



## **Takeover Code Pension Scheme Trustee Issues**

### **RESPONSE FROM ICAS TO THE CODE COMMITTEE OF THE TAKEOVER PANEL**

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## **Background**

The ICAS (Institute of Chartered Accountants of Scotland) Pensions Committee welcomes the opportunity to comment on the Takeover Panel's Code Committee's consultation on "Pension Scheme Trustee Issues".

Our CA qualification is internationally recognised and respected. We are a professional body for over 19,000 members who work in the UK and in more than 100 countries around the world. Our members represent different sizes of accountancy practice, financial services, industry, the investment community and the public and charity sectors.

Our Charter requires ICAS committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

## **Key Points**

Overall we welcome the planned extension of the provisions of the Takeover Code (the Code) which relate to employee representatives of the offeree company to the trustees of the offeree company's pension scheme(s). We believe that these will be beneficial to other stakeholders, including the offeree company's shareholders. However, we recognise that engagement with pension scheme trustees, where the pension scheme is a substantial creditor/ counterparty of the target company, may need to take place at an earlier stage to facilitate a meaningful offer being made.

We believe that the offeree company should pay for costs incurred in relation to the opinions of pension scheme trustees not the pension scheme trustees. The consultation paper suggests that this should be the case but the proposed changes to the Code do not clarify this. Therefore, we strongly recommend that the Code clarifies that it is the offeree company which is to pay.

Not all pension arrangements are trust based, therefore, we anticipate the requirements of the Code relating to the provision of information and documentation to the target's employees and employee representatives also mean that the offeror should disclose in its offer documents its intentions with regard to the continued employment of the employees and management of the offeree company (including any material change in the conditions of employment). This should draw out any intention to make changes to the existing contract based pension provision without the application of the new pension scheme trustee information and documentation requirements.

## **Our response to the specific consultation questions**

### **Question 1**

Do you have any comments on the proposed amendments to Rules 24.2(a) and (b) relating to the requirement for an offeror to disclose, among other matters, its intentions with regard to the offeree company's pension scheme(s)?

### **Answer 1**

As a general comment, we believe that the impact of an offer on an offeree company's pension scheme may vary significantly from situation to situation. If the pension scheme is comparatively small any impact from a takeover may not be material to the offer. On the other hand, the pension scheme may be a very substantial creditor/ counterparty of the target company in which case we would anticipate that discussions with the trustees would need to take place at an early stage to facilitate a meaningful offer being made. Such discussions could be of benefit to the offeree company's shareholders (the constituent which the Code is principally seeking to protect) if they lead to an offer being made which would not otherwise be made without these earlier discussions (and possibly an agreement) with the trustees.

**Question 2**

Do you have any comments on the proposed amendments to Rule 25.2(a) relating to the requirement for the offeree board to include in the offeree board circular its views on, among other matters, the effects of implementation of the offer on the offeree company's pension scheme(s)?

**Answer 2**

While the views of the Board of the offeree company regarding the impact of any offer on the offeree company's pension scheme may be aligned with those of the trustees, they might not be – in which case their views may be of limited value only. It would be helpful, therefore, to state whether the Board of the offeree company have sought the views of the trustees or not in formulating their view; and, if they have, for the Board to state whether or not their views are aligned with those of the trustees and, if appropriate, the Pensions Regulator.

**Question 3**

Do you have any comments on the proposed amendments to Rules 2.12(a), 2.12(b), 24.1, 25.1, 32.1, 32.6(a) and 27.1(b), and to Note 6 on Rule 20.1, in each case relating to the information to be disclosed to the trustees of an offeree company's pensions scheme(s)?

**Answer 3**

In principle, the disclosure requirements to the trustees appear reasonable – but we qualify this response by our general comment under our response to question 1 regarding the materiality of the pension scheme(s) and any need for early engagement with the pension scheme trustees.

**Question 4**

Do you have any comments on the proposed amendments to Rule 25.9 (and Note 1 on that Rule) and to Rule 32.6 regarding the rights of the trustees of an offeree company's pension scheme(s) to make known their views on the effects of the offer on the scheme(s)?

**Answer 4**

Further clarification is needed to ensure that it is clear who pays for costs incurred in relation to the opinions of pension scheme trustees. We believe that the offeree company should pay and not the pension scheme trustees.

Note 1 of Rule 25.9 states that the company must pay for the publication of the pension scheme trustees' opinion but makes no mention of who should pay for costs reasonably incurred by pension scheme trustees in obtaining the advice required for the verification of the information contained in that opinion. However, paragraph 3.11 of the consultation paper the Code Committee "considers that, in the event of [an actuarial and valuation analysis] being carried out, not only might the costs incurred become significant but there might also be considerable dispute as to whether they were incurred reasonably. In any event, the Code Committee understands that, in practice, a sponsoring company will normally be responsible for paying costs reasonably incurred by the trustees of the scheme(s), such that there may often be no need for the Code to require this."

Our understanding is that the Code Committee expects the costs of verifying the information contained in the opinion of the pension trustees to be paid for by the sponsoring company but does not believe there is any need to make this a requirement of the Code. This is inconsistent with the requirement in Note 1 for costs incurred by employee representatives to be paid by the offeree company. We believe that the Code should be consistent and should remove any doubt that the offeree company should pay for costs incurred by the pension scheme trustees.

**Question 5**

Do you have any comments on the proposed amendments to Rule 2.12(d) and to Rule 32.1 regarding the requirement for the trustees of the offeree company's pension scheme(s) to be informed of their rights under the Code to make known the effects of the offer on the scheme(s)? Do you have any comments on the proposed amendment to Rule 19.2 relating to directors' responsibility statements?

**Answer 5**

We have no comments to make on this question

**Question 6**

Do you have any comments on the proposed new Rule 24.3(d)(xvi) and new Rule 26.2(i) relating to the requirement for the offer document to include a summary of any agreement between the offeror and the offeree company's employee representatives or the trustees of the offeree company's pension scheme(s) in relation to any of the matters described in Rule 24.2 and to the requirement for any such agreement(s) to be put on display?

**Answer 6**

We have no comments to make on this question.