



RS7 Issued on 21 February 2002

**THE PANEL ON TAKEOVERS AND MERGERS**

**RESOLUTION OF COMPETITIVE SITUATIONS**

**STATEMENT BY**

**THE CODE COMMITTEE OF THE PANEL  
FOLLOWING**

**THE EXTERNAL CONSULTATION PROCESS ON  
PCP 7**

## **1. Introduction**

1.1 In October 2001 the Code Committee of the Takeover Panel published a Public Consultation Paper (PCP 7) entitled "Resolution of competitive situations - Revision proposals relating to Rules 31.6, 32 and 35 of the Takeover Code".

1.2 The purpose of this paper is to provide details of the Code Committee's response to the external consultation process on PCP 7.

## **2. Number of responses received**

A total of 7 responses were received. These were submitted by professional bodies representing practitioners, a trade body representing institutional investors, investment banks and an individual.

## **3. Conflict of views**

There was substantial support for an open auction procedure as a method for resolving competitive situations (and indeed none of the responses suggested that an open auction procedure would not achieve an orderly resolution of a competitive situation). There were a number of respondents who expressed reservations about the proposed approach: some considered that the offeree board should have a greater say in the choice of any applicable procedure. The reservations were, however, not consistent. Paragraph 4.1 below sets out the main proposal in the consultation paper; the principal comments made in responses; and the way in which the Code Committee proposes to proceed in light of those responses. Paragraphs 4.2 to 4.9 below set out the responses to the individual questions.

## **4. The Code Committee's Conclusions**

### **4.1 General**

4.1.1 The main proposal in the consultation paper was that, in the absence of a consensus being reached between all the parties, an "open auction procedure" should apply to resolve a competitive situation still subsisting on Day 46. A competing offeror would not be able to improve its offer otherwise than in accordance with that procedure, even if the offeree board were willing to recommend that offer. This contrasts with the position at the end of a single unilateral bid, when it is possible for an offeror to improve its offer after Day 46 (the last day for unilaterally revising an offer) - assuming that the offeror has not publicly stated its offer to be final and the offeree board is willing to recommend that offer. The justification given in the consultation paper for this limitation of the normal discretion of the offeree board was the need to provide an orderly framework for the conduct (including resolution) of competing bids, since in the absence of some specific procedure, the competitive situation might persist indefinitely.

4.1.2 While some respondents saw finality as being desirable in the interests of the offeree company and its shareholders, the view was expressed by others that achieving the highest price for offeree shareholders was the most important objective and that if, to this end, the offeree board wished to permit an extension of the timetable, the Panel should respect that wish. The view was expressed that the Panel was not in any event justified in seeking to achieve finality in a reasonable time frame.

4.1.3 The Code Committee acknowledges the force of these arguments but is not persuaded by them. The circumstances of a competitive situation are significantly different to those of a single unilateral bid. If one competing bidder is permitted to increase its offer after Day 46, the second offeror would also need to be given the same

opportunity. An uncontrolled auction process might well then develop without any Code timetable.

- 4.1.4 It needs also to be borne in mind that the stance of the offeree board will vary. In some bids, the offeree board will simply be willing to recommend the higher of the two offers (subject to any concerns as to the risk of any requisite competition or other regulatory clearance being denied). In others, the offeree board will be resisting both bids equally. Alternatively, the offeree board may prefer one bidder (and indeed may have solicited that bidder as a white knight). The Code needs to ensure both bidders are treated even-handedly.
- 4.1.5 The need to exclude the possibility of a perpetuation of the bid process through limiting the ability of the offeree board to recommend an increased offer was recognised in the rulings of the Panel in both the bids for Eagle Star in 1983 and the bids for Energy in 1998. Indeed, the idea of a procedure to bring a competitive situation to an orderly conclusion has not itself in the past been contested; rather, any dispute has centred on what procedure should apply and whose consent should be required for the adoption of any particular procedure.
- 4.1.6 On the basis that finality is a proper objective of the Code in the context of a competitive situation, and that the Code needs to incorporate some procedure for the resolution of competitive situations, the consultation paper went on to describe alternative procedures and to address the question of what default procedure should apply in the absence of consensus.
- 4.1.7 Certain respondents have expressed the opinion that the views of the offeree board should be decisive; and that the offeree board (and its financial advisers) can be relied upon to select the procedure best calculated to achieve the optimum results for offeree shareholders. In particular, the suggestion has been made that the offeree board should have the final (or at any rate,

greatest) say as to whether an open auction procedure or a sealed bid procedure should apply (and if so, whether formula bids should be permitted). The contrary view was also expressed, however, that the offeree board should have no say as to the applicable procedure.

4.1.8 The Code Committee considers it important that the Code sets down a default procedure which will apply in the absence of a consensus: the procedure must be robust and capable of working in all situations. The Code Committee does not agree with the suggestion that the choice of procedure should lie with the offeree board: as already discussed, the latter may be faced with conflicting considerations. Nor does the Code Committee consider it desirable that discretion should be conferred on the Panel as to what procedure should apply in the circumstances of the particular bid or as to whether, for example, formula bids should be permitted in the context of a sealed bid procedure. This would place the Panel in the invidious position of selecting the appropriate procedure when the parties have been unable to reach agreement between themselves.

4.1.9 The Code Committee has therefore decided to proceed with the original proposal set out in the consultation paper. In the opinion of the Code Committee, the open auction procedure best replicates the process which prevails up to Day 46 without any undue extension of the timetable. If a consensus exists between the parties that some other procedure should operate, the Code Committee would expect the Panel to adopt that procedure, save in exceptional circumstances.

4.2 **Question 1: Do you agree that the objective of achieving finality and an orderly resolution of a competitive situation is of paramount importance?**

There was a divergence of views. The majority view in the response of one representative body disputed that achieving an orderly resolution of a competitive situation (finality) was a proper objective of the Panel and the Code; the minority thought otherwise (and that achieving an orderly resolution of a

competitive situation was corollary to providing an orderly framework for the conduct of offers generally). Other respondents thought that achieving the maximum consideration for offeree shareholders was of greater importance than an orderly resolution of a competitive situation and that it should be left to the offeree board to determine whether to extend the timetable (or at least that the Panel should be obliged to give greatest weight to the views of the offeree board as to the process for resolving a competitive situation). Other responses, however, accorded with the views expressed in the consultation paper that achieving finality is in the best interests of the offeree company and its shareholders.

**4.3 Question 2: Do you agree that achieving an orderly resolution should be more important than achieving finality by a fixed time such as Day 46?**

The majority of correspondents agreed that an orderly resolution was more important than achieving finality by a fixed time. However, those respondents who disagreed with the premise of question 1 qualified their response to question 2 accordingly.

**4.4 Question 3: Do you agree that each of the actions set out in paragraph 6.1 would compromise the achievement of finality and the objective of an orderly resolution of the competitive situation?**

There was general agreement that such actions would compromise finality. However, the point was made that such actions may result in an increased offer for shareholders and that the offeree board should have the final say. For the reasons given in paragraph 4.1 above, the Code Committee considers it important that the Code provides a basis for an orderly resolution of competitive situations, although this may involve some limitation of the discretion of the offeree board.

- 4.5 Question 4: Do you consider the changes to Rule 31.6 and Rule 35.1 proposed in paragraph 7.2.1 would achieve the purpose of closing off the tactical opportunities open to a competing bidder after Day 46 (or after the completion of any open auction procedure of the kind described in paragraph 8.4)?**

There was general agreement that the amendments would achieve that purpose (though again the responses of those who disagreed with the premise of question 1 were qualified accordingly).

- 4.6 Question 5: Do you consider that a restriction on market purchases by a competing offeror whose bid has lapsed would be justified?**

There was general support for a restriction on a lapsed bidder buying offeree shares. Some respondents, however, considered that general provisions of the Code and the SARs already adequately dealt with purchases (eg the SARs and Rules 5 and 9). One representative body which responded was of the view that, while there would be circumstances in which restrictions would be justified, flexibility was important, although they considered this to be sufficiently provided in the draft Rule 35.4 set out in Appendix C to the consultation paper.

Within the general provisions of the SARs and the Code, a lapsed bidder would have freedom to buy a significant number of shares sending a signal to the market and possibly compromising the orderly resolution of the competitive situation. The Code Committee believes that a restriction on the lapsed bidder is justified.

- 4.7 Question 6: Do you agree that sealed bid procedures (whether or not formula offers are permitted) should only apply if**

**there is consensus between all the parties?**

Views on this question diverged. There was significant support for the view that the offeree board should be able to require (or to request the Panel to consider) a sealed bid procedure even if one or both competing bidders dissented. Not all respondents who expressed this view made clear who in their view ought to determine whether formula bids should be permitted. The suggestion was made that the offeree's view on formula bids should be persuasive but not binding on the Panel.

**4.8 Question 7: Do you agree that it is unnecessary to stipulate that a revised offer made under an open auction procedure represents a material improvement to the bidder's current offer?**

There was general agreement that this was unnecessary. One representative body, however, believed that the Panel should stipulate minimum increases (for example 5% of the offer price).

The Code Committee does not propose to require that revisions represent material increases.

**4.9 Question 8: Do you agree that an open auction procedure represents the fairest method of resolving a competitive situation?**

**Question 9: Do you agree that the Panel should impose an open auction procedure even if one of the bidders or the board of the offeree company disagrees? If not, what procedure do you believe should apply in the absence of a consensus?**



Responses to these questions were consistent with general comments. One respondent thought that the offeree board should be free to determine whether an open auction procedure or sealed bid procedure should apply. Other respondents thought that an open auction procedure should not apply unless the offeree board agrees; and that if the offeree board disagrees then the Panel should decide on the most appropriate procedure. However, the contrary view was also expressed that the offeree board should have no veto.

For the reasons given in paragraph 4.1, the Code Committee proposes that an open auction procedure should apply in the absence of a general consensus.

## **5. Amendment of the Code**

Amended Rules 31.6 and 35.1 and new Rules 32.5 and 35.4 as proposed in PCP 7 are set out in the Appendix to this statement. The amendments will take immediate effect.

### **APPENDIX**

#### **31.6 FINAL DAY RULE (FULFILMENT OF ACCEPTANCE CONDITION, TIMING AND ANNOUNCEMENT)**

**(a) Except with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day the initial offer document was posted. The Panel's consent will normally only be granted:-**

**(i) in a competitive situation (see Note 4 below); or**

**(ii) if the board of the offeree company consents to an extension; or**

**(iii) as provided for in Rule 31.9; or**

**(iv) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.**

**(b) For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in respect of which all relevant documents (as required by Notes 4 and 5 on Rule 10) are received by its receiving agent before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 1.00 pm on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended). In the event of an extension with the consent of the Panel in circumstances other than those set out in paragraphs (a) (i) to (iii) above, acceptances or purchases in respect of which relevant documents are received after 1.00 pm on the relevant date may only be taken into account with the agreement of the Panel, which will only be given in exceptional circumstances.**

**(c) Except with the consent of the Panel, on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended) an announcement should be made by 5.00 pm as to whether the offer is unconditional as to acceptances or has lapsed. Such announcement should include, if possible, the details required by Rule 17.1 but in any event must include a statement as to the current position in the count. (See Note 2.)**

1. *Extension of offer under Rule 31.6(a)*

*It should be noted that the effect of Rule 31.6(a) is that, unless the offer is unconditional as to acceptances by midnight on the final closing date (or the Panel gives permission for the offer to be extended), the offer will lapse. When, however, there is a Code matter outstanding on the final closing date, it may be inappropriate for the offer to become or be declared unconditional as to acceptances or to lapse at that time. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.6(a), give permission for the offer to be extended, but with no extension of the time by which all relevant documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule 31.6(b) and Rule 34.*

2. *Rule 31.6(c) announcement*

*Under Rule 31.6(c), an announcement as to whether the offer is unconditional as to acceptances or has lapsed should normally be made by 5.00 pm on the final closing date. This requirement should not be reflected in the terms of the offer pursuant to Rule 24.6, but, if there is any question of a delay in the announcement required by Rule 31.6, the Panel should be consulted as soon as practicable. Only in exceptional circumstances will the Panel agree to an offeror's request that this announcement may be made after 5.00 pm.*

3. *The Competition Commission and the European Commission*

*If there is a significant delay in the decision on whether or not there is to be a reference or initiation of proceedings, the Panel will normally extend "Day 39" (see Rule 31.9) to the second day following the announcement of such decision with consequent changes to "Day 46" (see Rule 32.1) and "Day 60".*

4. *Competitive situations*

*If a competing offer has been announced, both offerors will normally be bound by the timetable established by the posting of the competing offer document. In addition, the Panel will extend "Day 60" in accordance with any procedure established by the Panel in accordance with Rule 32.5.*

*The Panel will not normally grant its consent under Rule 31.6(a)(ii) in a competitive situation unless its consent is sought before the 46<sup>th</sup> day following the posting of the competing offer document.*

**32.5 COMPETITIVE SITUATIONS**

**If a competitive situation continues to exist in the later stages of the offer period, the Panel will normally require revised offers to be published in accordance with an auction procedure, the terms of which will be determined by the Panel. That procedure will normally require final revisions to competing offers to be announced by the 46<sup>th</sup> day following the posting of the competing offer document but enable an offeror to revise its offer within a set period in response to any revision announced by a competing offeror on or after the 46<sup>th</sup> day. The procedure will not normally require any revised offer to be posted before the expiry of a set period after the last revision to either offer is announced. The Panel will consider applying any alternative procedure which is agreed between competing offerors and the board of the offeree company.**

*NOTES ON RULE 32.5*

1. *Dispensation from obligation to post*

*The Panel will normally grant dispensation from the obligation to post a revised offer, which is lower than the final revised offer announced by a competing offeror, when the board of the offeree company consents.*

2. *Guillotine*

*The Panel may impose a final time limit for announcing revisions to competing offers for the purpose of any procedure established in accordance with this Rule taking into account representations by the board of the offeree company, the revisions previously announced and the duration of the procedure.*

**35.1 DELAY OF 12 MONTHS**

**(a) 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, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-**

**(i) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company); or**

**(ii) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule**

**9 to make an offer.**

**(b) The restrictions in this Rule may also apply where a person, having made an announcement which, although not amounting to the announcement of an offer, raises or confirms the possibility that an offer might be made, does not announce a firm intention either to make, or not to make, an offer within a reasonable time thereafter.**

**This applies irrespective of the precise wording of the announcement and the reason it was made. For example, it is relevant in the case of an announcement that a person is "considering his options" if, in all the circumstances, those options may reasonably be understood to include the making of an offer. However, the Panel envisages that this provision will only be applied occasionally and usually only if the Panel is persuaded by the potential offeree company that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the prospect of an offer.**

**The question as to what is "a reasonable time" has to be determined by reference to all the circumstances of the case: the stage which the offeror's preparations had reached at the time the announcement was made is likely to be relevant.**

*NOTE ON RULES 35.1 and 35.2*

*When dispensations may be granted*

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

(i) *the new offer is recommended by the board of the offeree company. Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror either was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement or was one of two or more competing offerors whose offers lapsed with combined acceptances of less than 50% of the voting rights of the offeree company; or*

(ii) *the new offer follows the announcement of an offer by a third party for the offeree company; or*

(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 (EEC) 4064/89. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or*

(iv) *the new offer follows the announcement by the offeree company of a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse take-over (see Note 2 on Rule 3.2) which has not failed or lapsed or been withdrawn.*

(b) *The Panel may also grant consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material regulatory clearances relating to an offer within the Code timetable. The Panel should be consulted by an offeror or potential offeror as soon as it has reason to believe that this may become the position.*

#### **35.4 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED**

**Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any concert party of that offeror, may acquire shares in the offeree company on terms better than those made available under its lapsed offer until each of the**

**competing offers has either been declared unconditional in all respects or has itself lapsed. For these purposes, the value of the lapsed offer shall be calculated as at the day the offer lapsed.**