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The Takeover Panel
10 Paternoster Square
London
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21 September 2012

Dear Sirs,

THE TAKEOVER PANEL CONSULTATION PCP 2012/2
PENSION SCHEME TRUSTEE ISSUES
RESPONSE FROM PENFIDA PARTNERS LLP

Further to our letter of 24th May, 2011 and subsequent discussions with the Panel we have set out below our formal response to the proposals you published on 5th July, 2012 to amend the Takeover Code to take account of the interests of the members of pension schemes reliant upon Offeree Companies which are subject to an Offer governed by the Takeover Code.

Overall our reaction to these proposals is supportive and we believe that they represent a constructive move to recognise and give consideration to the important and frequently underrepresented interests of Offeree pension fund members impacted by takeover bids. Hitherto pension trustees have had to rely for attention largely on the contractual powers of the relevant scheme and the sensitivity to pension issues of the relevant Offeror. Past experience indicates that a number of pension schemes have suffered material detriment to their members' interests as a consequence and their interests have not been discussed in any material sense until after the takeover became unconditional.

Save for our detailed comments below, we have two remaining areas of concern in connection with the principles underlying the current proposals:

1. **Interaction of the Code and the Pensions Regulator.** In our letter referred to above we suggested that where, in the trustees' opinion, material detriment could arise as a result of the Offer and no satisfactory mitigation has been agreed by a specified date in the Offer timetable, the matter should be referred to the Pensions Regulator. We believe that this suggestion should be considered further and would point out that:

a. The concept of referral of a takeover proposal to an appropriate regulator is not a new one. The Competition Commission and the European Commission are specifically accommodated within the Takeover Code and various specialist regulators e.g. the FSA have played key roles in relevant bids in the past. Pension creditors represent an important and substantial interest group in this regard.

b. The current proposals focus on replicating for pension scheme interests the recent improvements in the Code introduced for the benefit of employee representatives. We absolutely support this move given that pension scheme interests are so closely bound to the interests of present and past employees. Pension scheme interests differ, however, in one key respect from employees' direct interests in that they cannot withdraw their labour either temporarily or permanently and they are bound to their sponsor company for so long as there are obligations outstanding from the company.

c. The Pensions Regulator has as a key objective the protection of the members of UK pension schemes alongside the protection of the Pensions Protection Fund. Takeover bids can, if allowed to proceed without taking the interests of pension schemes into account, create very significant risks of material detriment for relevant schemes. The Pensions Regulator has significant knowledge and experience to contribute and ultimately has an interest in the prospective resolution of issues rather than having to use its retrospective powers.

We hope that these points can be considered further in reviewing the benefits of regulatory input / oversight being introduced in relation to considering the potential impact of takeovers on UK pension schemes.

2. **Pension schemes to meet the costs of providing an opinion to Code standards;** We entirely support the requirement that opinions published in offer documentation should be prepared to the required standard of diligence but we consider that it is an undue burden on pension schemes to require that they meet the cost of any necessary advice. We would point out the following:

    a. It may not always be the case that the Sponsor will meet the reasonable costs of obtaining such advice unless required to do so

    b. The Offeree and the Sponsor may be different companies; frequently Sponsors are subsidiary companies of the listed Group rather than the listed entity itself

c. The costs incurred may be very material in the context of the size and financial position of the relevant scheme and Trustees may be placed in the impossible position of having to decide whether to dissipate members' assets to defend the position with no guarantee of success

The pension scheme has no control over the development of an Offer but must nevertheless bear the cost. The Offeree and, indirectly, the Offeror are always likely to be in a better position to take on this burden advisedly.

As a result we believe that pension schemes should be treated in the same manner as employee representatives in relation to costs.

Detailed comments

As above, overall we are supportive of the majority of the proposed amendments in the consultation document. We have some specific comments on certain sections as set out below:

2.3 (a) We would note that the fact that the Takeover Directive does not include provisions for the benefit of Offeree company pension schemes or the trustees of those schemes should be considered alongside the fact that the UK defined benefit pension system is not directly replicated in any other European member state and that there is a wide disparity of pension provision and pension protection throughout the European Union. It is therefore no surprise that these issues appear to have been left to be dealt with at member state level.

2.5 (a) We accept that the future funding arrangements for UK pension schemes are a matter for regular, frequently triennial, discussion between the scheme and its sponsor company. We would however note that where the terms of a proposed Offer for a company would have a materially detrimental impact on the degree of reliance that a pension scheme can place on that company it would seem reasonable that the offer process could provide a practical framework for agreeing appropriate mitigation for that impact, involving if necessary the Pensions Regulator ("tPR").

3.3 (a) (iii) We think it would be helpful if in a note or guideline to this rule the definition of "likely repercussions" could be described as including:

- Impact on the employer covenant on which the scheme relies
- Impact on current funding arrangements
- Impact on future pensions provision

3.5 (a) We suggest that the note above in 3.3 (a) (iii) is equally applicable here.

3.6 We agree that the appropriate period for this commitment should be 12 months. If it should emerge, however, after a bid that material information regarding future intentions should have been disclosed during the bid, we would suggest that the Panel should have the power to investigate retrospectively.

3.11 We consider that the Code should require that the Offeree Company should pay for the costs reasonably incurred in obtaining the advice required for the verification of the information contained in any opinion the trustees express on the effects of the Offer on the scheme, in line with the provisions made for employee representatives.

3.21 We consider that where the trustees of the relevant scheme have formed the opinion that the Offer proposed would be materially detrimental to the ability of the scheme to meet its obligations and it has not been possible to agree appropriate mitigation by a specified date in the Offer timetable then the matter should be referred to tPR prior to the Offer becoming unconditional. tPR should be asked to produce a response within a defined period during which the Offer timetable could be suspended if necessary. That response could take the form of:

1. An informed comment by tPR to be considered by the Offeror before declaring the Offer unconditional

2. A statement by tPR as to whether it considers the proposal to be a Type A event and appropriate for clearance or not

We hope that you will find our commentary helpful and that you will be able to give further consideration to our suggested amendments. Please do contact us if you would like to discuss these matters further.

Yours faithfully

Paul Jameson
Penfida Partners LLP