KPMG LLP
Transaction Services
15 Canada Square
London E14 5GL
United Kingdom

Tel +44 (0) 20 7311 1000
Fax +44 (0) 20 7311 3311

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

Your ref

Our ref

Contact Maggie Brereton
Tel 020 7311 1000

22 September 2017

Dear Sir

PCP 2017/1: Asset sales in competition with an offer and other matters

We welcome the opportunity to comment on the Consultation Paper issued by the Code Committee of the Panel PCP 2017/1.

We set out our comments on the questions in the attachment to this letter. Whilst we recognise the background giving rise to the proposals, we believe that considerable caution needs to be exercised before extending the scope of the Code to transactions and circumstances which, although in certain circumstances they may produce a result that is analogous to that of transactions that the Code is intended to govern, are not in fact such transactions.

If you have any questions on this letter or wish to discuss any of the matters raised, please contact Maggie Brereton by email at maggie.brereton@kpmg.co.uk or by phone on 020 7311 8658.

Yours faithfully

KPMG LLP

Q1 Should an offeror or potential offeror be restricted from circumventing the provisions of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?
Q2 Should the proposed new restriction in each of Rules 2.8, 12.2 and 35.1 apply in relation to the purchase of assets which are significant in relation to the offeree company (as determined in accordance with Note 5 on Rule 2.8)?
Q3 Do you have any comments on the proposed amendments to Rule 2.8, Rule 12.2 and Rule 35.1?

Although we share the concerns of the Code Committee that nothing should affect the operation of the Code in relation to its fundamental objectives, we are also concerned that the proposals are seeking to address matters somewhat removed from the core objectives. The Code deals with changes in control of relevant companies. Decisions by an offeree board relating to the disposition of the company's assets do not, of themselves, bear directly on the question of control of the company. The additional element required to make such a situation analogous to an offer needs to be a decision by the offeree company to wind itself up and to distribute the remaining assets to shareholders.

Rules rightly exist in the Code to prevent offeree company boards from taking actions in relation to company assets where those actions might frustrate a bona fide offer (and shareholder approval is a key element), but we consider it to be a finely balanced question whether Code constraints designed to regulate relationships between offerors and offeree shareholders in relation to an offer should be extended so as to regulate relationships between offeree boards and offeree shareholders on matters that do not relate to change of control, but to a different type of transaction. We note, for example, that where a public company is in receipt of competing offers for the sale of its assets, issues similar to those highlighted in the PCP might arise, but there is no evidence that existing regulation (for example the FCA Listing Rules) are inadequate to deal with such situations. It is inevitable that there will be a blurring at the boundaries when looking at the scope and application of the Code, but we consider that it may be necessary to accept in some cases that although the effect of certain transactions may be analogous to an offer regulated by the Code (and this may particularly be the case where a board is regularly considering exit options for shareholders), this does not mean that such transactions need to be brought within the scope of the Code or that their use by buyers is primarily motivated by the fact that they offer an opportunity to circumvent the Code.

On balance we would prefer it to be a matter for the consideration of the offeree board whether to negotiate on a subsequent offer for the company's assets from a former offeror rather than to introduce constraints by extending the application of the Code.

Q4 Where shareholder approval is sought in general meeting for a proposed action under Rule 21.1, should a requirement be introduced:
(a) for the board of an offeree company to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable; and
(b) for the Panel to be consulted regarding the date on which the general meeting is to be held?
Q5 Do you have any comments on the proposed requirement for the board of an offeree company to publish a circular in the circumstances described in the proposed new Rule 21.1(f) containing the information set out in the proposed new Note 1 on Rule 21.1?
Q6 Do you have any comments on the proposed amendments to Rule 21.1?

We agree with the proposal to make explicit the circumstances in which the Panel will normally dispense with the requirements of Rule 21.1. In other respects, although what is proposed represents a codification of what actually happens in many cases, we are concerned with the possibility of overregulation, where for example the requirements overlap with the Class One rules for listed companies. We note in particular that the requirement for independent advice goes beyond that required under the Listing Rules, other than in the case of related party transactions. We also consider that changes to the Code should as a general matter be accompanied by evidence of genuine problems with the existing provisions. We are not aware what concerns are currently in evidence such that there is a pressing need for a change to a rule that appears to have worked effectively for many decades.

Q7 Should an offeree company be permitted to pay one or more inducement fees to a counterparty to an agreement to which Rule 21.1 applies provided that the aggregate value of the fees payable does not exceed the 1% limit referred to in Note 8 on Rule 21.1?
Q8 Do you have any comments on the proposed new Note 8 on Rule 21.1?

We agree that the practice confirmed in 2003 should continue.

Q9 Where, in competition with an offer or possible offer, an offeree company has announced its intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a statement by the offeree company quantifying the cash sum expected to be paid to shareholders be treated as a quantified financial benefits statement?

Q10 Do you have any comments on the proposed new Note on the definition of "quantified financial benefits statement"?

Our preference would be for the integrity of the concept of a 'quantified financial benefit' to be retained. Whilst we can understand that the Code Committee might be concerned that calculations of the value per share on a liquidation are sensitive and may wish therefore that statements setting out the calculated amount should be subject to a reporting obligation, the concept and calculation are so far removed from the original 'merger benefits' statement that the disclosure obligations are wholly inapplicable. We do not consider that suggesting that the requirements of Rule 28.6 should be complied with, 'to the extent that they apply', satisfactorily addresses the fact that the rule is intended to apply to something fundamentally different.

So far as the definition is concerned, we understand that the definition is only intended to apply in a situation when an offeree company has received a binding offer from a party to acquire its assets at an agreed price, and not merely a situation where an offeree company has announced that those assets are for sale and has placed a value on them. On this basis, we believe that the definition needs to avoid the ambiguous wording 'has announced its intention to sell' (which could simply imply that it has put the assets up for sale) and use language such as 'has announced that it has received a binding offer for the sale of all or substantially all of the company's assets (excluding cash and cash equivalents), which it intends to accept'.

Q11 Where, in competition with an offer or possible offer, an offeree company has announced an intention to sell all or substantially all of the company's assets (excluding cash and cash equivalents) and to return to shareholders all or substantially all of the company's cash balances (including the proceeds of any asset sale), should a purchaser of some or all of those assets be restricted from acquiring interests in shares in the offeree company during the offer period unless the board of the offeree company has made a statement quantifying the amount per share that is expected to be paid to shareholders and then only to the extent that the price paid does not exceed that amount?
Q12 Do you have any comments on the proposed new Rule 4.7?

Our comments on question 10 apply equally here.

Q13 Do you have any comments on the proposed new Note 6 on Rule 21.3?

We have no comments on this matter.

Q14 Do you have any comments on the proposed amendment to Rule 2.8 and to the introduction of the proposed new Note 2 on Rule 2.8?

We have no comments on this matter.

Q15 Do you have any comments on the consequential and minor amendments referred to in paragraph 5.9?

We have no comments on this matter.

Q16 Do you have any comments on the proposed amendments to Note 1 on Rule 19.1, Rule 20.3 and Rule 20.4?

We agree with the proposal

Q17 Do you have any comments on the proposed

We agree with the proposal