

## **PRACTICE STATEMENT NO 27**

### **RULE 21.2 – DIRECTORS’ IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT**

#### **1. Introduction**

- 1.1 This Practice Statement clarifies the way in which the Panel Executive interprets and applies Rule 21.2 of the Takeover Code in relation to irrevocable commitments and letters of intent given by offeree company shareholders who are also directors of the offeree company in connection with an offer.
- 1.2 Rule 21.2(a) provides that, except with the consent of the Panel, neither the offeree company nor any person acting in concert with it may enter into any offer-related arrangement with either the offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation. The offeree company’s directors are presumed to be acting in concert with the offeree company under paragraph (2) of the definition of “acting in concert”. The restriction in Rule 21.2(a) therefore extends to offer-related arrangements entered into between such directors and an offeror.
- 1.3 Rule 21.2(b) defines an “offer-related arrangement” as being any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or other arrangement having a similar or comparable financial or economic effect, subject to certain exclusions. Rule 21.2(b)(iv) provides that irrevocable commitments and letters of intent are excluded from the definition.

#### **2. Interpretation and application of Rule 21.2(b)(iv) in relation to irrevocable commitments and letters of intent given by offeree company shareholders who are also directors of the offeree company**

- 2.1 The Executive considers that Rule 21.2(b)(iv) permits an offeree company shareholder who is also a director of the offeree company to enter into an irrevocable commitment or letter of intent to accept an offer (or to vote in favour of a scheme of arrangement) with respect to the shares in the offeree company held or controlled by the individual concerned. However, the Executive considers that Rule 21.2(b)(iv) does not permit an offeree company shareholder who is also a director of the offeree company to enter into other kinds of offer-related arrangement with the offeror or any person acting in concert with the offeror.
- 2.2 Provisions which have appeared in irrevocable commitments given by offeree company shareholders who are also directors of the offeree

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company and which the Executive regards as being in breach of Rule 21.2 have included commitments:

- (a) not to solicit a competing offer;
- (b) to recommend an offer to offeree company shareholders;
- (c) to notify the offeror if the director becomes aware of a potential competing offer;
- (d) to convene board meetings and/or vote in favour of board resolutions which are necessary to implement the offer;
- (e) to provide information in relation to the offeree company for due diligence or other purposes;
- (f) to assist the offeror with the satisfaction of its offer conditions;
- (g) to assist the offeror with the preparation of its offer documentation;  
and
- (h) to conduct the offeree company's business in a particular manner during the offer period.

2.3 The Executive regards commitments of the kind referred to in paragraph 2.2 above as extending beyond the relevant individual's decision to accept an offer (or to vote in favour of a scheme of arrangement). The Executive regards such commitments as having been entered into in the relevant individual's capacity as a director of the offeree company and, as such, to be in breach of Rule 21.2. This would be the case even if the commitments were stated to be subject to the relevant director's fiduciary or statutory duties.

2.4 The Executive does, however, interpret Rule 21.2(b)(iv) to permit the inclusion in an irrevocable commitment or letter of intent of provisions which are designed solely to give effect to a commitment to accept the offer (or to vote in favour of the scheme of arrangement). Such permitted provisions may include, for example:

- (a) an undertaking not to dispose of the shares or withdraw an acceptance of the offer;
- (b) an undertaking to elect for a particular form of consideration when alternative forms of consideration are offered; and
- (c) representations regarding title to the shares to which the commitment relates.

**PRACTICE STATEMENT NO 27 CONTINUED****3. Consulting the Executive**

- 3.1 The Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a proposed irrevocable commitment or letter of intent is in compliance with Rule 21.2.

*Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk).*

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