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The Secretary to the Code Committee
The Takeover Panel
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22 September 2017

Dear Sirs,

Asset sales in competition with an offer and other matters

We welcome the opportunity to respond to the Takeover Panel's consultation on asset sales in competition with an offer and other matters. The Quoted Companies Alliance Legal Expert Group has examined your proposals and advised on this response. A list of members of the Expert Group is at Appendix A.

We have responded below in more detail to the specific amendments from the point of view of our members, small and mid-size quoted companies.

Responses to specific questions

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of the Code by purchasing the offeree company's assets following the offer or possible offer lapsing or being withdrawn?

An asset sale (including sale of shares held by the "target company") generally raises different issues from a public offer to acquire the shares of the target company. Any asset sale transaction will require the agreement of the target board and for a publicly traded company, and in certain other circumstances under company legislation, shareholder approval and/or third party advice or valuation may be required depending on the nature and size of the transaction. We consider that in most such cases the existing regulatory and legal regime provides adequate protection without the need for the reduced flexibility and additional cost and complexity which would potentially be involved with the proposed changes.

However, we consider that there is potentially a role for the proposed restrictions where there is a competitive situation while the target company remains in an offer period – with the objective of providing a level playing field between competing bidders.

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)?

Yes, the proposed new restriction in each of Rules 2.8, 12.2 and 35.1 should 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).

As noted in paragraph 4.1 of the Public Consultation Paper (PCP), the economic outcome of this type of transaction for shareholders in the target may be comparable with any competing offer and this is also consistent with the approach taken in other parts of the PCP.

We consider that this is the appropriate test, and that it is not necessary for the Code to restrict asset transactions where a lower level of assets of the target company is being sold and/or where shareholders retain a financial interest in the target.

Q3 Do you have any comments on the proposed amendments to Rule 2.8, Rule 12.2 and Rule 35.1?

See our response to Q14 below in relation to Rule 2.8.

Q4 Where shareholder approval is sought in a 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;

Obtaining such advice could increase the cost of, and possibly delay, such a transaction, at a time when by definition the transaction may not proceed. We question whether this is necessary, particularly given that, where a Rule 3 adviser is in place, assessment of such a transaction may be required as part of their role and that, for a publicly traded target company, compliance with any applicable listing or AIM rules in relation to such a transaction will already be required.

(b) for the Panel to be consulted regarding the date on which the general meeting is to be held?

We agree with the requirement to consult with the Panel regarding the date of the general meeting. We recognise the importance as noted in the paper that if, for example, the general meeting is proposed to be held prior to "Day 60", the Panel wishing to ensure that shareholders whose decision as to whether to accept the offer is influenced by what may happen at the general meeting have an opportunity to make that decision in the knowledge of the outcome of the meeting.

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?

Given the cost and potential delay involved in preparation of a circular, we think that it would be beneficial for the target company to be able to include the required information in an RIS announcement, where a circular is not required, in order to convene a general meeting.

Where a shareholder vote is required, the circular and any related disclosure requirements will be governed by the listing or AIM rules for a publicly traded company. The proposed new rule states "In addition, the circular and any contracts entered into in connection with the proposed action must be published on a website from the time the circular is published." We would encourage further clarification as to whether the Panel seeks to require disclosure of contracts which would not otherwise be disclosed under the Code (and/or applicable listing/AIM rules) and, if so, state which contracts these are.

An obligation to disclose sale contracts, and/or contracts relating to third party financing of the acquisition, could require disclosure of commercially sensitive information which would potentially prejudice the

parties and/or discourage the relevant proposal being put to shareholders when it could be in their best interests that it should be implemented. We would encourage the Panel for more clarification as to which circumstances, if any, it would consider dispensation from this requirement.

Q6 Do you have any comments on the proposed amendments to Rule 21.1?

The Rule could clarify how long display is required for.

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?

Yes, an offeree company should 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 have no comments on the proposed new Note 8 on Rule 21.1.

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?

We welcome the clarification of the Panel's approach in this context.

Nonetheless, we have some concerns (particularly for smaller target companies) as to the additional cost, and potential difficulty, of obtaining reports from the accountants/financial advisers on the Quantified Financial Benefits Statements on the sum expected to be paid to shareholders. We recognise that the Panel has discretion to waive the requirements; we would encourage the Panel to clarify whether it would take such factors into account in such circumstances and, if so, include this concept in the text.

Furthermore, if the Panel is to require a statement to be made quantifying the cash sum to be paid to shareholders, it should clarify whether the statement should also include a comment about the expected timescale within which such cash sum is likely to be paid. This would allow a shareholder to compare this timescale with the offer timetable and in particular the date for payment of consideration under the original offer.

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

We think it would be beneficial for the quantification of what is expected to be paid per target company share. This would make it easier to compare with another offer.

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?

Please see comments above in relation to the proposals more generally.

Q12 Do you have any comments on the proposed new Rule 4.7?

The reference to "purchaser" could be amended to "proposed purchaser".

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

We have no comments on the proposed new Note 6 on Rule 21.3.

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 think it would be beneficial to retain the phrase "or otherwise with the consent of the Panel" with the resultant retained discretion for the Panel to permit a Rule 2.8 statement to be set aside where appropriate. It may also be beneficial to make it clear that the target company announcing a formal sales process/strategic review would be permitted as a reservation to a Rule 2.8 statement.

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

We have no comments on the consequential and minor amendments referred to in paragraph 5.9.

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 have no comments on the proposed amendments to Note 1 on Rule 19.1, Rule 20.3 and Rule 20.4.

Q17 Do you have any comments on the proposed amendment to Note 5 of the Notes on Dispensations from Rule 9?

We agree with the proposed amendment to Note 5 of the Notes on Dispensations from Rule 9.

If you would like to discuss our response in more detail, we would be happy to attend a meeting.

Yours faithfully,

G. M. Thorpe
Chair of QCA Legal Expert Group

APPENDIX A

Quoted Companies Alliance Legal Expert Group

Gary Thorpe (Chair)	**Clyde & Co LLP**
Maegen Morrison (Deputy Chair)	Hogan Lovells International LLP
David Davies	Bates Wells & Braithwaite LLP
Martin Kay	Blake Morgan
Paul Arathoon	Charles Russell Speechlys LLP
David Hicks	
Philippa Chatterton	CMS
Mark Taylor	Dorsey & Whitney
Kate Francis	
Jane Wang	Fasken Martineau LLP
Paul Cliff	Gateley Plc
Richard Pull	Hamlins LLP
Nicholas Narraway	Hewitson Moorhead
Danette Antao	Hogan Lovells International LLP
Donald Stewart	Kepstorn
Nicola Mallett	Lewis Silkin
David Wilbe	
Tara Hogg	LexisNexis
Stephen Hamilton	Mills & Reeve LLP
Nicholas McVeigh	Mishcon De Reya
Simon Cox	Norton Rose Fulbright LLP
Julie Keefe	
Ashmi Bhagani	Pillsbury Winthrop Shaw Pittman LLP
Sarah Hassan	Practical Law Company Limited
Kieran Rayani	Stifel
Catherine Moss	Winckworth Sherwood LLP