See paragraph 6.15

shareholders who accept the offer may have no further relationship with the offeror, whereas the offeror will need to deal with the various consequences of having taken control of the offeree company. Therefore, it might be argued, shareholders in an offeror company should always be entitled to vote on whether to approve a takeover and should be afforded the benefit of independent advice on the merits of the transaction.

(c) Arguments against

7.9 By contrast, it might be argued that shareholders in an offeree company have a greater need for protection than shareholders in an offeror company, particularly in the case of a hostile or a mandatory offer. In making an offer, an offeror is taking a voluntary action and it is considered to be reasonable to assume that such an action will only be taken after full and careful consideration at board level and on an economically rational basis. In this context, it might be argued that it is for the non-executive directors of the offeror to act as the independent guardians of shareholders' interests and that it is always open to them to obtain independent advice on the offer if they consider that to be appropriate.

7.10 In addition, it might be argued that it would not be appropriate for any additional protections afforded to shareholders in an offeror company to be provided by means of the Code, even if the offeror company was incorporated in the UK. This is on the basis that the Code only applies in relation to certain types of acquisition, broadly, takeovers of UK public companies. However, given that the purpose of introducing additional protections for offeror shareholders would presumably be to minimise the risk of the offeror entering into a material value-destructive transaction, and given that such transactions are not limited to transactions subject to the Code (and might include, for example, a takeover of an overseas company or an acquisition of a private limited company), it would be illogical for such additional protections to be applied only in relation to transactions subject to the Code. Indeed, a more logical approach would be to follow the existing practice set out in Chapter 10 of the Listing Rules that such protection should be applied by reference to the materiality of the transaction being undertaken, and not the legal status of the entity being acquired.

7.11 Finally, in circumstances where an offeror is an overseas company, it might be argued that it would be entirely inappropriate (and unfeasible) for UK law or regulations to seek to afford protections extraterritorially to the offeror's shareholders (who would not otherwise be protected by UK law or regulations), simply because the company in question was making a takeover bid for a company to which the Code applied. For example, it is arguable that the Code should not, and could not, require the board of a Russian company to obtain independent advice on, or obtain shareholder approval of, an offer for an offeree company to which the Code applied, and that this would be a matter for Russian law and/or relevant regulations.

(d) Scope and jurisdiction

7.12 The Code Committee considers that, as the Code is currently framed, it is questionable whether it would have the jurisdiction to afford additional protections to offeror shareholders.

Q18 What are your views on the suggestion that shareholders in offeror companies should be afforded similar protections to those afforded by the Code to offeree company shareholders?

Q19 If you consider that offeror company shareholders should be afforded protections:

(a) to which offeror companies should such protections apply and in what circumstances?

(b) what form should such protections take?

(c) by whom should such protections be afforded (for example, the Panel, the FSA, the Government or another regulatory body)?

8. The "put up or shut up" regime, "virtual bids" and the offer timetable

8.1 Some commentators have suggested that the Code's "put up or shut up" regime should be re-examined as part of the current review. For example, on 1 March 2010, Lord Mandelson said that he believed that there was a case for "giving bidders less time to "put up or shut up" so that the phoney takeover war ends more quickly and properly evidenced bids must be tabled".

8.2 Other commentators have suggested that the regulation of possible offer announcements should be re-examined whilst others have queried whether offerors should continue to be permitted to announce "pre-conditional" offers.

8.3 This section 8 also considers the possibility of reducing the 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document and, briefly, whether the Panel should have the ability to shorten the offer timetables of second and subsequent competing offerors.

(a) Background

8.4 One of the primary purposes of the Code is to provide an orderly framework in which takeover bids may be conducted. A key aspect of this is the timetable set out in the Code for contractual offers and, to a lesser extent, schemes of arrangement (which are largely dependent on the timetable set by the court).

8.5 After it formally announces its firm intention to make an offer for an offeree company, an offeror must normally publish its offer document within 28 days (Rule 30.1(a)). The publication of the offer document then marks "Day 0" of the offer timetable provided for in Rules 30 and 31. In summary, in the context of a hostile contractual offer, the subsequent key dates of the offer timetable will normally include the following:

(a) *Day 14*: the date by which the board of the offeree company must publish a circular containing its opinion on the offer (Rule 30.2(a));

(b) *Day 21*: the "first closing date", i.e. the date until which, at the earliest, the offer must remain open for acceptance (Rule 31.1);

(c) *Day 39*: the date after which the board of the offeree company should not announce any material new information (Rule 31.9);

(d) *Day 42*: the date on which a person who has accepted the offer will normally become entitled to withdraw that acceptance (Rule 34);

(e) *Day 46*: the final date on which a revised offer document may be published (Rule 32.1); and

(f) *Day 60*: the final date by which the offer must become or be declared unconditional as to acceptances (Rule 31.6).

8.6 However, an "offer period" (as defined in the Code) may commence some time before the start of the offer timetable described in Rules 30 and 31. This is because an offer period, during which the disclosure regime under Rule 8 and various other provisions of the Code apply, often does not commence with the announcement by an offeror of a firm intention to make an offer but instead with a "possible offer" announcement. For example, under Rule 2.2, an announcement of the possibility of an offer is required to be made in certain circumstances, such as when the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price or when negotiations or discussions are about to be extended to include more than a very restricted number of people. Such announcements are required in order to prevent false markets occurring in circumstances where the secrecy of a possible offer may have been compromised.

In addition, an offeror or offeree company may announce a possible offer voluntarily, often for tactical reasons.

8.7 In recent years, the period following the announcement of a possible offer and prior to the announcement (if any) of a firm intention to make an offer has become more important than in the past. In some cases, a potential offeror may simply announce that it is considering the possibility of an offer for the offeree company, whereas in other cases the announcement by the potential offeror may include matters such as the detailed terms on which any offer might be made, reservations of the right to set those terms aside, and pre-conditions to the making of the offer (which pre-conditions may or may not be capable of being waived). The purpose of such announcements is often to test the sentiment of offeree company shareholders as to the attractiveness of a possible offer at a particular level (but without incurring an obligation to make a formal offer or incurring the financing and other costs of making an offer) and to put pressure on the board of the offeree company to engage in talks in relation to an otherwise unwelcome offer. Such possible offer announcements, and the debate on the merits of the possible offer that follow them, are often referred to as "virtual bids": "virtual" in that there is no certainty that a formal offer will ever be forthcoming, albeit that the debate takes place as if an offer had been announced. Even if a formal offer is made in due course, the period between the commencement of the offer period and the publication of the offer document may be much longer than in the past and, by the time that the offer document is published, there may in fact be little left to debate during the 60 day offer timetable provided by the Code.

8.8 As with the regulation of formal offers, the regulation of "virtual bids" requires various of the General Principles to be balanced against each other. For example:

(a) General Principle 3 provides that the board of an offeree company must not deny the holders of securities the opportunity to decide on the merits of the bid;

(b) General Principle 4 provides that false markets must not be created in the securities of the offeree or offeror company; and

(c) General Principle 6 provides that an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

(b) The "put up or shut up" regime

8.9 In August 2004, the Code Committee introduced the "put up or shut up regime" into Rule 2.4(b). In summary, Rule 2.4(b) requires that, at any time during an offer period following the announcement of a possible offer (provided the potential offeror has been publicly named), and before the notification of a firm intention to make an offer, an offeree company may request that the Panel impose a deadline by which the potential offeror must announce either a firm intention to make an offer or that it does not intend to make an offer. In the latter case, the potential offeror will be bound by the provisions of Rule 2.8, such that, broadly, it will be restricted from announcing or making an offer for the offeree company for six months thereafter.

8.10 The "put up or shut up" regime is designed to bring to an end the uncertainty and siege that may exist as a result of the announcement of a possible offer. Given this objective, the Panel will impose a "put up or shut up" deadline only if it is requested to do so by the board of the offeree company. In setting a "put up or shut up" deadline, the Panel seeks to balance the interests of offeree company shareholders in not being deprived of the opportunity to consider the possibility of an offer against the potential damage to the offeree company's business as a result of the uncertainty and siege created by the potential offeror's interest.

8.11 Between the codification of the "put up or shut up" regime in Rule 2.4(b) in August 2004 and 31 March 2010, the Panel set "put up or shut up" deadlines in respect of 61 offeree companies. By the end of those "put up or shut up" periods, of a total of 67 potential offerors, 24 (35.8%) announced a firm intention to make an offer under Rule 2.5 and 42 (62.7%) announced that they did not intend to make an offer. In one case, the "put up or shut up" deadline was withdrawn at the request of the offeree company board.

8.12 The facts of each case differ and the deadlines set for "put up or shut up" announcements have therefore varied. In PCP 2004/1 ("Put up or shut up" and no intention to bid statements), when consulting on the proposed codification of the "put up or shut up" policy developed by the Panel, the Code Committee stated that:

> "… the Panel's normal approach, when the request for "put up or shut up" is made at the start of the offer period, is to seek clarification within six to eight weeks, although the precise deadline will necessarily depend on the facts of the particular case, including (inter alia) the state of preparedness of the potential offeror at the time.".

8.13 The Code Committee considers that the "put up or shut up" regime has worked well since its introduction into the Code. For example, a number of commentators have stated that the "put up or shut up" regime provides the board of the offeree company with all the necessary tools required in order to avoid being put under siege for an unreasonable period of time and that one of the strengths of the regime is the flexibility given to the Panel to set an appropriate "put up or shut up" deadline in each case. Such commentators have noted that, in a number of cases, the reason why offeree company boards did not apply to the Panel to set a "put up or shut up" deadline earlier than they did may have been that they did not consider it appropriate to do so where this might have denied the company's shareholders the opportunity of considering a bid.

8.14 On the other hand, some commentators have suggested that there might be scope for improving the "put up or shut up" regime in a number of respects, for example, that changes might be made to the mechanism for setting, and the length of, "put up or shut up" deadlines, and that the board of a company in respect of which an offer period has not commenced should be able to request a "private" "put up or shut up" deadline, as described below.

(i) Standard deadlines

8.15 It has been suggested that, rather than the Panel setting different deadlines in different cases, the length of "put up or shut up" deadlines could be standardised. For example, when a "put up or shut up" deadline is set, it could always be of a standard length, unless the board of the offeree company consented to a later or extended deadline.

8.16 In favour of this suggestion, the Code Committee notes that debates as to the appropriate date for a "put up or shut up" deadline are often heated and time-consuming for the parties to the offer and the Panel, and that this is aggravated by the fact that, in initial discussions, the parties to the offer will often make unrealistic demands as to the appropriate deadline.

8.17 Against this suggestion, it might be argued that the facts of each case are different and that the Panel should therefore retain the flexibility to set an appropriate "put up or shut" up deadline (which might be longer or shorter than a standardised deadline) on a case by case basis. In addition, a standardised deadline might mean that certain offeree companies might become, in effect, "bid proof", for example, if certain types of offeror would, in practice, need a longer period of time in order to obtain regulatory clearances before being in a position to announce a firm intention to make an offer.

(ii) Automatic deadlines

8.18 It has also been suggested that the "put up or shut up" regime might apply automatically in all cases. For example, a "put up or shut up" deadline might always be set following the first identification of a potential offeror (unless the board of the offeree company requested otherwise). In favour of this suggestion, it might be argued that setting a "put up or shut up" deadline in all cases, rather than only in those cases where the board of an offeree company requests the Panel to set a deadline, would deter potential offerors from making unprepared approaches with little regard for the consequences of putting the offeree company "in play" (since, if they were not sufficiently prepared to be able to announce a firm offer by the deadline, their "Rule 2.8 announcement" would then preclude them from making an offer for six months). Against this suggestion, it might be argued that the setting of an automatic deadline would not necessarily be in the best interests of offeree company shareholders, who might be in favour of the board engaging in talks with the potential offeror for a longer period (although, of course, the board of the offeree company could always request an extension to the deadline).

(iii) Shorter deadlines

8.19 It has been suggested that "put up or shut up" deadlines are too long and should be shortened. It has also been suggested that the practice of setting a shorter deadline for a potential offeror who chooses voluntarily to make a "bear hug" possible offer announcement than for a potential offeror whose identity is revealed by the offeree company or as a result of an announcement required under Rule 2.2 should be codified. Against these suggestions, it might be argued that the imposition of shorter deadlines could have the effect of denying offeree company shareholders the opportunity of considering a bid if the potential offeror is unable to put a firm offer together before the deadline. In particular, it is often argued by potential offerors that, because of the requirement for secrecy before the possibility of the offer has been publicly disclosed, they are only able to commence work on time-consuming matters such as putting financing in place and obtaining regulatory clearances once the offer period has commenced.

(iv) *Private "put up or shut up" deadlines*

8.20 It has been suggested that the "put up or shut up" regime should be amended so as to allow the board of an offeree company to apply for a "put up or shut up" deadline after it has received an approach from a potential offeror but before any offer period has commenced, in which case neither the fact of the approach nor the setting of the deadline would be publicly announced.

8.21 In favour of this suggestion, it is argued that, even though an offer period might not have commenced, the board of a company which has been approached by a potential offeror might nevertheless be put under an unacceptable level of "siege" and the conduct of the company's affairs hindered. For example, it might be argued that:

(a) the board's ability to run the company's business in the way that it wishes may be significantly constrained by Rule 21.1, which provides that the board of the offeree company must not, without the approval of the company's shareholders, take any action which might frustrate an offer. Rule 21.1 also applies "before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent". The Code Committee understands that, historically, a low bar has been set in order for a potential offeror to establish that a bona fide offer might be imminent;

(b) the amount of management time that may be diverted following an approach from a potential offeror may be considerable, whether or not the company is also in an offer period; and

(c) to the extent that the potential offeror has been able to discuss its proposal with a limited number of shareholders within the constraints of Rule 2.2, the board of the offeree company may be subject to pressure from shareholders to engage with the potential offeror, even if no offer period has commenced.

8.22 Against the suggestion of "private" "put up or shut up" deadlines, it might be argued that:

(a) the board of an offeree company is only truly under "siege" (in the sense that the market, employees, customers and suppliers are alerted to a possible offer) once the fact of the potential offeror's approach has been publicly disclosed and an offer period has commenced; and

(b) it is always open to the board of an offeree company to resolve the situation by publicly disclosing the potential offeror's existence and identity and seeking a "put up or shut up" deadline from the Panel immediately thereafter. However, the counter-argument to this is that it is disproportionate to require a company to have to make such an announcement, and thereby to commence an offer period (and to put itself "in play", exacerbating the "siege"), simply in order to be able to seek a "put up or shut up" deadline.

(c) Possible offer announcements and pre-conditional offers

8.23 In August 2004, the Code Committee introduced Rule 2.4(c) in order to regulate the circumstances where a potential offeror proposes to make a statement in relation to the possible terms on which an offer might be made, in particular, a statement which relates to the expected price of any offer. Further amendments were subsequently made in relation to a statement which indicates that the stated terms are “final”. In summary, Rule 2.4(c) provides that, if such a statement is included in an announcement by a potential offeror, it will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right at the time of making the statement not to be so bound.

8.24 In April 2005, the Code Committee introduced amendments into the Code in relation to the conditions and pre-conditions to which a takeover offer might be subject. In summary, the effect of the relevant provisions is that:

(a) *possible offers*: the announcement of a possible offer may include pre-conditions to the making of the offer, including subjective pre-conditions (Note 1 on Rule 2.4). However, in order to avoid such an announcement creating a misleading or confusing impression, the announcement must clearly state whether or not the pre-conditions must be satisfied before an offer can be made or whether they are waivable. In addition, in order to ensure that there is no confusion as to whether the potential offeror is committed to proceeding with an offer if the pre-conditions are satisfied or waived, the announcement must 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; and

(b) *firm offers*: the announcement of a firm intention to make an offer may include only limited, objective pre-conditions to the making of the offer, relating principally to UK and EU competition clearances or, in certain circumstances, relating to other material official authorisations or regulatory clearances (Rule 13.3).

8.25 As indicated above, some commentators have queried whether:

(a) it should continue to be permissible for a potential offeror to announce the possible terms on which an offer might be made, or whether such announcements should be prohibited on the basis that there is a real risk that shareholders may mistake such an announcement for a "firm intention" announcement and/or that such announcements may heighten the siege of the offeree board without the potential offerror committing to make an offer (and notwithstanding the risk that information leaks might undermine any such prohibition); and

(b) a potential offeror should continue to be permitted to announce a possible offer subject to pre-conditions.

(d) The deadline for publication of the offer document

8.26 The Code Committee is not aware of any particular problems having arisen in relation to the 60 day offer timetable provided by the Code for contractual offers. As described above, this timetable commences upon the publication by the offeror of its offer document. However, the Code Committee believes that consideration might be given as to whether the period of up to 28 days between the announcement by the offeror of its firm intention to make an offer and the publication of the offer document ought to be reduced in some or all circumstances.

8.27 The 28 day period provided in Rule 30.1(a) was introduced into the Code at a time when the first public announcement in relation to an offer would often have been the announcement of the offeror's firm intention to make an offer. However, it might be argued that, given that many offer periods now commence some time before the announcement of a firm intention to make an offer, the period of up to 28 days prior to the publication of the offer document may serve to extend unduly the period of time during which an offeree company may be put under siege. This might particularly be the case where a potential offeror may already have been given a considerable period of time from the commencement of the offer period before being required to "put up or shut up". On the other hand, it might be argued that there may be a number of situations where an offeror would be genuinely unable to produce an offer document within a shorter period of time following the announcement of its firm intention to make an offer. For example, this might be the case where the offer is a securities exchange offer requiring the approval of a prospectus, where the structure of the offer is complex, where the document will be sent into a large number of overseas jurisdictions, or where there are other difficult legal or regulatory issues to address.

8.28 If the suggested reduction of the 28 day period prior to publication of the offer document were to be pursued, the Code Committee believes that a number of matters would need to be considered in further detail, including the following:

(a) whether the deadline for publication of the offer document for cash offers should be shorter than for securities exchange offers, on the basis that the former are likely to be subject to fewer legal and regulatory requirements;

(b) whether the deadline for publication of the offer document should be shorter for offers which follow the setting of a "put up or shut up" deadline than for offers in which no such deadline is set (and, if so, whether it should vary depending on the length of any "put up or shut up" deadline that had been set);

(c) whether the deadline for publication of the offer document should be shorter for second and subsequent competing offerors, particularly where the competing offer is to be recommended by the offeree company board; and

(d) whether different deadlines for publication of the offer document should apply depending on whether the takeover is proposed to be effected by means of a contractual offer or a scheme of arrangement.

(e) Shortening the timetable applicable to competing offerors

8.29 Separately, the Code Committee believes that consideration could be given to the question of whether the Panel should have the ability unilaterally to foreshorten the 60 day offer timetable for second and subsequent competing offers. At present, a second or subsequent competing offeror is entitled to make use of the full 60 day offer timetable following the publication of its offer document and, in order to preserve a "level playing field", the first offeror is entitled to move on to the timetable established by the publication of its competitor's offer document. This can sometimes lead to protracted offer periods, for example where a competing potential offeror waits until, say, Day 50 of the first offeror's timetable to announce its firm intention to make an offer. However, it might be argued that this could result in offeree company shareholders being given insufficient time to consider the competing proposal and/or that it might act as a deterrent to the making of competing offers.

(f) Scope and jurisdiction

8.30 The Code Committee believes that any changes as a result of the suggestions raised in this section 8 would be solely for it to make.

Q20 What are your views on the suggested amendments to the "put up or shut up" regime? In particular:

(a) what are your views on the suggestions that "put up or shut up" deadlines might be standardised, applied automatically and/or shortened?

(b) what are your views on the suggestion that a "private" "put up or shut up" regime might be introduced?

Q21 What are your views on possible offer announcements that include the possible terms on which an offer might be made and/or that include pre-conditions to the making of an offer?

Q22 What are your views on the deadline for the publication of the offer document and the suggestion that the current 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document might be reduced?

Q23 What are your views on the suggestion that the Panel should have the ability unilaterally to foreshorten the timetable for subsequent competing offers?

9. Inducement fees and other deal protection measures

(a) Introduction

9.1 A number of practitioners have raised concerns that inducement fee arrangements and other deal protection measures, often set out in "implementation agreements" (further described below) and other similar agreements, have the effect, either individually or when viewed as a whole, of leaving little, if any, room for the board of an offeree company to facilitate or recommend a competing offer, thereby frustrating bids by potential competing offerors, contrary to the spirit of Rule 21 and General Principle 3.

9.2 Further, it has also been suggested that, while inducement fee arrangements and other deal protection measures are in theory the subject of arm's length negotiations between the board of the offeree company and an offeror, in practice the balance of negotiating power has shifted away from the boards of offeree companies in favour of offerors, to the extent that the board of an offeree company may consider itself unable to resist the package of "market standard" deal protection measures demanded by the offeror. As a result, it is argued, it has become increasingly difficult for competing offerors to emerge, or for the board of an offeree company to withdraw a recommendation to accept an offer, to the detriment of the interests of offeree company shareholders. The problem is most acute, it is argued, in relation to any provisions which seek to restrict or impede the ability of the board of an offeree company to withdraw or change its recommendation at any stage of the offer.

9.3 It has been argued to the contrary that it would be overly paternalistic to prohibit the parties to an offer from choosing to enter into inducement fee arrangements and other deal protection measures. In circumstances where it appears to the board of the offeree company that the offeror would, in reality, continue to make an offer, even in the absence of an inducement fee or other deal protection measures, it is open to the board of the offeree company simply to refuse to agree to them. Indeed, it might be argued that, in such circumstances, the directors of an offeree company are required to do so in order to discharge their fiduciary duties. However, there may well be other circumstances (considering the position of the initial offeror, rather than subsequent offerors) in which it is clear to the board of the offeree company that the offeror's threat to walk away if an inducement fee arrangement and other deal protections are not forthcoming is real. In such circumstances, a prohibition on the offeree company board from entering into an inducement fee arrangement or other deal protection measures would, it is argued, result in offeree company shareholders being denied the opportunity of considering an otherwise recommendable offer for their shares, contrary to General Principle 3.

9.4 Accordingly, the Code Committee believes that consideration should be given to whether inducement fees and/or other deal protection measures should be either prohibited or otherwise restricted as a matter of principle. In addition, in this context, the Code Committee believes that it is important to give consideration to the arguments for and against various specific deal protection measures, as set out below.

(b) Inducement fees

(i) Background

9.5 Under the first paragraph of Note 1 on Rule 21.2, the basic definition of an inducement fee is as follows, although the relevant provisions of the Code in fact apply to a broader range of similar arrangements:

> "*An inducement fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from*

> *proceeding or causing it to fail (eg the recommendation by the offeree company board of a higher competing offer).*".

9.6 For a number of years, it has been common in recommended offers for the board of the offeree company to agree to enter into an inducement fee arrangement with an offeror, whereby a specified cash sum will become payable by the offeree company to the offeror upon the occurrence of certain triggering events (so called "triggers"), such as if the board recommends a competing offer (or otherwise changes or adversely modifies its recommendation) and either:

(a) the competing offer becomes wholly unconditional; or

(b) the original offer lapses or is withdrawn.

9.7 Broadly, Rule 21.2 permits an offeree company to enter into an inducement fee arrangement with an offeror, provided that certain safeguards are observed, in particular:

(a) that the inducement fee must be *de minimis*, which will normally mean no more than 1% of the value of the offeree company, calculated by reference to the offer price; and

(b) that the offeree company and its financial adviser must confirm to the Panel that they each believe the fee to be in the best interests of shareholders.

9.8 These safeguards were originally announced in Panel Statement 1999/10, which stated as follows:

> "The Panel considers it essential that the interests of the offeree shareholders are not adversely affected by inducement fee arrangements. The payment of such fees will necessarily reduce offeree shareholders' funds and, in cases where the offeree board has received an approach from

> another party, there are concerns that a bona fide offer may be frustrated by reason of these arrangements.”.

(ii) Arguments for and against permitting inducement fee arrangements

9.9 The primary argument against permitting inducement fee arrangements, reflected in Panel Statement 1999/10 referred to above, is that they may lead to a reduction in shareholders’ funds in the offeree company without any clear benefit being obtained by offeree company shareholders. On the other hand, it is asserted that, in many cases, the offeror would not be prepared to make an offer in the absence of an inducement fee (and potentially other deal protection measures) and point to the securing of the offer as the benefit obtained by offeree company shareholders in return. That said, the Code Committee understands that certain market participants have questioned whether this is in fact the case or whether inducement fees have now come to be regarded as simply a standard feature of recommended takeover offers which offeree boards feel unable to resist.

9.10 As regards the safeguards set out in Rule 21.2, the Code Committee considers that it is relevant to consider the timing of, and triggers for, payments commonly included in inducement fee arrangements. In circumstances where the original offer lapses or is withdrawn and no competing offer has become wholly unconditional (or, in the case of a scheme of arrangement, effective) then the payment of an inducement fee by the offeree company will self-evidently reduce offeree shareholders’ funds. However, this may be considered to be acceptable provided that the amount of the fee is *de minimis* and justifiable if the reason for the offer lapsing or being withdrawn is not because of a failure to implement the offer on the part of the original offeror.

9.11 In circumstances where a higher competing offer becomes wholly unconditional (or, in the case of a scheme of arrangement, effective) then the payment of an inducement fee by the offeree company to the original offeror may be regarded as an additional acquisition cost for the successful higher competing offeror. It might be argued that such a potential additional cost may operate to deter a potential competing offeror from making an offer, or that the eventual funding of such a fee by a successful higher competing offeror may have the effect of depriving offeree company shareholders of an incremental value that could have otherwise been added to the value of the successful higher competing offer. On the other hand, it might be argued to the contrary that experience has shown that inducement fees of up to 1% of the offer value have not, in practice, deterred competing offerors and, in circumstances where a competing offer becomes wholly unconditional (or, in the case of a scheme of arrangement, effective), the offeree shareholders have received the benefit of the successful higher competing offer, i.e. that the inducement fee was the cost to shareholders of creating the competitive tension which led to the successful higher competing offer. In any event, this too might be considered to be acceptable, provided that the amount of the fee is *de minimis*.

9.12 In contrast, it might be considered more difficult to justify an inducement fee, regardless of its size, which becomes payable prior to the original offer lapsing or being withdrawn or, if earlier, a competing offer becoming wholly unconditional (or, in the case of a scheme of arrangement, effective), particularly since the original offeror might seek to use the inducement fee paid by the offeree company to improve the terms of its offer.

9.13 In addition, it has been suggested that the confirmations currently required to be provided by the offeree board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders, have become standard and formulaic, thereby ceasing to provide a meaningful safeguard.

(c) Implementation agreements and other deal protection measures

(i) Background

9.14 In addition to entering into inducement fee arrangements, the Code Committee understands that it has become increasingly common, in the context of a recommended offer, for the offeree company and an offeror to enter into an "implementation agreement".

9.15 The Code Committee understands that the increasing use of such implementation agreements is due in part to the increased use of schemes of arrangement in order to effect takeover offers (on which subject the Code Committee consulted in PCP 2007/1 (Schemes of arrangement), leading to the introduction of Appendix 7 to the Code). A scheme of arrangement is a court process to which the offeror is not party, involving the offeree company proposing an arrangement to its shareholders, which arrangement must be voted on by offeree shareholders at a shareholder meeting convened by order of the court and, if approved by the requisite majority at that meeting, subsequently sanctioned by the court. By contrast, a contractual offer is a process controlled by the offeror. Therefore, an offeror choosing to effect a takeover offer by means of a scheme of arrangement may, understandably, wish to obtain certain contractual undertakings from the board of the offeree company in order to ensure that the scheme of arrangement is diligently progressed through the court and to give the offeror some contractual means of controlling the process. This will also involve imposing a timetable on the offeree company within which to progress the scheme. In addition, an offeror, will often seek to include certain "conduct of business" restrictions on the offeree company for the duration of the court process, with a view to ensuring that no value is lost from the offeree company during that period (which in some cases can be quite lengthy and potentially longer than a contractual offer timetable), supplementing the restrictions placed on the offeree company under Rule 21 (which prevent the offeree company from entering into contracts other than in the ordinary course of its business).

9.16 Implementation agreements also commonly include certain reciprocal undertakings from the offeror to the offeree company, for example to undertake to the court to be bound by the terms of the scheme (thereby giving the offeree company a contractual means to ensure that the consideration is provided to offeree shareholders) and to waive certain passive conditions to the takeover prior to the court hearing held to sanction the scheme (thereby ensuring the offer is unconditional as soon as the court's sanction is obtained).

9.17 The Code Committee also understands that implementation agreements are becoming an increasingly common feature of contractual offers, for example, where the offeror wishes to retain the ability to switch from a contractual offer to a scheme of arrangement during the course of the takeover or where the offeree company wishes to obtain undertakings from the offeror regarding the satisfaction or waiver of conditions, particularly in relation to obtaining the approvals of other regulatory bodies required for the takeover lawfully to become effective.

9.18 The Code Committee is not aware of any concerns having been raised about implementation agreements as such. However, implementation agreements often include a number of "deal protection measures", which could instead be included in stand alone agreements, about which a number of practitioners have raised concerns. At present, the Code does not specifically restrict or prohibit such deal protection measures other than in relation to inducement fees, described above.

(ii) Specific deal protection measures

9.19 The Code Committee understands that typical deal protection measures include the following:

(a) *exclusive inducement fee arrangements*: provisions restricting the board of the offeree company from agreeing a second or other inducement fee with any competing offeror. Those in favour of such provisions consider such provisions to be a *quid pro quo* of securing the original offer and that it is always open to the board of an offeree company to refuse to agree to a second break fee with a competing offeror irrespective of the terms of any break fee agreed with an initial offeror. Those in favour also point to the requirement in the FSA's Listing Rules that inducement fees must be *de minimis* and its application to inducement fees in aggregate (other than those that are mutually exclusive) which, it is argued, has the same commercial effect as an exclusive inducement fee arrangement. Those who oppose such provisions argue that they have the effect of deterring competing offerors and create an "unlevel playing field" as between competing offerors;

(b) *exclusive implementation agreement arrangements*: provisions restricting the board of the offeree company from agreeing a second or other implementation agreement with any competing offeror. Those in favour of such provisions consider them to be a *quid pro quo* of securing the original offer and those who oppose such provisions argue that they have the effect of deterring competing offerors;

(c) *non-solicitation undertakings*: provisions intended to restrict the board of the offeree company from soliciting competing offers (sometimes referred to as "no shop" provisions). The Code Committee understands such provisions to be a common feature of recommended offers and understands them to be justified by the boards of offeree companies in such cases as being a *quid pro quo* of securing the original offer, without restricting the ability of the board of the offeree company to receive approaches from unsolicited offerors. Such provisions are to be distinguished from provisions preventing the board of the offeree company from holding discussions with an unsolicited offeror (sometimes referred to as "no talk" provisions), which the Code Committee understands to be uncommon in recommended offers in the UK and more difficult for the directors of the offeree company to reconcile with their fiduciary duties;

(d) *notification undertakings*: provisions which require the board of the offeree company to inform the original offeror of, variously, the fact of receiving an unsolicited approach, the identity of the party making the unsolicited approach and the terms of the unsolicited approach. The Code Committee understands that such provisions would be justified by those in favour of them on the basis that keeping the original offeror informed of potential rivals can only promote competitive tension and may deliver a higher value for offeree shareholders. Those who oppose such provisions would argue that the risk of disclosure at such an early stage of an approach has the effect of deterring potential offerors from making an unsolicited approach and increases the risk of a leak and the attendant risk for the potential offeror of being publicly named;

(e) *notification undertakings coupled with a restriction on the offeree board from changing its recommendation for a fixed period of time*: such provisions incorporate notification undertakings as described above and go part of the way towards a “matching” or “topping” right, further described below, in that they prevent the board of the offeree company from changing its recommendation for a fixed period (for example 48 hours) after notifying the original offeror of the unsolicited approach. This enables the original offeror to retain its “first mover” advantage and to improve the terms of its offer in order to retain the recommendation of the offeree board in the light of the terms of the unsolicited approach. Those in favour of such provisions would argue that they promote competitive tension and may deliver a higher offer from the original offeror, whose offer may well be more deliverable, and able to complete more quickly, than the possible offer of the potential offeror making the unsolicited approach, provided that the period of the restriction is short in duration. Those who oppose such provisions would argue that any restriction on the ability of the board to withdraw or change its recommendation, no matter how short the duration, is undesirable and inappropriate in the context of often fast-moving takeover bids;

(f) *"matching rights" or "topping rights"*: provisions which allow the original offeror a limited period of time (for example 48 hours) in which to match (or in the case of a topping right, to improve upon) a higher competing offer or possible offer, during which period the board of the offeree company may not withdraw or change its recommendation, and which further provide that, if the original offeror does match (or top, as the case may be) within that period, then the board of the offeree company must continue to recommend the original offeror's revised offer. The Code Committee believes that the arguments in favour of and against such provisions are the same as those described above in relation to notification undertakings coupled with a restriction on the offeree board from changing its recommendation for a fixed period of time;

(g) *"no information" undertakings*: provisions which seek to limit the information which the offeree board is permitted to pass to a competing offeror. The Code Committee understands that the more aggressive formulations of such provisions limit the passable information to that which is first passed to the original offeror, and that less aggressive formulations require any new information subsequently passed to a competing offeror to be passed to the original offeror. Those who are in favour of such provisions would argue that, provided that they are consistent with Rule 20.2 (equality of information to competing offerors), they are acceptable, even in their aggressive formulations. Those who are opposed to such provisions would argue that the aggressive formulations may have the effect of inhibiting bids by certain types of potential offeror, such as private equity offerors, who might require much more information than trade buyers before being in a position to put forward an offer;

(h) *"force the vote" provisions*: provisions in the context of a scheme of arrangement which oblige the board of the offeree company to procure that a meeting of shareholders is convened to consider the original offeror's proposal, even where the offeree board has withdrawn its recommendation or recommended a competing offer. Those in favour of such provisions would argue that they ensure that shareholders, and not the board of the offeree company, are able to decide on the merits of two competing offers, which may be particularly relevant where the deliverability of an offer may be difficult to assess or the consideration offered by the less favoured offeror may be more difficult to value. Those opposed to such provisions would argue that they operate to restrict the ability of the offeree board to progress the competing offer until the original offer lapses or is withdrawn, thereby frustrating the competing offer;

(i) *"shareholder direction" resolutions*: the Code Committee is given to understand that such provisions are relevant only in the context of a scheme of arrangement and represent a recent, and relatively uncommon, development. Such provisions oblige the board of the offeree company to put a separate, special resolution to shareholders, at the time of the meeting to approve the scheme of arrangement, which, if passed, would direct the board of the offeree company to disregard any competing offers made after the time of the meeting and prior to the effective date of the scheme (and thereby specifically direct the directors of the offeree company to override their fiduciary duties). Those in favour of such provisions would argue that such provisions are designed to flush out any competing offerors before the time of the shareholder meeting to approve the scheme rather than being designed to prevent a competing offer from being made. Such persons also point to the fact that such provisions only become operative with the specific approval of offeree company shareholders (and point to the safeguards of a separate, noninterconditional, special resolution being put before shareholders). Those opposed to such provisions argue that shareholders may not be in a proper position to consider such a resolution, as the competing offeror may not be known at the time of the vote and may only emerge after the time of the vote, and that such provisions might be contrary to the fiduciary duties of the directors of the offeree company; and

(j) *"no piggy-backing" undertakings*: those who regard it as possible for a second competing scheme of arrangement to be put to offeree company shareholders as an alternative at the same time as, and as part of the same process as, the original offeror's scheme of arrangement may seek to impose on the offeree company obligations which prevent the board of the offeree company from amending the original offeror's scheme so as to allow a competing offeror to use the original offeror's court timetable and process in that way. Those who favour such provisions would argue that the original scheme of arrangement timetable and process is particular to the original offeror and that a competing offeror should not be able to make use of it. Those who oppose such provisions would argue that the timetable and process is that of the offeree company and that such provisions are designed to ensure that the first offeror's scheme of arrangement will always have a time advantage over a competing offeror's scheme of arrangement which they would argue is an unfair advantage over competing offerors.

(iii) Consequential amendments and other considerations

9.20 It has been suggested that the requirement to disclose inducement fee arrangements at the time of the publication of the offer document, or scheme document, as currently required by Rule 26(l), is too late and that disclosure of implementation agreements or other agreements containing deal protection measures (potentially including, for these purposes, irrevocable undertakings and letters of intent) should be required earlier, for example, from the commencement of the offer period or, if later, as soon as the agreement is entered into (which in practice, in most cases, is likely to be when the firm intention to make an offer is announced in accordance with Rule 2.5, although this will not always be the case).

9.21 It has also been suggested that any potential frustration of competing offers which may result from any of the above deal protection measures might be avoided by the board of the offeree company insisting on qualifying the deal protection measure in question with an express carve-out referring to the directors' fiduciary duties, a so-called "fiduciary out". In addition, some practitioners consider that certain "fiduciary outs" are terms which, in certain circumstances, may be implied into agreements, even if not expressly included. However, it has also been argued that the Code Committee should not regard "fiduciary outs" as providing a solution to alleviate the problems faced by offeree boards in this context. One reason for this is the suggestion that if the board of an offeree company is able to negotiate an express fiduciary out to a deal protection measure, or an express general fiduciary out to all deal protection measures, this may be regarded by offerors as having the effect of negating the commercial value of the deal protection measure in question and amount to the board of an offeree company refusing to agree to the deal protection measure. Therefore, some practitioners may consider that any debate around fiduciary outs may amount simply to the same debate as to whether or not it is open to the board of the offeree company simply to refuse to agree to deal protection measures or whether the balance of negotiating power has shifted too far away from the boards of offeree companies in favour of offerors.

9.22 An additional reason put forward to argue that "fiduciary outs" should not be regarded as providing a solution to alleviate the problems faced by offeree boards is the suggestion that in practice it is too difficult for the board of an offeree company to be able to rely on fiduciary outs (whether express or implied). This is because, so it is argued, in seeking to rely on a fiduciary out in the agreement, the board of the offeree company runs the risk that the offeror may challenge, before a court, whether the course of action proposed by the board of the offeree company is a proper discharge of its fiduciary duties and on that basis the offeror may challenge the purported exercise of the fiduciary out in the agreement and seek to injunct the board from taking the course of action in question. It is argued that this risk is even greater for the board of the offeree company where the offeror is a significant shareholder in the offeree company. Further, it has been suggested that the resolution of such matters before a court is undesirable in the context of fast-moving takeover offers and is something that the Panel and the Code should seek to avoid at all costs. Therefore, the Code Committee would welcome respondents' views on whether or not "fiduciary outs" should be considered to alleviate the problems faced by offeree boards in this context, and whether or not the Code should encourage, or even require, fiduciary outs to be included in any permissible deal protection measures.

9.23 It has further been suggested that any potential frustration of competing offers which may result from any of the above deal protection measures (other than "force the vote provisions" and shareholder direction resolutions, once passed), could be avoided by the board of the offeree company insisting on the implementation agreement terminating (and the deal protection measures ceasing to apply) in the event that the offeree board withdraws its recommendation. In other words, those in favour of deal protection measures might seek to argue that, if the only consequence of failing to comply with the deal protection measure in question is the payment of a *de minimis* inducement fee (and the implementation agreement then terminates and the deal protection measures with it) then there is no actual frustration of a competing offer.

9.24 Alternatively, it has been mooted that any potential frustration of competing offers which may result from any of the above deal protection measures might be cured by requiring the approval of offeree company shareholders in general meeting in all cases. However, it might be said that to do so would have the effect of negating the commercial value of the deal protection measure in question, for example an inducement fee agreed to by the board of the offeree company on the eve of the announcement of the offeror's offer and payable upon the withdrawal of the recommendation of the board of the offeree company may have become payable by the time that the offeree company shareholders meet to consider its approval, in which case it seems unlikely that offeree company shareholders would ever approve it.

(d) Scope and jurisdiction

9.25 The Code Committee believes that any changes to the regulation of inducement fees and/or deal protection measures would be primarily for the Code Committee to make.

Q24 What are your views on the Panel's approach to inducement fees? In particular:

(a) do you consider that inducement fees should be prohibited?

(b) if you consider that inducement fees should continue to be permitted:

(i) do you regard the *de minimis* nature of inducement fees (and the Panel's approach to what is *de minimis*) as a sufficient safeguard?

(ii) do you consider that any further restrictions should be imposed on inducement fees by the Panel (for example, in relation to the timing of payment or the triggers for payment)?

(iii) what are your views on the suggestion that the Panel should cease to require confirmations from the offeree company board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders?

Q25 What approach should the Panel take to deal protection measures? In particular, do you consider that any specific deal protection measures should be either prohibited or otherwise restricted? Please explain the reasons for your views.

Q26 What are your views on the suggestion that implementation agreements and other agreements containing deal protection measures should be required to be put on display earlier than at present?

Q27 What are your views on "fiduciary outs" in the context of inducement fee arrangements?

Q28 What are your views on the ability of deal protection measures to frustrate a possible competing offer and on whether linking deal protection measures to the payment of an inducement fee may cure any such potential frustration?

10. Substantial acquisitions of shares

(a) Background

10.1 From 1980, in addition to administering the Code, the Panel also administered a set of rules, the Rules Governing Substantial Acquisitions of Shares (the "**SARs**"), which, in effect, regulated stakebuilding in companies to which the Code applied below the level at which "control" of a company is deemed to pass under the Code. In summary, the SARs restricted the speed at which persons were able to increase a holding of shares and rights over shares to an aggregate of between 15% and 30% of the voting rights of a company. Rule 3 of the SARs also required accelerated disclosure of acquisitions of shares or rights over shares within the 15% to 30% band by comparison with the then disclosure requirements of the Companies Act 1985. However, the SARs did not apply to an acquisition:

(a) by a person who had announced a firm intention to make an offer for a company (because such a person was subject to the Code in respect of acquisitions made during the course of the offer); or

(b) which resulted in a person holding shares or rights over shares carrying 30% or more of the voting rights of the company (because such a person was subject to the provisions of Rule 5 of the Code and would, if appropriate be obliged to make a mandatory offer under Rule 9).

10.2 In 2005, the Code Committee concluded that the SARs no longer served a useful purpose, that they imposed an unwarranted restriction on dealings in shares and that they should be abolished. Following consultation on the proposals set out in PCP 2005/4 (Proposed abolition of the Rules Governing Substantial Acquisitions of Shares), the SARs were abolished with effect from 20 May 2006.

10.3 In the context of the current debate in relation to takeover regulation, it has been suggested that the reintroduction of safeguards similar to those previously provided under the SARs should be considered.

(b) Arguments in favour

10.4 Arguments that might be put forward in favour of reintroducing measures similar to the SARs might include the following:

(a) that slowing down the speed with which a person can acquire a significant stake in a company provides the company's board with time in which to react and to advise its shareholders how to react;

(b) that major market raids should be discouraged and that, in the absence of the SARs, there is now little to discourage them (albeit that market raids occur relative rarely and that their frequency has not increased markedly since the abolition of the SARs); and

(c) that the reintroduction of accelerated disclosure requirements, as compared with Chapter 5 of the FSA's Disclosure and Transparency Rules, for dealings in the 15% to 30% band would be beneficial to company boards and to market participants.

(c) Arguments against

10.5 The primary argument against reintroducing measures similar to the SARs is that, as was agreed at the time of the abolition of the SARs, and as reflected in the Introduction to the Code and in the Companies Act 2006, the Panel is principally responsible for the regulation of takeovers and mergers and other transactions which have as their object or potential effect the obtaining or consolidation of control of companies which are subject to the Code. It might therefore be argued that the Panel should not seek to restrict persons from acquiring shares, or existing shareholders from selling their shares, in circumstances where control (as defined in the Code) of a company is not passing or being consolidated. For example, Rule 5 continues to restrict the ability of a person to acquire interests in shares in a company which take that person's interests in shares (aggregated together with the interests of persons acting in concert with him) to 30% or more.

10.6 In addition, to the extent that one of the purposes of rules similar to the SARs would be to discourage major market raids, it might be argued that this is no longer necessary since shareholders are no longer prone to sell their shares to market raiders, such that market raids are now relatively rare.

(d) Consequential amendments and other considerations

10.7 The SARs applied to acquisitions of shares and "rights over shares" but they did not apply, as the Code now applies, to the acquisition of interests in shares by virtue of contracts for differences and other cash-settled derivative instruments. The Code Committee therefore notes that, if measures similar to the SARs were to be reintroduced, there is an argument that such measures would need to restrict acquisitions of interests in shares, including economic interests, and not just shares and rights over shares.

(e) Scope and jurisdiction

10.8 The Code Committee believes that any changes as a result of the suggestions raised in this section 10 would be for it to make, subject to it being confirmed that the making of rules in relation to substantial acquisitions of shares falls within the powers set out in section 943 of the Companies Act 2006.

Q29 What are your views on the suggestion that provisions similar to those previously set out in the Rules Governing Substantial Acquisitions of Shares should be re-introduced?

APPENDIX

List of questions

In formulating their answers to the specific questions set out below, respondents are invited to consider, in particular, the following:

(a) whether they consider that change in the particular area under discussion would be desirable;

(b) if it would be desirable for there to be change in a particular area, whether they consider that it should be principally a matter for the Panel to introduce such change (bearing in mind the current function and purpose of the Code) or whether such change should be principally for Government or for another regulatory authority to introduce; and

(c) if, for whatever reason, changes were to be introduced by the Panel (for example, either because they were desirable in themselves or as a consequence of changes introduced by Government or another regulatory authority), what the nature of those changes should be.

Q1 What are your views on raising the minimum acceptance condition threshold for voluntary offers above the current level of "50% plus one" of the voting rights of the offeree company?

Q2 What are your views on raising the acceptance condition threshold for mandatory offers above the current level of "50% plus one" of the voting rights of the offeree company?

Q3 If you believe that an increase in the acceptance condition thresholds for voluntary and/or mandatory offers would be desirable, at what level do you believe they should be set and why?

Q4 What are your views on the consequences of raising the acceptance condition thresholds?

Q5 What are your views on the suggestion that shares acquired during the course of an offer period should be "disenfranchised"?

Q6 If you are in favour of "disenfranchisement", what are your views on how such a proposal should be implemented? In particular, what are your views on the various consequential issues identified in section 3 of the PCP?

Q7 What are your views on the suggestion that shares in a company should not qualify for voting rights until they have been held by a shareholder for a

defined period of time and regardless of whether the company is in an offer period?

Q8 What are your views on the suggestion that the threshold trigger at which independent market participants become subject to the Code's disclosure regime, currently 1%, might be lowered to 0.5%?

Q9 What are your views on the suggestion that there should be additional transparency in relation offer acceptance decisions and of voting decisions in relation to schemes of arrangement? If you are in favour of this suggestion, please explain your reasons and how you think such additional transparency should be achieved?

Q10 What are your views on the suggestion that the application of the Code's disclosure regime to situations where the rights attaching to shares have been "split up" might be clarified?

Q11 What are your views on the suggestion that the same requirements as to the disclosure of financial information on an offeror, the financing of the offer, and information on quantified effects statements should apply regardless of whether:

(a) the consideration being offered is cash or securities;

(b) the offer could result in minority shareholders remaining in the offeree company; or

(c) the offer is hostile or recommended, or whether a competitive situation has arisen?

Q12 What are your views on:

(a) disclosures made by offerors of their intentions in relation to the offeree companies under Rule 24.1; and

(b) the views of the boards of offeree companies on offerors' intentions given under Rule 25.1?

If you consider that greater detail is required, how do you consider that this would be best achieved?

Q13 What are your views on the matters to which the board of the offeree company should have regard in deciding whether or not to recommend acceptance of an offer?

Q14 What are your views on the suggestion that there should be a requirement for independent advice on an offer to be given to offeree company shareholders separately from the advice required to be given to the board of the offeree company?

Q15 What are your views on the suggestion that the board of any offeree company should be restricted from entering into fee arrangements with advisers which are dependent on the successful completion of the offer?

Q16 What are your views on the suggestion that the fees incurred in relation to an offer should be required to be publicly disclosed?

Q17 If you are in favour of the disclosure of fees, how do you think that any provision should operate? For example:

(a) to which fees (and other costs) should any provision apply and on what basis?

(b) at what point(s) of the transaction should any disclosure be made?

Q18 What are your views on the suggestion that shareholders in offeror companies should be afforded similar protections to those afforded by the Code to offeree company shareholders?

Q19 If you consider that offeror company shareholders should be afforded protections:

(a) to which offeror companies should such protections apply and in what circumstances?

(b) what form should such protections take?

(c) by whom should such protections be afforded (for example, the Panel, the FSA, the Government or another regulatory body)?

Q20 What are your views on the suggested amendments to the "put up or shut up" regime? In particular:

(a) what are your views on the suggestions that "put up or shut up" deadlines might be standardised, applied automatically and/or shortened?

(b) what are your views on the suggestion that a "private" "put up or shut up" regime might be introduced?

Q21 What are your views on possible offer announcements that include the possible terms on which an offer might be made and/or that include pre-conditions to the making of an offer?

Q22 What are your views on the deadline for the publication of the offer document and the suggestion that the current 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document might be reduced?

Q23 What are your views on the suggestion that the Panel should have the ability unilaterally to foreshorten the timetable for subsequent competing offers?

Q24 What are your views on the Panel's approach to inducement fees? In particular:

(a) do you consider that inducement fees should be prohibited?

(b) if you consider that inducement fees should continue to be permitted:

(i) do you regard the *de minimis* nature of inducement fees (and the Panel's approach to what is *de minimis*) as a sufficient safeguard?

(ii) do you consider that any further restrictions should be imposed on inducement fees by the Panel (for example, in relation to the timing of payment or the triggers for payment)?

(iii) what are your views on the suggestion that the Panel should cease to require confirmations from the offeree company board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders?

Q25 What approach should the Panel take to deal protection measures? In particular, do you consider that any specific deal protection measures should be either prohibited or otherwise restricted? Please explain the reasons for your views.

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Q29 What are your views on the suggestion that provisions similar to those previously set out in the Rules Governing Substantial Acquisitions of Shares should be re-introduced?