



PCP3 Issued on 5 September 2001

THE PANEL ON TAKEOVERS AND MERGERS

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

**EQUALITY OF INFORMATION TO COMPETING
OFFERORS**

**REVISION PROPOSALS RELATING TO RULE
20.2 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 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 **5 October 2001**.

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
P.O. Box No. 226
The Stock Exchange Building
London
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Telephone: 020 7382 9026

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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 has considered amending Rule 20.2 of the Code to clarify, first, what conditions may be attached to the passing of information under the Rule and, secondly, that an offeror or potential offeror need not be named in order for a competing offeror to be able to obtain information under the Rule. The Code Committee has also considered whether information should be passable on both parties to a reverse takeover or merger under Rule 20.2.

1.2 The purpose of this Consultation Paper is to seek views on the proposals which have resulted from the Code Committee's review of these questions.

2. Conditions attached to the passing of information

New Note 2 on Rule 20.2

2.1.1 Rule 20.2 requires that a competing offeror be given equal access to information on an offeree company where the existence of an offeror or potential offeror has been publicly announced. In the absence of such a requirement a competing and, in the eyes of the offeree board, perhaps less welcome offeror might be dissuaded from bidding and the shareholders of an offeree company might therefore be deprived of the opportunity to consider another, potentially more favourable, offer.

2.1.2 The Executive does not intervene where conditions are imposed on a first offeror because Rule 20.2 does not apply at that stage. The Executive will not permit the provision of information under Rule 20.2 to a subsequent offeror to be subject to such conditions since the rationale behind Rule 20.2, as set out in paragraph 2.1.1 above, might be undermined as a consequence. The Executive does not, however, generally object to obligations to keep information provided under Rule 20.2 confidential if such obligations are not coupled with other conditions designed to deter a party from making an offer.

2.1.3 The Code does not expressly address this issue and, as a result, whilst some practitioners are aware of the Executive's position, others are not. Accordingly, offerors seeking information under Rule 20.2 frequently agree to the imposition of conditions even though they are not obliged to do so. Such conditions include, most notably, standstill or no hostile bid arrangements (whereby the recipient of the information is restricted from acquiring shares in the offeree company or from

making a hostile offer for it).

- 2.1.4 The Executive has had to consider this point on a number of occasions and the Code Committee believes that appropriate wording, by way of a new Note 2 on Rule 20.2, should be included in the Code in order to clarify the Executive's position.
- 2.1.5 The Code Committee recognises that parties providing information under Rule 20.2 might have legitimate concerns about the use to which such information might be put by the recipient, for example concerns that it may be used to solicit customers or staff. Accordingly, in addition to conditions relating to confidentiality, the Code Committee is of the view that the parties providing the information should be able to impose a condition that the information is used by the recipient solely in connection with an offer or potential offer.
- 2.1.6 The proposed wording to deal with this issue, which would constitute the first paragraph of the new Note, is set out below.

"2. Conditions attached to the passing of information

The passing of information pursuant to this Rule should not be made subject to any conditions other than those of confidentiality, which should be no more onerous than those imposed upon any other offeror or potential offeror, and the use of the information solely in connection with an offer or a potential offer."

Q.1 Do you agree with this amendment to the Code?

2.2.1 Offerors seeking financial or other information on the offeree company are also frequently required to enter into hold harmless agreements whereby they agree that they cannot hold the firm of accountants, or other third party, which produced the information liable for any loss arising from their relying on such information. The Executive does not generally object to hold harmless agreements if they are required of all offerors or potential offerors.

2.2.2 The Code Committee believes that appropriate wording, to be included as paragraph 2 of the new Note 2 on Rule 20.2, should be included in the Code in order to deal with hold harmless arrangements. Because such arrangements can take different forms, the Code Committee believes that the Executive should be consulted whenever hold harmless agreements are being proposed.

2.2.3 The proposed wording, to be included as paragraph 2 of the new Note, to deal with this issue is set out below.

"A requirement that a party sign a hold harmless letter in favour of a firm of accountants will normally be acceptable provided that any other offerors or potential offerors have been required to sign a letter in similar form. Nevertheless, where it is proposed to require an offeror or potential offeror to sign such a letter, or give another undertaking to a third party, in respect of information passable pursuant to this Rule, the Panel should be consulted."

Q.2 Do you agree with this amendment to the Code?

3. Rule 20.2 applies regardless of whether the original offeror or potential offeror has been publicly identified

Amendment to Rule 20.2

The Rule states that the requirement to provide information to another offeror or potential offeror "**will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror**". There is no requirement for the identity of a potential offeror to have been publicly announced in order for the Rule to apply. In addition, as set out in the Panel's 1999-2000 Annual Report, the Executive may also require information passed to one potential offeror to be passed to another offeror or bona fide potential offeror if such offeror or potential offeror is informed authoritatively of the existence of the first potential offeror, even though there has been no public announcement to this effect. The Code Committee believes the Code should state this expressly and proposes that the final sentence of the Rule should be amended to state:

"This requirement will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror, whether named or unnamed, to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of the first potential offeror."

Q.3 Do you agree with this amendment to the Code?

4. Which party or parties to a reverse takeover or merger should be regarded as the offeree for the purposes of Rule 20.2?

New Note 4 on Rule 20.2

4.1.1 The Executive has, on various occasions, been called upon to decide, for the purposes of Rule 20.2, which party or parties to a reverse takeover or a takeover

which is characterized as a "merger" should be regarded as the offeree.

4.1.2 Although with agreed reverse takeovers the smaller company is strictly speaking the offeror, the substance of the transaction is often very much the opposite because the smaller offeror will, as a result of the transaction, issue to the shareholders of the offeree company more than 100% of its existing issued share capital. The Code Committee believes either party to such a transaction could properly be viewed as the offeree. The Code Committee believes that the same is true in the case of a merger where the percentage shareholdings of the offeror and offeree companies' respective shareholders in the enlarged entity will be exactly equal on completion of the transaction. The Code Committee is, therefore, of the view that Rule 20.2 information should be passable on either party to such a reverse takeover or merger and that the Code should be amended to reflect this by the inclusion of a new Note 4 on Rule 20.2.

4.1.3 In the case of mergers where the percentage shareholdings of the offeror and offeree companies' respective shareholders in the enlarged entity may differ only slightly, the Code Committee considered whether the Executive should be given discretion to take into account other factors, in addition to shareholdings in the enlarged entity, when deciding whether Rule 20.2 should apply to both parties to such transactions. Matters considered included the board composition of the enlarged entity, the way in which the transaction is presented, and whether the offer price includes any premium. The Code Committee concluded, however, that this could lead to uncertainty in implementing the Rule. It, therefore, believes that, other than in the case of reverse takeovers as set out in paragraph 4.1.2 above, information should only be passable on both parties to a transaction where their shareholders will own exactly equal percentages of the enlarged entity.

4.1.4 The proposed wording for the new Note 4 is set out below.

"Reverse takeovers and mergers

Where an offer or possible offer might result in an offeror needing to increase its existing issued voting equity share capital by 100% or more, an offeror or potential offeror for either party to such an offer or possible offer will be entitled to receive information which has been given by such party to the other party."

Q.4 Do you agree with this amendment to the Code?

5. Consequential amendments

As a result of the amendments proposed, the existing Notes 2 and 3 on Rule 20.2 would become Notes 3 and 5 respectively.

6. Cost implications

Given that the proposed amendments serve to a large extent to codify existing practice, the Code Committee believes that the cost implications for offerors and offerees will be minimal.

7. Appendices

For convenience, the text of Rule 20.2, marked to show the proposed revisions, is set out in full in Appendix I. Appendix II contains the questions set out in the body of this document.

Appendix I

RULE 20. EQUALITY OF INFORMATION

20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS

Any information, including particulars of shareholders, given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. This requirement will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror, whether named or unnamed, to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of the first potential offeror.

NOTES ON RULE 20.2

1. General enquiries

The less welcome offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor.

2. Conditions attached to the passing of information

The passing of information pursuant to this Rule should not be made subject to any conditions other than those of confidentiality, which should be no more onerous than those imposed upon any other offeror or potential offeror, and the use of the information solely in connection with an offer or a potential offer.

A requirement that a party sign a hold harmless letter in favour of a firm of accountants will normally be acceptable provided that any other offerors or potential offerors have been required to sign a letter in similar form. Nevertheless, where it is proposed to require an offeror or potential offeror to sign such a letter, or give another undertaking to a third party, in respect of information passable pursuant to this Rule, the Panel should be consulted.

23. *Management buy-outs*

If the offer or potential offer is a management buy-out or similar transaction, the information which this Rule requires to be given to competing offerors or potential offerors is that information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror. The Panel expects the directors of the offeree company who are involved in making the offer to co-operate with the independent directors of the offeree company and its advisers in the assembly of this information.

4. *Mergers and reverse takeovers*

Where an offer or possible offer might result in an offeror needing to increase its existing issued voting equity share capital by 100% or more, an offeror or potential offeror for either party to such an offer or possible offer will be entitled to receive information which has been given by such party to the other party.

35. *The Competition Commission and the European Commission*

When an offer is referred to the Competition Commission or the European Commission

initiates proceedings, the offer period ends in accordance with Rule 12.2. The Panel will, however, continue to apply Rule 20.2 during the reference or proceedings and, therefore, for the purposes of this Rule alone, will normally deem the referred offeror to be a bona fide potential offeror.

Appendix II

Questions

- Q.1** Do you agree with the amendment to the Code set out in paragraph 2.1.6 above?
- Q.2** Do you agree with the amendment to the Code set out in paragraph 2.2.3 above?
- Q.3** Do you agree with the amendment to the Code set out in paragraph 3 above?
- Q.4** Do you agree with the amendment to the Code set out in paragraph 4.1.4 above?