

RS 2008/1 Issued on 15 July 2008

THE TAKEOVER PANEL

COMPETITION REFERENCE PERIODS

**STATEMENT BY THE CODE COMMITTEE OF
THE PANEL FOLLOWING THE EXTERNAL
CONSULTATION PROCESS ON PCP 2008/1**

1. Introduction and overview

1.1 This Response Statement (“RS”) sets out the response of the Code Committee of the Takeover Panel to the external consultation process on its proposals in PCP 2008/1 (the “PCP”), issued on 4 March 2008.

1.2 In the PCP the Code Committee proposed a number of amendments which were designed to clarify certain issues that had arisen in the light of the Panel Executive’s experience of applying Rule 12.2 and the definition of a “competition reference period” since these provisions were introduced into the Code in 2000. In particular it addressed the following matters:

- what happens when a referred offeror or potential offeror is cleared by the competition authorities;
- the application of Rule 12.2 in the case of an offer which is announced subject to a pre-condition relating to clearance from the competition authorities; and
- the application of the “put up or shut up” regime under Rule 2.4(b) during a competition reference period.

In addition the Code Committee proposed certain amendments designed to bring the relevant provisions more closely into line with current UK and European competition law.

2. Code amendments and entry into force

2.1 The Code amendments adopted as a result of this consultation exercise are set out in the Appendix to this RS. In the Appendix, underlining indicates new text and striking through indicates deleted text, as compared to current provisions of the Code. Where new or amended provisions of the Code are set

out in the main body of the Response Statement, however, they are marked up so as to show changes from the provisions proposed in the PCP.

- 2.2 The amendments will take effect on Tuesday, 29 July 2008 and will apply to all transactions as from that date. Amended pages of the Code will be published prior to that date.

3. Number of responses received

- 3.1 The Committee received one response to the PCP. This response came from the Institute of Chartered Accountants in England and Wales.

- 3.2 The respondent generally welcomed the Code Committee's proposals and agreed that their broad effect would be to codify existing practice but asked for further clarification on certain matters as described below.

4. Responses to Questions

Q1 Do you agree with the proposals for clarifying the application of Rules 35.1 and Rule 12.2 and for amending them as described in paragraphs 2.1 to 2.14?

- 4.1 In order to clarify the interaction of Rules 12.2 and 35.1, the Code Committee proposed in the PCP that Rule 35.1 should no longer apply to offers or possible offers that are referred to the UK or EU competition authorities and that Rule 12.2 should be restructured to deal completely, in one place, with the events that occur when an offer or possible offer is referred and subsequently cleared. The key elements of the proposed new Rule 12.2 were as follows:

- the offer period would end on a reference to the competition authorities (except in certain circumstances - see new Rule 12.2(a) - when the offer is announced subject to a pre-condition or in the case of an offer being implemented by way of a scheme of arrangement);

- the restrictions currently set out in Rule 35.1 would apply during the competition reference period, provided the offer period had ended;
- on clearance, a new offer period would begin and a cleared offeror or potential offeror would have 21 days within which to clarify its intentions, either by announcing an offer under Rule 2.5 or by making a statement that it had no intention of doing so, such a statement being treated as an announcement to which Rule 2.8 applied; and
- the new offer period would end if all cleared offerors or potential offerors announced that they did not intend to bid.

4.2 The respondent suggested that it should be made clear in the Rule that it did not apply to competing offerors which were not referred. The introductory wording to the new Rule 12.2 states:

“(a) When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end.....”

The Code Committee considers that it is clear from this wording that the Rule can only apply to an offer or potential offer which is referred. If there are two competing offers, one of which is referred and the other not, the offer period for the competing, non-referred offer will continue according to the normal timetable rules. The Code Committee does not consider that the Rule needs any further amendment to deal with this point.

4.3 The respondent also suggested that if two referred offers were cleared by the competition authorities on different days, then the 21 day period provided in the new Rule 12.2(b)(ii) should not begin until the date of clearance of the second offer.

4.4 The Rule as proposed in the PCP states:

“(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):-

(A) any offeror must, normally within 21 days of the offer’s being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in accordance with Rule 2.5 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies;...”

The Code Committee considers that, by use of the word “normally”, the Rule as proposed provides the Panel with sufficient flexibility to deal with the situation described without tying it in to only one solution. It might be appropriate in a particular case for the commencement of the 21 day period to be adjusted as the respondent suggested but each case will have to be determined on its merits. This formulation of the Rule will allow the Rule to be applied as appropriate in the circumstances of each case.

4.5 Also in relation to Rule 12.2(b)(ii), the respondent suggested that the reference to “any offeror” was drawn too widely and would appear to catch an offeror which had not been referred. As stated above, the Code Committee considers that it is clear that the Rule can only apply to referred offerors and potential offerors. However, with a view to providing further clarity it has decided to amend this part of the Rule further as follows:

“(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):-

(A) any cleared offeror or potential offeror must, normally within 21 days of ~~the~~its offer’s being allowed to proceed,...”

Q2 Do you agree that Rule 12.2 should not apply when an offer that is announced subject to a competition pre-condition as described above is referred but that the Panel should be able to grant dispensations from individual Rules during the competition reference period?

4.6 The respondent agreed with this proposal but felt that the Rule should contain examples of possible dispensations.

4.7 The Code Committee considered the possibility of including references to specific examples of possible dispensations in the Rule but rejected the idea on the grounds that doing so might give the impression that such dispensations would be given as a matter of routine, when in fact the Code Committee believes that each case should be decided on its merits, taking all circumstances into consideration. In the PCP, the Code Committee explained its understanding that the Executive would be prepared to consider granting dispensations from individual Rules on a case by case basis when continued compliance with those Rules during a competition reference period lasting several months might prove to be unduly burdensome for the parties concerned. Particular examples given in the PCP were as follows:

- continued policing of meetings with shareholders of the offeror or offeree company by the financial adviser to the relevant party under Note 3 on Rule 20.1, which might serve little purpose in an extended competition reference period if, in practice, it is unlikely that any new material information will be revealed;
- continued application of Note 4 on Rule 20.1, requiring approval by the Panel of brokers' circulars, which might be unnecessarily burdensome during a period of many months. The Code Committee understands that the Executive would consider a dispensation from the continued application of this Rule so that the Note would have effect, in accordance with its last paragraph, as if the offer period had ended in accordance with Rule 12.2; and
- the Code Committee understands that the Executive will normally apply General Principle 3 and Rule 21.1 on the more flexible basis set out in Note 4 on that Rule.

It is, however, the Code Committee's understanding, as explained in the PCP, that the Executive will not normally be prepared to grant a dispensation from the requirement for dealing disclosures under Rule 8 and Rule 38.5 during the competition reference period. Since the offeror is committed to proceed with the offer if cleared, it is important for shareholders and other market participants to continue to be informed about interests and dealings in relevant securities of the offeree company (and, if relevant, the offeror) throughout the extended offer period.

Q3 Do you agree that the Code should be amended in order to reflect more accurately both UK and EU competition law?

4.8 The respondent agreed with these proposals.

Q4 Do you agree with the proposed amendments?

4.9 The respondent agreed with the amendments, subject to the points made above. In addition, the respondent asked for an explanation of the factors that the Panel would be likely to consider in the application of the new Note 1 on Rule 12.2.

4.10 The new Note 1 on Rule 12.2 reads as follows:

“1. Certain restrictions disapplied while clearance is being sought

The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).”.

The Code Committee explained in paragraphs 2.13 and 2.14 of the PCP that the restrictions that have to date been applied to referred offerors and potential offerors during a competition reference period under Rule 35.1 would continue to be so applied under the new Rule 12.2. The new Note 1 on Rule 12.2 is therefore a replication of Note (c) on Rules 35.1 and 35.2, insofar as that Note applies in relation to an offer that lapses as a result of being referred

to the Competition Commission or initiation of proceedings by the European Commission. Note (c) on Rules 35.1 and 35.2 was introduced into the Code following the consultation exercise in PCP 2004/1 on “Put up or shut up”.

- 4.11 The purpose of the Note is to release an offeror which is pursuing its case before the competition authorities, with the consent of the Panel, from some of the restrictions to which it would otherwise be subject. In particular, it would enable a referred offeror to make reference publicly to the fact that it is pursuing its case with a view to making a new offer on clearance and also to extend knowledge of any such possible offer to persons outside those who need to know in the offeror and its immediate advisers.
- 4.12 In relation to this latter point, the referred offeror would only be able to extend knowledge of its possible new offer, to be made following clearance, subject to the provisions of Rule 2.2(e), which requires prior consultation with the Panel. The Code Committee notes that at the end of Note (c) on Rules 35.1 and 35.2 there is a reference to Rule 2.2(e), which was inserted as a reminder of this point. This was inadvertently not included in the new Note 1 on Rule 12.2 proposed in the PCP but the Code Committee has added it to the amendments in the Appendix to this RS.

Q5 Do you agree with the amendments to Rule 2.4(b)?

- 4.13 The respondent agreed with the proposal to amend Rule 2.4(b) to make it clear that the offeree company has a right to request the imposition of a “put up or shut up” deadline on a potential offeror only:
- (i) while the offeree company is in an offer period; and
 - (ii) in the period following the announcement of a possible offer (provided the potential offeror has been named) and before the announcement of a firm intention to make an offer.

5. Minor consequential amendments

- 5.1 The Code Committee has noted that two amendments consequential on the deletion of Note (a)(iii) on Rule 35.1 were omitted from the PCP. These consequential amendments are as follows:

“Rule 11.1

...

NOTES ON RULE 11.1

...

12. Competition reference period

If an offer is announced ~~in accordance with Note (a)(iii) on Rule 35.1~~ pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for cash during the competition reference period will be deemed to be acquisitions during the new offer period.”; and

“Rule 11.2

...

NOTES ON RULE 11.2

...

7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 2, 5, 6, 7, 8, 10 and 11 which may be relevant.

In addition, if an offer is announced ~~in accordance with Note (a)(iii) on Rule 35.1~~ pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for securities during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of this Rule.”.

- 5.2 The Code Committee also considers, on reflection, that it would be useful to refine some other cross-references to Rule 12.2 as follows:

“Rule 6.1

...

NOTES ON RULE 6

...

10. *Competition reference period*

When, under Rule 12.2(b)(ii), a new offer period begins...”;

“Rule 19.8

19.8 INFORMATION RELEASED FOLLOWING THE ENDING OF AN OFFER PERIOD PURSUANT TO RULE 12.2

The requirements of the Code relating to the release of information do not normally apply once an offer period has ended pursuant to Rule 12.2(a). ...”;

“Rule 20.1

...

NOTES ON RULE 20.1

...

4. *Information issued by associates (e.g. brokers)*

...

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...”;

“Rule 20.2

...

NOTES ON RULE 20.2

...

5. *The Competition Commission and European Commission*

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...”; and

“Rule 21.1

...

NOTES ON RULE 21.1

...

4. *The Competition Commission and European Commission*

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...”.

- 5.3 Finally, for the avoidance of doubt and to conform with other requirements for the publication of announcements in the Code, the Code Committee believes it should be made clear that any announcement made pursuant to Rule 12.2(b)(ii)(A), must be published in accordance with the requirements of Rule 2.9. It has therefore added a reference to Rule 12.2 (b)(ii)(A) to the list in Note 2 on Rule 2.9 as follows:

“Rule 2.9

...

NOTES ON RULE 2.9

...

2. *Rules 6, 7, 9, 11, 12, 17, 30, 31, 32, Appendix 1.6, Appendix 5, and Appendix 7*

Announcements made under Rules 6.2(b), 7.1, 9.1 (Note 9), 11.1 (Note 6), 12.2(b)(ii)(A), 17.1.....

APPENDIX

Amendments to the Code

In this Appendix, underlining indicates new text and striking through indicates deleted text.

DEFINITIONS

Competition reference period

Competition reference period means the period from the time when an announcement is made of the referral of an offer or possible offer to the Competition Commission or of the initiation of proceedings by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC, until the time of:

(a) an announcement of clearance (including clearance subject to conditions) or prohibition by the Competition Commission or the Secretary of State, as appropriate; or

(b) ~~of the~~ issuance of a decision under Article 8(1), Article 8(2) or Article 8(3) of the said Council Regulation; or

(c) the expiry of the time limits set out in Article 10(3) of the said Council Regulation with no decision having been issued by the European Commission and the offer being deemed compatible with the common market under Article 10(6).

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

(a) ...

(b) At any time during an offer period following the announcement of a possible offer (provided the potential offeror has been publicly named), and before the notification of a firm intention to make an offer, the offeree company may request.....

Rule 2.8

2.8 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

...

NOTES ON RULE 2.8

1. *Prior consultation*

...

2. *Rules 2.4(b) and 12.2(b)*

Where a statement to which Rule 2.8 applies is made following a time limit being imposed under Rule 2.4(b) or pursuant to Rule 12.2(b)(ii)(A), the only matters that a person will normally be permitted to specify in the statement as matters which would enable it to be set aside are:

...

Rule 2.9

...

NOTES ON RULE 2.9

...

2. *Rules 6, 7, 9, 11, 12, 17, 30, 31, 32, Appendix 1.6, Appendix 5, and Appendix 7*

Announcements made under Rules 6.2(b), 7.1, 9.1 (Note 9), 11.1 (Note 6), 12.2(b)(ii)(A), 17.1.....

Rule 6.1**6.1 ACQUISITIONS BEFORE A RULE 2.5 ANNOUNCEMENT**

...

NOTES ON RULE 6

...

10. *Competition reference period*

When, under Rule 12.2(b)(ii), a new offer period begins...

Rule 11.1**11.1 WHEN A CASH OFFER IS REQUIRED**

...

NOTES ON RULE 11.1

...

12. *Competition reference period*

If an offer is announced ~~in accordance with Note (a)(iii) on Rule 35.1 pursuant to Rule 12.2(b)(ii)~~, any acquisitions of interests in offeree company shares for cash during the competition reference period will be deemed to be acquisitions during the new offer period.

Rule 11.2

11.2 WHEN A SECURITIES OFFER IS REQUIRED

...

NOTES ON RULE 11.2

...

7. *Applicability of the Notes on Rule 11.1 to Rule 11.2*

See Notes 2, 5, 6, 7, 8, 10 and 11 which may be relevant.

In addition, if an offer is announced ~~in accordance with Note (a)(iii) on Rule 35.1 pursuant to Rule 12.2(b)(ii)~~, any acquisitions of interests in offeree company shares for securities during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of this Rule.

Rule 12.2

12.2 OFFER PERIOD CEASES DURING COMPETITION REFERENCE PERIODS

(a) When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will end, except in the following circumstances:-

(i) when the offer was announced subject to a pre-condition as permitted under Rule 13.3(b); or

(ii) in the case of an offer being implemented by way of a scheme of arrangement, where the reference or initiation of proceedings in relation to the offer does not cause it to lapse as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.

(b) If the offer period ends in accordance with Rule 12.2(a):-

(i) during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or

possible offer, nor any person who is subsequently acting in concert with any of them may:-

(A) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);

(B) acquire any interest in shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer;

(C) acquire an interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with him, would be interested and the shares in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;

(D) make any statement which raises or confirms the possibility that an offer might be made for the offeree company; or

(E) take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the offeror and its immediate advisers;

(ii) at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):-

(A) any cleared offeror or potential offeror must, normally within 21 days of its offer's being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in accordance with Rule 2.5 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies; and

(B) a new offer period will begin and, if no announcement of a new offer is made within the 21 day period referred to above, will end when each cleared offeror or potential offeror has announced that it does not intend to make an offer; and

(iii) where the competition reference period ends when either the Competition Commission or the Secretary of State has issued a

prohibition decision or when the European Commission has issued a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin.

~~A new offer period will be deemed to begin at the time that the competition reference period ends. If there is no announcement of a new offer in accordance with Note (a)(iii) on Rule 35.1, this offer period will last until either the expiry of the 21 day period provided for in that Note or the announcement by all cleared offerors that they do not intend to make an offer, whichever is the earlier.~~

NOTES ON RULE 12.2

1. — Schemes of arrangement

~~In the case of an offer being implemented by way of a scheme of arrangement, the offer period will end following a reference or initiation of proceedings only if the offer then lapses as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.~~

1. Certain restrictions disapplied while clearance is being sought

The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).

NB Rule 2.2(e) will continue to apply in these circumstances.

2. After a reference or initiation of proceedings

Following the ending of an offer period on a reference or initiation of proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.8 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 20.2, 35.1 and 35.2 and 38.2).

3. Offers announced subject to a pre-condition as permitted under Rule 13.3(b)

When an offer which was announced subject to a pre-condition as permitted under Rule 13.3(b) is referred to the Competition Commission or the European Commission initiates proceedings, the offer period will not end. However, during the competition reference period, the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so.

Rule 13.2**13.2 THE COMPETITION COMMISSION AND THE EUROPEAN COMMISSION**

Neither A a condition or pre-condition included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) is will be not subject to the provisions of Rules 13.1 or 13.4(a).

Rule 13.3**13.3 ACCEPTABILITY OF PRE-CONDITIONS**

The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the posting of the offer will be subject.

Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition: -

(a) is included pursuant to Rule 12.1(e) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission; or

(b) relates to a decision that there will be no reference to the Competition Commission or initiation of proceedings by the European Commission or, if there is such a reference or initiation of proceedings, a decision by the relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror); or

(b)(c) involves another material official authorisation....

Rule 19.8**19.8 INFORMATION RELEASED FOLLOWING THE ENDING OF AN OFFER PERIOD PURSUANT TO RULE 12.2**

The requirements of the Code relating to the release of information do not normally apply once an offer period has ended pursuant to Rule 12.2(a).

...

Rule 20.1**20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS**

... *NOTES ON RULE 20.1*

4. *Information issued by associates (e.g. brokers)*

...

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...

Rule 20.2

20.2 EQUALITY OF INFORMATION TO COMPETING OFFERORS

...

NOTES ON RULE 20.2

...

5. *The Competition Commission and the European Commission*

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...

Rule 21.1

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

...

NOTES ON RULE 21.1

...

4. *The Competition Commission and the European Commission*

When an offer or possible offer is referred to the Competition Commission or the European Commission initiates proceedings, the offer period may end in accordance with Rule 12.2(a). ...

Rule 35.1

SECTION N. RESTRICTIONS FOLLOWING OFFERS AND POSSIBLE OFFERS

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed otherwise than pursuant to Rule 12.1, neither the offeror....

NOTES ON RULES 35.1 and 35.2

(a) *The Panel will normally grant consent under this Rule when:-*

(i).....

(ii).....

~~(iii) the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation 139/2004/EC. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or~~

~~(iv) (iii) the new offer follows.....withdrawn.~~

(b)

(c) *The restrictions in Rules 35.1(d) and (e) will not normally apply to the extent that the offer lapsed as a result of being referred to the Competition Commission or the European Commission initiating proceedings, or as a result of the offeror failing to obtain ~~another~~ a material official authorisation or regulatory clearance relating to the offer within the usual Code timetable, but the offeror is continuing to seek clearance or a decision from the relevant official or regulatory authorities with a view subsequently to making a new offer with the consent of the Panel in accordance with ~~Note (a)(iii)~~ or Note (b) on Rule 35.1.*

NB Rule 2.2(e) will continue to apply in these circumstances.