

PCP 2004/2 Issued on 25 February 2004

THE PANEL ON TAKEOVERS AND MERGERS

**CONSULTATION PAPER ISSUED BY
THE CODE COMMITTEE OF THE PANEL**

POSSIBLE OFFER ANNOUNCEMENTS

**REVISION PROPOSALS RELATING TO
RULE 2.4 OF THE TAKEOVER CODE**

Before it introduces or amends any Rules of the Takeover Code or the Rules Governing the Substantial Acquisitions of Shares, the Code Committee of the Takeover Panel is normally required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by **23 April 2004**.

Comments may be sent by email to:

consultation@disclosure.org.uk

Alternatively, please send comments in writing to:

The Secretary to the Code Committee
The Panel on Takeovers and Mergers
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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

1. INTRODUCTION

- 1.1 The Code Committee is aware of a number of occasions on which a party making an announcement relating to a possible offer (but which does not amount to the announcement of a firm offer) has included in that announcement detailed or specific information about the terms on which an offer might be made, such as the price which is being considered by the potential offeror.
- 1.2 The Code Committee has been considering the implications under the City Code on Takeovers and Mergers (the “Code”) of including such information in possible offer announcements and the purpose of this Consultation Paper is to seek views on the proposals (which include amendments to the Code, as set out in Appendix A) which have resulted from the Code Committee’s review of the issues concerned.
- 1.3 The Code Committee has today also published PCP 2004/1 (“‘Put up or shut up’ and no intention to bid statements”) which seeks views on the Panel’s policy of “put up or shut up” following an announcement relating to a possible offer, and also certain issues relating to no intention to bid statements under Rule 2.8.

2. POSSIBLE OFFER ANNOUNCEMENTS AND RELEVANT CODE PROVISIONS

- 2.1 When a takeover offer is in contemplation, it is often the case that an announcement is made by one of the parties concerned which raises or confirms the possibility that an offer might be made, but which does not amount to the announcement of a firm intention to make an offer to which Rule 2.5 of the Code would apply.
- 2.2 Frequently, a possible offer announcement of this kind will be made in order to comply with Rule 2.2 of the Code which requires an announcement to be made in a number of circumstances, including (broadly) if there is rumour and

speculation about a possible offer for the offeree company or an untoward rise in the offeree company's share price and, in either case, that would appear to have resulted from information about the possible offer having leaked, notwithstanding the requirements of secrecy contained in Rule 2.1. Sometimes, however, an announcement about a possible offer is made even though there is no actual requirement under Rule 2.2 to make such an announcement at that time.

- 2.3 The Code recognises that at the time an announcement obligation arises under Rule 2.2, the offeror will often still be evaluating the feasibility of an offer as one of a number of options and, accordingly, Rule 2.4 of the Code provides that in these circumstances a brief statement confirming that talks are taking place, or that the offeror is considering making an offer, is all that is required by the Code. The relevant part of Rule 2.4 provides as follows:

“... until a firm intention to make an offer has been notified a brief announcement that talks are taking place (there is no requirement to name the potential offeror in such an announcement) or that a potential offeror is considering making an offer will normally satisfy the obligations under this Rule. ...”

- 2.4 Apart from Rule 2.4, however, the Code does not make express provision as to what information can, or can not, be included in an announcement relating to a possible offer, although certain provisions of the Code that apply to all documents issued or statements made during the course of an offer will be relevant when considering any possible offer announcement. For example, General Principle 6 of the Code provides as follows:

“All parties to an offer must use every endeavour to prevent the creation of a false market in the securities of an offeror or the offeree company. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market.”

In addition, a party making a Rule 2.4 announcement will need to consider the application of any other relevant legal or regulatory requirements, including the market abuse regime under the Financial Services and Markets Act 2000 and, when implemented, the requirements imposed by the Market Abuse Directive.

3. GENERAL APPROACH TO POSSIBLE OFFER ANNOUNCEMENTS

3.1 In considering what information should, or should not, be permitted to be included in a possible offer announcement, the inclusion of material information about the proposed offer terms might be considered undesirable because:

- the level of pressure (or “siege”) that an offeree company board is subjected to is arguably greater if the potential offeror includes details of the terms on which it might be prepared to offer than if it simply confirms that it is considering making an offer;
- the potential offeror might be able to use the possible offer announcement to its tactical advantage, for example by publicly gauging shareholders’ and the market’s reaction to the proposed terms, even though the potential offeror is not committed to proceed with an offer; and
- offeree company shareholders and the market may react to the announcement by attributing greater certainty to the likelihood of an offer than if the potential offeror is limited simply to confirming that it is considering making an offer and there might, therefore, be false market concerns if no offer in fact subsequently materialises.

It could, therefore, be argued that any announcement relating to a possible offer which does not amount to a firm intention to make an offer under Rule 2.5 should be limited to a simple statement in the terms provided for in Rule

2.4 and should not include any other material information relating to the terms on which any offer might be made.

- 3.2 The Code Committee is of the opinion, however, that the above concerns are generally out-weighed by a recognition that any announcement relating to a possible offer creates siege and uncertainty, but that from shareholders' (both the offeree company's and the offeror's) and the market's perspective, more information about a possible offer must be presumed preferable to less information. If a potential offeror includes information in a possible offer announcement about the proposed terms of its offer, shareholders and the market are better able to assess its intentions, the circumstances in which an offer might be forthcoming and the terms on which any offer might be made. Far from increasing false market concerns, therefore, additional information in a possible offer announcement should, provided it is clear that the announcement relates to a potential and not a firm offer and subject to paragraph 3.4 below, in fact reduce market uncertainty.
- 3.3 In addition, it would appear to be contrary to the general principle of seeking to avoid false markets if a potential offeror was prevented by the Code from attempting to confirm or correct by way of public announcement a material item of information relating to its possible offer that was the subject of extensive rumour and speculation in the press and the market. Indeed, attempting to prohibit the formal announcement of possible offer terms is likely to lead to more unconfirmed leaks of information in the future, and it must, as a general rule, be preferable for parties to be encouraged to announce matters publicly than to leak them to the press.
- 3.4 The position above is premised, however, on the assumption that, in order to preserve an orderly market and to comply with General Principle 6, any information included in a possible offer announcement by a potential offeror about the terms on which an offer might be made should be capable of being relied upon by shareholders and the market generally as an accurate statement of the offeror's intentions as regards those terms. The question this then raises is the extent to which the potential offeror should be bound by that statement,

such that it should not be allowed subsequently to make an offer for the offeree company on terms which conflict with those previously indicated. The following sections of this Consultation Paper seek views on this issue and also on a proposed new Rule to reflect the Code Committee's conclusions.

Q1 Do you agree that the Code should not generally seek to restrict the information that can be included in a possible offer announcement?

4. POSSIBLE OFFER ANNOUNCEMENTS AND PROPOSED OFFER VALUES

4.1 Reducing a previously stated offer value

4.1.1 This issue of the extent to which a potential offeror should be bound by an earlier statement relating to the possible terms of its offer is most obviously in point where a possible offer announcement includes details of the offeror's proposed offer price. The Code Committee is aware of occasions on which a potential offeror which has included details of its proposed offer price in this way has subsequently sought to be permitted to make a firm offer for the offeree company at a lower value or, at least, to do so with the recommendation of the board of the offeree company.

4.1.2 The argument in favour of allowing a potential offeror to make an offer at a lower price than it had previously indicated in an earlier announcement is that to do otherwise might have the effect of depriving offeree company shareholders of the possibility of considering an offer where the offeror is no longer in a position, or willing, to make its offer at the previously stated price. Not permitting an offer to be made in these circumstances might be considered to operate against the interests of shareholders, particularly where the lower offer is proposed to be made with the recommendation of the offeree company board.

4.1.3 The counter-argument to the above position, however, is that, since there is no obligation to include details relating to the offer value in a possible offer

announcement, it must be the case that the proposed offeror wants to derive some benefit from doing so and that the likely source of this benefit will be shareholders' and the market's reaction to the price. The maintenance of fair and orderly markets is crucial to the objective of the Code of providing an orderly framework within which takeover bids are conducted; the Code should, therefore, guard against the possibility of shareholders and the market being prejudiced by misleading statements or a lack of certainty, as would be the case if an offeror were permitted to make an offer at a lower value than it had previously indicated it was considering.

- 4.1.4 Having considered these arguments, the Code Committee is of the view that where an unqualified statement is made by a potential offeror about the price at which it is considering making an offer, the principle of certainty and orderly conduct should prevail over the apparent disadvantages which might result from holding the offeror to the statement in a particular case (especially as the offeror is under no obligation to mention its proposed offer price). Accordingly, in the absence of wholly exceptional circumstances, a potential offeror electing to make such an unqualified statement should not be permitted subsequently to make an offer at below that price. The Code Committee also believes that the same consequences should apply whether the statement is made in a formal announcement or informally, for example in an interview.
- 4.1.5 However, in seeking to establish an appropriate balance between the potential disadvantages to shareholders of being deprived of the possibility of an offer and the undesirable consequences for shareholders and the market if they cannot rely on the accuracy of statements made by an offeror, the Code Committee also considers, subject to the considerations in paragraph 4.1.6 below, that a potential offeror wishing to include details of its proposed offer price in a possible offer announcement or other statement should be able specifically to reserve the right at the time the preliminary announcement or statement is made subsequently to make any offer at a lower value and to state the circumstances in which it reserves the right to do so. The potential offeror should then be allowed (subject always to any obligation arising pursuant to Rules 6 and 11) to make an offer at a lower price if in the interim there has

occurred an event that it had specified in the announcement would allow it to set its previous price aside. In such a case, so long as the circumstances in which the offeror might not be bound by its previous price statement are clearly specified at the time of the original announcement, the Code Committee believes that any concerns about a lack of certainty arising from the offeror's announcement are not sufficient to outweigh the prejudice that offeree company shareholders would suffer if the offeror was prevented from going ahead with its offer if those circumstances subsequently arose.

4.1.6 The Code Committee does not believe, however, that a potential offeror should be free to specify any matter whatsoever it chooses as an event which will enable it to set aside its price and subsequently to make an offer at a lower value. In striking the appropriate balance between the competing interests referred to above, the Code Committee considers it important that any permitted reservation should be clear and unambiguous, and also that the fulfilment of the reservation should not depend on the subjective judgement of the offeror or be otherwise within the offeror's control. For example, therefore, a reservation relating to the offeror conducting satisfactory due diligence would not be acceptable as, due to the subjective nature of the reservation, the circumstances in which the offeror could set its price aside would remain uncertain. On the other hand, the recommendation of the board of the offeree company or a firm intention to make an offer for the offeree company being announced by a third party should always satisfy the necessary standard. In relation to any other matter that a potential offeror seeks to include as a reservation, the Code Committee is of the view that the Panel should be consulted in advance with a view to it determining whether the proposed reservation is sufficiently certain that it should be allowed.

4.1.7 It is important also to recognise a distinction between pre-conditions to the making of an offer included in a possible offer announcement and reservations that allow the offeror to make an offer at a lower price than previously suggested. Although any pre-conditions should always be clear and unambiguous, pre-conditions in possible offer announcements can be subjective or within the offeror's control (unlike a reservation on price). For

example, therefore, an offeror is able to announce that it is considering making an offer subject to the outcome of due diligence, in which case it is under no obligation to proceed to make an offer at all. However, by also including its proposed offer price in the announcement, if the offeror does in fact proceed with making an offer, that offer will have to be at or above the stated price (subject to any permitted reservation), whatever the outcome of the due diligence process. In other words, while the making of an offer can be announced to be pre-conditional upon due diligence, a proposed offer price cannot be. The Code Committee believes that possible offer announcements should therefore clearly distinguish between pre-conditions to the making of the offer and those matters that are reservations to a stated price.

Q2 Do you agree that an offeror which makes an unqualified statement about the value of its possible offer should not normally be permitted subsequently to make a lower offer (even if that lower offer would be recommended by the offeree company board)?

Q3 Do you agree that an offeror should be permitted to make an offer at below a previously stated price provided that at the time it reserved the right to do so in circumstances which subsequently arise?

Q4 Do you agree that offeree board recommendation or a firm offer announcement by a third party should always be allowed as reservations?

Q5 Do you agree that subjective matters, such as due diligence, should not be allowed as reservations in this context?

4.1.8 In terms of the period for which the potential offeror should be bound by any statement about its proposed offer price, the Code Committee considers that the restriction on making a lower offer should continue to apply at least throughout the time during which the offeree company is in an “offer period”. Once a possible offer announcement has been made by a potential offeror, an offer period will normally continue until any firm offer made for the offeree company is successful or lapses, or, if no firm offer is made, until any

disclosed potential offerors announce that they do not intend to bid for the offeree company.

4.1.9 There might exist possible loopholes in this approach, however, under which a potential offeror might be in a position to make a lower offer shortly after the end of the offer period. For example, an offeror is normally permitted to make a recommended offer following a no intention to bid statement without waiting the usual six month lock-out period provided for in Rule 2.8, provided that it reserved the right to do so at the time the statement was made.

4.1.10 In order to prevent a potential offeror being in a position to exploit any such loophole, and consistent with the anti-avoidance provisions relating to “no increase” and “no extension” statements contained in Note (a)(i) on Rules 35.1 and 35.2, the Code Committee therefore proposes that the restrictions imposed upon a potential offeror should apply not only throughout the offer period, but also during the three months thereafter. In this way, any potential benefit to an offeror in seeking to circumvent the usual restrictions is largely removed.

Q6 Do you agree that any restrictions imposed on a potential offeror should apply throughout the offer period and for the three months thereafter?

4.1.11 When a number of persons acting in concert are interested in pursuing the offer, the Code Committee believes that the restrictions proposed above should apply to each of the members of the concert party (other than an adviser which is a member of the concert party solely by reason of presumption (5) of the definition of “acting in concert”), irrespective of which one of them actually made the relevant statement. In addition, as it would be easy for a person bound by a previous statement as to price to circumvent the proposed restrictions during the period for which it would otherwise be bound by subsequently joining with, or becoming a concert party of, another person with a view to that other person making a lower offer for the offeree company, the Code Committee is also of the view that the proposed restrictions should extend to such future concert parties as well.

Q7 Do you agree that concert parties should also be restricted as set out in paragraph 4.1.11 above?

4.2 Announcing a higher offer

4.2.1 A related issue to that above is whether, having indicated its proposed offer price in a possible offer announcement or other statement, an offeror should be able subsequently to make a firm offer at a higher price. It might be argued that similar issues relating to a lack of certainty and orderly markets arise in a situation where an offeror seeks to make an offer at above a previously stated proposed offer value as do when it seeks to make a lower offer.

4.2.2 The argument in favour of not restricting the ability of an offeror to make a firm offer at above a previously indicated price is that, whereas it might be reasonable to expect to be able to place reliance on the fact that an offer will not be revised downwards or made at a lower price, shareholders and the market should not be surprised if an offeror subsequently seeks to improve its offer terms over and above its opening shot. For example, when a firm offer has been made, there is nothing to prevent the offeror from increasing or improving the terms of the offer, provided that it has not made a “no increase statement” subject to Rule 32.2 and provided that the offer will remain open for a further 14 days following the revision (see Rule 32.1). In other words, shareholders’ and the market’s understanding of the possibility of an offeror increasing its offer is sufficiently clear to address any concerns about a lack of certainty.

4.2.3 Also, given the ability of an offeror to revise its offer upwards once actually made, to restrict an offeror which has indicated a proposed offer price in an earlier possible offer announcement to making its firm offer only at that stated price could lead to a situation where, immediately after announcing its offer at that price, the offeror then revised it to achieve the desired, higher price. Such a practice itself would give rise to orderly markets concerns.

4.2.4 Although the Code Committee can see the argument that uncertainty exists whenever a potential offeror has indicated the price at which it is considering making an offer and then seeks to make its actual offer at a different price, it does not consider that, in practice, shareholders and the market should generally expect that an offeror would be unable to increase an offer price that had previously been stated. The Code Committee does not, therefore, believe that an offeror should be prevented from making a firm offer at a value higher than previously indicated in a possible offer announcement or other statement, unless the offeror has also made a “no increase statement”.

Q8 Do you agree that, subject to Rule 32.2, a potential offeror should not be restricted from making an offer at above a price stated in an earlier possible offer announcement?

4.3 Approximate offer values

4.3.1 Often, a potential offeror will seek to make a statement in a possible offer announcement which indicates approximately the price at which it is considering making an offer for the offeree company, but without actually stating a fixed price to which it could be firmly held. For example, the offeror might want to state that it is considering making an offer:

- within a stated range of possible prices;
- at or around a particular stated price; or
- at a substantial premium to the prevailing market price at the time.

4.3.2 Given the range of possible statements that an offeror might make in this regard, this is an area which easily becomes complex and the Code Committee is of the opinion that it is neither sensible, nor practicable, to attempt to codify all the possible consequences of making such statements. The Code Committee believes, however, that the Panel should be consulted in advance

in any case where a possible offer announcement indicates an approximate, but not a fixed, price at which an offer might later be made.

- 4.3.3 In considering a statement indicating an approximate future offer value, the Panel's primary concern will be to attempt to ensure that shareholders and the market cannot be said to have been misled by the statement. An announcement by the offeror that it is considering making an offer "at a substantial premium" to a particular benchmark (or any similar unquantified statement) is, accordingly, unlikely to be acceptable since it will not be clear to what price the offeror should be held in the event that it does proceed with its offer. The statement would, therefore, create an unacceptable degree of uncertainty for shareholders and the market which would not be consistent with General Principle 6.
- 4.3.4 On the other hand, a statement that the offeror is considering making an offer "at or around" a stated price or within a range of stated prices will normally be acceptable. In the former of these two examples, the Panel's usual practice is to establish a "floor" price at or above which any subsequent offer must be made, the floor normally being no more than 5 per cent. below the stated price. Similarly, where a potential offeror announces that its offer is expected to be within a stated range of prices, the Code Committee believes that shareholders and the market should be entitled to expect that any future offer will not be made at below the bottom end of that range (so that any subsequent offer must be at or above the lowest value stated), but that, in line with its conclusions set out in section 4.2 above, the offeror will normally still be able to make an offer at above the price stated as the higher end. An offeror should be careful in these circumstances, however, not to indicate that no offer will be made above the top end of the range (as, otherwise, the offeror will be held to that statement in accordance with Rule 32.2), although a range of possible prices will not normally be interpreted as a "no increase statement" subject to Rule 32.2 unless this is the clear intention of the statement made by the potential offeror.

- Q9 Do you agree that the Panel must be consulted in any case where a statement indicates an approximate, rather than a fixed, possible future offer price?**

5. POSSIBLE OFFER TERMS OTHER THAN PRICE

- 5.1 Apart from the price at which an offer might be made, a potential offeror might also, or instead, disclose other information about the terms on which it has approached the offeree company or is considering making an offer, for example that any offer is likely to be in cash, or a securities exchange offer, or that the offer will include a loan note alternative. The question, again, is the extent to which the potential offeror should then be bound by any such statement.
- 5.2 The Code Committee is of the opinion that similar issues concerning certainty and orderly markets apply in relation to such statements as they do when a proposed offer value is disclosed, although the influence that the relevant information will have on shareholders and the market, and the degree of reliance that they might place upon it, will generally be very much less than in the case of a stated price. For example, where a potential offeror announces that its offer will be at a particular level in cash, the Code Committee is of the view that the principal factor influencing shareholders' and the market's reaction to the information, and therefore upon which reliance is likely to be placed, will be the "value" of the proposed offer, rather than the form of consideration proposed.
- 5.3 In seeking to balance the potential detriment to shareholders of being deprived of an offer (i.e. if the offeror is no longer in a position to make its offer on the basis previously stated) and the consequences of not being able to rely on information disclosed by a potential offeror, the Code Committee believes that an offeror making an unqualified statement about any proposed term of its possible offer should still be held to that statement in the event that it does proceed to make an offer. However, the offeror should not be bound if it reserved the right at the time the statement was made to set it aside and to

make an offer on different terms. Unlike in the case of a proposed price, the reservation in these circumstances could be general in nature, rather than having to identify specifically the matters that would allow the offeror not to be bound. In these circumstances, so long as the reservation of the right to make an offer on different terms is clear, the Code Committee does not believe that shareholders or the market could be considered to have been materially prejudiced if the offer is indeed subsequently made on altered terms.

- 5.4 This would, therefore, enable a potential offeror to indicate that its offer was likely to be at a particular price in cash or at a particular exchange ratio in the case of a proposed securities exchange offer, but to reserve the right to make the offer in whole or in part in a different form of consideration if it so chose, provided that the “value” of the consideration subsequently offered is above that originally indicated (in the absence of a specific reservation to offer a lower price that could be relied upon). In this case, for the purposes of determining whether any requirement to offer at least the same value has been satisfied, the Code Committee believes that the value of any securities concerned, against which the offer consideration will be compared, should normally be taken at the time of announcement of the firm intention to make the offer. For example, therefore, if a potential offeror indicates that it is considering making a securities exchange offer of one offeror share for every two offeree company shares, but reserves the right to replace some or all of the consideration with a different form of consideration, any later all-cash offer must be at a level at least equal to 50 per cent. of the mid-market price of an offeror share at the time of announcement of the offer.

Q10 Do you agree with the conclusions set out in section 5 above?

6. STATEMENTS MADE BY THE OFFEREE COMPANY

- 6.1 The Code Committee has also been considering the position where a statement which includes details of the terms of a potential offer is made by the offeree company, rather than by or on behalf of the potential offeror.

- 6.2 The Code Committee is aware that if, under the proposals set out above in this Consultation Paper, the potential offeror would be bound by any such statement in the same way whether the statement was made by the potential offeror or the offeree company, this could be used to the tactical advantage of the offeree company. For example, an offeree company in receipt of an unwelcome approach from a potential offeror indicating that it was considering making an offer at a particular price in cash might choose to announce that fact in the knowledge that the potential offeror would then be bound by the statement and unable to make a lower offer, even though the offeror's proposal was subject to a number of caveats and the offeror itself had no intention of publicising the terms of its approach. In such circumstances, the Code Committee does not consider it fair that the potential offeror should be bound by the terms announced by the offeree company, since it would not be the offeror which had sought to gain any advantage from shareholders' or the market's reaction to the information. On the other hand, if the potential offeror were not bound by such a statement when made by the offeree company, the parties to a friendly transaction might seek to circumvent the usual consequences that would apply by arranging for the relevant announcement to be made by the offeree company instead of the potential offeror.
- 6.3 The Code Committee believes that both these outcomes would be undesirable in terms of seeking to ensure an orderly market and that any proposed new Rule should therefore seek to address this issue. The Code Committee recognises, however, that it may not always be possible, or indeed desirable, to prevent an offeree company from making an announcement which includes details of the terms on which it has received an approach from the potential offeror as the offeree company might consider it has an obligation to make such an announcement, or might wish to do so in order to keep its shareholders properly informed of developments.
- 6.4 Having considered these issues, the Code Committee therefore proposes the following where an offeree company wishes to include details relating to the terms on which any offer might be made in a possible offer announcement:

- the offeree company must consult the Panel in advance with a view to obtaining its consent to the announcement. The Panel will then be concerned to understand whether the announcement is being made with the agreement or approval of the potential offeror;
- where the announcement is made with the agreement or approval of the potential offeror, a statement to that effect must be included in the announcement and the potential offeror will then be bound by the relevant statement, if the proposals set out above in this Consultation Paper are adopted, in the same way as if it had made the statement itself; and
- where the announcement is not made with the agreement or approval of the potential offeror, a prominent statement must be included in the announcement to that effect that there is no certainty that an offer will be made and that, if made, there is no certainty as to the terms on which any offer might be made - in which case the potential offeror will not be bound.

6.5 The Code Committee is of the opinion that this proposal strikes an appropriate balance between not unduly fettering the ability of the offeree company to keep its shareholders and the market properly informed and not unfairly prejudicing the potential offeror in its ability to prosecute its offer, while at the same time seeking to ensure that shareholders and the market are not misled through reliance upon the offeree company's statement as an accurate statement of the potential offeror's intentions.

Q11 Do you agree with the proposals set out in paragraph 6.4 above when a possible offer announcement including details of the terms on which an offer might be made is issued by the offeree company?

7. CODE AMENDMENTS

7.1 In order to reflect the Code Committee's conclusions set out in this Consultation Paper, the Code Committee is proposing that a new Rule 2.4(c)*, together with certain Notes, be introduced as set out in Appendix A to this Consultation Paper.

7.2 The proposal that in certain circumstances an offeror should not be permitted to make an offer below a previously stated price may have cost implications for offerors in such circumstances. However, the Code Committee believes that the implementation of the proposals in this Consultation Paper are necessary in order to ensure a fair and orderly market and are, therefore, in the interests of shareholders and the market as a whole.

(The Code Committee has today published PCP 2004/1 ("Put up or shut up' and no intention to bid statements") which proposes, among other matters, the introduction of a new Rule 2.4(b). If the proposals set out in PCP 2004/1 are not adopted, but the proposals in this Consultation Paper are, this proposed Rule 2.4(c) will be renumbered accordingly as Rule 2.4(b).)*

Q12 Do you agree with the proposed amendments to the Code set out in Appendix A below?

APPENDIX A

Possible Code amendments to reflect the proposals in this Consultation Paper

Add a new Rule 2.4(c)* as follows:

“(c) Before a firm intention to make an offer is notified, the Panel must be consulted in advance if any person proposes to make a statement in relation to the terms on which an offer might be made for the offeree company.

Except with the consent of the Panel, if any such statement is included in an announcement by a potential offeror or is made by or on behalf of a potential offeror, its directors, officials, or advisers, and not immediately withdrawn if incorrect, the potential offeror will be bound by the statement if an offer for the offeree company is subsequently made, unless it reserved the right not to be so bound at the time the statement was made.

Where the statement concerned relates to the price of a possible offer (or a particular exchange ratio in the case of a proposed securities exchange offer), except with the consent of the Panel, the potential offeror will not be allowed subsequently to make an offer for the offeree company at a lower value (taking the value of any securities concerned at the date of announcement of the firm intention to make the offer), unless there has occurred an event which the potential offeror specified in the statement as an event which would enable it to be set aside.

Except with the consent of the Panel, the consequences of a statement to which Rule 2.4(c) applies will normally apply also to any person acting in concert with the potential offeror and to any person who is subsequently acting in concert with the potential offeror or such a person.”

Add new Notes* on Rule 2.4 as follows:

“5. Reservation of right to set statements aside

The first announcement in which a statement subject to Rule 2.4(c) is made must contain prominent reference to any reservation (precise details of which must also be included in the announcement). Any subsequent mention by the offeror of the statement must be accompanied by a reference to the reservation.

6. Duration of restriction

The restrictions imposed by Rule 2.4(c) will normally apply throughout the period during which the offeree company is in an offer period, and for a further three months thereafter.

7. *Statements by the offeree company*

Any statement made by the offeree company in relation to the terms on which an offer might be made must also make clear whether or not it is being made with the agreement or approval of the potential offeror. Where the statement is made with the agreement or approval of the potential offeror, the statement will be treated as one to which Rule 2.4(c) applies in the same way as if it had been made by the potential offeror itself. Where it is not so made, the statement must also include a prominent warning to the effect that there can be no certainty that an offer will be made, nor as to the terms on which any offer might be made.”

(* The Code Committee has today published PCP 2004/1 which proposes, among other matters, the introduction of a new Rule 2.4(b) and new Notes 2 to 4 on Rule 2.4. If the proposals set out in PCP 2004/1 are not adopted or are modified, the proposed new Rule 2.4(c) and/or the new Notes on Rule 2.4 set out above will be renumbered accordingly.)

APPENDIX B**Questions for Consultation**

- Q1** Do you agree that the Code should not generally seek to restrict the information that can be included in a possible offer announcement?
- Q2** Do you agree that an offeror which makes an unqualified statement about the value of its possible offer should not normally be permitted subsequently to make a lower offer (even if that lower offer would be recommended by the offeree company board)?
- Q3** Do you agree that an offeror should be permitted to make an offer at below a previously stated price provided that at the time it reserved the right to do so in circumstances which subsequently arise?
- Q4** Do you agree that offeree board recommendation or a firm offer announcement by a third party should always be allowed as reservations?
- Q5** Do you agree that subjective matters, such as due diligence, should not be allowed as reservations in this context?
- Q6** Do you agree that any restrictions imposed on a potential offeror should apply throughout the offer period and for the three months thereafter?
- Q7** Do you agree that concert parties should also be restricted as set out in paragraph 4.1.11 above?
- Q8** Do you agree that, subject to Rule 32.2, a potential offeror should not be restricted from making an offer at above a price stated in an earlier possible offer announcement?

- Q9** Do you agree that the Panel must be consulted in any case where a statement indicates an approximate, rather than a fixed, possible future offer price?
- Q10** Do you agree with the conclusions set out in section 5 above?
- Q11** Do you agree with the proposals set out in paragraph 6.4 above when a possible offer announcement including details of the terms on which an offer might be made is issued by the offeree company?
- Q12** Do you agree with the proposed amendments to the Code set out in Appendix A below?