EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Consultation: Review of Certain Aspects of the Regulation of Takeover Bids

Response of the Employment Lawyers Association

27 May 2011

ELA Response to consultation issued by the Code Committee of the Takeover Panel: 'Review of Certain Aspects of the Regulation of Takeover Bids'

INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, but rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of Sarah Gregory (Baker & McKenzie LLP) to consider and comment on the consultation document "Review of Certain Aspects of the Regulation of Takeover Bids". Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

OVERVIEW

1. In light of ELA's purpose and expertise, its responses to specific questions posed are limited to those in the context of the interests of employees (questions 26 to 33 inclusive). However, ELA would also make the following general points:

1.1 At present the offer document must state the intentions of the offeror with regard to the employment of the employees and management of the offeree and its subsidiaries. In ELA's view it would be helpful to clarify throughout the Code that references in the Code to employees or employee representatives of the offeree include employees or employee representatives of the offeree's subsidiaries, rather than simply the offeree (and similarly in relation to the offeror's employees).

1.2 In the case of a scheme of arrangement, the timings referred to in the Code, such as in new Rule 25.9 regarding the deadline for provision of the employee representatives' opinion, may need to be amended to take account of the scheme timetable.

SPECIFIC QUESTIONS

Q.26 Do you have any comments on the proposed new Rule 24.2?

2. The proposed new Rule 24.2 in principle is intended to result in fuller, better quality and earlier clarification of the employment implications of the offeror's strategic plans. In practice, however, given the proposed new Note 3 to Rule 19.1 and the natural commercial aversion to disclosing "strategic plans" publicly, ELA considers that the offeror is likely to caveat heavily any statement and to limit the period for which the statement will hold true to a short-term window. A statement of its intention for the immediate short-term period following the take-over is unlikely to be meaningful for employees. By way of example, the offeror could make a negative statement at the time of the offer document to the effect that it has no such intentions, but that the position will be reviewed within a specified period of time.

Q.27 Do you have any comments on the proposed new Note 3 on Rule 19.1?

3. ELA would welcome clarification of (i) the meaning "public statement" and (ii) at what level/by whom a statement must be made (board or other) in order for such a statement to be regarded as emanating from a "party". The reference to "any public statement whether in a document, an announcement or otherwise" is potentially very broad. It may have the inadvertent result that offerors may be inclined (or advised) to limit dialogue between their employees and the offeree, and/or representatives of the offeree.

4. ELA is further concerned that disputes may arise as to what falls within the definition of a "public statement": for example, arguments may arise that statements made during the course of dialogue with trade unions and/or the workforce are "public statements" for these purposes. Lack of clarity in this

respect may discourage meaningful discussions between offeror, offeree and the workforce or its representatives.

5. It is unclear whose statements will be regarded as statements of a "party". As regards the offeree company, paragraph 7.8 of the Consultation Paper indicates that it is statements made by the board. However, as regards the offeror, it is unclear whether it is the intention that it should capture a broader range of individuals below executive board level, such as individuals in HR and line managers. Paragraph 7.7 of the Consultation Paper simply provides that the offeror should be held to statements made in the offer document but also to "other statements during the offer period, whether in a document, an announcement or otherwise". Again, any perceived lack of clarity in this respect may inhibit dialogue with trade unions and the workforce.

6. The requirement for adherence to the course of action for the period indicated in the statement is in ELA's view likely to: (i) lead to less communication between the offeror and employees of the offeree; (ii) encourage the offeree to heavily caveat any public statements for fear of subsequently being held to statements made; and (iii) may encourage the offeror to limit the effective period of any such commitment that it is prepared to make publicly.

7. ELA would note that, after the takeover, circumstances may arise in which an offeror, acting in good faith but as a result of unforeseen events, may need to take action which is inconsistent with the statement of intent. Rather than having to take such action and suffer the risk of censure, it would be helpful for an offeror to be able to apply to the Panel for prior approval of any action which is not in adherence with the public statement.

Q.28 Do you have any comments on the proposed new structure for the obligations in relation to the publication, content and display of documents?

8. In ELA's view, the currently proposed wording of 24.1(c), 25.1(c) and 32.6(a)(iii) "where there are no employee representatives, to the employees themselves" gives rise to a potential problem where the workforce has only intermittent employee representation (i.e. where some areas of the business have employee representation

in place whilst others do not). In such a situation the offeror / offeree obligations would appear to be satisfied by making the documents available to employee representatives and there would be no obligation to then make the same available to those groups of employees who are not represented. In ELA's view, this could result in a lack of parity in terms of protection of represented employees' interests as compared with unrepresented employees.

9. One possible method of addressing the issue raised in paragraph 8 would be to provide for the election of employee representatives in respect of unrepresented employee groups. However, drawing on experience of such election processes in other contexts (for example in relation to collective redundancies) it is the view of ELA that such a process is likely to give rise to delay in the publication of the employee representatives' opinion.

10. ELA notes that revised rules 24.1(b) and (c) adopt a different approach from that set out in to rule 25.1 insofar as it relates to when information is shared (i.e. "(b) on the same day (i) and (ii)…and (c) at the same time, ……" as opposed to "at the same time…(a)… (b)…; and (c)…"). ELA would query whether any difference was intended. If so, ELA would suggest that guidance is provided regarding the impact of the difference.

Q.29 Do you have any comments on the proposed new definition of "employee representative"?

11. The wording of the new definition is, in the view of ELA, extremely wide. The wording in paragraph (b) in particular is ambiguous and could lead to confusion, since it is unclear whether any formal election process is necessary or whether multiple representatives may be nominated or appointed on an informal basis.

12. Given the financial implications of bearing employee representatives' advisors costs as proposed by the Code Committee, it is of further concern to ELA that the offeree may have to bear the costs of a number of different employee representative bodies. The issue of such costs more generally is dealt with in answer to Q32 (at paragraph 26) below.

Q.30 Do you have any comments on the proposed new Note 6 on Rule 20.1?

13. In ELA's view, it is unlikely that an offeror or offeree will wish to share confidential information with employees, given the practical problems of ensuring that the information is kept confidential by the recipient employees. This concern will arise equally in respect of employee representatives, unless the company can secure sufficient comfort from the representatives about the protection of the confidential information in question

14. It is unclear how employee representatives and/or employees will be treated for the purpose of rule 2.2(e) (the "rule of six"). Any such ambiguity will further limit the likelihood that confidential information will be shared.

Q.31 Do you have any comments on the proposed new Rules 2.12(a) and (d) and second sentence of Rule 32.1(b)?

15. ELA agrees that employee representatives should be notified at the same time as other interested parties of the commencement of the offer period and that they should be notified of their right to provide an opinion. Many employee representatives are unlikely to be aware of such a right. With the proposed introduction of the right for employee representatives to obtain advice in relation to the provision of their opinion, it would seem appropriate for the employee representatives also to be advised of that right. In ELA's view wording should be included in the Code to reflect this.

16. New Rule 2.12 and new Rule 32.1(b) require the Rule 2.7 announcement to be made "readily available" to the offeree employee representatives or where there are none, to employees themselves. Rather than simply reiterating the views that the Code Committee expressed in PCP 2005/5 and the related Response Statement, it would be helpful to provide clarity on what this means by providing a note to the relevant rule (as described in paragraph 7.22 of the Consultation Paper (i.e. information being made available through whatever means the company normally uses to communicate with its employees). Such a note should also refer to the usual method of communication with its employee representatives, as this may differ.

17. As noted in paragraph 8 above in relation to Rules 24.1(c), 25.1(c) and 32.6(a)(iii), the wording of new Rule 2.12 and new Rule 32.1(b) does not anticipate the common situation where there are employee representatives in place who represent only part of the offeree's workforce, rather than the whole workforce. On the current drafting unrepresented employees would not receive the Rule 2.7 announcement because the offeree has employee representatives, who do not represent all employees. In ELA's view the Panel should amend the wording to address this situation (for instance where the employee representatives do not represent the whole workforce there should also be an obligation to make the announcement readily available to the unrepresented employees).

18. New Rule 2.12 and new Rule 32.1(b), consistent with the current Code, do not give employee representatives of the offeror the right to provide an opinion. It is often the case that the offeror's employees (including employees of its subsidiaries and associates) will be impacted by the takeover. On that basis it would seem appropriate for the offeror's employee representatives also to be given the opportunity to provide an opinion. Instead of this being appended to the offeree board's circular it could be published on the offeror's website with a RIS announcement being made about the publication of the opinion, mirroring the position proposed when an offeree's employee representatives provide their opinion not in good time for it to be appended to the offeree's board circular.

19. ELA notes that employees of the offeree, as well as employee representatives, will be advised of the right of employee representatives to provide an opinion. Where there are employee representatives in place this may, in line with the stated aim to make their views known, encourage the employee representatives to provide an opinion, particularly if the employees being aware of this right ask them to do so. The obligation to notify the employees of this right is, however, redundant if there are no employee representatives in place to take advantage of this right. In that case the obligation should not apply.

Q.32 Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6?

20. New Rule 25.9 and Rule 32.6, consistent with the current Code, refer to the opinion being provided "in good time". In ELA's view it would be helpful to provide clarity on what this means by providing a note to the rule which sets out what the Panel considers this to mean. Presumably, as described in paragraph 8.14 of the Consultation Paper, it means in sufficient time to publish the employee representatives' opinion with the offeree board opinion.

21. New Rule 25.9 and Rule 32.6 do not specify when the opinion should be published on the offeree's website. The Panel should consider including a timing obligation to clarify this (e.g. promptly on receipt).

22. The deadline for the employee representatives to provide an opinion which will be published on a website is "*within 14 days of the offer becoming or being declared wholly unconditional*". The thinking behind this, and in fact its meaning, is unclear to ELA. Does this mean 14 days before the offer becomes wholly unconditional (which in practice the parties would be unable to determine in advance due to uncertainty as to when the offer becomes wholly unconditional) or 14 days after, at which point there is little value in disseminating an opinion?

23. Given that the stated aim is to improve the ability of employee representatives to make their views known and presumably for shareholders to be able to take account of those views, we suggest that an alternative time period be proposed, and one which will entail provision of the opinion while shareholders are in fact deciding their response to the offer. For example, 14 days after the offeree's board circular is published. In addition, in ELA's view, in case shareholders wish to take any such opinion into account, there is benefit in including a statement in the board circular that some employee representatives have not at the time of publication provided an opinion but may elect to do so; and that should they do so within 14 days that opinion will be available on the offeree's website.

24. Given that employee representatives would under these proposals have access to legal advice when preparing their opinion, and given the obligation on the offeree to publish the opinion, in ELA's view it would be helpful for there to be a requirement in the Code for the opinion to make clear on its face that it is an opinion for the purposes of the Code. ELA can foresee difficulties for the offeree in determining what communications from employee representatives amount to an opinion, for this purpose.

25. There may be concerns from an offeree as to whether there are any defamatory statements, for example, in the opinion, given that this must be put on its website. It is acknowledged that this is already a potential concern when appending an opinion to a circular. One suggestion to deal with this is that an offeree may seek to include a disclaimer on the opinion.

26. The wording of new Rule 25.9 and Rule 32.6 anticipate that only one opinion will be provided by the offeree's employee representatives. It is possible, in fact, that there may be several opinions provided, due to the fact that there could be several sets of employee representatives representing different constituencies (e.g. various trade unions, works councils and other employee representative bodies) potentially with conflicting or different opinions. In ELA's view the wording should be amended to clarify the intention and the scope of the offeree's obligations in respect of publication and the cost of verification.

27. The proposed note to Rule 25.9 refers to the offeree paying for costs incurred by the employee representatives in obtaining "any advice" required for verification of the information contained in that opinion to ensure that the information published meets the standard required by Rule 19.1. In ELA's view the wording should be amended to clarify both the type and extent of that advice. ELA considers that it would be helpful for the note to Rule 25.9 to provide greater clarity on the extent of the offeree's obligations in respect of the employee representatives' costs relating to their opinion. In particular, is it anticipated that this will be limited to the cost of advice purely for the process of verification or more generally for advising on the preparation/content of the opinion? In addition, could such payment be made subject to the opinion actually being provided by employee

representatives, to avoid the possibility of disparate groups each claiming entitlement to costs in respect of advice on opinions which are never aired?

28. What sanctions are intended to apply to employee representatives who fail to comply with the relevant obligations in the Code in relation to their opinion (for example failure to meet the standard required by Rule 19.1)? Censure may be less of a concern to an employee representative than to others who may otherwise be subject to a sanction.

Q.33 Do you have any comments on the proposed new Rule 19.2(a)(iii)?

29. None.

Members of ELA Working Party

Sarah Gregory, Baker & McKenzie LLP

Stephen Ratcliffe, Baker & McKenzie LLP

Elizabeth Slattery, Hogan Lovells International LLP

Christine Young, Herbert Smith LLP

Alistair Woodland, Clifford Chance LLP

Suzanne Horne, Paul Hastings Janofsky & Walker (Europe) LLP

Steven Cochrane, Allen & Overy LLP

Jean Lovett, Linklaters LLP