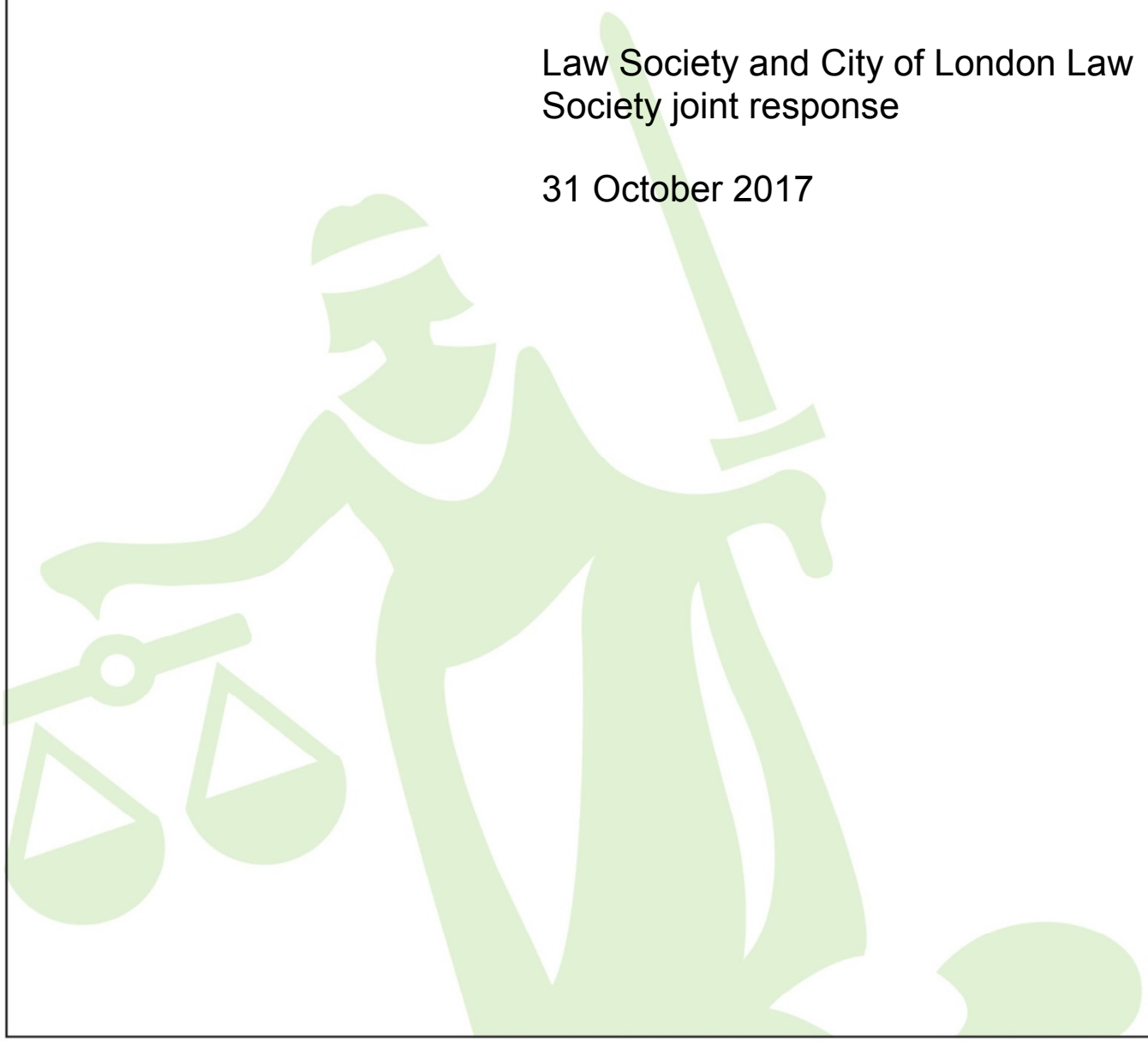
Takeover Panel consultation paper PCP2017/2

Law Society and City of London Law Society joint response

31 October 2017



Introduction

1. The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers.

Response

Q1 Should Rule 24.2(a) be amended so as to require an offeror to make specific statements of intention with regard to the offeree company's research and development functions, the balance of the skills and functions of the offeree company's employees and management, and the location of the offeree company's headquarters and headquarters functions?

5. We do not have any comments on this proposal.

Q2 Do you have any comments on the proposed amendments to Rules 24.2(a) and (b)?

6. It would be helpful for the Panel to clarify what is meant by the reference to the "balance" of the skills and functions of the employees and management. For instance, is it intended to refer to the number/proportion of employees and management in different functions? It would also be helpful to understand how specific disclosure is expected to be in this context given the restrictions under which a bidder operates (for example, under s188 Trade Union & Labour Relations (Consolidation) Act 1992, a bidder is unable to consult target employees until after its offer closes).

Q3 Should Rule 2.7 be amended so as to bring forward to the firm offer announcement the requirement for an offeror to state its intentions with regard to the business, employees and pension scheme(s) of the offeree company and, where appropriate, the offeror?

7. We do not object to this proposal in principle. However, we would anticipate that parties to an offer will need to engage with the Panel to a greater extent than is currently practice in connection with the framing of the intention statements to be included in the Rule 2.7 announcement. Currently, the Panel will contact a bidder if it considers the (voluntary) intention statements made in the Rule 2.7 announcement should be amended/expanded in the offer document in order to ensure that they are compliant with the requirements of Rule 24.2, but there is no established practice or procedure for the Panel to review or pre-vet bidder intention statements to be included in the Rule 2.7 announcement (although a party may request this, including where there are unusual or complex issues to be determined). Given that, under the proposed revised rules, the statements made in the Rule 2.7 announcement must comply fully with the requirements of Rule 24.2, parties to an offer are likely to want to engage with the Panel prior to making the Rule 2.7 announcement to ensure that the Panel considers the disclosures to have been made to the relevant standard. It would be helpful if the Panel would confirm that it would be happy to engage in this form of pre-vetting of intention statements relating to the target business where it is requested to do so by a bidder.

8. As a separate point, there may be situations where the bidder changes its intentions for the target business, in particular in a hostile or competitive situation – for example, in order to secure a recommendation from the target board. We assume that the revised regime is not meant to prevent a bidder from changing its intentions following the making of a Rule 2.7 announcement (provided that this is appropriately disclosed to the market), but it would be helpful if the Panel could confirm this.

9. For the avoidance of doubt, it would also be helpful if the Panel could explicitly confirm that it is not intended to require bidders to include any specific intention statements regarding the target business in announcements that are made prior to a firm offer announcement under Rule 2.7 – i.e. it would still be permitted to make a possible offer announcement to the effect that bidder and target are in discussions without needing to include any further detail.

Q4 Do you have any comments on the proposed amendments to Rule 2.7 and Rule 25.9?

10. We do not have any comments on the drafting of the proposed amendments other than as referred to in the response to Q2.

Q5 Should an offeror be obliged to seek the consent of the board of the offeree company in order to publish an offer document within the 14 days following its firm offer announcement?

11. In our view, the PCP does not set out a compelling argument for changing the long-standing rules on offer timetables. The proposed changes will be most relevant in the context of hostile cash offers (it would be unusual for offer documentation in relation to a hostile securities offer to be published shortly after the Rule 2.7 announcement). Whilst 14 days is a relatively short period of time for a target board to respond to a hostile bid this does not, in our view, materially prejudice the target company shareholders or other stakeholders given the fact that the target board has the ability to continue to publish material new information up until Day 39 (including any profit forecasts or quantified financial benefits statements that may be relevant to supporting its defence), and in our experience that is sufficient time to prepare profit forecasts or quantified financial benefits statements.

12. The proposed approach set out in the PCP may also, in effect, restrict bidders' scope or appetite to carry out stakebuilding activity (and therefore shareholders' ability to sell shares to the bidder). This is because, under the Companies Act 2006, shares purchased by the bidder will only count towards the 90% compulsory acquisition threshold where the purchases take place once the offer has been made (i.e. following publication of the offer document). It may also extend the period during which the bid is at risk of lapsing under Rule 12.

13. If the Panel does intend to proceed with changes to permit target company boards and other stakeholders a longer period to respond to hostile offers, whilst we do not advocate a change to the current Code timetable, we note that this could also be achieved by extending the period for publishing a defence circular (for example, to 21 days after posting of the offer document) and moving the first closing date accordingly (for example, to Day 28). This should not have an impact on the later dates in the timetable which could remain as they currently are and would avoid unnecessarily restricting the bidder's ability to proceed with making its formal offer and extending the period of time for which a target company is in an offer period.

14. It would also be helpful to understand how the Panel envisages the proposed posting restriction would apply in the case of a subsequent non-recommended bidder (see also paragraph 12 above).

15. On a separate point, if the proposals in the PCP are adopted in the form proposed, we assume that the target board would not be permitted to agree with the bidder the timing of publication of the offer document as this would be treated as an offer-related arrangement for the purposes of Rule 21.2. If this assumption is correct, we assume that the target company would be permitted to make a commitment in the Rule 2.7 announcement to the effect that posting will be permitted earlier than the 14 day deadline. This is important to ensure that the bidder has certainty over timetable at the time it makes its firm offer announcement and that the market and other interested stakeholders are properly informed of the intended timetable.

Q6 Do you have any comments on the proposed amendments to Rule 24.1 and Rule 25.1?

16. We do not have any comments on the drafting of the proposed amendments.

Q7 Should an offeror or offeree company which has made a post-offer undertaking always be required to publish, in whole or in part, any report submitted to the Panel under Rule 19.5(h)?

17. We have no comments on this proposal.

Q8 Do you have any comments on the proposed amendments to Rule 19.5(h)?

18. We do not have any comments on the drafting of the proposed amendments.

Q9 Should an offeror or offeree company which has made a post-offer intention statement be required, at the end of the period of 12 months from the date on which the offer period ends, or such other period of time as was specified in the statement, to confirm in writing to the Panel whether it has taken, or not taken, the course of action described in the post-offer intention statement and publish that confirmation via a RIS?

19. We have some concerns regarding this proposal. In particular, in our view it risks blurring the distinction between binding post-offer undertakings and non-binding statements of intention which are qualitatively different and, in our view, the requirement would be likely to lead to bidders being more cautious about making detailed intention statements (which would be to the disadvantage of the target).

20. We note that, in any event, Rule 19.6(b) requires a party that departs from an intention statement to make a public announcement of that fact unless the Panel consents otherwise. Given this rule, and the existing regime of private confirmation to the Panel, we think an effective enforcement mechanism already exists and we do not think it is appropriate for there to be a positive public confirmation at the end of the period. We also do not see how it would be of benefit to target shareholders, other stakeholders or the market.

21. If the Panel does proceed with the proposed changes, it would helpful to include greater detail on the form and nature of the public confirmation that would be expected.

22. In connection with the requirement for the confirmation to be published via RIS, where the bidder is a private/non-UK entity that does not maintain an RIS account, would the Panel be prepared to publish the confirmation on their behalf or otherwise allow them to publish it on a website instead?

Q10 Do you have any comments on the proposed new Rule 19.6(c)?

23. We do not have any comments on the drafting of the proposed amendments other than as referred to in the response to Q9.

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