

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

28 September 2012

Subject: Consultation regarding proposed amendments to the Takeover Code - PCP 2012/2

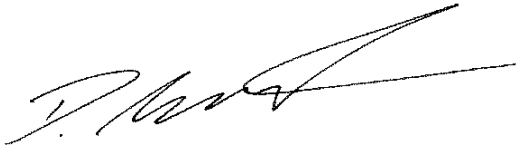
Dear Sir

Mercer Limited is a global leader for HR and related financial advice and services. In the UK, our client base includes employers and trustees providing occupational pension schemes to employees in all sectors of industry. We provide pension advice and services to companies in the FTSE350, and we also have a large proportion of clients that are employers classed as "Small to Medium sized Enterprises". A large proportion of our clients are the trustees of pension schemes with sponsoring employers in all of these classes. We will comment from the perspective of these groups.

We were among the respondents to PCP 2011/1 who argued that the then proposed amendments to the Code giving employee representatives rights to notice and disclosure of information should be extended to trustees of DB pension schemes sponsored by the offeree or offeror. We therefore broadly welcome the proposals in the current consultation.

We have made specific comments on the questions in the consultation document, contained in Appendix I to this letter.

Yours sincerely



Darren Masters
Principal

APPENDIX I

Q1. 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)?

We understand that the UK would be the only country to have this requirement. There is therefore a danger that the requirement could be perceived as onerous for UK deals, adding weight to the arguments of those who claim that the UK is a hard place to do business.

However, in our experience it is not uncommon for an offeror to under-estimate the effect of the offeree company's pension scheme on the combined business post-acquisition, in particular arising from transaction structures and any immediate plans for reorganisation of operations of the offeree and integration into the offeror.

A rule that requires offerors properly to consider the effect of offers on relevant schemes should therefore not be onerous but beneficial to offerors, and if properly disclosed may provide the offeree's shareholders with a better understanding of how pension risk may have influenced deal pricing.

There remains however a risk that in the absence of a detailed engagement between the offeror and the trustees of any relevant pension schemes, the statements made regarding repercussions for pension schemes may only be the offeror's views on those (although there is of course a proposal for a statement from the trustees of the pension schemes that will identify the extent of any differences in that regard).

We therefore agree with and welcome the Panel's intention that interested parties should have the opportunity to debate the effects of an offer on the offeree company's pension scheme.

We recognize, however, that the requirements of the Code would offer very limited additional protection to trustees and scheme members: any offeror making statements of intent in bad faith would at most be required to delay unannounced changes for a period of twelve months.

We feel that clarification would be useful in relation to the definition of "repercussions", with clearer guidance provided on the key areas where such repercussions might be considered in the context of impact on pension schemes, extending beyond simple issues of the continued availability of certain pension benefits.

Q2. 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)?

We agree with and welcome the proposal that the requirement of the offeree board to comment on an offer made is extended to include the likely effect of the offer on pension schemes, but would echo similar concerns to those raised in relation to statements from the offeror:

- a) detailed engagement is required with pension scheme trustees to properly reflect on the repercussions to schemes, and board views on those may be at odds with trustee positioning; and
- b) clarity would be beneficial on the nature of repercussions to be considered.

Pension schemes, particularly defined benefit pension schemes, are long term company obligations and as a result we have certain reservations that stated "intentions" at the point of offer may not be borne out by future experience beyond the requisite period of twelve months that parties to an offer are committed to a stated course of action. In effect this would provide commit offerors to maintaining existing benefit structures and contributions for 12 months. However, we acknowledge that there are separate mechanisms available to pension scheme trustees to deal with subsequent events beyond the "protection" offered by the Code.

Consequently, we agree that the best course of action is for there to be committed agreements in place between offerors and pension scheme trustees, and such agreements are beyond the scope and reach of the Code.

Q3. 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)?

We would expect the offeree company to provide details of the offer to the scheme's trustees as a matter of good practice. However we are aware that good practice is not always followed. We therefore welcome the proposal to include this requirement in the Rules.

Whilst we welcome the formalisation of certain disclosure requirements we have reservations concerning the extent of the proposed disclosure and the ability that such disclosure provides for the trustees of pension schemes to fully analyse, understand and comment upon the repercussions of an offer.

Our experience suggests that publicly available disclosures give only limited information and an overview of implications for the wider offeree group. In the context of the “employer covenant” as understood in the pensions industry and with particular application to defined benefit pension schemes, the repercussions of a transaction are relevant at both the wider group level, but more relevantly at individual company level, with a focus on those offeree group companies that have a legal liability to support pension schemes.

Whilst acknowledging the above point, we do not feel that the disclosure requirements in the Code can sensibly be extended further, without creating an onerous burden beyond what is required in current pensions legislation and practice.

We consider that the need for trustees to provide a statement on the repercussions of an offer should give offerors an incentive to engage with pension scheme trustees and provide the necessary information beyond public disclosures that are typically required to establish a full view of the transaction impact.

Q4. 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)?

We agree that the trustees should have the opportunity to make their opinion known. However, given (i) that trustee boards are made up largely of volunteers and (ii) obtaining sufficient information (both transaction related and scheme related data) to provide a detailed statement can be a complex and time-consuming process.

We believe that in certain cases, it may be difficult for the trustees to meet the required timescale to provide an impact statement for publication in the offeree company’s circular, and consequently we welcome the extension of the requirement currently in place for employee representatives to publish and announce such opinions when they are received. In exceptional circumstances it may not be possible for the trustees of a pension scheme to provide a finalised commentary on the impact of a transaction on the scheme in question within the period of 14 days after the offer becomes or is declared unconditional, for example where negotiations are ongoing between the trustees and the offeror.

On balance we do not consider it desirable to extend the timetable to accommodate these concerns, and consider that a qualified impact statement could be provided at any stage of the process, setting out the trustees’ views of the impact based upon what they know at that point in time.

Q5. 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?

We have agreed that the trustees of pension schemes should be notified of their rights under Rule 25.9, and have no further comment to make in relation to that provision.

However, we do not agree that pension scheme trustees should be treated differently from employee representatives with respect to their reasonable costs of obtaining advice required for the verification of the information contained in their opinion.

Pension scheme trustees will necessarily require advice in order to provide the proposed statement on repercussions of the transaction, as well as complying with current guidance from the Pensions Regulator on assessing and responding to the impact of transactions. These are potentially complex matters beyond the knowledge and skills of a typical scheme trustee, going beyond actuarial and valuation advice to include specialist financial and legal input on organisational and financing structures.

Whilst we acknowledge that the offeree company typically picks up the costs incurred by pension scheme trustees, the mechanisms for this (e.g. annual allowance for regular budgeted expenses) can result in pension schemes being significantly out of pocket for a prolonged period, potentially reducing the security of members' benefits.

We consider that it should be possible to incorporate wording that recognises that costs reasonably incurred, that are not otherwise immediately settled by the offeree company on behalf of the pension scheme trustees, should be the responsibility of the offeree company.

Q6. 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?

We agree that a summary of agreements made between the offeror and the company's pension scheme(s) should be included in the offer document, as such agreements will be important to other stakeholders in determining their attitude to the offer made.

Further, given the degree of disclosure required in other areas, we recognise the intent behind a proposal to disclose copy agreements made between trustees and offerors to other parties, particularly other competing bidders, however our experience suggests that trustees and offerors may wish any agreements they make pre-deal to remain confidential.

If the trustees believe that a confidential agreement is in members' best interests, then the arrangements should facilitate this, acknowledging that it is open to the parties to seek approval from the Panel not to make a document available.

We do not accept the justification that the intention of such documentary disclosure is also intended for the benefit of pension scheme beneficiaries. It is the role of the pension scheme trustees to communicate matters of importance to pension scheme beneficiaries, and agreements made in respect of transactions will be communicated to beneficiaries in other ways. In general, pension scheme trustees would not be required to provide disclosure to scheme beneficiaries of all agreements entered into by them in fulfilling their fiduciary responsibilities. However, we acknowledge that as such disclosure is appropriate for other stakeholders, there is no reason why pension scheme beneficiaries could not gain access to such documents whilst available and subject to the previously noted concern regarding confidentiality.