

# LONG-TERM PRACTICAL PERSPECTIVES LIMITED

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25 September 2012

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

Dear Sirs,

**Takeover Panel Consultation PCP 2012/2  
Pension Scheme Trustees Issues  
Response from Long-Term Practical Perspectives Limited**

This submission draws on the experience of a former Chief Executive of a major UK pension scheme (assets over £5 billion, membership over 50,000) with practical experience of takeovers affecting large and medium-sized schemes. The author also has a personal interest in a UK defined benefit pension scheme.

## **General observations**

1. We support the overall principle that the Code should be expanded to provide broadly the same benefits for Offeree pension fund members (through the trustees of their scheme) as for Offeree employees (through their employee representatives). Indeed, bearing in mind that the previous consultation which introduced provisions for the benefit of employees (PCP 2011/1) expressed the intention of addressing the interests of "persons who are affected by takeovers," we would regard it as perverse and unreasonable not to recognise pension scheme members as persons equally likely to be affected.

In particular, we would point out that:

- a. Experience of pension schemes affected by takeovers over the last decade (most of whom, regrettably, are not willing to discuss their own experiences in public) suggest that there is an disturbingly wide variation in outcomes achieved for pension scheme members. Outcomes seem to be driven sometimes by differences in contractual powers, sometimes by differences in standards of openness by the Offeror, sometimes by misplaced confidence that the Offeree Board is willing (or even able) to safeguard the interests of Offeree pension scheme members on behalf of the trustees.

Defining minimum standards of conduct helps not only to avoid the worst abuses by Offeror or Offeree Boards, but also to give legitimacy and encouragement to those who wish to deal openly with pension scheme trustees and, finally, to improve understanding of what trustees should expect to have to undertake themselves.

- b. Since the establishment of the Pension Protection Fund in April 2005, failed pension schemes represent (through the mechanism of the PPF levy) a potential burden on the shareholders of all other UK employers who have ongoing obligations to their own defined benefit pension schemes. This means that UK shareholders generally have a relevant interest in avoiding other companies' takeover activity proceeding in a manner which might result in Offeree pension schemes becoming significantly more exposed to future failure.

Updating the Code for the post-2005 world of PPF levies is a long-overview step which is very much in the wider interests of UK investors.

- 2. Our understanding is that it is not the role of the Panel to encourage or discourage takeover activity, nor to pronounce on whether or not particular takeovers would be in the national interest; its role is simply to ensure that, as and when offers are made, they are properly conducted. Accordingly, we would expect the Code Committee to disregard any objections to these proposals based wholly or mainly on the possibility that future levels of takeover activity might be reduced.

### **Comments on specific proposals**

- 3. We are not persuaded by the counter-arguments in para. 2.3 against extending the Code to protect pension scheme members. In particular:
  - a. It is not surprising that the Takeovers Directive should have far more to say on the subject of employees than of pension scheme members, since companies in all member states have employees, whereas only a very few member states have large-scale pension schemes whose viability depends on ongoing financial support from the employer. Consequently, this is not a valid reason for failing to treat the interests of employees and pension scheme members consistently, in those member states where both may be affected by takeovers.
  - b. Whilst it is true that there are Pensions Acts and Regulations designed to protect the general interests of pension scheme members, there are equally Employment Acts and Regulations designed to protect general employment rights. Neither the Pensions Regulator nor any Employment Tribunal has any powers specifically in relation to takeovers. Consequently, there is no valid reason on this account for failing to treat the interests of employees and pension scheme members consistently.

4. We support the principle that the timetable for communicating the expected impact of any takeover offer should be the same in relation to employees and to pension scheme members.

In particular, we would point out that it may sometimes be material for Offeror shareholders to understand the potential impact of any adverse funding consequences anticipated by trustees, before the final structure of any takeover transaction is irrevocably decided.

5. We support the proposals in relation to the provision of information to trustees of Offeree company pension schemes.
6. We are disappointed that the Code Committee is minded not to provide for payment by the Offeree company of costs reasonably incurred by trustees in obtaining advice on takeover proposals.

We urge you to reconsider for the following reasons:

- a. The Code should not lightly discard the principle of treating employee representatives and pension scheme trustees consistently
  - b. Trustee costs are only likely to be significant where pension scheme liabilities themselves are substantial relative to the size of the Offeree company. In such circumstances, it is in the interests of both sets of shareholders, just as much as of trustees and their members, that everyone should understand any potential adverse pensions consequences at the earliest possible stage.
7. We support the proposals in relation to publication of trustee views.
  8. We support the proposals in relation to disclosure of any agreement between the Offeror and trustees.
  9. We welcome the recognition by the Code Committee (para 3.20) that pension scheme trustees are normally independent of the sponsoring company. Pension scheme trustees have a duty (both under trust law and under the Pensions Acts) at all times to act in the interests of their beneficiaries and it would be intolerable for the Code to seek to restrict their freedom to discharge these duties.

10. We note with disappointment (ref 3.21) that the Panel does not see it as part of its role to refer individual transactions of concern to the Pensions Regulator.

We would urge you to reconsider, on the grounds that:

- a. It would seem to be in the long-term interests of Offeror shareholders to avoid irrevocable commitments in circumstances where there is serious risk that the Pensions Regulator might use its retrospective powers
- b. It seems inconsistent with the approach to competition issues, where the Code already recognises that there are relevant public interest considerations beyond the interests of shareholders alone.

In the event that the Panel is not persuaded to take any wider view of its own role, we trust that, as a minimum, the Panel would express no objection against Parliament or the DWP extending the powers of the Pensions Regulator (if they were minded to do so) in relation to takeovers which are potentially damaging to the interests of pension scheme members.

Yours faithfully,

For and on behalf of  
Director, Long-Term Practical Perspectives Limited