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Finance for Europe

12 September 2014

Secretary to the Code Committee
Panel on Takeovers & Mergers
10 Paternoster Square
London
EC4M 7DY

PCP 2014-1: Miscellaneous Amendments

Dear Sir

We are grateful for the opportunity to comment on the proposed changes to the Takeover Code which is referenced above. In general, our members are comfortable with the proposed changes. We do have comments in respect of issues raised by Questions 5, 11, 21, 25 and 37; and these are set out in the attached question sheet.

We would be pleased to meet with you to discuss our views if that would be useful.

Thank you very much for your consideration.

Yours faithfully

William Ferrari

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PCP 2014/1

Responses to questions: 5, 11, 21, 25, 37

Q5 Should the Panel, in appropriate cases, continue to be able to permit a potential competing offeror to clarify its position after the date of the shareholder meetings and, in such cases, should the deadline be set for a date which is no later than 5.00pm on the seventh day prior to the date of the court sanction hearing?

While accepting the logic of the code committee's proposal, there are ambiguities concerning the application of the term "in appropriate circumstances". There is a concern that a judge overseeing a scheme of arrangement would need a more detailed discussion of the referenced term in addition to Section 4(6) of Appendix 7 in order to avoid any perception of arbitrariness. We would welcome clarification of what circumstances would be "appropriate".

Q11 Should paragraph (b) of Note 4 on Rule 2.2 be amended as proposed so as to require that an announcement which the Panel requires to be made by the offeree company under that paragraph (b) should normally identify the former potential offeror?

We believe that such an amendment would materially alter the balance of the rule, and would act as a deterrent to many potential offerors even beginning to contemplate offers as there would be a greater risk of public disclosure even after an approach and a subsequent downing of tools, which would be to the great detriment of potential offeree shareholders, and we therefore oppose the change.

By changing the balance of presumption towards the 'outing' of a potential offeror, the change would undermine the comfort which many potential offerors take that they can undertake preparations for an offer and have approached the offeree while having in certain circumstances the ability to 'down tools' and avoid disclosure of their potential interest, albeit at the cost of being locked out for a period. The change of presumption will act as a further deterrent to potential offerors concerned about the risks of premature disclosure, and will act against the interests of offeree shareholders and an efficient market.

Q21 Should a competing offeror be permitted to submit a revised offer to the Panel in the fifth and final round subject to the condition that it will be announced only if the other competing offeror also submits a revised offer?

Our view is generally against conditional bids, unless there is a good reason for them. In the interest of offeree shareholders, our view is that an offeror's revised bid should be announced whether or not a rival offeror has submitted a revised bid, ie that the proposed condition should not be allowed.

We would note that in any offer situation, regardless of whether an auction procedure is required or not, offerors evaluate a number of factors in considering whether to launch an offer and where to strike its terms, including among other things whether the offer will secure offeree board support, offeree shareholder support and the appetite or otherwise of potential competing offerors to intervene. Any or all of these

could lead to an offeror undertaking an element of "bidding against itself" so we do not see a strong rationale to distinguish the final round of the auction procedure as being any different in this respect.

While there is rightly no requirement under the Code for an offeror to be forced to pay its maximum price, a primary driver of the Code is to protect the interests of offeree shareholders. A fifth round with each offeror being bound to honour any offer it puts forward in that round minimises the opportunity for offerors to game the auction and is in our view the most appropriate means to draw the auction to a conclusion in the interests of offeree shareholders by ensuring the bidders put forward their final "no regrets" price, regardless of whether it is their maximum. We would further note that under the Panel's proposed construct offeror B, sensing it was unlikely to win, may be able to make minor adjustments to its own prior offer, in order to ensure that at the very least offeror A is forced to commit to its own fifth round offer.

Q25 Should the terms of the Proposed Auction Procedure prohibit announcements by the competing offerors or the offeree company (or persons acting in concert with them) which relate to, or could reasonably be expected to affect the orderly operation of, the auction procedure or which relate to the terms of either competing offeror's offer?

We believe firmly in the principles of free speech. There is a good and time honoured framework for parties to an offer to make announcements subject to compliance with their obligations under the Code. Our strong view is therefore that public comments by parties to an offer should not be restricted during an auction procedure in the manner proposed.

It should certainly be open to the offeree company to issue appropriate public announcements regarding the competing offers as and when it sees fit. It is highly likely that the competing offerors will have been making announcements about the merits of their own and other offers throughout the process leading up to the auction procedure. Attempting to impose a blackout by stopping such announcements during the auction procedure we believe may lead to information being released improperly without the checks and balances applied to announcements during an offer period. This could in turn result in misleading speculation about the merits of one or other of the offerors' bids without it having the ability to defend itself until after the auction, by which time such views may have gained currency among investors.

Q37 Should Rule 2.10 be amended so as to bring forward the latest deadline for announcements of the numbers of relevant securities in issue from 9.00am to 7.15am?

We agree that there should be Panel guidance to offerees and offerors that disclosures be made expeditiously under Rule 2.10. However, there is little evidence that present 9.00am deadline creates any significant issues, whereas the proposed change alters the balance of inconvenience for parties to an offer and we therefore oppose it.

Those disclosing under Rule 8.3 do not have an unreasonable burden as matters stand, and in almost all cases are experienced market participants with systems in place to fulfil their reporting obligations. Companies which are parties to an offer are less likely to be very familiar with the reporting requirements under Rule 2.10 and the present arrangement has the benefit of providing at least a brief opportunity, after the

rush to issue an announcement under Rule 2.2, to secure the necessary information from individual(s) who may have been entirely unaware until that point of the existence of a possible offer.