

THE TAKEOVER PANEL

PUBLIC CONSULTATION BY THE CODE COMMITTEE

CONDITIONS TO OFFERS AND THE OFFER TIMETABLE



The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 15 January 2021.

Comments may be sent by email to:

supportgroup@thetakeoverpanel.org.uk

Alternatively, please send comments in writing to:

The Secretary to the Code Committee

The Takeover Panel

One Angel Court

London

EC2R 7HJ

Telephone: +44 (0) 20 7382 9026

All responses to formal consultation will be published on the Panel’s website at www.thetakeoverpanel.org.uk unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

CONTENTS

	Page
1. Introduction and summary	1
2. The offer timetable	9
3. Suspending the offer timetable for official authorisations and regulatory clearances	24
4. Long-stop dates for contractual offers and requirement to take necessary procedural steps in relation to a scheme of arrangement	38
5. Consistent treatment for official authorisations and regulatory clearances	48
6. Acceptance condition invocation notices and announcements of acceptance levels	60
7. Single date for the satisfaction of all conditions	71
8. Withdrawal rights	81
9. The invocation of conditions and pre-conditions to offers	84
10. Mandatory offers	101
11. Miscellaneous amendments	107
12. Assessment of the impact of the proposals	113
 APPENDIX A	
Proposed amendments to the Code	117
 APPENDIX B	
List of questions	169
 APPENDIX C	
Draft of revised Practice Statement No 5	171
 APPENDIX D	
Illustrative offer timetable	175

1. Introduction and summary

(a) Introduction

- 1.1 In this Public Consultation Paper (“**PCP**”), the Code Committee of the Takeover Panel (the “**Code Committee**”) proposes various amendments to the [Takeover Code](#) (the “**Code**”) in relation to conditions to offers and the offer timetable, as summarised below.
- 1.2 The majority of the proposals in this PCP were the subject of an informal pre-consultation in January and February 2020 with organisations and individuals drawn from various quarters of the Panel’s regulated community (the “**Pre-Consultation**”). The Code Committee thanks the respondents to the Pre-Consultation for their valuable input, which has resulted in a number of amendments to the initial proposals.

(b) Background and summary

(i) *The nature and purpose of the Code*

- 1.3 Section 2(a) of the Introduction to the Code summarises the nature and purpose of the Code. In particular, the first paragraph of Section 2(a) provides that:

“The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.”.

(ii) *Orderly framework*

- 1.4 The offer timetable prescribed by the Code is designed to strike an appropriate balance between the interests of the offeror (or, in a competitive situation, offerors), the offeree company and the shareholders in the offeree company.
- 1.5 In particular, the offer timetable takes into account both the requirement of General Principle 2 that:

“The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid”,

and the requirement of General Principle 6 that:

“An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities”.

- 1.6 The key timetable requirements of Rule 31 (*Timing of the offer*), Rule 32 (*Revision*) and Rule 2.6 (*Timing following a possible offer announcement*) include that:
- (a) an offer must be open for at least 21 days following the publication of the initial offer document (Rule 31.1) and must become or be declared “unconditional as to acceptances” by the 60th day following the publication of the initial offer document (Rule 31.6(a));
 - (b) the offeree company must not announce any material new information after the 39th day following the publication of the initial offer document (Rule 31.9);
 - (c) shareholders must have at least 14 days to consider the offeror’s final offer. Accordingly, if the offeror takes advantage of the full 60 day timetable, any revised offer document must be published by no later than the 46th day following the publication of the initial offer document (Rule 32.1(c));
 - (d) a potential competing offeror must clarify its position by the 53rd day following the publication of the first offeror’s initial offer document (Rules 2.6(d) and (e)); and
 - (e) after an offer becomes or is declared unconditional as to acceptances, any outstanding conditions to the offer must be satisfied within 21 days, i.e. by the 81st day following the publication of the initial offer document (Rule 31.7).
- 1.7 Many of the timetable rules have no practical application where a “contractual offer” is recommended by the board of the offeree company as General Principle 6 will be less in point and, where necessary, the offer timetable can normally be extended with the consent of the board of the offeree company. In addition, the majority of the offers which the Panel regulates are currently implemented as a scheme of arrangement under Part 26 of the Companies Act 2006, to which the offer timetable rules do not generally apply. However, the timetable rules remain fundamental to the objective of providing an orderly framework for the conduct of takeovers, particularly in relation to a “hostile” offer or in a competitive situation.
- 1.8 This PCP proposes a number of amendments to the operation of the offer timetable under the Code which are intended to simplify the offer timetable and to accommodate the potentially lengthy timeframes required in order to satisfy the conditions relating to official authorisations and regulatory clearances to which many offers are now subject. In summary, the proposals include the following:

- (a) ***new definitions of certain key dates in an offer timetable:*** “Day 60” would be defined as the 60th day following the publication of the initial offer document or any later date set by the Panel pursuant to an extension of the offer timetable. Days 39, 46 and 53 would be set by counting back from Day 60 as opposed to counting forwards from Day 0 (as is currently the case with Days 39 and 53). Therefore, Days 39, 46 and 53 would be automatically extended (or re-set) if Day 60 is extended (see **Section 2**);
- (b) ***single date for the satisfaction of all conditions:*** there would no longer be a distinction between the date by which the acceptance condition to an offer needs to be satisfied and the date by which the other conditions to the offer need to be satisfied or waived (see **Section 7**). It is proposed that:
 - (i) the Code would require all of the conditions to an offer to be satisfied by **“Day 60”**;
 - (ii) the date specified by the offeror as the date by which all of the conditions to its offer would need to be satisfied or waived would be defined as the **“unconditional date”**;
 - (iii) in the absence of an offeror making an **“acceleration statement”** (i.e. a statement in which the offeror brings forward the latest date by which all of the conditions to the offer must be either satisfied or waived), the unconditional date would be Day 60. The unconditional date would therefore be automatically extended if the Panel extended Day 60; and
 - (iv) subject to certain exceptions, the **acceptance condition** would only be capable of being satisfied once all of the other conditions to the offer had been satisfied or waived;
- (c) ***acceptance condition invocation notices:*** in order to give offeree company shareholders notice of its intention to do so, an offeror would be required to serve an “acceptance condition invocation notice” if it wished to invoke the acceptance condition and lapse its offer prior to the “unconditional date”. Accordingly, offers would no longer have “closing dates” ahead of the unconditional date (see **Section 6**);
- (d) ***announcements of acceptance levels:*** amendments would be made to the timing of announcements of acceptance levels required to be made by an offeror under Rule 17 (see **Section 6**);

- (e) **long-stop dates for contractual offers:** an offeror would be required to set a “long-stop date” for a contractual offer, similar to the long-stop date typically included in a scheme of arrangement (see **Section 4(b)**); and
- (f) **withdrawal rights:** offeree company shareholders who have accepted an offer would be able to withdraw their acceptance at any time prior to the satisfaction of the acceptance condition (see **Section 8**).

(iii) *Market integrity*

1.9 One of the principal ways in which the Code seeks to promote the integrity of the financial markets is by providing shareholders and other market participants with certainty that once a firm offer has been announced it will not lapse or be withdrawn without good reason.

1.10 The means by which this is achieved include that:

- (a) an offeror must announce a firm intention to make an offer only after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement the offer (Rule 2.7(a));
- (b) an offeror must use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject (Rule 13.5(b));
- (c) conditions and pre-conditions to an offer must generally be objective (Rule 13.1); and
- (d) an offeror is generally restricted from invoking a condition or pre-condition so as to cause the offer to lapse unless the circumstances which give rise to the right of invocation are of “material significance” to the offeror in the context of the offer (Rule 13.5(a)).

1.11 In support of these principles, this PCP proposes the following amendments:

- (a) **application of the “material significance” requirement:** Rule 13.5 (*Invoking conditions and pre-conditions*) would be amended so as to clarify the application of the “material significance” requirement to the invocation of the conditions to an offer (see **Section 9**). If the proposed amendments are adopted, the Panel Executive (the “**Executive**”) also intends to make a number of amendments to Practice Statement No 5 (*Rule 13.5(a) – Invocation of conditions*); and

- (b) ***requirement to take necessary procedural steps in relation to a scheme of arrangement:*** where an offer is being implemented as a scheme of arrangement, the Code would expressly require the offeror, once all relevant conditions had been satisfied or waived, to take the procedural steps necessary for the scheme to become effective (see **Section 4(c)**).

(iv) *Official authorisations and regulatory clearances*

1.12 There is a potential for tension between the requirement to complete an offer within a particular timetable and the requirement that an offer should not lapse without good reason. For example, an offer may be subject to various conditions relating to official authorisations or regulatory clearances which might not be capable of being satisfied within the normal offer timetable.

1.13 In relation to the clearance of an offer by the Competition and Markets Authority (the “CMA”) or the European Commission, there are a number of ways in which the Code addresses this tension. For example:

- (a) if, by the later stages of the offer timetable (i.e. by “Day 39”) there has not been a decision as to whether there will be a Phase 2 CMA reference or whether Phase 2 European Commission proceedings will be initiated, it is possible for an offeror or the offeree company to request that the offer timetable be suspended pending that decision (Rule 31.6(a)(iii)). However, there is no equivalent ability for an offeror or the offeree company to request the Panel to suspend the offer timetable pending a decision relating to any other official authorisation or regulatory clearance;
- (b) if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated before:
 - (i) the later of the “first closing date” and the date on which the acceptance condition is satisfied or deemed to be satisfied (in the case of a contractual offer); or
 - (ii) the shareholder meetings (in the case of a scheme of arrangement),

the Code requires the offer to include a term that it must then lapse (Rule 12.1). If the offer is subsequently cleared at the end of the reference or proceedings, the Code provides that the offeror may make a new offer (and that the usual prohibition on an offeror re-bidding within 12 months of a lapsed offer will not apply), which offer is not required to be on the same terms as the previous offer (Rule 12.2). However,

there are no equivalent provisions in relation to any other official authorisation or regulatory clearance;

- (c) if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated after the date when the Code would have required the offer to lapse, the relevant condition to the offer may be invoked without the offeror being required to demonstrate that the circumstances are of material significance to it in the context of the offer (Rule 13.2). However, if the offeror wishes to lapse the offer on a condition relating to any other official authorisation or regulatory clearance, it would need to satisfy the “material significance” requirement referred to above (Rule 13.5(a)); and
- (d) an offeror may announce an offer subject to a pre-condition relating to clearance by the CMA or the European Commission without the offeror having to demonstrate (as it would in relation to other regulatory pre-conditions) that the authorisation or clearance is likely to prove impossible to obtain within the Code timetable (Rule 13.3).

1.14 The Code Committee considers that the Code should apply consistent treatment to any official authorisation or regulatory clearance to which an offer is subject and that the Code should not apply different treatment to the CMA and the European Commission, as compared with other regulatory authorities from which an official authorisation or regulatory clearance is required. In summary, the proposals in this PCP include the following:

- (a) ***suspending the offer timetable for official authorisations and regulatory clearances***: an offeror or the offeree company would be able to request that the offer timetable should be suspended in relation to a condition relating to any official authorisation or regulatory clearance, provided that, if only one of the parties wishes to suspend the timetable, the condition must relate to a “material” authorisation or clearance (see **Section 3**);
- (b) ***removal of the special treatment given to the CMA and the European Commission*** (see **Section 5**):
 - (i) there would no longer be a requirement for an offer to lapse if, before a particular date, a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated;
 - (ii) an offeror which wishes to invoke a condition relating to a Phase 2 CMA reference not being made or Phase 2 European Commission proceedings not being initiated would be required to demonstrate that the circumstances are of

material significance to the offeror in the context of the offer in the same way as if it wished to invoke a condition relating to any other official authorisation or regulatory clearance; and

- (iii) the distinction between pre-conditions relating to the CMA or the European Commission and those relating to other official authorisations or regulatory clearances would be removed.

1.15 In **Section 10** it is proposed that the Panel should be able to grant a dispensation from the restriction in Rule 9.3 on a person triggering a **mandatory offer** if the making or implementation of that offer would be subject to any condition or consent. Such a dispensation would be available where:

- (a) the condition or consent relates to a material official authorisation or regulatory clearance;
- (b) the triggering share purchase is itself subject to a condition relating to that material official authorisation or regulatory clearance in identical terms to the condition or pre-condition to the offer; and
- (c) the invocation of the condition to the share purchase agreement (and the condition or pre-condition to the offer) is subject to the consent of the Panel, applying the “material significance” requirement in Rule 13.5(a).

(v) *Miscellaneous amendments*

1.16 **Section 11** proposes certain **miscellaneous amendments** to the Code with regard to matters which are related to the main proposals in this PCP.

(vi) *Assessment of the impact of the proposals*

1.17 **Section 12** provides an **assessment of the impact of the proposals**.

(c) **Invitation to comment**

1.18 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 15 January 2021 and should be sent in the manner set out at the beginning of this PCP.

1.19 The **proposed amendments** to the Code are set out in **Appendix A**. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted.

1.20 A list of the **questions** that are put for consultation is set out in **Appendix B**.

(d) Draft of revised Practice Statement No 5

1.21 The Executive has provided the Code Committee with a draft revised version of **Practice Statement No 5** (*Rule 13.5(a) – Invocation of conditions*), as referred to in Section 9. The draft is set out in **Appendix C**.

(e) Revised offer timetable

1.22 The key differences between the current **offer timetable** and the offer timetable which would apply if the Code were to be amended as proposed in this PCP are highlighted in the diagram set out in **Appendix D**.

(f) Implementation

1.23 The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in Spring 2021.

1.24 The Code Committee anticipates that, in order to give practitioners and others time to prepare, the amendments to the Code would come into effect approximately three months after the publication of the Response Statement in relation to firm offers announced after that time. The Code Committee would welcome respondents' views on this issue.

2. The offer timetable

(a) Introduction

2.1 Section 2:

- (a) summarises the key dates in the timetable which the Code sets for an offer; and
- (b) proposes the introduction of new defined terms for certain of those dates and amendments to certain of the Code's timetable rules.

(b) Background

2.2 The Code sets out various rules which govern the timetable for a "contractual" offer. These timetable rules implement, amongst other things:

- (a) the objective that the Code should provide "*an orderly framework within which takeovers are conducted*", as referred to in **section 2(a) of the Introduction to the Code**;
- (b) the requirement in **General Principle 2** that "*The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid*"; and
- (c) the requirement in **General Principle 6** that "*An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities*".

2.3 The provisions of the Code relating to the timetable following the announcement of a firm intention to make an offer are designed principally with a "hostile" offer (or a competitive situation) in mind and many of these provisions are not necessarily relevant in the context of a recommended contractual offer. In addition, the majority of the timetable rules discussed in this Section are disapplied in relation to an offer implemented as a scheme of arrangement and none of the amendments proposed in this Section will be relevant to offers implemented by means of a scheme.

2.4 The principal rules relating to the timetable for a contractual offer are, in summary, as follows:

- (a) within 28 days of the announcement of a firm intention to make an offer, the offeror must send an offer document to offeree company shareholders (**Rule 24.1(a)**);

- (b) within 14 days of the publication of the offer document, the board of the offeree company must send a circular to offeree company shareholders (**Rule 25.1(a)**);
- (c) the offer must be open for acceptance for at least 21 days following the date on which the initial offer document is published (**Rule 31.1**);
- (d) the board of the offeree company should not announce any material new information after the 39th day following the publication of the initial offer document (**Rule 31.9**);
- (e) an accepting shareholder must be entitled to withdraw its acceptance from the date which is 21 days after the “first closing date” until the earlier of:
 - (i) the time that the offer becomes or is declared unconditional as to acceptances; and
 - (ii) the final time for lodgement of acceptances that can be taken into account for the purposes of satisfying the acceptance condition (**Rule 34.1**);
- (f) the offer must be kept open for at least 14 days following the date on which a revised offer document is published. Therefore, no revised offer document may be published in the 14 days ending on the last day the offer is able to become unconditional as to acceptances (**Rule 32.1(c)**);
- (g) if it has been announced that a publicly identified potential offeror might make an offer in competition with an existing offer (or if the offeree company has referred to the existence of a potential competing offeror which has not been publicly identified), the potential competing offeror must, by 5.00 pm on the 53rd day following the publication of the first offeror’s initial offer document, either:
 - (i) announce a firm intention to make an offer; or
 - (ii) announce (or the offeree company must announce) that it does not intend to make an offer (**Rules 2.6(d) and (e)**);
- (h) the offer may not normally become or be declared unconditional as to acceptances after midnight on the 60th day following the day on which the initial offer document is published (**Rule 31.6(a)**);
- (i) if the Panel consents to an extension of the final day by which the acceptance condition must be satisfied, it will normally also grant an extension to, or re-set, the

other key dates (as referred to above) of the offer timetable (**Note 1 on Rule 31.6**); and

- (j) all conditions other than the acceptance condition must be satisfied (or waived), or the offer must lapse, within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later (**Rule 31.7**).

A number of these rules are discussed in more detail in the following Sections of this PCP.

2.5 Certain of the dates mentioned in paragraph 2.4 are normally referred to as numbered “Days” of a contractual offer timetable, with the date on which the initial offer document is published being “**Day 0**”. For example:

- (a) the date until which an offer must initially remain open is referred to as “**Day 21**”;
- (b) the latest date on which the offeree company board may publish any material new information is referred to as “**Day 39**”;
- (c) the latest date on which an offeror may publish a revised offer document (i.e. 14 days before the last day the offer is able to become unconditional as to acceptances) is referred to as “**Day 46**”;
- (d) the date by which a potential competing offeror must clarify its position is referred to as “**Day 53**”;
- (e) the latest date by which the acceptance condition must be satisfied is referred to as “**Day 60**”; and
- (f) the latest date by which all other conditions must be satisfied is referred to as “**Day 81**”.

The Code itself uses these shorthand references in certain places, although they are not defined terms.

2.6 As indicated above, the date by which the offer must become or be declared unconditional as to acceptances may, in certain circumstances, be extended beyond the 60th day following the publication of the initial offer document. In summary:

- (a) if a competing offeror announces a firm intention to make an offer, both competing offers will normally be subject to the timetable established by the publication of the later offer document (see **Rule 31.6(a)(i)** and **Note 2 on Rule 31.6**);
- (b) the offer timetable may be suspended pending a decision as to whether a Phase 2 CMA reference is to be made or Phase 2 European Commission proceedings are to be initiated. In such cases, the timetable will resume at “Day 39” on the second day following the announcement of the decision that there will be no “phase 2” reference or proceedings (see **Rule 31.6(a)(iii)** and **Note 5 on Rule 31.6**); and
- (c) the date by which the offer must become or be declared unconditional as to acceptances may be extended if the board of the offeree company either consents to the extension (**Rule 31.6(a)(ii)**) or announces material new information after “Day 39” (**Rule 31.6(a)(iv)**). In such cases, it will normally also be necessary to re-set each of “Day 39”, “Day 46” and “Day 53” of the offer timetable (see **Note 1 on Rule 31.6**).

2.7 Conversely, under **Rule 31.5**, an offeror may make a statement that the offer will not be extended beyond a specified date unless it is unconditional as to acceptances (a “**no extension statement**”), in which case the offeror will not be allowed to extend the offer beyond the stated date, except where it has reserved the right to set the statement aside in specified circumstances (and those circumstances subsequently arise) or in wholly exceptional circumstances.

(c) Proposals

(i) Introduction

2.8 A number of the amendments proposed in this PCP will have the effect of changing the way in which the offer timetable set by the Code currently operates. Broadly:

- (a) **single date for satisfaction of conditions:** there would no longer be a distinction between the date by which the acceptance condition needs to be satisfied and the date by which the other conditions to the offer need to be satisfied or waived (see further Section 7);
- (b) **acceptance condition last to be satisfied:** subject to certain exceptions, the acceptance condition would only be capable of being satisfied once all of the other conditions to the offer had been satisfied or waived (see further Section 6);

- (c) **“Day 60”**: the Code would stipulate that all of the conditions to an offer must be satisfied by no later than “Day 60”, which would be defined as the 60th day following the publication of the initial offer document or any later date set by the Panel pursuant to an extension of the offer timetable. Days 39, 46 and 53 would be set by counting back from Day 60 by, respectively, 21, 14 and seven days, as opposed to counting forwards from Day 0 (as is currently the case with Days 39 and 53). Therefore, Days 39, 46 and 53 would be automatically extended (or re-set) if Day 60 is extended. There would no longer be a “Day 81” of the offer timetable;
- (d) **timetable suspensions**: the Panel would be able to suspend the offer timetable (and therefore extend Day 60) pending the satisfaction of conditions relating to any official authorisation or regulatory clearance and not only pending a determination as to whether there is to be a “phase 2” reference to the CMA or the European Commission. A suspension would normally commence on “Day 37” and the offer timetable would normally resume on “Day 32”, following the satisfaction or waiver of the last relevant condition (see further Section 3);
- (e) **“unconditional date”**: the date specified by the offeror as the date by which all of the conditions to its offer would need to be satisfied or waived would be defined as the “unconditional date”. In the absence of the offeror making an “acceleration statement” (see paragraph (f)), the unconditional date would be Day 60 and would therefore be automatically extended if the Panel extended Day 60;
- (f) **“acceleration statement”**: an offeror could bring forward the unconditional date of its offer by making an “acceleration statement” (which would, in effect, replace the current “no extension statement”). In addition, an offeror which set an unconditional date of earlier than Day 60 in the initial offer document would be treated as having made an acceleration statement. In either case, the offeror would be required to waive (or not include) any conditions to its offer relating to an official authorisation or regulatory clearance. Further, the requirement for the board of the offeree company to announce any material new information by Day 39 and the requirement for a potential competing offeror to clarify its position by Day 53 would not apply in such circumstances;
- (g) **“acceptance condition invocation notice”**: an offeror would be required to serve an “acceptance condition invocation notice” if it intended to lapse its offer on the acceptance condition so as to give offeree company shareholders notice of its intention to do so. Therefore, an offer would no longer have “closing dates” at which

the offeror could either lapse or extend the offer if it had not become unconditional as to acceptances (see further Section 6);

- (i) ***period for which offer to remain open for acceptance***: any offer would be required to remain open until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses. In addition, other than where the offer is not subject to an acceptance condition, any offer would be required to remain open for acceptance for at least 14 days after the date on which it becomes or is declared unconditional (see further Section 7);
- (j) ***“long-stop date”***: an offeror would be required to set a “long-stop date” by which all conditions relating to an official authorisation or regulatory clearance would need to be satisfied (see further Section 4); and
- (k) ***withdrawal rights***: offeree company shareholders who accept an offer would be able to withdraw their acceptances from the outset of the offer until such time as the acceptance condition is satisfied or the offer lapses or is withdrawn (see further Section 8).

2.9 The diagram in Appendix D highlights the key differences between the current offer timetable and the offer timetable which would apply if the Code were to be amended as proposed in this PCP.

(ii) *“Day 60” and other key dates of the contractual offer timetable*

2.10 The Code Committee considers that it would be helpful for certain of the key dates of the timetable for a contractual offer to be defined in the Definitions Section of the Code and for consequential amendments to be made to certain provisions which refer to those dates, as proposed below.

2.11 In defining the key dates of the contractual offer timetable, the Code Committee considers that a distinction should be drawn between:

- (a) the latest date by which the Code stipulates that all of the conditions to the offer must be satisfied (or, if appropriate, waived) in order for the offer to succeed, i.e. either:
 - (i) the 60th day following the publication of the initial offer document; or
 - (ii) if the Panel extends that date, that later date,

which the Code Committee proposes to define as “**Day 60**”; and

- (b) the latest date by which an offeror specifies that all of the conditions to the offer must be satisfied (or, if appropriate, waived), i.e. either:
 - (i) the latest date stipulated by the Code in accordance with paragraph (a); or
 - (ii) any earlier date specified by the offeror (either in the offer document or in a subsequent announcement or document),

which the Code Committee proposes to define as the “**unconditional date**”.

- 2.12 If an offeror wishes to take advantage of the maximum period of time permitted by the Code for the satisfaction of the conditions to the offer, Day 60 and the unconditional date will be the same date. However, if an offeror foreshortens the timetable by specifying an earlier final date for the satisfaction of the conditions to the offer, the unconditional date will be a date which is earlier than Day 60.
- 2.13 If “Day 60” is defined as is proposed, the Code Committee considers that “Day 39” and “Day 53” should be defined as the dates which are, respectively, the 21st day and the seventh day prior to Day 60, as opposed to being the 39th and the 53rd day following the publication by the offeror (or, in the case of Day 53, the first offeror) of its initial offer document. Similarly, “Day 46” would be defined as the 14th day prior to Day 60.
- 2.14 In the light of the above, the Code Committee proposes to introduce a new Rule 31.1(a) which would provide that, except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60. In other words, the unconditional date specified by an offeror in its initial offer document would be required to be no later than Day 60 (which date could be extended by the Panel). The proposed new Rule 31.1(a) would, in effect, replace the first sentence of the current Rule 31.6(a).
- 2.15 The Code Committee recognises that there might be circumstances in which, for technical reasons, it is not possible for a particular condition to be satisfied prior to the acceptance condition and the new Rule 10.2 proposed in Section 7 provides that the Panel may grant an appropriate dispensation in such circumstances for the satisfaction of that particular condition (but not the other conditions).
- 2.16 Otherwise, the only circumstances in which it would be possible for an offeror to extend the unconditional date of its offer would be where the Panel extended Day 60 of the offer

timetable under the proposed new Rule 31.3. In the event that Day 60 was so extended, the unconditional date would be extended accordingly, unless the offeror made an acceleration statement.

(iii) *“Acceleration statement”*

- 2.17 As indicated above, the effect of the introduction of a requirement for an offeror which intends to lapse its offer on the acceptance condition to serve an “acceptance condition invocation notice” (see Section 6) would be that an offer would no longer have a series of “closing dates” upon which the offeror would need to decide whether to lapse the offer or extend it to a new closing date. At present, an offeror which does not wish to extend its offer beyond the next closing date may at any stage make a “no extension statement” in accordance with Rule 31.5. If offers were no longer to have closing dates but only an unconditional date, the Code Committee considers that an offeror should be able to bring forward the unconditional date by making a statement to that effect. However, it would not be correct to refer to such a statement as a “no extension statement” and the Code Committee proposes that such a statement should be defined in the Definitions Section of the Code as an **“acceleration statement”** (replacing the definition of a “no extension statement” in the current Rule 31.5(a)).
- 2.18 The Code Committee considers that there should be a minimum period of time between the date of an acceleration statement and the new unconditional date in order to give offeree company shareholders both an adequate opportunity to make an informed decision as to whether to accept the offer and sufficient time to implement that decision. The Code Committee considers that, where the unconditional date is brought forward, the new unconditional date should be set at not less than 14 days from the date of the acceleration statement. This would be consistent with the proposed notice period following an “acceptance condition invocation notice” (see Section 6).
- 2.19 In view of the proposed new requirement that all of the conditions to an offer must be satisfied by the same date, which date must be no later than Day 60, the Code Committee considers that an offeror which publishes an acceleration statement should be required to waive any outstanding conditions (whether specific or general) relating to an official authorisation or regulatory clearance. Otherwise, in the event of an official authorisation or regulatory clearance remaining outstanding on the (brought forward) unconditional date, the Panel would be placed in the invidious position of having either to permit the offer to be extended (which would be inconsistent with the terms of the acceleration statement) or to require the offer to lapse (assuming that failure to obtain the authorisation or clearance met the “material significance” requirement in Rule 13.5(a)).

2.20 In addition, the Code Committee considers that, if an offeror makes an acceleration statement in order to bring forward the unconditional date of its offer:

- (a) the requirement in Rule 31.9 (to become Rule 31.8) for the offeree company to announce any material new information by Day 39 should be disapplied, i.e. there should be no restriction on the board of the offeree company announcing any material new information at any time it wishes prior to the new unconditional date;
- (b) the requirement in Rule 2.6(d) or (e) (as appropriate) for a publicly disclosed potential competing offeror to clarify its intentions by Day 53 should also be disapplied, i.e. the potential competing offeror should not be required to clarify its intentions by any particular date prior to the new unconditional date; and
- (c) the offeror should nevertheless be required to publish any revised offer document by no later than 14 days prior to the new unconditional date, as provided for in Rule 32.1(c).

2.21 The Code Committee also considers that, where an offeror wishes to specify an unconditional date in the initial offer document which is earlier than Day 60, the offeror should normally be treated as having made an acceleration statement. The Code Committee therefore considers that an offeror should be required to consult the Panel in advance of specifying an unconditional date of earlier than Day 60 in its initial offer document. The Code Committee proposes to introduce a new Rule 31.1(b) to this effect. However, the Code Committee would not expect the Panel to treat an offeror as having made an acceleration statement where the unconditional date was set only a small number of days earlier than Day 60 for practical reasons, for example, where Day 60 would fall on a weekend or public holiday.

(iv) *Period for which the offer must remain open for acceptance*

2.22 As indicated above, Rule 31.1 currently provides that an offer must initially be open for at least 21 days following the date on which the offer document is published, i.e. the “first closing date” must be no earlier than Day 21. If, as is proposed, an offer would no longer have closing dates, the Code Committee considers that there should nonetheless be a minimum period of time for which any offer should remain open for acceptance in order to respect the requirement in General Principle 2 that offeree company shareholders must have sufficient time to enable them to reach a properly informed decision on the bid.

- 2.23 The Code Committee proposes to amend Rule 31.1, which would become Rule 31.2(a), so as to provide that an offer should remain open until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses.

(v) *Extensions to Day 60*

- 2.24 The second sentence of Rule 31.6(a) currently sets out the circumstances in which the Panel will normally consent to an offer becoming or being declared unconditional as to acceptances after the 60th day following the publication of the initial document. The Code Committee proposes that the reference in Rule 31.6(a)(iii) to the possibility of the timetable being extended pending a decision of the CMA or the European Commission as to whether there is to be a “phase 2” reference be replaced with a reference to the possibility of the offer timetable being suspended pending the satisfaction of an outstanding official authorisation or regulatory clearance (see further Section 3).

- 2.25 **Rule 31.6(b)** currently provides that any extension to Day 60 must be announced by the offeror. However, this does not reflect what typically happens in practice. For example, an offeror will not normally make an announcement when the offer timetable is extended under Rule 31.6(a)(i) on account of a competing firm offer being announced. In addition, the Panel, rather than the offeror, will make an announcement if an offer timetable is extended under Rule 31.6(a)(iii) pending a “phase 2” decision or under Rule 31.6(a)(iv) in the event that the board of the offeree company announces material new information after Day 39. The Code Committee considers that the question of whether an announcement should be made if the offer timetable is extended and, if so, by whom the announcement should be made should be determined by the Panel at the relevant time. The Code Committee therefore proposes to delete Rule 31.6(b).

- 2.26 Note 1 on Rule 31.6 currently makes clear that, where Day 60 of the offer timetable is extended, Days 39, 46 and 53 will be moved accordingly. If, as is proposed, Day 39, Day 46 and Day 53 are defined by reference to Day 60, Note 1 on Rule 31.6 will no longer be necessary and the Code Committee therefore proposes to delete it.

- 2.27 Although Rule 31.6(a)(ii) provides that the Panel will normally consent to an extension to Day 60 with the agreement of the board of the offeree company, **Note 3 on Rule 31.6** currently provides, in effect, that where competing offers have been made the Panel will not normally consent to an extension to Day 60 after Day 46, notwithstanding that one of the offerors may have obtained the consent of the board of the offeree company to such an extension. This is because extending Day 60 after Day 46 in such circumstances would circumvent **Rule 32.5**, which provides that if a competitive situation continues to exist in the

later stages of the offer period the Panel will normally require revised offers to be announced in accordance with an auction procedure.

- 2.28 The first paragraph of **Note 4 on Rule 31.6** currently provides, in effect, that if the Panel consents to an extension to Day 60 after Day 46 has passed the offeror will normally be able to revise its offer by no later than the new Day 46, provided that it is not prevented from doing so by the terms of a “no extension” or “no increase” statement. In other words, in the absence of the offeror having made such a statement, it will generally be possible for an offeror to revise its offer, notwithstanding that Day 46 has already passed, if it is able to persuade the board of the offeree company to extend Day 60. The second paragraph of Note 4 on Rule 31.6 makes clear that if the offeror and the board of the offeree company agree to extend Day 60 then the Day 53 deadline for any potential competing offeror will also be extended.
- 2.29 The Code Committee proposes to combine Note 3 on Rule 31.6 and the first paragraph of Note 4 on Rule 31.6, both of which relate to Day 46 matters, into a Note 2 on the proposed new Rule 31.3. Given that the proposed definition of Day 53 would make clear that Day 53 was the seventh day prior to Day 60, the Code Committee considers that the second paragraph of Note 4 on Rule 31.6 would be unnecessary and proposes to delete it.
- 2.30 In addition, the Code Committee proposes to delete **Note 5 on Rule 32.1** on the basis that it is duplicative of Note 4 on Rule 31.6.

(vi) *Amendments to the Code*

- 2.31 In the light of the above, the Code Committee proposes make the amendments described below.
- 2.32 The Code Committee proposes to introduce the following new definitions into the Definitions Section of the Code:

“Acceleration statement

An acceleration statement is a statement in which an offeror brings forward the latest date by which all of the conditions to the offer must be satisfied or waived.

...

Day 14

Day 14 means the 14th day following the date on which the initial offer document is published (see Rule 25.1(a)).

Day 21

Day 21 means the 21st day following the date on which the initial offer document is published (see Rule 31.2).

Day 39

Day 39 means the 21st day prior to Day 60 (see Rule 31.8).

Day 46

Day 46 means the 14th day prior to Day 60 (see Rule 32.1(c)).

Day 53

Day 53 means the seventh day prior to Day 60 (see Rules 2.6(d) and (e)).

Day 60

Day 60 means the 60th day following the publication of the initial offer document or such later date as is set pursuant to Rule 31.3.

...

Unconditional date

The unconditional date is Day 60 or any earlier date specified by an offeror as being the latest date by which all of the conditions to the offer must be satisfied or waived.”.

- 2.33 The Code Committee proposes to introduce a new Rule 31.1 (which would, in effect, replace the first sentence of Rule 31.6(a)) and to amend the current Rule 31.1 (which would become the new Rule 31.2(a)), as follows:

“31.1 DAY 60 AND THE UNCONDITIONAL DATE

(a) Except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60.

(b) An offeror which wishes to specify an unconditional date in the initial offer document which is earlier than Day 60 must consult the Panel in advance and will normally be treated as having made an acceleration statement.

31.42 FIRST CLOSING DATE PERIOD FOR WHICH THE OFFER MUST REMAIN OPEN FOR ACCEPTANCE

(a) ~~An offer must initially be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses for at least 21 days following the date on which the offer document is published.~~

- 2.34 The Code Committee proposes to introduce a new Rule 31.3 and Notes 1 and 2 thereon, as follows:

“31.3 EXTENSIONS TO DAY 60

The Panel will normally only extend Day 60 beyond the 60th day following the publication of the initial offer document:

- (a) if a competing firm offer has been announced (see Note 1); or**
- (b) if the board of the offeree company consents to an extension; or**
- (c) as provided for in Rule 31.4 (Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding); or**
- (d) as provided for in Rule 31.8 (Offeree company announcements after Day 39); or**
- (e) if the offeror’s receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.1.**

NOTES ON RULE 31.3

1. Timetable for competing firm offers

If a competing firm offer has been announced, Day 60 for both offerors will normally be set by reference to the publication of the later offer document. In addition, the Panel may extend Day 60 to allow for any auction procedure under Rule 32.5. See also the Note on Rule 31.4.

2. Day 46

If the Panel extends Day 60 after Day 46 has passed, the offeror will normally be able to revise its offer by no later than the new Day 46, provided that it is not prevented from doing so by the terms of an acceleration statement or a no increase statement.

The Panel will not normally extend Day 60 under Rule 31.3(b) after Day 46 has passed where competing offers have been made.”.

2.35 As indicated above:

- (a) the new Rule 31.3 would, in effect, replace the second sentence of the current Rule 31.6(a);
- (b) the new Note 1 on Rule 31.3 would replace the current Note 2 on Rule 31.6;
- (c) the new Note 2 on Rule 31.3 would replace the current Notes 3 and 4 (first paragraph) on Rule 31.6; and
- (d) the current Rule 31.6(b), Note 1 on Rule 31.6, Note 4 on Rule 31.6 (second paragraph) and Note 5 on Rule 32.1 would be deleted.

- 2.36 The Code Committee proposes to amend Rules 31.5, as follows (and to make minor amendments to the Notes on Rule 31.5, as set out in Appendix A):

“31.5 NO EXTENSION ACCELERATION STATEMENTS

~~(a) A “no extension statement” is a statement that an offer will not be extended beyond a specified date unless it is unconditional as to acceptances.~~

(a) Where an offeror makes an acceleration statement, the new unconditional date must be not less than 14 days from the date on which the acceleration statement is made.

(b) An acceleration statement must state that the offeror has waived any and all unsatisfied conditions relating to any official authorisation or regulatory clearance.

(c) If an offeror makes an acceleration statement:

(i) Rule 31.8(a) will not apply and there will therefore be no restriction on the date by which the board of the offeree company may announce any material new information; and

(ii) Rules 2.6(d) and (e) will not apply and there will therefore be no requirement for a potential competing offeror to clarify its position by a particular date.

~~(bd) If an offeror (or its directors, officials or advisers) makes a no extension an acceleration statement, and that statement is not withdrawn immediately if incorrect, the offeror will not be allowed subsequently to extend its offer beyond the stated date set the statement aside, except:~~

~~(i) where the right to do so in certain circumstances is specifically reserved at the time the no extension acceleration statement is made and those circumstances subsequently arise; or~~

~~(ii) in wholly exceptional circumstances.~~

~~(ce) If an offeror wishes to include a reservation to a no extension an acceleration statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.~~

(f) If any of an offeror’s directors, officials or advisers makes a statement that a new unconditional date will be set, and that statement is not withdrawn immediately if incorrect, the offeror will be required to make an acceleration statement.

~~(d) The provisions of Rule 31.4 will apply in any event.”.~~

- 2.37 Rule 32.1(c) would be amended so as to provide that the offeror would be required to publish any revised offer document by no later than 14 days prior to the unconditional date set by an acceleration statement (as opposed to 14 days prior to Day 60), as set out in Appendix A.

2.38 In addition, the Code Committee proposes to delete the current Note 2 on Rule 31.5 and Note 2 on Rule 32.2 in relation to “wholly exceptional circumstances” on the basis that they are duplicative of the current Rule 31.5(b)(ii) and Rule 32.2(b)(ii).

2.39 Consequential amendments would be made to the following provisions:

- (a) Rules 2.6(d) and (e) (*Timing following a possible offer announcement*);
- (b) Rule 25.1(a) (*The offeree board circular*);
- (c) Rule 31.9 (to become Rule 31.8) (*Offeree company announcements after Day 39*);
- (d) Note 3 on Rule 32.1 (*When revision is not permissible*);
- (e) Note 4 (to become Note 3) on Rule 32.2 (*Rule 31.9 announcements*);
- (f) Note 1(a) on Rules 35.1 and 35.2 (*When consent may be given*); and
- (g) the definition of “Day 46” in the Definitions and Interpretation Section of Appendix 8 (*Auction procedure for the resolution of competitive situations*),

as set out in Appendix A.

2.40 In addition, subject to certain minor amendments, the current Rules 31.6(c) and (d) and Note 6 on Rule 31.6 would, in effect, become the new Rules 31.7(a) and (b) and the Note on Rule 31.7, as set out in Appendix A.

Q1 Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?

3. Suspending the offer timetable for official authorisations and regulatory clearances

(a) Introduction

- 3.1 Section 3 proposes that an offeror or the offeree company should be able to request a suspension of the offer timetable if one or more conditions relating to an official authorisation or regulatory clearance have not been satisfied prior to Day 39.
- 3.2 The proposals in Section 3 are not relevant where an offer is implemented as a scheme of arrangement since the relevant timetable rules do not apply to a scheme.

(b) Background

(i) Timetable suspensions pending a decision of the CMA or the European Commission

- 3.3 **Rule 31.6(a)** provides that an offer may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day on which the offer document is published. Under **Rule 31.6(a)(iii)**, the Panel will normally consent to an extension to this final day for the acceptance condition to be satisfied (effectively suspending the offer timetable):

“if there is a significant delay in the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings”.

- 3.4 In addition, **Note 5 on Rule 31.6** provides that:

“In the case of an extension in accordance with Rule 31.6(a)(iii), the Panel will normally extend “Day 39” to the second day following the announcement of the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings.”.

- 3.5 In practice:

- (a) the offeree company may request a suspension of the offer timetable if it does not wish to announce any material new information in accordance with **Rule 31.9** at a time when the offer might lapse on the mandatory term required under **Rule 12.1(a)** or **Rule 12.1(b)** (see Section 5);
- (b) an offeror may request a suspension of the offer timetable if it does not wish to make a final revision to its offer in accordance with **Rule 32.1(c)** before it has clarity as to its position as regards the CMA or the European Commission; and

- (c) the Panel will agree to a request for a suspension of the offer timetable on this basis by either party (even if it is opposed by the other party).

3.6 If the offer timetable is suspended and the decision is that there will not be a Phase 2 CMA reference or Phase 2 European Commission proceedings then:

- (a) the new Day 39 (i.e. the latest date on which the board of the offeree company may publish any material new information) will become the date which is the second day following the announcement of the decision;
- (b) the new Day 46 (i.e. the final day on which the offeror may make a revised offer) will become the date which is seven days after the new Day 39;
- (c) if relevant, the new Day 53 (i.e. the final day by which any publicly disclosed potential competing offeror must clarify its intentions under **Rule 2.6(d) or (e)**) will be the date which is 14 days after the new Day 39; and
- (d) the new Day 60 will become the date which is 21 days after the new Day 39.

A timetable suspension under Rule 31.6(a)(iii) therefore needs to be sought by the offeree company or an offeror prior to Day 39. Where there are two or more competing offerors and the offer timetable is suspended, the timetable will normally be suspended for all the offerors.

3.7 If the offer timetable is suspended and the decision is that a Phase 2 CMA reference will be made or that Phase 2 European Commission proceedings will be initiated then the offer will lapse in accordance with the mandatory term required under, respectively, Rule 12.1(a) or Rule 12.1(b).

(ii) *Timetable extensions pending other official authorisations or regulatory clearances*

3.8 The Code does not allow for the offer timetable to be suspended by the Panel in a similar way where any other official authorisation or regulatory clearance which is the subject of a condition to the offer remains outstanding in the later stages of the offer period and more time is needed for the satisfaction of that condition. In these circumstances, and assuming that the offeree company and the offeror do not both agree to an extension to Day 60 under **Rule 31.6(a)(ii)**, the offeror may seek an extension to Day 81 after the offer has become or been declared unconditional as to acceptances. Such an extension would be made under **Rule 31.7**, which provides that:

“Except with the consent of the Panel, all conditions must be fulfilled or the offer must lapse within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later. The Panel’s consent will normally only be granted if the outstanding condition involves a material official authorisation or regulatory clearance relating to the offer and it had not been possible to obtain an extension under Rule 31.6.”.

- 3.9 However, the Panel generally considers an extension to Day 81 to be undesirable as accepting shareholders will be “locked in” to the offer and unable to deal in their shares (except in assented form) during the period of any extension. This is because **Rule 34.1** provides that the ability for accepting shareholders to withdraw their acceptance ceases upon the offer becoming or being declared unconditional as to acceptances (see Section 8). Accordingly, the Executive’s practice is to encourage an offeror which may require a timetable extension in order to satisfy one or more conditions relating to an official authorisation or regulatory clearance to seek an extension to Day 60 with offeree company consent, as opposed to an extension to Day 81. However, if an offer becomes unconditional as to acceptances at an early stage, or if the offeree company is not willing to agree to an extension to Day 60, an extension to Day 81 may be unavoidable. On occasion, the Executive has had no practical option but to consent to an extension to Day 81 which has lasted for a number of months.

(iii) Where it is impossible to obtain a material official authorisation or regulatory clearance within the offer timetable

- 3.10 If it is known from the outset that it is likely to prove impossible to obtain a material official authorisation or regulatory clearance within the offer timetable provided by the Code, an offeror may, subject to consultation with the Panel, announce the offer subject to a pre-condition relating to that authorisation or clearance, in accordance with **Rule 13.3**. In this case, the offer document will be published, and thus the offer timetable will commence, only once the pre-conditions are either satisfied or waived (see also Section 11(b)).

- 3.11 Separately, **Note 1(b) on Rules 35.1 and 35.2** provides that the Panel may grant a dispensation from the prohibition on an offeror making a new offer within 12 months of the lapsing of the previous offer if it proved impossible to obtain a material official authorisation or regulatory clearance relating to the offer within the offer timetable. However, the Code Committee is not aware of this provision having been used in practice. This is because, if an offeror is aware that an authorisation or clearance is likely to prove impossible to obtain within the normal offer timetable, it will normally seek either to announce a pre-conditional contractual offer or to implement the offer as a scheme of arrangement. In addition, where an offeror has not proceeded in either of these manners but it has nonetheless proved

impossible to obtain the authorisation or clearance within the normal offer timetable, the Panel has normally consented to an extension to Day 81 under Rule 31.7, rather than requiring an offer which has become or been declared unconditional as to acceptances to lapse and then allowing the offeror to make a new offer if the authorisation or clearance is obtained.

- 3.12 In addition, **Note 1(c) on Rules 35.1 and 35.2** disapplies the restrictions imposed on a lapsed offeror under **Rules 35.1(d) and (e)** where the offer lapsed because of the failure to obtain a material official authorisation or regulatory clearance within the usual Code timetable.

(c) *Suspension of the offer timetable if an official authorisation or regulatory clearance remains outstanding*

(i) *Consistent approach to official authorisations and regulatory clearances*

- 3.13 The timetable rules of the Code were introduced at a time when the majority of offerors for UK public companies were themselves UK companies and a competition clearance by the CMA (or its predecessors) or the European Commission was the principal, and sometimes only, regulatory issue faced by such offerors. In recent years, however:

- (a) the businesses of UK public companies have become increasingly international;
- (b) the number of overseas offerors for UK public companies has increased; and
- (c) there has been a proliferation of official authorisations and regulatory clearances required from various regulatory authorities around the world, such that any large and/or cross-border offer is likely to be subject to a number of conditions relating to such authorisations or clearances.

- 3.14 The Code Committee considers that the Code should apply consistent treatment to any official authorisation or regulatory clearance to which an offer is subject, i.e. the Code should not apply different treatment to the CMA and the European Commission as compared with other regulatory authorities from which an official authorisation or regulatory clearance is required.

- 3.15 It is therefore proposed that, if one or more conditions to the offer relating to an official authorisation or regulatory clearance (i.e. not only a condition relating to there being no Phase 2 CMA reference or Phase 2 European Commission proceedings) has not been

satisfied or waived prior to Day 39, the Panel should be able to suspend the offer timetable either:

- (a) at the joint request of the offeror and the offeree company; or
- (b) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to an official authorisation or regulatory clearance which the Panel is satisfied is a “material” authorisation or clearance (as to which, see further below).

3.16 The Code Committee considers that any request for a timetable suspension should be made in good time and by no later than the second day prior to Day 39.

3.17 In terms of the materiality of an official authorisation or regulatory clearance which remains outstanding at the time of a request to suspend the offer timetable:

- (a) where the offeror and the offeree company jointly request a suspension of the offer timetable, the Code Committee considers that it should not be necessary for the Panel to determine whether the outstanding authorisation or clearance is a “material official authorisation or regulatory clearance” (as proposed to be defined below);
- (b) where the offeree company requests a suspension of the offer timetable on the basis that one or more outstanding conditions relates to a “material official authorisation or regulatory clearance”, but the offeror opposes the suspension, the Code Committee would not expect the offeror to seek to argue that any such authorisation or clearance was not “material”. If the offeror wished to avoid a timetable suspension, the Code Committee would expect the offeror instead to waive the condition in question (in which case a timetable suspension would no longer be relevant). This is on the basis that the consequence of the offeror successfully arguing that the authorisation or clearance is not material would be that the offeror would not, in any circumstances, be able to invoke the condition so as to cause the offer to lapse in accordance with the “material significance” requirement in Rule 13.5(a) (see paragraph 3.24); and
- (c) where an offeror requests a suspension of the offer timetable on the basis that one or more outstanding conditions relates to a “material official authorisation or regulatory clearance”, but the offeree company opposes the suspension, the Code Committee considers that it would be sufficient in the first instance for the offeror to establish that at least one outstanding authorisation or clearance was “material”, i.e. the Panel should not at that time be required to determine the materiality of each of

the outstanding authorisations and clearances. If the condition relating to the authorisation or clearance which the Panel had determined to be “material” was subsequently either satisfied or waived, it would then be open to the offeror to satisfy the Panel that at least one other “material official authorisation or regulatory clearance” remained outstanding, i.e. that the offer timetable should not resume but rather that the suspension should continue.

- 3.18 If on the “long-stop date” (see Section 4) the offeror sought to lapse its offer on the basis that a regulatory condition remained outstanding, the question as to whether the authorisation or clearance in question was a “material official authorisation or regulatory clearance” would need to be addressed at that time in the light of the up-to-date facts.
- 3.19 The Code Committee considers that this proposal would enable the offer timetable to accommodate better than at present the increased number of official authorisations and regulatory clearances required in relation to an offer and the length of time required to obtain them. In particular, in keeping with the rationale behind Rule 31.6(a)(iii) and Note 5 on Rule 31.6, an offeree company would not be required to publish its “Day 39” information, and an offeror would not be required to make its final offer, in circumstances where a material official authorisation or regulatory clearance remained outstanding and the offer might lapse if the relevant condition was not satisfied.
- 3.20 A consequence of extending the circumstances in which the offer timetable could be suspended might be to make certain offers continue for a longer period of time than might otherwise have been the case. For example, it would become possible under this proposal for the offer timetable to be suspended not only pending the decision as to whether a regulatory authority was to undertake a “phase 2” investigation but also for the duration of the investigation if a reference was made (and potentially also whilst any remedies were implemented). However, the Code Committee does not consider that this would result in an overall increase in the level of “siege” under which offeree companies could be put by offerors, given that it has for many years been possible under Rule 13.3 for an offeror to announce an offer subject to one or more pre-conditions relating to a material official authorisation or regulatory clearance.
- 3.21 The Code Committee notes that, in the light of the amendments proposed in Section 2, if the offer timetable were to be suspended, and Day 60 extended, pending the satisfaction or waiver of a condition relating to an official authorisation or regulatory clearance, the unconditional date of the offer would also normally be extended. However, an offeror could, at any time, either:

- (a) waive any outstanding conditions relating to an official authorisation or regulatory clearance in order to resume the offer timetable (see paragraphs 3.36 to 3.39); or
- (b) if the acceptance condition is capable of being satisfied, waive all of the other outstanding conditions and declare its offer unconditional (see Section 7).

(ii) *Definition of a “material official authorisation or regulatory clearance”*

3.22 As indicated above, the Code Committee considers that the Panel should normally only consent to a unilateral request from the offeror or the offeree company to suspend the offer timetable if an official authorisation or regulatory clearance which remains outstanding as at the date which is two days prior to Day 39 is determined by the Panel to be a “material” authorisation or clearance.

3.23 Under the current **Rule 13.3(c)**, an offer may be announced subject to a pre-condition if that pre-condition relates to a “material” official authorisation or regulatory clearance and either:

- (a) the offer is recommended by the board of the offeree company; or
- (b) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable.

3.24 Although the term “material” is not defined in the Code, the Code Committee understands that the Executive will consider an official authorisation or regulatory clearance to be “material” for the purposes of Rule 13.3(c) (and thus eligible to be the subject of a pre-condition) if the offeror satisfies the Executive that failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer, i.e. if it is possible that the (separate) “material significance” requirement in **Rule 13.5(a)** might be satisfied if the offeror sought to invoke the pre-condition so as to cause the offer not to proceed in the event that the authorisation or clearance was not obtained. Put the other way round, the Executive will not regard an authorisation or clearance as being “material” for the purposes of Rule 13.3(c) if the failure to obtain the authorisation or clearance could not, in any circumstances, satisfy the “material significance” requirement in Rule 13.5(a).

3.25 The Code Committee agrees with the Executive’s approach to determining whether an official authorisation or regulatory clearance is “material” for the purposes of Rule 13.3(c) and proposes to codify this test in a new definition of “material official authorisation or regulatory clearance”, as set out below.

- 3.26 The Code Committee proposes that it should be made clear in a Note on the proposed new definition that a determination by the Panel that an official authorisation or regulatory clearance is “material” should not be taken as an indication that, if the offeror fails to obtain the authorisation or clearance and then seeks to invoke the relevant condition to the offer, the Panel will agree that the “material significance” requirement in Rule 13.5(a) has been satisfied. As is currently the case, the question of whether circumstances are of material significance to the offeror in the context of the offer for the purposes of Rule 13.5(a) will need to be determined by reference to the facts of the case at the time that the relevant circumstances arise.

(iii) *Amendments to the Code*

- 3.27 In the light of the above, the Code Committee proposes:

- (a) to introduce new Rule 31.4(a), as follows:

“31.4 SUSPENSION OF OFFER TIMETABLE IF AN OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE REMAINS OUTSTANDING

(a) If one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5.00 pm on the second day prior to Day 39, the Panel will normally suspend the offer timetable:

(i) at the joint request of the offeror and the offeree company; or

(ii) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to a material official authorisation or regulatory clearance.”; and

- (b) to introduce a new definition of “material official authorisation or regulatory clearance” into the Definitions Section, as follows:

“Material official authorisation or regulatory clearance

An official authorisation or regulatory clearance is a material official authorisation or regulatory clearance if the Panel is satisfied that the failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

NOTE ON MATERIAL OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE

A determination by the Panel that an official authorisation or regulatory clearance is a material official authorisation or regulatory clearance should not be taken as an indication that the Panel would agree that the failure to obtain the authorisation or clearance would result in circumstances of material significance to the offeror in the context of the offer for the purposes of Rule 13.5(a).”.

- 3.28 As indicated in Section 2, the Code Committee proposes that the ability for the Panel to extend Day 60 (by suspending the offer timetable) in the circumstances set out in the proposed new Rule 31.4(a) should be set out in a new Rule 31.3(c) (which would, in effect, replace the current Rule 31.6(a)(iii)), as follows:

“31.3 EXTENSIONS TO DAY 60

The Panel will normally only extend Day 60 beyond the 60th day following the publication of the initial offer document:

...

(c) as provided for in Rule 31.4 (Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding); or”.

- 3.29 In addition, the Code Committee proposes that Notes 1(b) and (c) on Rules 35.1 and 35.2, as summarised in paragraphs 3.11 and 3.12 above, should be deleted. This is because there should no longer be circumstances in which it would be impossible to obtain a material official authorisation or regulatory clearance within the Code timetable, given that the Panel would normally grant an offeror’s request for a suspension of the offer timetable under the proposed new Rule 31.4.

- Q2 Should the Panel have the ability to suspend an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39, as proposed?**

(d) Subsequent extensions or suspensions of the offer timetable

- 3.30 The Code Committee recognises that there may be circumstances in which neither the offeror nor the offeree company requests a suspension of the offer timetable on or before the date which is two days prior to Day 39 (for example, because at that time all conditions relating to an official authorisation or regulatory clearance are expected to be satisfied before Day 60) but it subsequently becomes clear that more time is required.
- 3.31 The Code Committee considers that the Panel should normally only suspend the offer timetable or otherwise extend Day 60 in relation to a material official authorisation or regulatory clearance after the date which is two days prior to Day 39 with the agreement of both the offeror and the offeree company. This would be consistent with the current Rule 31.6(a)(ii) (proposed to become Rule 31.3(b)), pursuant to which the Panel will normally extend Day 60 if the board of the offeree company consents to the extension.
- 3.32 The Code Committee recognises, however, that there could be exceptional circumstances in which the Panel might accede to a unilateral request by the offeror to suspend the offer

timetable, or otherwise extend Day 60, after the date which is two days prior to Day 39. This might be the case where, for example, in the later stages of the offer, a regulatory authority determined for the first time, and contrary to the expectations of the parties, that the offeror required a material official authorisation or regulatory clearance.

(e) *Ending a timetable suspension*

(i) Introduction

3.33 The Code Committee considers that a suspension of an offer timetable under the proposed new Rule 31.4(a) could be brought to an end in one of the following three ways:

- (a) by the automatic resumption of the offer timetable following the satisfaction or waiver of the last remaining condition relating to a relevant official authorisation or regulatory clearance. In such a case, the date on which the offer timetable would resume would be 28 days prior to the new Day 60, i.e. the new “Day 32”;
- (b) by the offeror making an “acceleration statement”. In such a case, the statement would need to:
 - (i) waive any unsatisfied conditions relating to an official authorisation or regulatory clearance; and
 - (ii) set a new unconditional date of not less than 14 and not more than 27 days from the date of the statement; or
- (c) by the offeror agreeing with the offeree company that the offer timetable should be resumed. In such a case, the offer timetable would normally resume on the 28th day prior to the new Day 60.

3.34 These three ways of ending a timetable suspension are discussed in more detail in the following paragraphs.

3.35 The Code Committee considers that, whenever an offer timetable resumes as described in paragraph 3.33(a) or (c) above, the offeror should be required to make an immediate announcement of the new Day 60. The proposed new Rule 31.4(d) to this effect is set out in Appendix A.

(ii) *Automatic resumption of the offer timetable*

- 3.36 In the normal course, a suspended offer timetable would resume automatically following the satisfaction, or waiver by the offeror, of the last remaining condition relating to a relevant official authorisation or regulatory clearance. This would be similar to the current position where an offer timetable which is suspended under Rule 31.6(a)(iii) resumes following the announcement of the decision that there will be no Phase 2 CMA reference or Phase 2 European Commission proceedings.
- 3.37 As mentioned above, Note 5 on Rule 31.6 currently provides that the date of such an announcement will, in effect, become the new “Day 37” of the offer timetable. However, if, as proposed, it becomes possible to suspend an offer timetable in relation to official authorisations or regulatory clearances more generally (and not only in relation to a decision as to whether there is to be a “phase 2” investigation by the CMA or the European Commission), offer timetable suspensions are likely to be for longer (and, in certain cases, less predictable) periods of time than is currently the case.
- 3.38 In view of this, the Code Committee considers that a requirement for the offer timetable to resume on “Day 37” might not provide the offeree company with sufficient time to prepare for the announcement of any material new information by the re-set Day 39. The Code Committee therefore considers that, following the end of an offer timetable suspension, the offeree company should have a period of seven days in which to prepare for the announcement of any material new information on Day 39, i.e. the offer timetable should resume on “Day 32”. The date on which the last condition relating to a relevant official authorisation or regulatory clearance was satisfied or waived would therefore become the 28th day prior to the new Day 60 and the new Days 39, 46, and 53 would be set by reference to the new Day 60.
- 3.39 The Code Committee therefore proposes to introduce a new Rule 31.4(b) (which would, in effect, replace the current Note 5 on Rule 31.6), as follows:

“(b) A suspended offer timetable will resume on the date on which the last condition relating to a relevant official authorisation or regulatory clearance is satisfied or waived, which will normally become the 28th day prior to Day 60.”

- Q3 Should an offer timetable which has been suspended under the proposed new Rule 31.4(a) normally resume on the 28th day prior to Day 60 when the last relevant condition is satisfied or waived?**

(iii) *Acceleration statement*

- 3.40 As an alternative to a suspended offer timetable resuming automatically as described above, the Code Committee considers that an offeror should be able to bring a timetable suspension to an end by making an “acceleration statement”, which would have the effect of setting a new unconditional date of not less than 14 and not more than 27 days from the date of that statement. As proposed in Section 2, where an offeror makes an acceleration statement it will be required at the same time to waive any outstanding conditions relating to an official authorisation or regulatory clearance and, in addition, the requirements which would otherwise apply to an offeree company on Day 39 and to a potential competing offeror on Day 53 will be disapplied.
- 3.41 The Code Committee notes that an offeror which wanted to end a timetable suspension but which did not wish to see the requirements which apply on Day 39 and Day 53 disapplied could simply waive any outstanding conditions relating to an official authorisation or regulatory clearance without making acceleration statement and so put itself into the circumstances described in the proposed new Rule 31.4(b).
- 3.42 Under **Rule 31.5(b)(i)**, an offeror is currently allowed to extend its offer beyond the date stated in a “no extension statement” where it specifically reserves the right to do so in certain circumstances which are specified at the time the statement is made and those circumstances subsequently arise. The Code Committee considers that an “acceleration statement” made by an offeror after an offer timetable has been suspended under the proposed new Rule 31.4(a) should similarly be permitted to be subject to reservations specifying the circumstances in which the offeror may set aside that statement. If those circumstances subsequently arise (or if the Panel determines that “wholly exceptional circumstances” have arisen – see **Rule 31.5(b)(ii)**), and if the acceleration statement is set aside, the Code Committee considers that Day 60 should normally be deemed to be the 28th day following the date of the statement (unless that date is extended as a result of the announcement of a competing offer, in which case, in accordance with **Note 2 on Rule 31.6**, the offer timetable for both offerors would be re-set by reference to the date of the publication of the competing offeror’s offer document).

(iv) *Offeree company consent*

- 3.43 Thirdly, the Code Committee considers that an offeror should be able to resume a suspended offer timetable without being required to waive any unsatisfied conditions relating to an official authorisation or regulatory clearance, provided that the offeree

company consents to this. In such circumstances, the Code Committee considers that the offer timetable should normally resume on the 28th day prior to the new Day 60.

- 3.44 The Code Committee proposes that this should be reflected in a new Rule 31.4(c), as follows:

“(c) With the consent of the offeree company, a suspended offer timetable may be resumed without the offeror being required to waive any unsatisfied condition relating to an official authorisation or regulatory clearance, in which case the offer timetable will normally resume on the 28th day prior to Day 60.”.

- Q4 Do you have any comments on the proposals in relation to a suspended offer timetable resuming with the consent of the offeree company?**

(f) Competitive situations

- 3.45 The Code Committee considers that, where there are two or more competing offers and the offer timetable is suspended following a request by one of the offerors or the offeree company under the proposed new Rule 31.4(a):

- (a) the offer timetable should normally be suspended for each of the offerors; and
- (b) the offer timetable for all of the offerors should normally be resumed when the last offeror’s suspension ends in accordance with the proposed new Rule 31.4(b) or (c).

- 3.46 The Code Committee notes, however, that where the offer timetable is suspended in a competitive situation an offeror which wishes to seek to complete its offer while the suspension remains ongoing will nevertheless be able to set an earlier unconditional date by making an acceleration statement.

- 3.47 In addition, the Code Committee notes that, where the offer timetable is suspended, there would be no obligation for an offeror to extend the long-stop date of its offer (see Section 4) to the date of any later long-stop date set by the competing offeror.

- 3.48 In the light of the above, the Code Committee proposes to introduce a Note on the proposed new Rule 31.4, as follows:

“Competing offers

If there are two or more competing offers and the offer timetable is suspended under Rule 31.4(a), the offer timetable will normally be suspended for all the offerors and will normally only resume when it is resumed by the last offeror in accordance with Rule 31.4(b) or (c). Alternatively, an offeror may bring forward the unconditional date of its offer by making an acceleration statement.”.

Q5 Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?

(g) Pre-conditional offers

3.49 The Code Committee recognises that a number of the issues which give rise to the proposals in this Section 3 can currently be addressed if an offeror announces an offer subject to one or more pre-conditions relating to a material official authorisation or regulatory clearance under Rule 13.3 and formally makes its offer only once those pre-conditions have been satisfied or waived.

3.50 The Code Committee does not consider that an offeror should be required to obtain all material official authorisations and regulatory clearances before formally making its offer, as this would result in an unnecessary extension to the total length of the offer timetable in a large proportion of offers (i.e. where the relevant authorisations and clearances can be obtained within the standard offer timetable).

3.51 Certain offerors might nonetheless continue to prefer to announce a pre-conditional offer under Rule 13.3. This might be the case where, for example:

- (a) a securities exchange offeror does not wish to publish an offer document and prospectus and then be on risk of having to publish a supplementary prospectus throughout the period during which it is seeking to obtain a material official authorisation or regulatory clearance; or
- (b) the expected timetable faced by the offeror for receipt of a material official authorisation or regulatory clearance is unusually long and the offeror wishes to seek the Panel's consent to make its offer subject to a financing pre-condition in accordance with **Rule 13.4**.

3.52 The Code Committee therefore considers that an offeror should continue to be able to choose to announce an offer subject to such pre-conditions if the proposed amendments are adopted. The Code Committee is, however, proposing to make certain amendments to Rule 13.3, as discussed in Section 5(e).

Q6 Should an offeror continue to be able to announce an offer subject to pre-conditions in accordance with Rules 13.3 and 13.4?

4. Long-stop dates for contractual offers and requirement to take necessary procedural steps in relation to a scheme of arrangement

(a) Introduction

4.1 Section 4 proposes that:

- (a) an offeror should be required to set a “long-stop date” for a contractual offer similar to the long-stop date typically included in a scheme of arrangement; and
- (b) where an offer is being implemented as a scheme of arrangement, the Code should require the offeror, once all relevant conditions have been satisfied or waived, to take the procedural steps necessary for the scheme to become effective.

(b) Long-stop dates for contractual offers

(i) Background

4.2 The Code Committee recognises that, if it were to become possible for a contractual offer timetable to be suspended pending the satisfaction or waiver of one or more conditions relating to an official authorisation or regulatory clearance, as proposed in Section 3, an offeror might be concerned at the prospect of an offer timetable being, in effect, open-ended and incapable of being brought to an end.

4.3 This could be the case if, for example, following a request for a suspension of the offer timetable:

- (a) there was a significant delay in the expected timetable for the obtaining of an official authorisation or regulatory clearance and no clear deadline for the regulatory authority to make its decision (or no practical way for the offeror to persuade the regulatory authority to make a decision); and
- (b) the offeror was unable or unwilling to waive the relevant condition as it would be required to do under the proposed new Rule 31.5 in order to make an acceleration statement and bring forward the unconditional date.

4.4 In addition, an offeror might have secured funding for its offer only for a specified period, which might be shorter than an unexpectedly long timetable suspension.

(ii) *Requirement to include a long-stop date*

4.5 The Code Committee considers that an offeror's concerns with regard to an unexpectedly long suspension of the offer timetable would be addressed if the offeror was required to set a "long-stop date" for its offer. This would be the latest date by which, in the event of a suspension of the offer timetable:

- (a) the acceptance condition would be required to be satisfied; and
- (b) all conditions relating to an official authorisation or regulatory clearance would be required to be either satisfied or waived.

If, as at the long-stop date of a conditional offer, the offeror had received sufficient acceptances to satisfy the acceptance condition but a condition relating to an official authorisation or regulatory clearance had not been satisfied or waived, the offeror would normally be able to lapse its offer, subject to the consent of the Panel, as described below.

4.6 Similarly, the Code Committee considers that an offeror which announces a pre-conditional offer should be required to include a long-stop date, i.e. a latest date by which all pre-conditions relating to an official authorisation or regulatory clearance would be required to be either satisfied or waived. If, as at the long-stop date, a pre-condition relating to an official authorisation or regulatory clearance had not been satisfied or waived, the offeror would normally be able to withdraw and not proceed with the offer, subject to the consent of the Panel, as described below.

4.7 The Code Committee also considers that the requirement for a long-stop date would be consistent with the requirement of General Principle 6 that "*An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities*".

(iii) *Timing of a long-stop date*

4.8 Where an offer is recommended, the Code Committee considers that the offeror and the offeree company should be free to agree the long-stop date between themselves. This would be consistent with the way in which an offeror is currently able to agree with the offeree company a long-stop date in relation to a scheme of arrangement (i.e. a date stated in the scheme circular to be the latest date by which the scheme must become effective and included as such in the terms of the scheme).

- 4.9 In the case of a unilateral offer, the Code Committee considers that the offeror should be required to consult the Panel and that the long-stop date should be required to be no earlier than the date by which the offeror reasonably expects the condition or pre-condition relating to the “slowest” material official authorisation or regulatory clearance to be satisfied. As regards the offeror’s reasonable expectations, the Code Committee considers that, if the offeror reasonably expects that the offer will not be subject to, for example, a Phase 2 CMA reference (or an equivalent reference or process), it should be permissible for the offeror to set a long-stop date which would be shorter than any Phase 2 CMA reference (or equivalent reference or process) which was (unexpectedly) initiated.

(iv) *Lapsing an offer on the acceptance condition on a long-stop date*

- 4.10 In the case of a conditional (as opposed to a pre-conditional) offer, the Code Committee considers that, the offeror would, in effect, be putting offeree company shareholders on notice that, in the event that the offer timetable is suspended, it intends to lapse the offer if the acceptance condition is not satisfied by the long-stop date. Accordingly, the Code Committee considers that the offer should be required to lapse on the long-stop date if sufficient acceptances have not been received so as to enable the acceptance condition to be satisfied (unless the offeror and the offeree company agree to extend the long-stop date).

- 4.11 If, however, the offeror has received sufficient acceptances as at the long-stop date to satisfy the acceptance condition, the offeror would need either to obtain the Panel’s consent to lapse the offer on account of a condition relating to an outstanding official authorisation or regulatory clearance (see below) or, in the absence of receiving such consent, to waive any outstanding conditions and declare the offer unconditional.

(v) *Outstanding authorisation or clearance to be a “material official authorisation or regulatory clearance”*

- 4.12 The Code Committee considers that, where the offeror has received sufficient acceptances of a conditional offer to satisfy the acceptance condition but a condition relating to an official authorisation or regulatory clearance remains outstanding, the offeror should be permitted to lapse the offer on the long-stop date only if the Panel so consents. Similarly, if a pre-condition relating to an official authorisation or regulatory clearance remains outstanding, the offeror should be permitted to withdraw and not proceed with the offer on the long-stop date only if the Panel so consents.

- 4.13 In considering whether to give its consent, the first issue which the Panel will need to address is whether, as at the long-stop date, the failure to obtain the outstanding official authorisation or regulatory clearance could give rise to circumstances of material significance to the offeror in the context of the offer. In other words, the Panel would need to be satisfied that, at that time, the outstanding authorisation or clearance is a “material official authorisation or regulatory clearance” (as proposed to be defined in Section 3).
- 4.14 The Code Committee notes that the Panel may previously have determined that an authorisation or clearance was a material official authorisation or regulatory clearance for the purposes either of suspending the offer timetable or of the offeror making the authorisation or clearance the subject of a pre-condition. However, the fact that the Panel has previously made such a determination will not necessarily mean that the Panel will be satisfied, as at the long-stop date, that it remains a material official authorisation or regulatory clearance. This is because the question will need to be addressed by reference to the facts at the time, which may have changed since the question was previously addressed. Alternatively, a suspension of the offer timetable may have been agreed between the offeror and the offeree company under the proposed new Rule 31.4(a)(i), in which case the Panel would be considering the matter for the first time as at the long-stop date.
- 4.15 If the Panel is not satisfied, as at the long-stop date, that the outstanding authorisation or clearance is a material official authorisation or regulatory clearance, the offeror will be required to waive the condition or pre-condition and declare the offer unconditional (in the case of a condition) or publish the offer document (in the case of a pre-condition).

(vi) *Remedial action and the “material significance” requirement*

- 4.16 If the Panel is satisfied that the outstanding authorisation or clearance is a material official authorisation or regulatory clearance, the Code Committee considers that the Panel will then need to consider whether it is sufficiently clear what form of remedial action would need to be taken in order for the authorisation or clearance to be obtained (for example, whether the relevant regulatory authority has indicated the conditions to which the granting of the authorisation or clearance would be subject, such as a requirement to divest a certain business or to inject a certain amount of capital into the combined group).
- 4.17 The Code Committee considers that:
- (a) if it is not sufficiently clear what action would be required to be taken in order for the official authorisation or regulatory clearance to be obtained, the Panel should

normally consent to the offer lapsing or (in the case of a pre-conditional offer) being withdrawn and not proceeding. This is on the basis that it will have been determined that the failure to obtain the authorisation or clearance could give rise to circumstances of material significance to the offeror in the context of the offer and that there will be insufficient clarity as to the circumstances in which the authorisation or clearance could be obtained; and

- (b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the Panel should normally consent to the offer lapsing, or (in the case of a pre-conditional offer) being withdrawn and not proceeding, if the taking of that action would give rise to circumstances which would be of material significance to the offeror in the context of the offer (i.e. it would satisfy the “material significance” requirement in Rule 13.5(a)). If, by contrast, the taking of that action would not satisfy the “material significance” requirement, the Code Committee considers that the Panel should not normally give its consent to the offer lapsing, or being withdrawn and not proceeding, and that the offeror should be required to waive the relevant condition or pre-condition (see paragraph 4.15).

(vii) Extension of a long-stop date

4.18 The Code Committee considers that any extension to a long-stop date of a contractual offer would normally need to be agreed by both the offeror and the offeree company.

4.19 In addition, the Code Committee considers that, if a question as to whether the Panel will give its consent to the offer lapsing or being withdrawn and not proceeding on account of an outstanding official authorisation or regulatory clearance remains unresolved on the long-stop date, the offeror should not normally be permitted to lapse or withdraw the offer pending the final determination of the issue.

(viii) Amendments to the Code

4.20 In the light of the above, the Code Committee proposes to introduce a new Rule 12 in relation to long-stop dates in contractual offers, as follows:

“RULE 12. LONG-STOP DATE”

12.1 INCLUSION OF A LONG-STOP DATE

(a) The offeror must include a term in the firm offer announcement and in the offer document that the offer will not proceed, will lapse or will be withdrawn on a specific date (a “long-stop date”):

(i) if sufficient acceptances have not been received so as to enable to acceptance condition to be satisfied (in the case of a conditional offer); or

(ii) with the consent of the Panel, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived.

(b) If the offer is not recommended by the board of the offeree company, the Panel must be consulted prior to the publication of the firm offer announcement as to the date of the long-stop date. In such circumstances, the Panel will normally require the long-stop date to be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied.

12.2 WHEN CONSENT MAY BE GIVEN UNDER RULE 12.1

The Panel will normally give its consent under Rule 12.1(a)(ii) if it is satisfied, as at the long-stop date, that the outstanding official authorisation or regulatory clearance is a material official authorisation or regulatory clearance, and provided that either:

(a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or

(b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

12.3 EXTENSION OF A LONG-STOP DATE

Except with the consent of the Panel, the long-stop date may only be extended by the offeror with the agreement of the offeree company.

NOTE ON RULE 12

Where a determination under Rule 12 remains outstanding on the long-stop date

If a question as to whether the Panel will give its consent under Rule 12.1(a)(ii) remains outstanding on the long-stop date, the offeror will not normally be permitted to lapse or withdraw the offer pending the final determination of the issue.

Rule 12 is disapplied in a scheme. See Appendix 7.

Q7 Should an offeror be required to set a “long-stop date” for a contractual offer, as proposed?

(c) Requirement to take necessary procedural steps in relation to a scheme of arrangement

(i) Background

4.21 **Section 3(b) of Appendix 7** allows the parties to an offer to include within the conditions to a scheme of arrangement a long-stop date by which the scheme must become effective, which may be extended with the agreement of the parties to the offer.

4.22 **Section 3(c) of Appendix 7** provides that a condition relating to a scheme long-stop date is not subject to Rule 13.5(a), i.e. there is no requirement that the offeror may only invoke such a condition so as to cause the offer to lapse if the circumstances are of material significance to the offeror in the context of the offer.

4.23 In the light of the above proposal that a contractual offer should lapse on a long-stop date if the acceptance condition has not been satisfied or, with the consent of the Panel, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived, the Code Committee has considered whether a similar requirement should be introduced in relation to the lapsing of a scheme of arrangement on its long-stop date.

(ii) Proposal

4.24 The Code Committee notes that, in contrast to a contractual offer, a scheme of arrangement is a process which is led and controlled by the offeree company, with the offeror being unable to control the timing of its conclusion. The Code Committee considers that it would not be appropriate for an offeree company which, for whatever reason, did not wish to make the scheme effective, despite the offeror having confirmed that all of the other conditions had been either satisfied or waived, to be able to prolong indefinitely the scheme process and the offeror's commitment to the offer. The Code Committee therefore considers that the current position, whereby the long-stop date of a scheme of arrangement is not, of itself, subject to the "material significance" requirement and an offeror can automatically lapse its offer if the scheme of arrangement has not become effective by the long-stop date, remains appropriate.

4.25 However, the Code Committee is aware that, whilst an offeror cannot unilaterally cause a scheme of arrangement to become effective, it does in practice have the ability to prevent this from occurring by refusing to take certain actions in connection with the court sanction hearing. In particular, the Code Committee understands that there are two key procedural

steps that an offeror must take in order for a scheme of arrangement to be sanctioned by the court and, therefore, in order for it to become effective:

- (a) first, by no later than the start of the court sanction hearing, the offeror will need to have confirmed that all of the conditions to the offer have been either satisfied or waived, other than the conditions relating to the sanctioning and effectiveness of the scheme (and, occasionally, certain other technical or procedural conditions that are to be satisfied following the court sanction hearing); and
- (b) secondly, at the court sanction hearing, the offeror will need to undertake to the court to be bound by the terms of the scheme insofar as it relates to the offeror.

4.26 Whilst a scheme is, in effect, conditional upon these procedural steps being taken, they are not typically included as specific conditions to the offer. The Code Committee understands that an offeror may undertake to the offeree company to take the necessary procedural steps under the terms of a “bid conduct agreement”. However, the terms of a bid conduct agreement, if one is entered into, are not capable of enforcement by the Panel.

4.27 It is therefore possible that an offeror which no longer wished a scheme to become effective but was unable to invoke a condition to the offer (owing to the circumstances which had arisen not being of material significance to the offeror in the context of the offer) might seek to refuse either:

- (a) to waive the unsatisfied conditions prior to the court sanction hearing; and/or
- (b) to undertake to the court to be bound by the scheme.

This could result in the scheme not being sanctioned by the court prior to its long-stop date and, therefore, in the offeror seeking to lapse the offer on the long-stop date in circumstances in which it would not otherwise have been permitted to invoke a condition to the offer. The Code Committee considers that this would be contrary to the spirit of Rule 13.5(a) and that the Code should seek to avoid the occurrence of such a situation.

4.28 The Code Committee therefore proposes that where an offer is implemented as a scheme of arrangement there should be an express requirement under the Code for the offeror:

- (a) prior to the court sanction hearing, to confirm that all of the conditions to the offer have been either satisfied or waived, other than any conditions which are capable of satisfaction only upon or following the scheme being sanctioned; and

- (b) at the court sanction hearing, to undertake to the court to be bound by the terms of the scheme insofar as it relates to the offeror.

4.29 The Code Committee recognises, however, that an offeror might be unwilling or unable to waive an outstanding condition relating to an official authorisation or regulatory clearance or to be bound by the terms of the scheme if such a condition remains unsatisfied. The Code Committee considers that, in order for the Panel to determine whether to require an offeror to waive such a condition and to be bound by a scheme in such circumstances, the Panel should apply the same test as it is proposed will apply when an offeror wishes to lapse a contractual offer on its long stop-date, as discussed in Section 4(b) above.

4.30 In other words, an offeror should not be required to take the necessary procedural steps, and thus the scheme should be allowed to lapse on its long-stop date, if, at the date on which the offeree company decides to convene the court sanction hearing, a condition relating to a material official authorisation or regulatory clearance is outstanding and either:

- (a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or
- (b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, that the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer.

4.31 The offeror would also not be required to take the necessary procedural steps if, at the time at which the offeree company seeks to bring the scheme before the court for sanctioning, a condition other than a condition relating to an official authorisation or regulatory clearance remains outstanding and the Panel agrees that the offeror is entitled to invoke that condition in accordance with Rule 13.5(a).

4.32 The Code Committee notes that the procedural aspects of a scheme of arrangement are under the control of the offeree company. Therefore, if the offeree company considers that the only outstanding official authorisations or regulatory clearances (or other outstanding conditions) are not material and wishes to bring matters to a head, it can apply to the court to convene the court sanction hearing and, in view of the above, the offeror will then be required to waive the relevant conditions and agree to be bound by the scheme unless it can satisfy the Panel in the terms described in paragraphs 4.30 or 4.31 above. If the offeree company chooses not to convene the court sanction hearing prior to the long-stop date and the relevant conditions are not satisfied or waived, the scheme will lapse on its

long-stop date unless the parties agree to extend it. As such, an offeror which wishes to prevent a scheme of arrangement from becoming effective prior to its long-stop date will need to satisfy the same materiality requirements as an offeror which wishes to lapse its contractual offer on a long-stop date, albeit that these requirements will be applied at the time of the court sanction hearing rather than at the long-stop date itself.

(iii) *Amendments to the Code*

4.33 In the light of the above, the Code Committee proposes to introduce a new Section 3(g) of Appendix 7 and a new Note on Section 3, as follows:

“(g) Except with the consent of the Panel, the offeror must:

(i) prior to the court sanction hearing, confirm to the offeree company and the Panel that all of the conditions to the offer have been either satisfied or waived, other than any conditions which are capable of being satisfied only upon or following the scheme being sanctioned (which conditions should normally be specified in the scheme circular); and

(ii) at the court sanction hearing, undertake to the court to be bound by the terms of the scheme insofar as it relates to the offeror.

The requirements in paragraphs (i) and (ii) will not apply if a condition relating to a material official authorisation or regulatory clearance is outstanding, provided that either:

(A) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or

(B) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

NOTE ON SECTION 3

Where a determination under Section 3(g) remains outstanding on the long-stop date

If a question as to whether the proviso to Section 3(g) has been satisfied remains outstanding on the long-stop date, the parties to the offer will normally be required to agree an extension to the long-stop date pending the final determination of the issue.”

Q8 Should there be a requirement for an offeror to take the procedural steps necessary for a scheme of arrangement to become effective, as proposed?

5. Consistent treatment for official authorisations and regulatory clearances

(a) *Introduction*

5.1 Section 5 proposes that the Code should apply consistent treatment to all official authorisations and regulatory clearances to which an offer is subject. In addition to the proposal in Section 3 to allow the suspension of an offer timetable in relation to official authorisations or regulatory clearances more generally (and not only in relation to a decision as to whether there is to be a “phase 2” investigation by the CMA or the European Commission), this would be achieved by, in summary:

- (a) removing the requirement for an offer to include a term that it must lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, in each case prior to a certain point in the offer timetable;
- (b) requiring all conditions and pre-conditions relating to an official authorisation or regulatory clearance to be subject to the requirement that they may only be invoked where the circumstances are of material significance to the offeror in the context of the offer; and
- (c) applying the same approach to a pre-condition relating to a clearance by the CMA or the European Commission as is applied to a pre-condition relating to any other official authorisation or regulatory clearance.

(b) *Background*

5.2 At present, there are a number of differences between the way the Code treats an offer that falls within the jurisdiction of the CMA or the European Commission and the way it treats an offer that falls within the jurisdiction of another regulatory authority.

5.3 In summary, these differences include the following:

- (a) under **Rule 12.1(a)** and **Rule 12.1(b)**, unless it is subject to a relevant pre-condition in accordance with **Rule 13.3(a)** or **Rule 13.3(b)**, an offer that falls within the jurisdiction of the CMA or the European Commission must include a term (a “**mandatory lapsing term**”) that it will lapse if (as appropriate) a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated before:
 - (i) the later of the “first closing date” and the date on which the offer becomes or

is declared unconditional as to acceptances (in the case of a contractual offer); or

- (ii) the shareholder meetings to approve the offer (in the case of a scheme of arrangement).¹

However, there is no equivalent requirement for an offer to include a term that it will lapse if it is subject to an equivalent reference or similar process by any other domestic or overseas regulatory authority from which an official authorisation or regulatory clearance is required;

- (b) under **Rule 13.2**, the requirement in **Rule 13.5(a)** that “*An offeror should not invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer*” does not apply to a condition included pursuant to **Rule 12.1(c)** or a pre-condition included pursuant to Rule 13.3(a) or Rule 13.3(b), i.e.:

- (i) a condition or pre-condition that no Phase 2 CMA reference is made or that Phase 2 European Commission proceedings are not initiated; or
- (ii) a pre-condition that the offer is cleared following a Phase 2 CMA reference or Phase 2 European Commission proceedings.

However, the “material significance” requirement does apply to a condition or pre-condition relating to the offer not being referred to a “phase 2” investigation by, or being cleared by, any other domestic or overseas regulatory authority from which an official authorisation or regulatory clearance is required; and

- (c) the requirement under **Rule 13.3(c)** for a material official authorisation or regulatory clearance to be “*likely to prove impossible to obtain ... within the Code timetable*” in order for it to be the subject of a pre-condition to a non-recommended offer does not apply to a pre-condition relating to the CMA or the European Commission which falls under Rule 13.3(a) or Rule 13.3(b).

5.4 As previously explained, the Code Committee considers that the Code should apply consistent treatment to any official authorisation or regulatory clearance to which an offer is subject, i.e. the Code should not apply different treatment to the CMA and the European

¹ Rule 9.4 confirms that a mandatory offer must, if appropriate, contain the term required by Rule 12.1(a) or (b).

Commission as compared with other regulatory authorities from which an official authorisation or regulatory clearance is required.

(c) Removal of the “mandatory lapsing term”

(i) Introduction

- 5.5 In the 1970s, at the request of the Office of Fair Trading (the “**OFT**”) and the Monopolies and Mergers Commission (the “**MMC**”) (the predecessor bodies to the CMA), the Panel introduced into the Code a requirement that an offer must include a term that it would lapse if there was a reference to the MMC before the later of the “first closing date” and the date on which the offer became or was declared unconditional as to acceptances. On the basis that, as explained above, an offer must be open for acceptance until at least Day 21, this provided the OFT with a minimum of 21 days to decide whether to refer the offer to the MMC and, if it did so, provided the MMC with the opportunity to undertake an investigation of the competition issues prior to the businesses of the offeror and the offeree company being combined.
- 5.6 In 1990, when the EU Merger Regulation came into effect, the requirement for a mandatory lapsing term was extended to apply also to the initiation of Phase 2 European Commission proceedings, on the basis that the European Commission would, in effect, be acting as the United Kingdom’s competition regulatory authority where an offer fell within the scope of the Merger Regulation. However, the Code has never included an equivalent requirement for an offer to lapse if any other domestic or overseas regulatory authority from which an official authorisation or regulatory clearance is required undertakes a detailed investigation into the transaction similar to a Phase 2 CMA reference or Phase 2 European Commission proceedings.
- 5.7 In 2007, the Code was amended so as to require that, in the case of an offer being implemented by way of a scheme of arrangement, the offer must include a term that it will lapse and the scheme will not become effective if there is a Phase 2 CMA reference or Phase 2 European Commission proceedings are initiated before the shareholder meetings to approve the scheme.
- 5.8 If an offer lapses when a Phase 2 CMA reference is made or when Phase 2 European Commission proceedings are initiated, the “**offer period**” will end and the provisions of the Code which apply during an offer period will fall away. However, a “**competition reference period**” will then commence pursuant to **Rule 12.2**, during which the Code imposes certain requirements and restrictions on the parties to the offer. If the offeror is

cleared to proceed at the end of the competition reference period it may, but is not obliged to, make a new offer for the offeree company and this new offer can be made at a price which is lower than the price of the original offer.

(ii) *Proposal*

5.9 The Code Committee considers that the Code should apply consistently whenever a regulatory authority from which an official authorisation or regulatory clearance is required initiates a “phase 2” investigation or a similar reference or process. The Code Committee notes that:

- (a) there is no clear justification why the Code should require an offer to lapse if a Phase 2 CMA reference is made or Phase 2 European proceedings are initiated but should not require an offer to lapse if an equivalent reference or similar process is undertaken by any other domestic or overseas regulatory authority from which a material official authorisation or regulatory clearance is required;
- (b) the requirement for an offer to lapse because the CMA or the European Commission determines that a “phase 2” investigation is required was introduced following a request from the OFT and the MMC at a time when their powers were more limited than those which the CMA has now;
- (c) following the UK’s exit from the European Union, and the end of the transition period provided for in the Withdrawal Agreement between the EU and the UK (i.e. 31 December 2020), the European Commission will no longer act as a domestic competition regulatory authority in the UK and it would not be logical, or appropriate, for the Code to continue to have special requirements relating to clearances from the European Commission; and
- (d) the mandatory lapsing term is, in any event, of little practical relevance as it is rare for an offer to lapse (and a competition reference period to commence) following a Phase 2 CMA reference being made or Phase 2 European Commission proceedings being initiated. This is because, where material competition issues are identified, the offer will almost always be structured as a pre-conditional offer (in which case Rules 12.1(a) and (b) will not be in point) or as a scheme of arrangement (in which case the offer will not be required to lapse provided that the reference is made, or the proceedings are initiated, after the date of the shareholder meetings).

5.10 In the light of the above, the Code Committee proposes that the requirement in Rules

12.1(a) and (b) (and, in relation to a mandatory offer, **Rule 9.4**) for an offer to include a mandatory lapsing term should be removed, such that the Code would no longer automatically require an offer to lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated prior to the dates referred to in those Rules.

- 5.11 The Code Committee notes that, if the Code is amended as proposed in Section 3, the offer timetable would normally be suspended (if this was agreed by the parties or requested by either the offeror or the offeree company) pending the resolution of any issues relating to a relevant official authorisation or regulatory clearance. If a Phase 2 CMA reference was made or Phase 2 European Commission proceedings were initiated, the offer would not automatically lapse (because there would no longer be a requirement for a mandatory lapsing term) and, if the offer timetable was suspended, the suspension would continue until the outcome of the “phase 2” investigation was known (or, if the Code is amended as proposed in Section 4, the long-stop date).
- 5.12 One consequence of the proposed amendments would be that the current ability for an offeror whose offer lapses on a mandatory lapsing term, but which subsequently obtains a clearance at the end of a competition reference period, to make a new offer at below the previous offer price would be removed. It is well-established that, for reasons of market certainty, the Panel does not allow an offeror to reduce its offer price during the course of an offer and the Code Committee considers that this principle should be upheld in circumstances where the offer continues to remain open whilst the offer timetable is suspended.

(iii) *The CMA and the Enterprise Act 2002*

- 5.13 The Executive (on behalf of the Code Committee) has discussed with the CMA the proposal to remove from the Code the requirement for an offer to include a term that it will lapse if a Phase 2 CMA reference is made before a particular date. The CMA has confirmed that it has no objections to the proposal.
- 5.14 The Code Committee notes that section 78(2) of the Enterprise Act 2002 provides that where a Phase 2 CMA reference has been made:

“No relevant person² shall, without the consent of the CMA, directly or indirectly acquire during the relevant period³ an interest in shares in a company if any

² A “relevant person” includes any person who carries on any enterprise to which the reference relates.

³ The “relevant period” is the period beginning with the making of the reference concerned and ending when the reference is finally determined.

enterprise to which the reference relates is carried on by or under the control of that company.”

- 5.15 The Code Committee understands that the primary intention of section 78(2) is to prevent a relevant person from gaining or consolidating control over an offeree company by purchasing shares in the company during the period of a Phase 2 CMA reference. On its face, section 78(2) also prohibits an offeror (as a relevant person) from receiving acceptances from offeree company shareholders during the relevant period. This is because section 79(3) provides that an acquisition of an interest in shares for the purposes of section 78(2) includes circumstances in which the relevant person enters into a contract to acquire the shares, including on a conditional basis.
- 5.16 However, section 79(4) provides that the circumstances in which a person acquires an interest in shares for the purposes of section 78(2) do not include those where the person acquires the interest in pursuance of an obligation assumed before the publication by the CMA of the reference concerned.
- 5.17 The CMA has confirmed that, in its view, any conditional interest in shares that would be acquired as a result of the offeror receiving acceptances from offeree company shareholders after a Phase 2 CMA reference has been made would fall within the scope of section 79(4) and, therefore, that the receipt by the offeror of acceptances in these circumstances would not be prohibited by section 78(2).

(iv) Amendments to the Code

- 5.18 In the light of the above, the Code Committee proposes that the following provisions should be deleted:
- (a) Rules 12.1(a) and (b);
 - (b) the Note on Rule 12.1 (*The effect of lapsing*); and
 - (c) Rule 12.2 and the Notes thereon.
- 5.19 As a consequence of the deletion of the provisions referred to in the previous paragraph, the following would also be deleted:
- (a) the definition of “competition reference period” in the Definitions Section;
 - (b) Note 2 on the definition of “offer period” in the Definitions Section (which comprises a cross-reference to Rule 12.2);

- (c) Note 10 on Rule 6, Note 12 on Rule 11.1, and the second paragraph of Note 7 on Rule 11.2 (which deem acquisitions of interests in securities during a competition reference period to be relevant for those respective rules);
- (d) Rule 9.4 (*The CMA and the European Commission*) and the Notes thereon;
- (e) Rule 19.7 (which relates to information published during a competition reference period);
- (f) paragraph (c) of Note 4 on Rule 20.1 (which relates to investment analyst publications during a competition reference period);
- (g) Note 4 on Rule 21.1 (which relates to the application of the rules regarding “frustrating action” during a competition reference period);
- (h) Note 5 on Rule 21.3 (which relates to the equality of information to competing offerors during a competition reference period);
- (i) in Note 1 on Rule 26 (which relates to the period for which documents etc. are to be made available on a website), the reference to “*any related competition reference period*”;
- (j) in Rule 35.1 (*Delay of 12 months*), the reference to Rule 12.1; and
- (k) the Note on Rule 38.2 (which relates to dealings between offerors and connected exempt principal traders during a competition reference period).

Q9 Should the requirement for an offer to include a “mandatory lapsing term” if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated be removed from the Code?

(d) *CMA and European Commission clearance conditions and pre-conditions to be subject to the material significance requirement*

(i) *Introduction*

5.20 Rule 13.2 provides that:

“Neither a condition included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) will be subject to the provisions of Rules 13.1 or 13.5(a).”

5.21 Rule 12.1(c) provides that:

“Except in the case of an offer under Rule 9, the offeror may, in addition, make the offer conditional on a decision being made that there will be no Phase 2 CMA reference, initiation of Phase 2 European Commission proceedings or referral by the European Commission under Article 9(1) of the Council Regulation 139/2004/EC. In such a case, the condition may state that the decision must be on terms satisfactory to the offeror.”.

5.22 Rules 13.3(a) and (b) provide as follows:

“Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition:

(a) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings;

(b) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings or, if there is such a reference or initiation of proceedings, a decision by the relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror)”.

5.23 Accordingly:

- (a) a condition that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings; and
- (b) a pre-condition that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings and/or, if there is, that the offer is allowed to proceed,

are not subject to the “material significance” requirement in Rule 13.5(a). In other words, if an offeror wishes to invoke such a condition or pre-condition so as to cause the offer to lapse or to be withdrawn, it will not need to demonstrate that the circumstances that have arisen are of material significance to it in the context of the offer. However, if an offeror wishes to invoke a condition or pre-condition relating to any other official authorisation or regulatory clearance, it will need to demonstrate that the “material significance” requirement has been satisfied.

(ii) *Proposal*

5.24 As indicated above, the Code Committee considers that the Code should apply consistent treatment to any official authorisation or regulatory clearance to which an offer is subject, i.e. the Code should not apply different treatment to the CMA and the European

Commission as compared with other regulatory authorities from which an official authorisation or regulatory clearance is required.

5.25 In addition, the Code Committee considers that the Code should continue to minimise the scope for market uncertainty as a result of an offeror seeking to lapse its offer without good reason. The application of the “material significance” requirement to the invocation of conditions and pre-conditions is one of principal ways by which the Code seeks to achieve this and any exceptions to the application of that requirement should be kept to a minimum.

5.26 Accordingly, the Code Committee considers that:

- (a) it is no longer appropriate for the Code to establish one regime for the invocation of conditions and pre-conditions relating to clearances required from the CMA and the European Commission and another regime for the invocation of conditions and pre-conditions relating to all other official authorisations and regulatory clearances; and
- (b) the regime that should apply should be that which currently applies to authorisations and clearances other than from the CMA and the European Commission, i.e. the “material significance” requirement should be applied to the invocation of all conditions and pre-conditions relating to official authorisations and regulatory clearances, including those from the CMA and the European Commission.

5.27 The application of the “material significance” requirement to the invocation of a condition or pre-condition relating to a “phase 2” reference (or an equivalent reference or process) is discussed further in Section 9.

(iii) Amendments to the Code

5.28 In the light of the above, the Code Committee proposes that Rule 12.1(c) and Rule 13.2 should be deleted.

5.29 In addition, the definitions of the “CMA”, a “Phase 2 CMA reference” and “Phase 2 European Commission proceedings” in the Definitions Section would no longer be required and would also be deleted.

Q10 Should the exemption from the “material significance” requirement in Rule 13.5(a) for CMA and European Commission clearance conditions and pre-conditions be removed?

(e) Pre-conditional offers

(i) Introduction

5.30 At present, Rule 13.3 provides that an offer may be announced subject to a pre-condition only after consultation with the Panel and only if the pre-condition relates to:

- (a) there being no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings (Rule 13.3(a));
- (b) the offer being cleared at the end of any Phase 2 CMA reference or Phase 2 European Commission proceedings (Rule 13.3(b)); or
- (c) another material official authorisation or regulatory clearance being obtained (Rule 13.3(c)) and either:
 - (i) the offer is recommended by the board of the offeree company (Rule 13.3(c)(i)); or
 - (ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable provided by the Code (Rule 13.3(c)(ii)).

5.31 As explained in Section 3, the Executive considers an official authorisation or regulatory clearance to be “material” for this purpose if the offeror is able to establish that a failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer, i.e. if it might be possible to satisfy the (separate) “material significance” requirement in Rule 13.5(a) if the offeror were to seek to invoke the pre-condition to an offer so as to cause the offer not to proceed. The Code Committee is proposing in Section 3 to introduce a new definition of a “**material official authorisation or regulatory clearance**” to this effect into the Definitions Section of the Code.

(ii) Proposal

5.32 As previously explained, the Code Committee considers that the Code should apply consistent treatment to any official authorisation or regulatory clearance to which an offer is subject. Accordingly, the Code Committee proposes to delete Rules 13.3(a) and (b) so that a pre-condition relating to a Phase 2 CMA reference or Phase 2 European Commission proceedings would fall within what is currently Rule 13.3(c).

5.33 In addition, given the proposal in Section 3 that the Panel should be able to suspend the offer timetable in relation to a condition relating to an official authorisation or regulatory clearance either:

- (a) with the agreement of both the offeror and the offeree company; or
- (b) at the request of either party if the authorisation or clearance is a “material official authorisation or regulatory clearance”,

it would be illogical to impose any further limitations on the circumstances in which an offeror could announce an offer subject to a regulatory pre-condition.

5.34 The Code Committee therefore proposes to delete the stipulations in Rules 13.3(c)(i) and (ii) that, in order for the Panel to consent to the announcement of a pre-conditional offer, either:

- (a) the offer must be recommended by the board of the offeree company; or
- (b) the Panel must be satisfied that it is likely to prove impossible to obtain the relevant authorisation or clearance within the Code timetable.

5.35 In summary, the Code Committee considers that, subject to consultation with the Panel, an offeror should be able to announce an offer subject to a pre-condition in relation to an official authorisation or regulatory clearance if either:

- (a) the offeree company agrees to the pre-condition; or
- (b) the authorisation or clearance is a “material official authorisation or regulatory clearance”.

5.36 The Code Committee further considers that Note 2 on Rule 2.7, as referred to in Rule 13.3, is redundant and proposes that it should therefore be deleted.

(iii) Amendments to the Code

5.37 In the light of the above and taking into account the amendments set out in Appendix A, the amended Rule 13.3 would read as follows:

“13.3 ACCEPTABILITY OF PRE-CONDITIONS

(a) The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the making of an offer will be subject.

(b) Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition involves an official authorisation or regulatory clearance relating to the offer and either:

(i) the offeree company agrees to the pre-condition; or

(ii) the authorisation or clearance is a material official authorisation or regulatory clearance.”.

Q11 Should a pre-condition relating to a clearance from the CMA or the European Commission be treated in the same way as a pre-condition relating to any other official authorisation or regulatory clearance?

6. Acceptance condition invocation notices and announcements of acceptance levels

(a) Introduction

6.1 Section 6 proposes:

- (a) that an offeror should be required to serve an “acceptance condition invocation notice” if it wishes to invoke the acceptance condition so as to cause its offer to lapse on any date prior to the “unconditional date” (as proposed to be newly defined) in order to give offeree company shareholders notice of its intention to do so;
- (b) amendments to the timing of announcements of acceptance levels required to be made by an offeror; and
- (c) minor amendments to various provisions of the Code to reflect the fact that an offer would no longer have “closing dates”.

(b) Background

6.2 Any “contractual” offer⁴ must include an acceptance condition. This will typically make the offer conditional on the offeror receiving acceptances which represent:

- (a) at least 90% of the shares to which the offer relates (so that the offeror can “squeeze out” the minority under the Companies Act 2006); or
- (b) such lesser percentage as the offeror may decide, provided that (in accordance with **Rule 10**) the shares accepted to the offer, together with shares already held by the offeror, represent more than 50% of the voting rights of the offeree company.

6.3 **Rule 31.1** provides that an offer must initially be open for at least 21 days following the date on which the offer document is published (the “first closing date”). In addition, **Rule 25.1** and **Rule 25.2** provide that the board of the offeree company must send a circular to the company’s shareholders setting out the board’s opinion on the offer within 14 days of the publication of the offer document. These provisions reflect the requirement in **General Principle 2** that:

“The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid”.

⁴ Other than an offer to minority shareholders where the offeror already holds shares carrying over 50% of the voting rights.

- 6.4 **Rule 31.2** provides that, if the offer has not become unconditional as to acceptances by the first (or any subsequent) closing date, the offeror may extend the offer until a subsequent closing date.
- 6.5 **Rule 31.6** provides that, in order for an offer to succeed, the acceptance condition must be satisfied by no later than midnight on the 60th day after the publication of the initial offer document (the reference to the “initial” offer document makes clear that the timetable is not re-set if the offeror publishes a revised offer document under **Rule 32.1**). Subject to any extension of Day 60, this is therefore the latest day on which the offeror may set the “final closing date” of the offer.
- 6.6 **Rule 31.3** provides that there is no obligation for an offer to be extended if the acceptance condition has not been satisfied by the first or any subsequent closing date. In addition, **Rule 13.5(a)** provides that the invocation of the acceptance condition is not subject to the “material significance” requirement. This is because it is ultimately for offeree company shareholders to decide whether they wish to accept the offer in sufficient numbers so as to satisfy the acceptance condition, failing which the offer will lapse.
- 6.7 There is no requirement for an offeror to give prior notice as to whether it intends to extend the offer if the acceptance condition has not been satisfied by a particular closing date. Therefore, if an offer has not become unconditional as to acceptances by the next closing date, the offeror may then invoke the acceptance condition and cause the offer to lapse, without having forewarned shareholders. However, it is rare for an offer to lapse in this way and it is customary for an offeror to extend an offer on any closing date prior to the final closing date.

(c) Proposals

- (i) *Requirement for an “acceptance condition invocation notice” if an offeror wishes to lapse an offer on any date prior to the unconditional date*
- 6.8 The Code Committee continues to believe that:
- (a) an offer should be required to remain open for a minimum of 21 days;
 - (b) the acceptance condition should not be subject to the material significance requirement; and

- (c) an offeror should be required to lapse its offer if the acceptance condition has not been satisfied by the “unconditional date” (as proposed to be defined in Section 2), regardless of whether the offeror has given notice of its intention to do so.

6.9 However, the Code Committee is concerned that the lapsing of an offer by invoking the acceptance condition on a date prior to the unconditional date (in the absence of prior notice being provided) would be contrary to shareholders’ and the market’s expectations and inconsistent with the requirement of General Principle 2 that shareholders “*must have sufficient time and information to enable them to reach a properly informed decision on the bid*”. This concern would be particularly acute if the true reason for the offeror lapsing the offer by invoking the acceptance condition at that time was that it might not be able to invoke any of the other conditions to the offer because it would be unable to demonstrate that circumstances had arisen which were of material significance to it in the context of the offer.

6.10 It is therefore proposed that, if an offeror wishes to lapse an offer by invoking the acceptance condition on any date on or after Day 21 (being the minimum time for which an offer must be open for acceptance) but before the unconditional date, it should be required to publish a notice to this effect (an “**acceptance condition invocation notice**”) prior to the relevant date.

(ii) *Notice period*

6.11 The Code Committee considers that an acceptance condition invocation notice should be published at least 14 days prior to the date on which the offeror intends to lapse the offer. The Code Committee considers that a notice period of 14 days would give offeree company shareholders an adequate opportunity to make an informed decision as to whether to accept the offer and to implement that decision. The Code Committee understands that the implementation of an acceptance decision by an offeree company shareholder may require various steps to be taken by a number of intermediaries and that a shorter period of, say, seven days, may not be a sufficient period for the completion of those steps.

(iii) *Effects of an acceptance condition invocation notice*

6.12 The Code Committee considers that, if an acceptance condition invocation notice is served by the offeror and the acceptances received by the relevant date are below the level specified in the notice, the offer should be required to lapse. The Code Committee considers that, consistent with the long-standing principle that parties to an offer should be

“held to what they say”, it should not be permissible for an offeror to call the bluff of offeree company shareholders by threatening to lapse the offer and then later change its mind.

- 6.13 However, if the acceptances received by the relevant date exceed the level specified in the acceptance condition invocation notice, the offer would not lapse at that time. Nor would the acceptance condition be satisfied at that time, assuming that the proposals in Section 7 are adopted. This is because the new Rule 10.2, as proposed in Section 7, provides that the acceptance condition would only be capable of being satisfied once all the other conditions to the offer had been either satisfied or waived. Accordingly, if sufficient acceptances were received by the date specified in the acceptance condition invocation notice, but the offer remained subject to other conditions, the offer would remain open for acceptance and the offer timetable would continue.
- 6.14 In addition, if **Rule 34** is amended as proposed in Section 8, accepting shareholders would continue to have the ability to withdraw their acceptances until the offer had become or been declared unconditional (or had lapsed). It would therefore remain a possibility that the acceptance condition would not be satisfied on the unconditional date, and that the offer would therefore lapse, notwithstanding that the offeror had not been able to lapse the offer as a result of serving the acceptance condition invocation notice.

(iv) *Detailed requirements for an acceptance condition invocation notice*

- 6.15 The Code Committee considers that, in order to provide certainty as to the offeror's intentions and as to the consequences of the notice, an acceptance condition invocation notice should be required to specify the level of acceptances which must be received in order for the offer not to lapse on the specified date. Given that the offeror's intention in serving an acceptance condition invocation notice will be to lapse the offer, it is likely that the notice would normally specify the highest permissible level at the relevant time in accordance with the terms of the acceptance condition, i.e. typically 90% of the shares to which the offer relates.
- 6.16 For reasons of market certainty, the Code Committee considers that once an acceptance condition invocation notice has specified the level of acceptances required in order for the offer not to lapse it should not be permissible for the offeror to change that level prior to the specified date. For example, an offeror would not be permitted to serve a notice specifying a level of 90% but, regretting its decision, subsequently seek to reduce the level to 50% in order to reduce the chances of the offer lapsing on the specified date.

6.17 Similarly, the Code Committee considers that once served an acceptance condition invocation notice should not be capable of being revoked. Market participants may have acted in reliance on the offeror's statement that it intends to lapse the offer if it is not accepted by a sufficient number of offeree company shareholders and the offeror should therefore be held to the terms of that statement.

6.18 The fact that an offeror intends to lapse its offer if the acceptance condition is not satisfied by the specified date may be important information for shareholders who might be required to bring forward an acceptance decision which they were not expecting to make until later in the offer period. The Code Committee therefore considers that an acceptance condition invocation notice should not only be required to be published via a regulatory information service (or "**RIS**") in accordance with the requirements of **Rule 30.1** but that the notice should also be required to be sent to offeree company shareholders in accordance with the requirements of **Rule 30.2**.

(v) *Differences between an "acceptance condition invocation notice" and an "acceleration statement"*

6.19 The Code Committee recognises that the proposed "acceptance condition invocation notice" would share certain common features with an "acceleration statement" made under **Rule 31.5** (as proposed to be amended in Section 2). For example, both an acceptance condition invocation notice and an acceleration statement might:

- (a) lead to the offer timetable being foreshortened; and
- (b) result in the offer lapsing if the offeror does not receive sufficient acceptances by the relevant date.

6.20 However, there are key differences between the two:

- (a) **acceptance condition invocation notice:** an acceptance condition invocation notice would be served by an offeror which, for whatever reason, wished to lapse its offer. In the (unlikely) event that the offeror wished to reduce the threshold level for acceptances prior to the relevant date, it would need to do so by no later than the date of the notice so that offeree company shareholders who wished to accept the offer would be doing so in the knowledge of the relevant threshold. It would not be possible for a regretful offeror to change its mind and "waive down" the threshold at the end of the notice period in an attempt to avoid the need for the offer to lapse. In addition, unlike an acceleration statement, there would be no need for an offeror which served an acceptance condition invocation notice to waive any outstanding

conditions relating to an official authorisation or regulatory clearance when serving the notice. This is because, even if the necessary level of acceptances is obtained on the date specified in the acceptance condition invocation notice, the acceptance condition will not be satisfied (assuming that the offer remains subject to other conditions) and the offer timetable will continue (see Section 7); and

- (b) ***acceleration statement***: an acceleration statement would generally be made by an offeror which wanted its offer to succeed and wished to bring forward the date by which the offer conditions would need to be satisfied from Day 60 to an earlier date. There would be no requirement for an offeror to state in an acceleration statement the minimum level of acceptances (above 50%) which would be required in order for the acceptance condition to be deemed satisfied and, subject to the drafting of the acceptance condition, the offeror would be able to decide on the new unconditional date whether to “waive down” the acceptance condition threshold. The acceleration statement would, however, need to include a waiver by the offeror of any outstanding conditions relating to any official authorisation or regulatory clearance and would also result in the “Day 39” and “Day 53” requirements ceasing to apply (see Section 2).

6.21 The Code Committee notes that an offeror which wished to complete its offer earlier than Day 60 would not necessarily need to make an acceleration statement. Provided that it had received sufficient acceptances so as to satisfy the acceptance condition, it would always be open to such an offeror to waive any outstanding conditions and to declare its offer unconditional.

(vi) *Proposed new Rule 31.6*

6.22 In the light of the above, the Code Committee proposes to introduce a new Rule 31.6, as follows:

“31.6 ACCEPTANCE CONDITION INVOCATION NOTICE

(a) If an offeror intends to invoke the acceptance condition so as to cause the offer to lapse on a date which is:

(i) on or after Day 21; and

(ii) earlier than the unconditional date,

it must publish a notice of its intention to do so, specifying the relevant date (an “acceptance condition invocation notice”).

(b) An acceptance condition invocation notice must:

(i) be published at least 14 days prior to the relevant date;

(ii) be irrevocable;

(iii) specify the level of acceptances which must be received in order for the offer not to lapse on the relevant date, which level cannot be changed prior to or on the relevant date; and

(iv) be sent to all offeree company shareholders and persons with information rights.

(c) If the required level of acceptances has not been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will be regarded as being incapable of satisfaction and the offer must lapse.

(d) If the required level of acceptances has been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will not be regarded as having been satisfied at that time unless all other conditions to the offer have been either satisfied or waived (see Rule 10.2)."

Q12 Should an offeror be required to serve an "acceptance condition invocation notice" in the form proposed if it wishes to lapse its offer on the acceptance condition prior to the unconditional date?

(vii) Removal of references to "closing dates"

6.23 If an offeror is not able to lapse its offer on the acceptance condition prior to the unconditional date unless it has served an acceptance condition invocation notice, it will no longer be meaningful for an offeror to have the ability to set "closing dates" for the offer prior to the unconditional date.

6.24 The Code Committee therefore proposes to amend the provisions of the Code which refer to closing dates of an offer, as follows:

(a) the references to the "first closing date" in the following provisions would be amended so as to refer instead to "Day 21":

(i) Note 3 (to be renumbered Note 2) on the definition of "offer period";

(ii) Rule 5.2(c)(iii) (exceptions to restrictions in Rule 5.1);

(iii) Rule 9.6 (*Obligations of directors*); and

(iv) Rule 31.8 (to become Rule 31.9) (*Settlement of consideration*);

- (b) the references to the “final closing date” in the following provisions would be amended so as to refer instead to the “unconditional date”:
 - (i) Notes 4, 5 and 6 on Rule 10 (*The acceptance condition*) (in addition, references to “*the last time for acceptance set out in the offeror’s relevant document or announcement*” or to “*the final [or last] time for acceptance*” would be amended so as to refer to “the unconditional date”);
 - (ii) Note 2 on Rule 24.7 (which relates to Rule 31.6(d)); and
 - (iii) Sections 3(c) and 7 of Appendix 4 (*Receiving agents’ Code of Practice*) (in addition, the definitions of “**final register day**” and “**final closing date**” at the end of Appendix 4 would be deleted, with “final register day” instead being defined in the second paragraph of Section 3(c));
- (c) the references to a “closing date” other than the “first closing date” or the “final closing date” in the following provisions would be amended as follows:
 - (i) in Rule 20.5(c)(iii) (*Advertisements*), the reference to “*closing dates and times*” would be replaced with a reference to the “unconditional date”; and
 - (ii) in Note 1 on Rule 33.1 (to become the new Rule 33.2) (in relation to “mix and match” elections), the words “*on any closing date*” would be deleted (see further Section 11); and
- (d) Rule 31.3 (*No obligation to extend*) would be deleted,

as set out in Appendix A.

6.25 A number of the respondents to the Pre-Consultation suggested that the removal of closing dates from offers might have the effect of removing the incentive for offeree company shareholders to accept an offer prior to the unconditional date and the ability for an offeror to generate “momentum” for its offer. The Code Committee considers that interim closing dates currently have little meaning in practice given that, as noted above, offeree company shareholders have grown to expect that the offeror will extend (rather than lapse) the offer on a closing date and will wish to make their decision as to whether to accept the offer only in the days immediately before the final closing date. An offeror which wished to create a sense of “momentum” could, however, make an announcement (to which it would be held) that if, on a specified date, acceptances of at least a specified level had been received, the

offeror would at that time waive any conditions which remained unsatisfied and declare the offer unconditional.

Q13 Do you have any comments on the proposals relating to the removal from the Code of references to “closing dates”?

(viii) Announcements of acceptance levels

6.26 **Rule 17.1** provides that an offeror must make an announcement stating the number of shares which it may count towards the satisfaction of its acceptance condition, and certain other information, by no later than 8.00 a.m. on the business day following a day on which an offer:

- (a) is due to expire (i.e. a closing date);
- (b) becomes or is declared unconditional as to acceptances; or
- (c) is revised or extended.

6.27 The Code Committee considers that it is useful for offeree company shareholders, and the market generally, to be updated during an offer as to the offeror’s progress towards the satisfaction of the acceptance condition. It has therefore considered when such announcements should be required if, following the amendments to the Code proposed above, an offer would no longer have closing dates.

6.28 The Code Committee understands that an offeror’s receiving agent will, in practice, provide the offeror with daily updates as to acceptance levels, at least in the later stages of the offer, and that the additional work which would be required in order for the receiving agent to prepare a certificate to the standards required by **Appendix 4** (*Receiving agents’ Code of Practice*), so as to enable announcements under Rule 17.1 to be made on a daily basis, would be minimal. However, daily announcements throughout the offer may be of limited benefit and shareholders might find such frequent announcements unhelpful and confusing, at least in the early stages of an offer.

6.29 The Code Committee considers that an offeror should be required to make an announcement in relation to acceptance levels at the following times:

- (a) on the day after Day 21 and every seven days thereafter, until the final week preceding the unconditional date;
- (b) after each day in the week up to and including the unconditional date;

- (c) after the day on which the offer is declared unconditional or lapses;
- (d) after the expiry of an acceptance condition invocation notice; and
- (e) after any day on which, as at 5.00 p.m., acceptances plus other shares which count towards satisfaction of the acceptance condition go up or down through any of the following thresholds:
 - (i) the current threshold to which the acceptance condition is subject (typically 90% of the shares to which the offer relates);
 - (ii) 75% of the shares carrying voting rights in the offeree company; and
 - (iii) the minimum threshold to which, in accordance with its terms, the acceptance condition may be made subject (typically shares carrying more than 50% of the voting rights in the offeree company).

6.30 In addition, the Code Committee considers that an offeror should be required to include the same information in relation to acceptance levels in any announcement which includes an acceptance condition invocation notice, an acceleration statement or a revision of the offer.

(ix) *Proposed amendments to Rule 17*

6.31 In the light of the above, the Code Committee proposes to amend Rule 17.1, as follows:

~~“17.1 TIMING AND CONTENTS~~

(a) An offeror must make an announcement including the details set out in Rule 17.2 By 8.00 am at the latest on the business day following the day on which an offer is due to expire, or becomes or is declared unconditional as to acceptances, or is revised or extended, an offeror must make an appropriate announcement, each of the following days:

- (i) Day 21 and every seventh day thereafter;**
- (ii) each of the five business days leading up to, and including, the unconditional date;**
- (iii) any day on which an acceptance condition invocation notice expires;**
- (iv) any other day on which the offer is declared unconditional or lapses; and**
- (v) any day on which, as at 5.00 pm, the total percentage of shares which the offeror may count towards satisfaction of the acceptance**

condition has increased or decreased to, or through, any of the following thresholds:

(A) the percentage threshold to which the acceptance condition is currently subject;

(B) 75% of the shares carrying voting rights in the offeree company; and

(C) if the threshold in (A) can be reduced to a specified minimum threshold, that threshold.

(b) An offeror must also include the details set out in Rule 17.2 in any announcement which includes:

(i) an acceptance condition invocation notice;

(ii) an acceleration statement; or

(iii) a revision of the offer.”.

6.32 In addition, the Code Committee proposes to:

- (a) renumber the contents requirements of Rule 17.1 as new Rules 17.2(a) and (b); and
- (b) renumber Note 2 on Rule 17.1 (*General statements about acceptance levels*) as a new Rule 17.3, in order to give greater prominence to that provision,

as set out in Appendix A.

Q14 Should an offeror be required to make announcements as to acceptance levels as proposed in the amended Rule 17.1?

7. Single date for the satisfaction of all conditions

(a) *Introduction*

7.1 Section 7 proposes that:

- (a) there should be a single date by which all of the conditions to an offer must be satisfied or waived; and
- (b) the acceptance condition should not normally be capable of being satisfied until all of the other conditions to an offer have been either satisfied or waived.

(b) *Background*

7.2 As mentioned in Section 6, **Rule 10** provides that a voluntary offer must not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire shares carrying over 50% of the voting rights in the offeree company.⁵ An offer will therefore typically be conditional on acceptances of the offer being received in respect of:

- (a) at least 90% of the shares to which the offer relates (so that the offeror can “squeeze out” the minority); or
- (b) such lesser percentage as the offeror may decide, provided that the shares accepted to the offer, together with shares already held by the offeror, represent more than 50% of the voting rights of the offeree company.

Such an offer will “become unconditional as to acceptances” if the 90% level referred to in paragraph (a) is achieved and may be “declared unconditional as to acceptances” if the offeror decides to settle for a lower level, provided that it meets the “more than 50% of the voting rights” requirement referred to in paragraph (b).

7.3 **Rule 31.6(a)** provides that an offer may not become or be declared unconditional as to acceptances after midnight on the 60th day after the publication of the offer document, except where the offer timetable is extended in the limited circumstances described in **Rules 31.6(a)(i) to (vi)**.

7.4 As previously noted, **Rule 31.7** provides that:

⁵ Rule 9.3 sets out the requirements for the acceptance condition to a mandatory offer and provides that a mandatory offer must not normally be subject to any other conditions. See Section 10.

- (a) except with the consent of the Panel, all outstanding conditions must be satisfied or waived (i.e. the offer must become or be declared “wholly unconditional” or “unconditional in all respects”) or the offer must lapse within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later; and
- (b) the Panel's consent to an extension of this 21 day period will normally only be granted if the outstanding condition involves a material official authorisation or regulatory clearance relating to the offer and it has not been possible to obtain an extension under Rule 31.6.

Given that the latest date for the satisfaction of the acceptance condition is Day 60 and the latest date for the satisfaction or waiver of all other conditions is 21 days after the satisfaction of the acceptance condition, the deadline in Rule 31.7 is commonly referred to as “Day 81”.

- 7.5 When an offer becomes or is declared unconditional as to acceptances, the offer period ends and the ability for shareholders who have accepted the offer to withdraw their acceptance ceases (**Rule 34.1(a)**). Therefore, if the Panel grants an extension to Day 81 to give the offeror more time for the satisfaction of a condition relating to a material official authorisation or regulatory clearance, shareholders who have accepted the offer will be “locked in” to their acceptance, potentially for a long period of time, and unable to withdraw their acceptance and sell their shares in the market, other than in assented form.
- 7.6 However, if it becomes possible for the Panel to suspend the offer timetable ahead of Day 60 in order to allow for the satisfaction of any conditions relating to a material official authorisation or regulatory clearance, as proposed in Section 3, there would no longer be a need for an offeror to have an additional period of time following Day 60 in order to satisfy any such conditions.

(c) Proposals

(i) Merger of Day 60 and Day 81

- 7.7 The Code Committee believes that there is no particular reason for the Code to make a distinction between the latest date for the satisfaction of the acceptance condition (i.e. Day 60) and the latest date for the satisfaction of the other conditions to the offer (i.e. Day 81) and that it would be more logical for the Code to require there to be a single latest date by which all of the conditions to an offer must be satisfied (or waived). Such a requirement would have the benefit of avoiding the current situation whereby accepting

shareholders could be “locked in” to the offer for a long period of time after the offer had become or been declared unconditional as to acceptances owing to an extension of the offer timetable following an unexpected delay to the obtaining of a material official authorisation or regulatory clearance.

7.8 The Code Committee observes that, in certain cases, all of the conditions to an offer are already required to be satisfied by Day 60. For example, the Panel has agreed with the US Securities and Exchange Commission (the “SEC”) that, if US securities laws are relevant because a certain proportion of the offeree company shareholders are located in the USA, withdrawal rights should be available for offeree company shareholders from the outset of the offer until it becomes or is declared wholly unconditional. Accordingly, such an offer will be required to become or be declared both unconditional as to acceptances and wholly unconditional on the same date.

7.9 If the Code were to require all of the conditions to an offer to be satisfied by a single date, the question arises as to what that date should be, for example the 60th or the 81st day following the publication of the offer document. The Code Committee considers that Day 60 would be the most appropriate date, given that, if the proposals in Section 3 are adopted, all conditions relating to a material official authorisation or regulatory clearance will have been satisfied or waived by Day 60 (as it will be possible for the Panel to suspend the offer timetable pending the satisfaction of any such conditions) and all other conditions should be capable of being satisfied within this timeframe.

7.10 In the light of the above, the Code Committee proposes to:

(a) introduce a new Rule 31.1(a) (as previously proposed in Section 2), as follows:

“(a) Except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60.”;
and

(b) delete the current Rule 31.7 and the Notes thereon.

Q15 Should there be a single latest date (i.e. Day 60) for the satisfaction of (a) the acceptance condition and (b) the other conditions to an offer?

(ii) Satisfaction of the acceptance condition

7.11 If all of the conditions to an offer were required to be satisfied by a single date, further amendments would be required to ensure that the acceptance condition could not be satisfied (causing the offer period to end and withdrawal rights for accepting shareholders

to cease) until all of the other conditions had been satisfied (or waived), i.e. the acceptance condition should, in effect, be the last condition to be satisfied.

- 7.12 However, it may not be possible for certain conditions to an offer to be satisfied until after the acceptance condition has been satisfied. For example, a listing condition in relation to the consideration securities being offered by a securities exchange offeror may not be capable of being satisfied until the listing authority is certain that the offer will succeed. In addition, a condition relating to a resolution as referred to in **paragraph (a) of Rule 18** (*The use of proxies and other authorities in relation to acceptances*) will only be capable of satisfaction after the acceptance condition has been satisfied. The Code Committee considers that, in the case of such “mechanical” conditions, the Panel should normally grant a dispensation from the requirement that the acceptance condition should be the last condition to be satisfied.
- 7.13 The Code Committee considers that it should continue to be possible for an offeror, at any time, to state that it intends (subject to the requirements of Rule 10) to declare its acceptance condition to be satisfied when a particular level of acceptances has been received (i.e. to “waive down” the acceptance condition threshold). However, if an offeror made such a statement, it would only be able to declare the acceptance condition to be satisfied if, at the same time, it declared all of the other outstanding conditions to the offer to be satisfied (or waived).
- 7.14 In the light of the above, the Code Committee proposes to introduce a new Rule 10.2, and a new Note thereon, as follows:

“10.2 SATISFACTION OF THE ACCEPTANCE CONDITION

Except with the consent of the Panel, the acceptance condition must not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived.

NOTE ON RULE 10.2

When a dispensation may be granted

The Panel will normally grant a dispensation from the requirement in Rule 10.2 where another condition is not capable of being satisfied until after the acceptance condition has been satisfied (such as a condition relating to the admission to listing and/or admission to trading of the securities being offered as consideration).”

- 7.15 As a result of the introduction of the proposed new Rule 10.2, the current Rule 10 would become Rule 10.1 and consequential amendments would be made to provisions of the Code which currently refer to Rule 10, as set out in Appendix A.

Q16 Should the Code provide that the acceptance condition must not be capable of being satisfied until all of the other conditions have been satisfied or waived, subject to the ability of the Panel to grant dispensation where this is not possible?

(iii) *Period for which an offer must remain open for acceptance and closing the offer*

- 7.16 The first sentence of **Rule 31.4** provides that, after an offer has become or is declared unconditional as to acceptances, the offer must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired. Since Rule 31.1 provides that an offer must be open until at least Day 21, an offer which becomes or is declared unconditional as to acceptances will therefore need to remain open for acceptance until at least “Day 35”.
- 7.17 This provision is intended to give offeree company shareholders who do not initially wish to accept the offer, but who also do not wish to remain as shareholders in a company which is controlled by the offeror, an opportunity to accept the offer once it has become clear that statutory control of the company will pass to the offeror (subject to the satisfaction of any outstanding conditions). This is sometimes referred to as “fence-sitter” protection. However, such protection is not relevant where the offeror already has statutory control of the offeree company and the offer is not subject to an acceptance condition. Accordingly, the second sentence of Rule 31.4 provides that a 14 day extension is not required where an offer is unconditional as to acceptances from the outset (but that the position must be set out clearly and prominently in the offer document).
- 7.18 **Rule 9.5(d)** similarly provides that, where a mandatory offer is required, the cash offer or cash alternative must remain open after the offer has become unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired.
- 7.19 The Code Committee considers that, if the distinction between an offer becoming “unconditional as to acceptances” and “wholly unconditional” is removed as proposed, shareholders should nevertheless retain the ability to accept an offer once it is clear that statutory control of the offeree company will pass to the offeror. However, the Code Committee considers that, subject always to the requirement that an offer should be open for acceptance until at least Day 21 (see the new Rule 31.2(a) proposed in Section 2), it would be sufficient for the ability to accept the offer to be available to “fence-sitting” shareholders for not less than 14 days after the date on which the offer becomes or is declared unconditional (as opposed to not less than 14 days after the date on which the offer would otherwise have expired).

7.20 Rule 31.2 provides as follows:

“31.2 FURTHER CLOSING DATES TO BE SPECIFIED

In any announcement of an extension of an offer, either the next closing date must be stated or, if the offer is unconditional as to acceptances, a statement may be made that the offer will remain open until further notice. In the latter case, or if the offer will remain open for acceptances beyond the 70th day following the publication of the offer document, at least 14 days’ notice must be given, before the offer is closed, to those shareholders who have not accepted by sending a notification to offeree company shareholders and persons with information rights.”.

7.21 The Code Committee considers that:

- (a) an offeror should be required to give at least 14 days’ notice whenever it intends to close an offer (and not only in the circumstances referred to in the current Rule 31.2); and
- (b) where an offeror intends to close an offer which is unconditional and which has been kept open until further notice, the offeror should also be required to send a notification to the remaining shareholders in offeree company in accordance with the requirements of Rule 30.2.

7.22 In the light of the above, the Code Committee proposes to:

- (a) amend the current Rule 31.4, which would become the new Rules 31.2(b) and (c); and
- (b) delete the current Rule 31.2 and introduce a new Rule 31.2(d) in its place.

7.23 Taking into account the amendments set out in Appendix A, the new Rule 31.2 (including the new Rule 31.2(a) proposed in Section 2) would read as follows:

“31.2 PERIOD FOR WHICH THE OFFER MUST REMAIN OPEN FOR ACCEPTANCE

- (a) **An offer must be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses.**
- (b) **In addition, after an offer becomes or is declared unconditional it must remain open for acceptance for not less than 14 days and the offeror must give at least 14 days’ notice before the offer is closed.**
- (c) **Subject to paragraph (a), when an offer is not subject to an acceptance condition, it is not required to remain open for acceptance in accordance with paragraph (b), provided that the position is set out clearly and prominently in the offer document.**

(d) When an offer becomes or is declared unconditional and remains open for acceptance until further notice, a notification must be sent to offeree company shareholders and persons with information rights at least 14 days before the offer is closed.”.

7.24 In addition, the Code Committee proposes to amend Rule 9.5(d), as follows:

“9.5 CONSIDERATION TO BE OFFERED

...

(d) The cash offer or the cash alternative must remain open for not less than 14 days after the offer has become unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.42).”.

Q17 Do you have any comments on the proposals in relation to the period for which an offer must remain open for acceptance and the closing of the offer?

(iv) *Consequential amendments*

7.25 As indicated above, various provisions of the Code currently make a distinction between an offer becoming or being declared:

- (a) “unconditional as to acceptances”, i.e. when the acceptance condition has been satisfied or has been declared to be satisfied; and
- (b) “wholly unconditional” or “unconditional in all respects”, i.e. when all of the conditions to the offer have been either satisfied or waived.

7.26 If, as proposed, the Code is amended so that there is a single date by which all of the conditions to an offer must be satisfied and a requirement that the acceptance condition must not be capable of being satisfied unless all the other conditions have been satisfied or waived, there would in most cases be no need for the Code to make the distinction referred to in the previous paragraph as an offer would simply become or be declared “unconditional” once all of the conditions had been either satisfied or waived.

7.27 The Code Committee therefore proposes to make consequential amendments to the following provisions, as set out in Appendix A:

- (a) *references to an offer becoming or being declared “unconditional as to acceptances”:*
 - (i) the third paragraph of the definition of “offer period” in the Definitions Section and Note 3 (to become Note 2) thereon;

- (ii) Rule 4.5 (*Restriction on the offeree company accepting an offer in respect of treasury shares*);
 - (iii) Rule 9.5(d) (*Consideration to be offered*) (see above);
 - (iv) Rule 10 (to become Rule 10.1) (*The acceptance condition*) and Notes 2, 6 (heading) and 7 thereon;
 - (v) Note 2 on Rule 24.7 (which relates to Rule 31.6(d));
 - (vi) Rule 31.6(d) (to become Rule 31.7(b)) (*Final day rule*) and Note 6 on Rule 31.6 (to become the Note on Rule 31.7);
 - (vii) Rule 36.4 (*Offer for between 30% and 50%*);
 - (viii) Rule 38.3 (*Assenting securities and dealing in assented securities*);
 - (ix) Section 3 of Appendix 2 (*Formula offers guidance note*); and
 - (x) Sections 3(c), 3(d) and 7 of Appendix 4 (*Receiving agents' Code of Practice*); and
- (b) *references to an offer becoming or being declared "wholly unconditional" or "unconditional in all respects":*
- (i) Rule 5.2(c)(iv) (exceptions to restrictions in Rule 5.1);
 - (ii) the second sentence of Rule 9.6 (*Obligations of directors*) (to become Rule 9.6(b));
 - (iii) Rule 18(a) (*The use of proxies and other authorities in relation to acceptances*);
 - (iv) Note 1(b) on Rule 21.2 (*Competing offerors*);
 - (v) Rule 25.9(b) (*Employee representatives' opinion and pension scheme trustees' opinion*);
 - (vi) Rule 31.8 (to become Rule 31.9) (*Settlement of consideration*);
 - (vii) Rule 32.6(b) (*The offeree board's opinion and the opinions of the employee representatives and the pension scheme trustees*);

(viii) Rules 35.1, 35.2, 35.3 and 35.4 and the Note on Rules 35.3 and 35.4 (*Restrictions following offers*); and

(ix) Section 9 of Appendix 2 (*Formula offers guidance note*).

(v) *Offeree protection conditions*

7.28 **Rule 13.6** provides that an offeree company should not invoke, or cause or permit the offeror to invoke, any condition to an offer (an “**offeree protection condition**”) unless the circumstances which give rise to the right to invoke the condition are of material significance to the shareholders in the offeree company in the context of the offer. **Note 2 on Rule 13.6** provides that, if the Panel does not permit the offeree company to invoke, or to cause or permit the offeror to invoke, an offeree protection condition, it may instead determine that accepting shareholders should have the right to withdraw their acceptances.

7.29 The Code Committee notes that Rule 13.6 will generally only be in point in the period between an offer becoming or being declared unconditional as to acceptances and its becoming or being declared wholly unconditional. This is illustrated by the fact that the alternative to allowing an offeree company to invoke an offeree protection condition is for the Panel to reintroduce withdrawal rights, which would have ceased upon the offer becoming or being declared unconditional as to acceptances.

7.30 However:

- (a) if the proposals in Section 8 are adopted, withdrawal rights for accepting shareholders will run from the commencement of the offer until the acceptance condition is satisfied; and
- (b) if the proposals in this Section are adopted, there would generally no longer be a distinction between an offer becoming or being declared unconditional as to acceptances and its becoming or being declared wholly unconditional.

7.31 In addition, the Code Committee:

- (a) notes that offeree protection conditions are not included in offers implemented as a scheme of arrangement. This is on the basis that an offeree company is, in effect, able to ensure that a scheme of arrangement is not implemented by, for example, withdrawing its recommendation of the offer and its cooperation with the offeror, without being required to demonstrate that the circumstances are of material significance to offeree company shareholders in the context of the offer; and

- (b) is not aware of any examples of an offeree company having invoked an offeree protection condition in a contractual offer since Rule 13.6 was introduced in 2005.

7.32 In the light of the above, the Code Committee proposes that Rule 13.6, and Notes 1 and 2 thereon, should be deleted.

7.33 If Rule 13.6 is deleted as proposed, the following provisions which refer to Rule 13.6 would be required to be either amended or deleted (as appropriate):

- (a) Rule 24.7 (*Incorporation of obligations and rights*) (amend);
- (b) paragraph (vi) of Rule 31.6(a) (*Final day rule*) (the second sentence of Rule 31.6(a) would, in effect, become Rule 31.3 but paragraph (vi) would not be replicated);
- (c) Rule 34.2 (*Offeree protection conditions*) (delete);
- (d) Note 1 on Rule 38.3 (*Withdrawal rights under Rule 13.6*) (delete); and
- (e) in Appendix 7 (*Schemes of arrangement*), Section 14 (*Incorporation of obligations and rights*) (amend) and paragraph (e) of Section 16 (*Provisions disapplied in a scheme*) (delete),

as set out in Appendix A.

Q18 Should Rule 13.6 in relation to invoking offeree protection conditions be deleted as proposed?

8. Withdrawal rights

(a) *Introduction*

- 8.1 Section 8 proposes that offeree company shareholders who have accepted an offer should be able to withdraw their acceptance at any time, and not only from the date which is 21 days after the first closing date.

(b) *Background*

- 8.2 **Rule 31.1** provides that an offer is required to remain open for acceptance for at least 21 days following the date on which the initial offer document is published. An offeror will therefore customarily set the “first closing date” of its offer as Day 21.
- 8.3 **Rule 34.1** provides that an offeree company shareholder who accepts an offer is entitled to withdraw its acceptance from the date which is 21 days after the first closing date until the time that the offer becomes or is declared unconditional as to acceptances. This is on the basis that offeree company shareholders might be expected not to accept an offer until shortly before the first closing date and should not be “locked in” to their acceptance decision for more than a reasonable period thereafter, considered to be 21 days. Withdrawal rights for accepting offeree company shareholders will therefore normally commence on “Day 42”.
- 8.4 It is possible, however, that an offeror may set the first closing date of an offer for a later date than Day 21. In such circumstances, withdrawal rights for offeree company shareholders will not commence until a date which is later than Day 42 and, if the first closing date is set on or after Day 39, withdrawal rights will never become available (unless there is an extension to Day 60).
- 8.5 As noted in Section 7, if US securities laws are relevant to the offer because a certain proportion of the offeree company shareholders are located in the USA, the Panel has agreed with the SEC that withdrawal rights should be available for offeree company shareholders from the outset of the offer until it becomes or is declared wholly unconditional (the final day for which in such circumstances must be no later than Day 60).

(c) *Proposals*

(i) *Withdrawal rights to run from the publication of the offer document*

- 8.6 The Code Committee considers that it is reasonable that offeree company shareholders

who accept an offer but who wish to withdraw their acceptance if, for example, material new information emerges or circumstances change, should then be free to do so at any time and, accordingly, that they should not be required to wait until “Day 42” or later in order to do so.

- 8.7 The Code Committee continues to believe that withdrawal rights for offeree company shareholders should cease once the acceptance condition has been satisfied. In any event, if the proposals in Section 7 are adopted, such that there is a single latest date for the satisfaction of all of the conditions to an offer, the acceptance condition will usually be the last condition to the offer to be satisfied.

- 8.8 In the light of the above, the Code Committee proposes to amend Rule 34.1, as follows:

“34.1 WHEN THE RIGHT OF WITHDRAWAL MAY BE EXERCISED

An accepting shareholder must be entitled to withdraw his an acceptance from the date which is 21 days after the first closing date of the initial offer at any time, if the offer has not by such date become or been declared unconditional as to acceptances unless the offer is unconditional from the outset. This entitlement to withdraw must be exercisable until the earlier of:

(a) the time that the offer becomes or is declared unconditional as to acceptances the acceptance condition is satisfied; and

(b) the final latest time for lodgement the receipt of acceptances on the unconditional date which can be taken into account in accordance with Rule 31.6.

- 8.9 The Code Committee notes that, if Rule 34.1 is amended as proposed, this would not affect the ability for an offeree company shareholder to give an irrevocable commitment to an offeror:

- (a) to accept an offer; and
- (b) not subsequently to withdraw the acceptance.

- (ii) *Competitive situations following a “no extension” or “no increase” statement*

- 8.10 **Paragraph (b) of Note 3 on Rule 31.5 and paragraph (b) of Note 3 on Rule 32.2** provide, respectively, that where an offeror has made a “no extension statement” or a “no increase statement” and wishes to set that statement aside in reliance on a reservation relating to a competitive situation arising, any shareholders who accepted the offer after the date of the statement must be given a right to withdraw their acceptance for a period of eight days following the date of the announcement that the statement has been set aside.

If Rule 34.1 is amended as proposed, offeree company shareholders will, in any event, have the right to withdraw their acceptance from the outset of the offer and these provisions would therefore become redundant.

- 8.11 The Code Committee therefore proposes to delete paragraph (b) of each of Note 3 on Rule 31.5 and Note 3 on Rule 32.2, as set out in Appendix A.

(iii) *Withdrawn acceptances not to be counted towards the satisfaction of the acceptance condition*

- 8.12 As a separate matter, the Code Committee proposes to introduce a new sentence at the end of **Note 4 on Rule 10** (to become Rule 10.1) which would expressly state that an acceptance which has been withdrawn must not be counted towards fulfilling an acceptance condition, as set out in Appendix A.

(iv) *Withdrawal rights if an offeror fails to announce acceptance levels under Rule 17.1*

- 8.13 **Rule 17.2** provides as follows:

“17.2 CONSEQUENCES OF FAILURE TO ANNOUNCE

(a) If an offeror, having announced the offer to be unconditional as to acceptances, fails by 3.30 pm on the relevant day to comply with any of the requirements of Rule 17.1, immediately thereafter any acceptor will be entitled to withdraw his acceptance. Subject to Rule 31.6, this right of withdrawal may be terminated not less than 8 days after the relevant day by the offeror confirming, if such is the case, that the offer is still unconditional as to acceptances and complying with Rule 17.1.

(b) For the purpose of Rule 31.4, the offer must remain open for acceptance for not less than 14 days after the date of such confirmation and compliance.”.

- 8.14 The Code Committee considers that, if the amendments proposed in Section 7 are adopted, such that there is a single date for the satisfaction of all conditions to an offer, it would not be appropriate for withdrawal rights to be reintroduced after an offer has become or been declared unconditional.

- 8.15 The Code Committee therefore proposes that Rule 17.2 should be deleted. The reference to Rule 17 in Rule 24.7 (*Incorporation of obligations and rights*) would also be deleted.

Q19 Do you have any comments on the proposed amendments to the Code in relation to withdrawal rights?

9. The invocation of conditions and pre-conditions to offers

(a) *Introduction*

9.1 Section 9:

- (a) describes the Panel's approach to the invocation of conditions and pre-conditions to an offer, including the requirement for an offeror which wishes to invoke a condition or pre-condition to satisfy the Panel that the circumstances which have arisen are of "material significance" to it in the context of the offer;
- (b) proposes amendments to the Code in relation to the "material significance" requirement; and
- (c) explains the amendments which the Executive proposes to make to Practice Statement No 5 (*Rule 13.5(a) – Invocation of conditions*).

(b) *Background*

(i) *Relevant provisions of the Code*

9.2 **Section 2(a) of the Introduction to the Code** summarises the nature and purpose of the Code, as follows:

"(a) Nature and purpose of the Code

The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.

...

The Code has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to offeree company shareholders and an orderly framework for takeovers can be achieved. ...".

9.3 The Code is a principles-based system of regulation, the provisions of which are applied in accordance with their spirit to achieve their underlying purpose. This is reflected in **Section 2(b) of the Introduction to the Code**, as follows:

“(b) General Principles and Rules

The Code is based upon a number of General Principles, which are essentially statements of standards of commercial behaviour. These General Principles ... are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied in accordance with their spirit in order to achieve their underlying purpose.

In addition to the General Principles, the Code contains a series of rules. Although most of the rules are expressed in less general terms than the General Principles, they are not framed in technical language and, like the General Principles, are to be interpreted to achieve their underlying purpose. Therefore, their spirit must be observed as well as their letter.”.

- 9.4 Having regard to the objectives of fair treatment for shareholders, providing an orderly framework for the conduct of takeovers, and the promotion of the integrity of the financial markets, the Code seeks to minimise the market uncertainty that would otherwise arise if an offeror were able to cause an offer not to proceed, to lapse or to be withdrawn without good reason. This reflects the Panel's long-standing policy, as set out in [Panel Statement 1974/7](#), dated 13 March 1974, which stated that:

“One of the objectives of the City Code was to prevent the directors of companies from announcing offers and then without adequate reason withdrawing from them – thus creating a false market and often leading to unfair treatment as between shareholders of the offeree company. The Panel has therefore been and remains very reluctant to agree to the withdrawal of an offer that has been announced. In [\[Panel Statement 1974/2\]](#), dated 15th January 1974, the Panel indicated that a change in economic, industrial or political circumstances would not normally justify the withdrawal of an announced offer. To justify unilateral withdrawal, the Panel would normally require some circumstance of an entirely exceptional nature, and amounting to something of the kind that would frustrate a legal contract.⁶ ... Directors, in announcing an offer and the terms and conditions on which it will be made, must have carefully considered the matter and must fully intend to go through with the operation.”.

- 9.5 As explained below, the Code therefore contains a number of rules which regulate: the decision to announce a firm intention to make an offer; the timetable for proceeding to make the offer; the conditions to which the offer may be subject; and the circumstances in which those conditions may be invoked so as to cause the offer not to proceed, to lapse or to be withdrawn.
- 9.6 **Rule 2.7(a)** sets out the standard of care and responsibility required of an offeror which decides to announce a firm intention to make an offer (and its advisers), as follows:

⁶ The relevance of the frustration of a legal contract was subsequently addressed by the Executive in Practice Statement No 5. See below.

“2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

(a) An offeror should announce a firm intention to make an offer only after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror.”.

- 9.7 In addition, **Rule 2.7(b)** sets out an offeror's obligation, having announced a firm intention to make an offer, to proceed to make its offer, as follows:

“(b) Following an announcement of a firm intention to make an offer, the offeror must proceed to make the offer unless, in accordance with the provisions of Rule 13, it is permitted to invoke a pre-condition to the making of the offer or would be permitted to invoke a condition to the offer if the offer were made. ...”.

- 9.8 **Rule 13.1** limits the extent to which the conditions to an offer may be couched in subjective terms, as follows:

“13.1 SUBJECTIVITY

An offer must not normally be subject to conditions or pre-conditions which depend solely on subjective judgements by the offeror or the offeree company (as the case may be) or, in either case, its directors or the fulfilment of which is in their hands. The Panel may be prepared to accept an element of subjectivity in certain circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition or pre-condition may depend, especially in cases involving official authorisations or regulatory clearances, the granting of which may be subject to additional material obligations for the offeror or the offeree company (as the case may be).”.

- 9.9 **Rule 13.5(a)** is the primary protection against widely-drafted conditions being invoked contrary to the reasonable expectations of offeree company shareholders and the market generally. It overrides the legal and contractual effect of offer conditions by imposing a materiality threshold which must be met in order for an offeror to be permitted to invoke any condition to its offer, regardless of the specific drafting of the condition, as follows:

“13.5 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) An offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. The acceptance condition is not subject to this provision.”.

- 9.10 In addition, **Rule 13.5(b)** imposes an obligation on the offeror to endeavour to satisfy all of the conditions to its offer, as follows:

“(b) Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.”.

(ii) *Panel Statement 2001/15: WPP/Tempus*

9.11 The question of when an offeror should be permitted to invoke a condition so as to cause its offer to lapse was considered in [Panel Statement 2001/15](#), dated 6 November 2001, in which the Panel (prior to the establishment of the Hearings Committee) rejected the request by WPP Group plc to invoke the “material adverse change” condition to its offer for Tempus Group plc. WPP had announced its offer on 20 August 2001 and contended that the terrorist attacks in the USA on 11 September 2001 had caused a material adverse change in the prospects of Tempus which was of material significance to WPP in the context of its offer, i.e. that the test in Rule 13.5(a) (which was at that time set out in Note 2 on Rule 13) had been satisfied.

9.12 The Code Committee notes, in particular, the following statements made by the Panel in the *WPP/Tempus* case, which remains the leading case on the invocation of conditions under the Code:

“16. ... [M]eeting [the test in Rule 13.5(a)] requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous, as the 1974/2 Panel Statement put it, to something that would justify frustration of a legal contract.⁷ To accept a lower test would allow an offeror to use a material adverse change condition to defeat the object of Rule 2.7 and the 1974 Panel Statements. The Panel, accordingly, did not accept the test proposed by WPP that it is sufficient if there has been “a change which undermines, from the offeror’s perspective, the rationale for having made the offer at the price and on the terms specified”.

...

18. It was not disputed by WPP that the offeror cannot rely on what he knows or anticipates at the relevant time (or, the Panel would add, what he would have known if he had complied with his obligations under General Principle 3⁸ to announce an offer only after the most careful and responsible consideration).

...

21. All parties acknowledged that the burden of proof was on WPP to prove that a material adverse change affecting Tempus has occurred and that this was of material significance to WPP in the context of its offer.

...

⁷ See previous footnote

⁸ Now Rule 2.7(a)

31. It was clear to the Panel, applying the test in paragraph 16 above, that a temporary effect on profitability was not of itself sufficient. The adverse change had to be long lasting since a purchaser of 100 percent of a company for strategic reasons was clearly investing for the long term and therefore something of material significance to such an offeror "in the context of the offer" had to be long term.

...

35. For an offeror to invoke a material adverse change condition and so withdraw its offer requires, in the opinion of the Panel, the offeror to demonstrate to the Panel that exceptional circumstances have arisen affecting the offeree company which could not have reasonably been foreseen at the time of the announcement of the offer. The effect of the circumstances in point must be sufficiently adverse to meet the high test of materiality described in paragraph 16 above and judged, at least in the present type of case, not in terms of short term profitability but on their effect on the longer term prospects of the offeree company."

(iii) *Publication of Practice Statement No 5 in 2004*

9.13 [Practice Statement No 5](#), initially published on 28 April 2004, sets out further detail on the Executive's approach to the application of Rule 13.5(a).

9.14 Practice Statement No 5 states that, in a typical offer, the conditions can be broken down into four broad categories, as follows:

- “• the acceptance condition – i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer;
- UK or European Commission competition clearances;
- other, effectively mandatory, conditions designed to give effect to some supervening regulatory requirement – for example, a listing condition on a securities exchange offer; and
- other conditions included for the benefit of the offeror in order to give it the right not to proceed with the offer in the circumstances stipulated. There is a wide range of conditions which fall within this category, although one of those frequently encountered is the “material adverse change” (or “MAC”) condition, whereby the offeror can lapse its offer in the event of a material adverse change in the business or prospects of the offeree company in the period after announcement of the offer.”.

9.15 Practice Statement No 5 goes on to state that:

“The purpose of Rule 13.5(a) is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of then Note 2 on Rule 13 (which is now Rule 13.5(a)) was considered by the Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was a MAC condition. The Panel concluded that the necessary test of “material significance” was not met and in its decision stated that:

“... meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous ... to something that would justify frustration of a legal contract.”.

The Executive is aware that certain practitioners interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer (other than the acceptance condition or any UK or European Commission competition condition). The Executive does not consider this interpretation to be correct.

In applying Rule 13.5(a) in the light of the Panel’s decision set out in Panel Statement 2001/15, the Panel Executive’s practice is as follows:

- as set out in Rule 13.5(a), the appropriate test for the invocation of a condition is whether the relevant circumstances upon which the offeror is seeking to rely are of material significance to it in the context of the offer – which must be judged by reference to the facts of each case at the time the relevant circumstances arise;
- in the case of a MAC, or similar, condition, whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and
- whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.”.

(iv) *PCP 2004/4 and Response Statement 2004/4*

9.16 Following Panel Statement 2001/15 and the initial publication of Practice Statement No 5, the Code Committee carried out a review of the Panel’s approach to certain aspects of conditions and pre-conditions to offers, as set out in [PCP 2004/4](#), dated 10 August 2004, and [RS 2004/4](#), dated 25 April 2005.

9.17 In paragraph 4.4 of PCP 2004/4, the Code Committee noted that:

“In most offers, the conditions will follow a reasonably standard format in which the conditions are drafted in very wide terms and, even in recommended offers, they will often have been subject to little, if any, real negotiation. This does not raise particular concerns under the Code, however, given the overriding application of [Rule 13.5(a)].”.

9.18 In paragraph 4.5 of PCP 2004/4, the Code Committee went on to note that, in some offers, an offeror might want to include certain more bespoke conditions and sought views as to whether bespoke or negotiated conditions should be exempt from the “material significance” requirement under Rule 13.5(a).

9.19 In RS 2004/4, the Code Committee concluded that bespoke or negotiated conditions should be subject to the material significance requirement in the usual way, stating that:

“4.1.3 As stated in the PCP, the Code Committee believes that, in striking the appropriate balance between the interests of the offeror and the offeree company shareholders, it is ‘legitimate for the Code to impose a high supervening threshold for the invocation of conditions in all cases’. The Code Committee agrees that there will inevitably be uncertainty as to whether any particular condition may be invoked, since it will always have to be judged in the light of all the circumstances prevailing at the time when invocation is sought. The Code Committee does not accept, therefore, that certain conditions should be exempt from the application of [Rule 13.5(a)].

...

4.2.6 ... [T]he Code Committee believes that the fact of a condition having been negotiated should be significant in the Panel’s assessment of its materiality. However, the Code Committee does not accept that negotiated or bespoke conditions to a recommended offer should automatically be regarded as being material. Indeed, ... it would be possible for a comparatively trivial condition to have been the subject of negotiation with the offeree company. The Code Committee considers that the role of the Panel in determining materiality is key to ensuring consistency of approach and to providing offeree company shareholders and the market with the necessary comfort that a condition may not be invoked at the sole discretion of the party for whose benefit it has been written.”.

9.20 In PCP 2004/4 and RS 2004/4, the Code Committee also discussed two other specific factors (i.e. in addition to whether a condition had been negotiated) which it considered should be taken into account by the Panel, on a non-exhaustive basis, when making its assessment as to whether a condition could be invoked, i.e. whether the condition was:

- (a) expressly drawn to offeree company shareholders’ attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and/or
- (b) included to take account of the particular nature of the business of the offeree company.

(v) *Amendments to Practice Statement No 5 in 2009*

9.21 In March 2009, the Executive amended Practice Statement No 5 so as to reflect the three factors discussed in PCP 2004/4 and RS 2004/4 by inserting the following paragraphs:

“In accordance with RS 2004/4, in considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive’s practice to take into account all relevant factors, including whether:

- the condition was the subject of negotiation with the offeree company;
- the condition was expressly drawn to offeree company shareholders’ attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and

- the condition was included to take account of the particular circumstances of the offeree company.”.

(c) Requirement for Panel consent in order to invoke a condition

(i) Background

9.22 As indicated above, Rule 13.5(a) provides that an offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. Since it is for the Panel to determine whether this test has been satisfied, the Code Committee considers that an offeror must not invoke a condition or pre-condition unless the Panel has consented to its doing so and that the offeror must either satisfy or waive a condition if the Panel does not consent to the condition being invoked.

9.23 The fact that the invocation of a condition or pre-condition requires the consent of the Panel is supported by **Rule 24.7**, which provides as follows:

“24.7 INCORPORATION OF OBLIGATIONS AND RIGHTS*

The offer document ... must incorporate language which appropriately reflects ... those parts of Rules 13.5(a) ... which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.”.

Section 14 of Appendix 7 provides in similar terms in relation to a scheme circular.

9.24 It is a long-established policy that the Panel will not make a hypothetical determination as to whether, if particular circumstances were to arise in the future, they would be of material significance to the offeror in the context of its offer. As stated in Practice Statement No 5, this can only be judged by reference to the facts of each case at the time the relevant circumstances arise.

(ii) Proposals

9.25 The Code Committee considers that it would be helpful for Rule 13.5(a) clearly to provide that:

- (a) the consent of the Panel is required in order for an offeror to invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn;

- (b) language appropriately reflecting this requirement should be incorporated into each of the firm offer announcement and the offer document; and
- (c) the Panel will judge whether circumstances are of material significance to the offeror in the context of the offer by reference to the facts of each case at the time the relevant circumstances arise.

(iii) *Amendments to the Code*

9.26 In the light of the above, the Code Committee proposes to amend Rule 13.5(a), as follows:

“13.5 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) An offeror ~~should not~~ may only invoke any a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel. The firm offer announcement and the offer document must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise. ...”

9.27 In addition, the Code Committee proposes to:

- (a) delete the current references to Rule 13.5(a) in Rule 24.7 and Section 14 of Appendix 7; and
- (b) introduce a new Rule 2.7(c)(iv) and a new Rule 24.3(d)(vii), which would respectively refer to the requirement for a firm offer announcement and an offer document to include language which appropriately reflects that the offeror may only invoke any condition or pre-condition with the consent of the Panel,

as set out in Appendix A.

Q20 Do you have any comments on the proposed amendments to Rule 13.5(a) with regard to the invocation of conditions and pre-conditions?

(d) *Conditions to which Rule 13.5(a) does not apply*

(i) Background

9.28 The invocation of certain conditions is not subject to the material significance requirement and does not therefore require the Panel’s consent. This includes any condition which is not capable of being waived by the offeror (on the basis that it is not meaningful to require

the offeror to obtain the Panel's consent to invoke a condition which it is unable to waive if that consent is not forthcoming).

9.29 For example:

- (a) the second sentence of Rule 13.5(a) provides that "*The acceptance condition is not subject to this provision*". Similarly, Rule 13.5(a) does not apply to a condition relating to the approval of a scheme of arrangement by the offeree company's shareholders or to the sanctioning of the scheme by the court;
- (b) **Rule 13.2** provides that certain conditions and pre-conditions relating to the clearance of an offer by the CMA or the European Commission are not subject to Rule 13.5(a). However, the Code Committee is proposing in Section 5 that Rule 13.2 should be deleted;
- (c) in paragraph 3.5 of PCP 2004/4, the Code Committee stated that:

"[Rule 13.5(a)] does not apply in practice to other conditions [i.e. other than the acceptance condition and CMA/European Commission conditions] required to give effect to some overriding statutory or regulatory requirement necessary to implement the offer or to issue any consideration securities under the terms of the offer, for example a listing condition or a Class 1 shareholder approval condition (or a similar condition in another jurisdiction)".

The Code Committee continues to believe that Rule 13.5(a) should not apply to such a listing condition or shareholder approval condition. The Code Committee notes, however, that Rule 13.5(a) does apply to a condition or pre-condition relating to an official authorisation or regulatory clearance;
- (d) **Rule 13.4(b)** provides that, where a cash offer is to be financed by the issue of new securities, the offer must be made subject to any condition required, as a matter of law or regulatory requirement, in order for the securities to be issued and admitted to listing or trading and that any such conditions must not be waivable. Accordingly, such conditions cannot be subject to Rule 13.5(a); and
- (e) in the context of a scheme of arrangement, **Section 3(c) of Appendix 7** provides that the conditions referred to in **Section 3(b) of Appendix 7**, relating to long-stop dates and so-called "mini long-stop dates" (i.e. specific dates by which the shareholder meetings and the court sanction hearing must be held), are not subject to Rule 13.5(a).

9.30 In addition, the Code Committee considers that an offeror's ability to lapse, or to withdraw or not to proceed with, its offer on the long-stop date of a contractual offer pursuant to the proposed new Rule 12.1(a) (see Section 4) would not be subject to the requirements of Rule 13.5(a). This is because the offer will normally be permitted not to proceed, to lapse or to be withdrawn if, as at the long-stop date:

- (a) sufficient acceptances have not been received to satisfy the acceptance condition; or
- (b) a condition or pre-condition relating to a material official authorisation or regulatory clearance has not been satisfied or waived and either:
 - (i) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or
 - (ii) taking the action that would be required to be taken in order for the authorisation or clearance to be obtained would give rise to circumstances of material significance to the offeror in the context of the offer.

9.31 Furthermore, the Code Committee notes that the Panel may agree that a condition should be "non-waivable" and therefore not subject to Rule 13.5(a) in the particular circumstances. This may be the case where, for example:

- (a) the approval of offeree company shareholders is required for a transaction under **Note 2 on Rule 16.1** (such as a proposed disposal of offeree company assets by the offeror to an offeree company shareholder) or for certain management incentivisation arrangements falling under **Rule 16.2**; or
- (b) where the offer is subject to a condition relating to action by offeree company shareholders, such as the rejection of an acquisition or disposal proposed by the board of the offeree company (see **Rule 21.1**).

(ii) *Proposals*

9.32 The Code Committee considers that it would be helpful for the Code to include a list of conditions to which the material significance requirement in Rule 13.5(a) does not apply.

9.33 In addition, the Code Committee considers that the offeror, in the firm offer announcement and offer document, should be required to state:

- (a) which conditions and pre-conditions will not be subject to Rule 13.5(a); and

- (b) that any condition or pre-condition that is subject to Rule 13.5(a) may be waived by the offeror.

(iii) *Amendments to the Code*

- 9.34 In the light of the above, the Code Committee proposes to introduce a new Rule 13.5(b), as follows:

“(b) The following will not be subject to Rule 13.5(a):

(i) the acceptance condition (see Rules 9.3 and 10.1);

(ii) a condition relating to the approval of a scheme of arrangement by the offeree company’s shareholders or to the sanctioning of the scheme by the court;

(iii) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);

(iv) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities (see also Rule 24.10);

(v) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror’s articles of association (or equivalent), for the offeror’s shareholders to approve the implementation of the offer;

(vi) a term relating to the long-stop date of a contractual offer (see Rule 12.1);

(vii) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (see Sections 3(b) and (c) of Appendix 7); and

(viii) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.”.

- 9.35 In addition, the Code Committee proposes to introduce new Rules 13.5(c) and 13.5(d), as follows:

“(c) The firm offer announcement and the offer document must state which conditions and, in the case of a firm offer announcement, pre-conditions are not subject to Rule 13.5(a).

(d) The firm offer announcement and the offer document must state that any condition or, in the case of a firm offer announcement, pre-condition that is subject to Rule 13.5(a) may be waived by the offeror.”.

9.36 References to the proposed new Rules 13.5(c) and 13.5(d) would be introduced into:

(a) the proposed new Rules 2.7(c)(v) and (vi) (in relation to the firm offer announcement); and

(b) the proposed new Rules 24.3(d)(viii) and (ix) (in relation to the offer document),

as set out in Appendix A.

Q21 Do you have any comments on the proposed new Rule 13.5(b), with regard to the conditions and pre-conditions to which Rule 13.5(a) does not apply, or on the proposed new Rules 13.5(c) and (d), with regard to the disclosures to be made in the firm offer announcement and the offer document?

(iv) *Current Rule 13.5(b): requirement to use all reasonable efforts to satisfy conditions*

9.37 In addition, it is proposed to move the requirement in Rule 13.5(b) that an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject into a new Rule 13.2 so as to give greater prominence to that requirement. This would replace the current Rule 13.2, which is proposed to be deleted (see Section 5).

9.38 The Code Committee notes that the current Rule 13.5(b) applies to all conditions and pre-conditions, regardless of whether they are subject to Rule 13.5(a).

(e) *Implications of the proposed amendments*

9.39 The Code Committee has considered the implications of the amendments proposed in this PCP to the Panel's approach to the invocation of conditions to offers. The Code Committee considers that, fundamentally, there should be no change to the principle that an offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer.

9.40 The Code Committee recognises, however, that certain of the amendments proposed in this PCP will give rise to practical implications for the application of the requirements of Rule 13.5(a). For example:

(a) if **Rule 12.1(a)** and **Rule 12.1(b)** are deleted as proposed in Section 5, there will no longer be a requirement for an offer to lapse automatically if a Phase 2 CMA

reference is made or if Phase 2 European Commission proceedings are initiated;
and

- (b) if Rule 13.2 is deleted as proposed in Section 5, a condition or pre-condition relating to there being no Phase 2 CMA reference or Phase 2 European Commission proceedings or, if there is, that clearance is obtained at the end of the reference or proceedings, would become subject to the requirements of Rule 13.5(a).

(f) *Categories of condition*

9.41 The proposed amendments to the Code, if adopted, will result in a change to the Executive's categorisation of conditions for the purposes of Practice Statement No 5.

9.42 Subject to the adoption of the relevant amendments proposed in this PCP, the Executive has advised the Code Committee that it intends to identify the following categories of condition in the revised Practice Statement No 5:

- (a) the acceptance condition or, in the case of a scheme of arrangement, the shareholder approval and court sanction conditions;
- (b) conditions designed to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association, relating to the listing and/or admission to trading of the consideration securities or to the approval of the implementation of the offer by the offeror's shareholders;
- (c) specific or general conditions relating to the obtaining of an official authorisation or regulatory clearance and bespoke conditions relating to the (non-)occurrence of a specific event or circumstance in relation to the offeree company; and
- (d) other conditions, principally general protective conditions (including a "material adverse change" condition).

9.43 The material significance requirement in Rule 13.5(a) would not apply to the conditions referred to in paragraphs 9.42(a) and (b) but would apply to the conditions referred to in paragraphs 9.42(c) and (d). In the case of a condition referred to in paragraph 9.42(d), whether the material significance requirement is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction.

(g) Factors to be taken into account: general

(i) Introduction

9.44 As indicated above, in considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive's practice to take into account all relevant factors. As seen, the three factors specifically identified in Practice Statement No 5 are whether the condition was:

- (a) the subject of negotiation with the offeree company;
- (b) expressly drawn to offeree company shareholders' attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and/or
- (c) included to take account of the particular circumstances of the offeree company.

9.45 The Executive has advised the Code Committee that it considers that it would be helpful to set out in Practice Statement No 5 a number of the other factors that might be taken into account in considering whether the material significance requirement has been met.

(ii) Foreseeability

9.46 As identified in Panel Statement 2001/15 in relation to the *WPP/Tempus* case, a key factor will be whether the circumstances which have arisen could not have reasonably been foreseen at the time of the announcement of the offer. In general, and particularly in relation to general protective conditions, an offeror will be permitted to invoke a condition only if the circumstances could not have reasonably been foreseen. However, this is not determinative and the fact that a particular outcome was foreseeable will not necessarily exclude the possibility that the Panel will consent to the condition being invoked if, for example, the probability of that outcome occurring was remote. This is particularly the case for conditions relating to an official authorisation or regulatory clearance and bespoke conditions.

9.47 In addition, even if the probability of a foreseeable outcome occurring is more than remote, an offeror may be able to increase the likelihood of its being permitted to invoke a condition by clearly disclosing in the announcement of the offer and in the offer document its intention to seek to invoke the condition if specified circumstances occur. For example, an offeror might disclose its intention to lapse the offer if a regulatory authority requires assets with a value above a particular threshold to be disposed of as a condition to its clearance of

the offer. In this case, offeree company shareholders and other market participants will have been informed of the offeror's intention and the Panel may therefore be more willing to consent to the invocation of the relevant condition. Whilst an offeror may be unwilling to make such a disclosure if it is reluctant to reveal to the relevant regulatory authority the value of the disposals that it is willing to make in order to secure the necessary clearance, the offeror will need to weigh this against the potential assistance that the making of such a disclosure might provide in the event that it seeks to invoke the relevant condition.

(iii) Actions of the offeror

9.48 Another factor that will be taken into account in considering whether the material significance requirement has been met is the action taken by the offeror since the firm offer announcement and, in particular, since the occurrence of the circumstances on which the offeror seeks to rely in order to invoke the condition or pre-condition.

9.49 For example, if the offeror has purchased shares in the offeree company since the relevant circumstances arose, or has made statements indicating an intention to continue to pursue the offer, the Panel will be less likely to agree that the circumstances are of material significance to the offeror in the context of the offer.

(iv) Views of the offeree board

9.50 In considering whether to consent to the invocation of a condition, the Panel will wish to take into account the views of the board of the offeree company. As a general rule, the likelihood of the Panel consenting to an offer lapsing will be increased if the board of the offeree company agrees that this is the appropriate course of action.

(h) Factors to be taken into account: official authorisations and regulatory clearances

9.51 As mentioned above, if the proposals in Section 5 are adopted, the invocation of a condition or pre-condition relating to clearance by the CMA or the European Commission will be subject to the same requirements as the invocation of a condition or pre-condition relating to any other official authorisation or regulatory clearance. In summary, the material significance requirement will apply to the invocation of such a condition or pre-condition and will be judged by reference to the facts of the case at the time the relevant circumstances arise.

9.52 The Executive has advised the Code Committee that, in addition to the above, factors which will be taken into account in considering whether a condition or pre-condition relating

to the obtaining of an official authorisation or regulatory clearance may be invoked will include:

- (a) the significance of the authorisation or clearance to the offeror;
- (b) what action, if any, the offeror would need to take in order to obtain the authorisation or clearance and the strategic consequences for the offeror if it were to take that action; and
- (c) the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance.

9.53 In the case of a condition or pre-condition relating to there being no Phase 2 CMA reference (or equivalent reference or process), the factors that will be taken into account will also include:

- (a) whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company; and
- (b) the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low.

(i) *Draft of revised Practice Statement No 5*

9.54 The Executive has advised the Code Committee that, if the amendments proposed in this PCP are adopted, it intends to publish a revised version of Practice Statement No 5, a draft of which (marked to show the changes that would be made to the current Practice Statement No 5) is set out in Appendix C.

10. Mandatory offers

(a) *Introduction*

10.1 Section 10 proposes that the Panel should be able to grant a dispensation from the restriction on a person triggering a mandatory offer if the making or implementation of that offer would be subject to any condition or consent where:

- (a) the condition or consent relates to a material official authorisation or regulatory clearance;
- (b) the triggering share purchase is itself subject to a condition relating to that material official authorisation or regulatory clearance in identical terms to the condition or pre-condition to the offer; and
- (c) the invocation of the condition to the share purchase agreement (and the condition or pre-condition to the offer) is subject to the consent of the Panel, applying the “material significance” requirement in Rule 13.5(a).

(b) *Background*

10.2 **Rule 9.1** provides, in summary, that a person must make a mandatory offer to the other shareholders in a company if the person (and persons acting in concert with it) either:

- (a) acquires “control” of the company (i.e. interests in shares carrying 30% or more of the voting rights); or
- (b) consolidates its control of the company by making an acquisition in the 30-50% band which increases the percentage of shares carrying voting rights in which the person is interested.

10.3 The definition of “**interest in securities**” provides that an “interest in shares” includes a conditional agreement to purchase, or an option to acquire, shares. The entering into of an agreement by a person to acquire shares subject to the obtaining of an official authorisation or regulatory clearance will therefore trigger an obligation for a mandatory offer to be made if it would result in an increase in the percentage of shares in which that person and persons acting in concert with it are interested through a threshold in Rule 9.1.

10.4 **Rule 9.3(a)** provides that, except with the consent of the Panel:

“offers made under Rule 9 must be conditional only upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding shares carrying more than 50% of the voting rights [in the offeree company]”.

10.5 **Rule 9.3(b)** provides that, except with the consent of the Panel:

“no acquisition of any interest in shares which would give rise to a requirement for an offer under this Rule may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements”.

10.6 **Note 3 on Rule 9.3** provides that the Panel will not normally consider a request for a dispensation under Rule 9.3 other than in exceptional circumstances, such as *“when any official authorisation or regulatory clearance is required before the offer document is published”*. It is rare for a person to seek the Panel’s consent to trigger a mandatory offer that would be subject to an official authorisation or regulatory clearance. However, where such a dispensation is granted, paragraph (b) of Note 3 on Rule 9.3 provides that:

- (a) if the authorisation or clearance is obtained, the offer document must be published immediately; and
- (b) if the authorisation or clearance is not obtained, the same consequences will follow as if the merger had been prohibited following a Phase 2 CMA reference or Phase 2 European Commission proceedings, i.e. the offeror would be likely to be required to reduce its interests to below the mandatory bid-triggering threshold (in accordance with **Note 1 on Rule 9.4**).

10.7 **Rule 9.4** provides that a mandatory offer must contain a term required by **Rule 12.1(a)** or **Rule 12.1(b)**, i.e. the offer must lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated before the earlier of the first closing date and the date when the offer becomes unconditional. However, this would no longer be the case if Rule 9.4 (and Rules 12.1(a) and (b)) are deleted as proposed in Section 5.

(c) Proposal

10.8 The Code Committee considers that:

- (a) mandatory offers should continue normally to be subject only to a “50%” acceptance condition, as prescribed by Rule 9.3(a);

- (b) a person should continue normally to be restricted from triggering a mandatory offer if the making or implementation of the offer would or might be dependent on any condition, consent or arrangement; and
- (c) the Code should continue to enable the Panel to consent to a person triggering a mandatory offer in certain circumstances where an official authorisation or regulatory clearance will be required.

10.9 However, the Code Committee considers that the circumstances in which the Panel should consent to a mandatory offer being triggered where an official authorisation or regulatory clearance is required should be drawn narrowly. For example, it would be unsatisfactory if:

- (a) a person was permitted to trigger a mandatory offer by means of an unconditional share purchase, as a result of which the making of the offer was then subject to an official authorisation or regulatory clearance;
- (b) the authorisation or clearance was not obtained and, as a result, the mandatory offer was not made, or lapsed; and
- (c) the person was then required to reduce its shareholding to below the mandatory bid-triggering threshold.

10.10 Whilst the Code Committee recognises that a similar situation could currently occur if a mandatory offer lapses when a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated and the merger is prohibited at the end of the “phase 2” process, this has rarely occurred in practice. In addition:

- (a) it is difficult to reconcile the situation referred to in the previous paragraph with the requirement in **General Principle 1** that all shareholders should be afforded equivalent treatment, given that only the selling shareholder will have been provided with an exit upon the passing of control of the company to the purchaser; and
- (b) the disposal of shares to below the triggering threshold in such a situation could be a long and difficult process and, as such, detrimental to the interests of the company and its shareholders.

10.11 The Code Committee considers that these concerns could be addressed if:

- (a) the purchase of the triggering shares itself was permitted to be made subject (only) to a condition relating to the official authorisation or regulatory clearance; and

- (b) the circumstances in which the condition to the share purchase agreement between the offeror and the seller of the shares could be invoked (for example, on account of the authorisation or clearance being refused) were the same as those in which an identical condition to a voluntary offer could be invoked, i.e. in circumstances which were of material significance to the offeror in the context of the mandatory offer.

10.12 Accordingly, the Code Committee considers that:

- (a) the dispensation should only be available in connection with a “material official authorisation or regulatory clearance”, as proposed to be defined in Section 3;
- (b) the condition to the share purchase agreement should be in identical terms to a condition or pre-condition to the mandatory offer relating to the material official authorisation or regulatory clearance; and
- (c) the invocation of the condition to the share purchase agreement, and of the condition or pre-condition to the mandatory offer, should be subject to the “material significance” requirement in **Rule 13.5(a)**, as determined by the Panel.

10.13 The Code Committee considers that the effect of the above would be that:

- (a) as is currently the case, the obligation to make the mandatory offer would be triggered at the time that the share purchase agreement was entered into; and
- (b) the requirement in General Principle 1 for equivalent treatment of shareholders in the offeree company would be upheld because:
 - (i) if the condition to the share purchase agreement was satisfied (or was required by the Panel to be waived), the purchase of the shares would complete, the condition (or pre-condition) to the mandatory offer would also be satisfied (or waived), and a mandatory offer subject only to a “50%” acceptance condition prescribed by Rule 9.3(a) would be made (with the result that the remaining shareholders would be offered an exit opportunity on the same terms as the selling shareholder); but
 - (ii) if the Panel agreed that the condition to the share purchase agreement could be invoked, the purchase of the shares would not complete and the mandatory offer would lapse or be withdrawn (with the result that neither the selling shareholder nor the remaining shareholders would realise an exit).

10.14 In the light of the above, the Code Committee proposes:

- (a) to move the provisions of Rule 9.3(b) to a new Rule 9.4, as set out in Appendix A; and
- (b) to delete paragraph (b) of Note 3 on Rule 9.3 and to introduce a Note on the proposed new Rule 9.4, as follows:

“When a dispensation may be granted

(a) The Panel will normally only grant a dispensation under Rule 9.4 if the share purchase agreement in relation to the acquisition of the interest in shares which would give rise to a requirement for an offer under Rule 9 is made subject to a condition relating to a material official authorisation or regulatory clearance, which is also included as a condition or pre-condition to the offer, and to no other conditions.

(b) An announcement in compliance with Rule 2.7 will be required to be made under Rule 2.2(b) immediately upon the entering into of the share purchase agreement, following which the offeror must use all reasonable efforts to ensure the satisfaction of the condition(s) to the share purchase agreement (see Rule 13.2).

(c) The terms of the share purchase agreement must provide that the condition relating to the material official authorisation or regulatory clearance may only be invoked with the consent of the Panel, which consent will normally only be given if the circumstances which give rise to the right to invoke the condition are considered by the Panel to be of material significance to the offeror in the context of the offer (see Rule 13.5(a)).”.

10.15 In addition, the Code Committee proposes to delete paragraph (a) of Note 3 on Rule 9.3, which provides that a dispensation from Rule 9.3 may be granted when the cash consideration for a mandatory offer is to be provided, wholly or in part, by an issue of new securities. This is on the basis that the Code Committee does not consider that it would be appropriate for a mandatory offer to be conditional on the approval by the offeror's shareholders of the issue of the new shares which would finance the cash offer. In any event, it is now rare for offers (particularly mandatory offers) to be structured in this way.

10.16 Furthermore, the Code Committee notes that the penultimate sentence of Note 3 on Rule 9.3 provides that an offeror must endeavour to fulfil any conditions with all due diligence. This is duplicative of the requirement in **Rule 13.5(b)** (to become Rule 13.2), and in the proposed new Note (b) on Rule 9.4, that an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to an offer. The Code Committee therefore proposes to delete that sentence.

10.17 The references to Note 3 on Rule 9.3 in **Note 9 on Rule 9.1** (*Triggering Rule 9 during an offer period*) would also be deleted.

- Q22** Should the Panel be able to grant a dispensation from the restriction on a person triggering a conditional mandatory offer where the triggering share purchase would itself be subject to a condition relating to a material official authorisation or regulatory clearance, as proposed in the new Note on Rule 9.4?

11. Miscellaneous amendments

(a) *Introduction*

11.1 Section 11 proposes certain miscellaneous amendments to the Code with regard to matters which are related to the main proposals in this PCP.

(b) *Pre-conditional offers*

11.2 In addition to the amendments to **Rule 13.3** proposed in Section 5, the Code Committee proposes to make minor amendments to certain other provisions of the Code which refer to pre-conditions to an offer.

(i) *Exceptions to the restrictions on acquisitions in Rule 5.1*

11.3 **Rule 5.1** restricts a person, and persons acting in concert with it, from acquiring interests in shares in a company in certain circumstances, subject to the exceptions in **Rule 5.2**. The exceptions in **Rule 5.2(a)** and **Rule 5.2(c)** apply when the person has announced a firm intention to make an offer, provided that the making of that offer is not subject to any pre-condition, whereas the exception in **Rule 5.2(b)** applies immediately before the person announces a firm intention to make an offer, regardless of whether the making of that offer will be subject to any pre-condition.

11.4 The Code Committee considers that the exceptions in each of Rules 5.2(a), 5.2(b) and 5.2(c) should apply consistently, regardless of whether the making of the offer will be subject to any pre-condition, and therefore proposes to amend Rules 5.2(a), 5.2(b) and 5.2(c), as set out in Appendix A.

(ii) *Timing of publication of offer document*

11.5 **Rule 24.1** provides that, except with the consent of the Panel, an offeror must publish an offer document within 28 days of the announcement of its firm intention to make an offer. However, where, in accordance with Rule 13.3, an offeror announces a firm intention to make an offer subject to one or more pre-conditions, the offer document will not be required to be published within 28 days of the firm offer announcement. In such cases, the practice of the Executive is normally to require the offer document to be published by no later than 28 days following the satisfaction or waiver of the last remaining pre-condition. The Code Committee agrees with this practice and considers that it should be codified.

11.6 The Code Committee therefore proposes to introduce a new Note on Rule 24.1, as follows:

“Pre-conditional offers

Where an offeror announces a firm intention to make an offer subject to one or more pre-conditions in accordance with Rule 13.3, the Panel will normally require the offer document to be published within 28 days of the last remaining pre-condition being either satisfied or waived.”

(iii) *Pre-conditional possible offers*

11.7 **Rule 2.5(c)** relates to “pre-conditions” included in a possible offer announcement. The Code Committee proposes to make certain minor amendments to Rule 2.5(c), as set out in Appendix A.

(c) *Announcements relating to unlisted offeree companies*

11.8 **Note 4 on Rule 17.1** provides that, in the case of an offeree company whose securities are not admitted to listing or admitted to trading, it will normally be permissible to advise shareholders of the progress which an offeror is making towards the satisfaction of the acceptance condition to its offer by means of sending a notification to shareholders instead of making an announcement via a RIS.

11.9 This provision has, in effect, been made redundant by the practice of the Executive, where the offeree company is an unlisted company, to grant a general dispensation from the Code’s requirements to publish announcements via a RIS and instead to require all announcements required by the Code to be published on the offeree company’s website. By way of exception, this dispensation is not applied to the announcements which commence and end an offer period, which the Executive continues to require to be made via a RIS in accordance with the requirements of **Rule 30.1(a)**.

11.10 The Code Committee considers that the Executive’s practice should be codified and therefore proposes to:

- (a) delete Note 4 on Rule 17.1;
- (b) introduce a new Note on Rule 30.1, as follows:

“Unquoted public companies and relevant private companies

The Panel will normally grant a dispensation from the requirement for announcements to be published via a RIS where the relevant securities in the offeree company are not admitted to trading, provided that the offeree company agrees to publish all relevant announcements on its website. Any such dispensation will not apply to the announcements which commence and end the offer period, which must be published in accordance with Rule 30.1(a).

In such circumstances, the Panel will also normally grant a dispensation from the requirements of Note 3 on Rule 8, such that public disclosures made under Rule 8 may be made to the offeree company and published on its website rather than being made via a RIS.”; and

- (c) introduce cross-references to the new Note on Rule 30.1 into Notes 3 and 11 on Rule 8 (*Disclosure of dealings and positions*), as set out in Appendix A.

(d) Return of documents of title

11.11 A number of the provisions of the Code regulate the return in certain situations of share certificates and other documents submitted by offeree company shareholders as part of the offer process:

- (a) **Rule 31.10** provides that, if an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned to accepting shareholders by the offeror’s receiving agent as soon as practicable and in any event within 14 days of the lapsing of the offer;
- (b) **Rule 34.3** provides that, if a shareholder withdraws its acceptance, all documents of title etc. must be returned to the shareholder as soon as practicable following the receipt of the withdrawal and in any event within 14 days; and
- (c) **Section 11 of Appendix 7** provides that, if an offer being implemented by way of a scheme of arrangement lapses or is withdrawn, or if a shareholder withdraws its election for a particular form of consideration, all documents of title etc. must be returned to the shareholder as soon as practicable and in any event within 14 days of the lapse or withdrawal.

11.12 Where documents of title etc. are required to be returned to offeree company shareholders, the primary obligation is that they must be returned “as soon as practicable”. In most cases, the documents are returned significantly more quickly than the latest deadline of 14 days referred to in the respective provisions. Nonetheless, the Code Committee considers that a latest deadline of 14 days for the return of documents is too long and that this should be reduced to a period of seven days.

11.13 The Code Committee therefore proposes to amend the references to “14 days” in each of Rule 31.10, Rule 34.3 (to become Rule 34.2) and Section 11 of Appendix 7 so as to refer to “seven days”, as set out in Appendix A.

(e) Alternative offers

(i) *Introduction*

11.14 **Rule 33** sets out the requirements of the Code with regard to the timing and revision of alternative offers (**Rule 33.1**), the shutting off of cash underwritten alternatives (**Rule 33.2**) and the reintroduction of alternative offers which have been closed for acceptance (**Rule 33.3**).

(ii) *Removal of ability to close an alternative offer during the offer period*

11.15 **Note 2 on Rule 33.1** provides as follows:

“2. Shutting off

Normally, except as permitted by Rule 33.2, if an offer has become or is declared unconditional as to acceptances, all alternative offers must remain open in accordance with Rule 31.4.

In accordance with Rule 31.3, if on a closing date an offer is not unconditional as to acceptances, an alternative offer (except a cash alternative provided to satisfy the requirements of Rule 9) may be closed without prior notice. However, if, on the first closing date on which an offer is capable of being declared unconditional as to acceptances, the offer is not so declared and is extended, all alternative offers must, except as permitted by Rule 33.2, remain open for 14 days thereafter but may then be closed without prior notice.”.

11.16 Rule 33.3 provides as follows:

“33.3 REINTRODUCTION OF ALTERNATIVE OFFERS

Where a firm statement has been made that an alternative offer will not be extended or reintroduced and that alternative has ceased to be open for acceptance, neither that alternative, nor any substantially similar alternative, may be reintroduced. Where, however, such a statement has not been made and an alternative offer has closed for acceptance, an offeror will not be precluded from reintroducing that alternative at a later date. Reintroduction would constitute a revision of the offer and would, therefore, be subject to the requirements of, and only be permitted as provided in, Rule 32.”.

11.17 The Code Committee considers that, where alternative offers are made by an offeror, each alternative offer should be required to be kept open for acceptance until the end of the offer period and, if the offer becomes or is declared unconditional, for 14 days thereafter in accordance with the requirements of Rule 31.4 (to become Rule 31.2), i.e. an offeror should not be able to close an alternative offer before such a date. The Code Committee therefore proposes to delete Note 2 on Rule 33.1.

11.18 In addition, if an offeror is unable to close an alternative offer during the offer period, there will be no need for a rule relating to the reintroduction of alternative offers. Accordingly, the Code Committee also proposes to delete Rule 33.3.

(iii) *“Mix and match” elections*

11.19 **Note 1 on Rule 33.1** provides as follows:

“1. Elections

For the purpose of this Rule, an arrangement under which shareholders elect, subject to the election of other shareholders, to vary the proportion in which they are to receive different forms of consideration is not regarded as an alternative offer and may be closed without notice on any closing date; this must be clearly stated in the offer document.”.

11.20 The Code Committee considers that an arrangement of the type described in Note 1 on Rule 33.1 should remain open until the end of the offer period and that an offeror should not be able to withdraw the ability for shareholders to make a so-called “mix and match” election before the offer has become or been declared unconditional.

11.21 The Code Committee therefore proposes to amend Note 1 on Rule 33.1 (which would become the new Rule 33.2), as set out in Appendix A.

(iv) *Cash underwritten alternatives*

11.22 Rule 33.2 relates to the shutting off of cash underwritten alternatives.

11.23 It is many years since a securities exchange offeror has made an offer with a cash underwritten alternative and the Code Committee considers that the provision is now redundant. The Code Committee therefore proposes to delete Rule 33.2 and the Notes thereon.

(v) *Amendments to the Code*

11.24 In the light of the above, and taking into account the amendments set out in Appendix A, the amended Rule 33 would read as follows:

“RULE 33. ALTERNATIVE OFFERS*

33.1 TIMING AND REVISION

The provisions of Rules 31 and 32 apply equally to alternative offers.

33.2 “MIX AND MATCH” ELECTIONS

An arrangement under which shareholders elect, subject to the election of other shareholders, to vary the proportion in which they are to receive different forms of consideration is not regarded as an alternative offer. Any such arrangement must remain open so that shareholders may make elections until the date on which the offer becomes or is declared unconditional and may be closed without notice thereafter. This must be clearly stated in the offer document.

This Rule is disapplied in a scheme. See Appendix 7.

11.25 As a consequence of the above amendments, the Code Committee proposes to delete the following provisions:

- (a) Note 1 on Rule 17.1 (*Acceptances of cash underwritten alternatives*);
- (b) Note 3 on Rule 17.1 (*Alternative offers*); and
- (c) Rule 24.14 (*Cash underwritten alternatives which may be shut off*) and the reference to Rule 24.14 in Section 16 of Appendix 7.

11.26 In addition, the Code Committee proposes to move the current Rule 24.17 (*Dividends*) to become Rule 24.14 so as to minimise the renumbering required as a result of the deletion of the current Rule 24.14.

Q23 Do you have any comments on the miscellaneous amendments proposed in Section 11 of the PCP?

12. Assessment of the impact of the proposals

(a) *The offer timetable*

12.1 The amendments proposed in Section 2 are intended to assist readers of the Code by defining certain key dates in an offer timetable and amending certain rules of the Code which govern the offer timetable. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or have any additional cost implications.

(b) *Suspending the offer timetable for official authorisations and regulatory clearances*

12.2 The amendments proposed in Section 3 relate to the ability for an offeror or the offeree company to request that the Panel suspend the offer timetable if one or more conditions relating to an official authorisation or regulatory clearance have not been satisfied by the date which is two days prior to Day 39. The Code Committee considers that the proposed amendments better accommodate the fact that the number of official authorisations and regulatory clearances required in relation to an offer, and the length of time required to satisfy them, has increased in recent years.

12.3 The Code Committee considers that whilst the proposed amendments will be of benefit to a hostile offeror where it is unable to satisfy the relevant conditions by Day 60 and the offeree company does not agree to an extension to the offer timetable, they will also be of benefit to offerors in any contractual offer, offeree company shareholders and other market participants. The Code Committee also considers that the elimination of the scope for extensions to Day 81 will remove a potentially unfavourable consequence for shareholders in offeree companies. The Code Committee believes that the amendments will not place any significant new burdens on the parties to an offer or have any significant additional cost implications.

(c) *Long-stop dates for contractual offers and requirement to take necessary procedural steps in relation to a scheme of arrangement*

12.4 The amendments proposed in Section 4 focus on the requirement for an offeror to set a long-stop date in a contractual offer and on the procedural steps which an offeror must take in order for a court to sanction a scheme of arrangement.

12.5 In relation to contractual offers, the proposed amendments are intended to address an offeror's concerns in relation to an unexpectedly long suspension of an offer timetable by requiring the offeror to set a long-stop date for its offer. In addition, the new provisions will

provide clarity as to the period for which an offeror's financing of an offer will need to be available. Whilst this clarity will be of benefit to an offeror that is facing a long or uncertain regulatory process, the Code Committee recognises that financing may become more difficult or expensive to arrange in the case of an offer that would currently lapse (rather than be suspended, as is proposed in Section 5) following a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings. If the amendments are adopted as proposed, an offeror will need to have financing in place for the duration of the Phase 2 CMA reference or Phase 2 European Commission proceedings.

- 12.6 In relation to schemes of arrangement, where the parties to an offer are already permitted to include a long-stop date as a condition to the offer, the amendments focus on ensuring that an offeror is required by the Code to take the key procedural steps necessary in order for a scheme of arrangement to be sanctioned by the court. The proposed amendments should reduce the scope for an offeror which cannot invoke a condition in order to lapse the scheme of arrangement to instead refuse to take the required procedural steps, which could result in the scheme of arrangement not being sanctioned by the court. Accordingly, the proposed amendments should provide additional clarity to offeree company shareholders and the market.
- 12.7 The Code Committee believes that the amendments proposed in Section 4 will not place any significant new burdens on parties to offers or have any additional cost implications.

(d) *Consistent treatment for official authorisations and regulatory clearances*

- 12.8 The amendments proposed in Section 5 are intended to remove the special treatment given to conditions and pre-conditions relating to the clearance of an offer by the CMA or the European Commission. The Code Committee considers that the amendments proposed in Section 5 will simplify the requirements of the Code, including the deletion of the separate regime that relates to competition reference periods.
- 12.9 The Code Committee recognises that the proposed amendments could result in a reduction in the circumstances in which an offer can lapse, i.e. an offer would no longer be required to lapse upon a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings. However, the proposed amendments will reduce uncertainty for offeree company shareholders and other market participants. Whilst this may be of concern for an offeror that wants to have the certainty that its offer will lapse on a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings, the Code Committee notes that an offeror must only make an offer if it has every reason to believe that it can and will be able to implement the offer.

12.10 The Code Committee believes that these proposed amendments will not place any significant new burdens on parties to offers or have any significant additional cost implications in the large majority of cases.

(e) *Acceptance condition invocation notices and announcements of acceptance levels*

12.11 The amendments proposed in Section 6 introduce the concept that an offeror should be required to serve an “acceptance condition invocation notice” if it wishes to invoke the acceptance condition so as to cause the offer to lapse prior to the unconditional date. Further amendments are proposed in relation to the timing of announcements of acceptance levels by an offeror under Rule 17.

12.12 The Code Committee considers that the proposed amendments will provide greater certainty to offeree company shareholders and other market participants because an offeror will no longer have scope to lapse an offer on the acceptance condition contrary to shareholders’ expectations. An offeror will still be able to lapse its offer on the acceptance condition but only if it has given notice of its intention to do so. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or result in any significant additional cost implications.

(f) *Single date for the satisfaction of all conditions*

12.13 The amendments proposed in Section 7 introduce the concepts that:

- (a) there should be a single date by which all of the conditions to an offer must be satisfied; and
- (b) the acceptance condition must normally not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived.

12.14 The Code Committee considers that the removal of the distinction between the latest date for the satisfaction of the acceptance condition and the latest date for the satisfaction of other conditions will simplify the operation of the Code, to the benefit of market participants. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or result in any additional cost implications.

(g) *Withdrawal rights*

12.15 The amendments proposed in Section 8 focus on ensuring that offeree company shareholders who have accepted an offer will be able to withdraw their acceptance from

the time that the offer document is published, and not only from 21 days after the first closing date. The Code Committee considers that the proposed amendments will be of benefit to offeree company shareholders.

- 12.16 Whilst there may be a small administrative burden associated with the exercise of withdrawal rights from an earlier time, the Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or have any significant additional cost implications.

(h) *The invocation of conditions and pre-conditions to offers*

- 12.17 The amendments proposed in Section 9 are intended to clarify the current operation of the Code and to provide greater certainty to parties to an offer and to the market. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or have any additional cost implications.

(i) *Mandatory offers*

- 12.18 The amendments proposed in Section 10 would give the Panel an ability to grant a dispensation from the restriction on a person triggering a mandatory offer, the making or implementation of which would be subject to conditions or consents, but only where the triggering share purchase is itself conditional upon a material official authorisation or regulatory clearance.

- 12.19 The Code Committee considers that the proposed amendments will provide greater certainty to the parties to an offer and to market participants, and will uphold the requirement in General Principle 1 for equivalent treatment for offeree company shareholders. The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or result in any additional cost implications.

(j) *Miscellaneous amendments*

- 12.20 The Code Committee believes that the amendments proposed in Section 11 will not place any significant new burdens on parties to offers or result in any additional cost implications.

APPENDIX A

Proposed amendments to the Code

DEFINITIONS

Acceleration statement

An acceleration statement is a statement in which an offeror brings forward the latest date by which all of the conditions to the offer must be satisfied or waived.

Acting in concert

...

NOTES ON ACTING IN CONCERT

...

11. Indemnity and other dealing arrangements

...

(b) ...

Such dealing arrangements must be disclosed as required by Note 2 on Rule 2.4, Rule 2.7(c)(~~ix~~), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.

(c) *Note 11(b) does not apply to irrevocable commitments or letters of intent, which are subject to Rule 2.7(c)(~~viii~~) and Rule 2.10.*

...

CMA

~~The Competition and Markets Authority~~

~~Competition reference period~~

~~Competition reference period means the period from the time when an announcement is made of a Phase 2 CMA reference or of the initiation of Phase 2 European Commission proceedings, until the time of:~~

~~(a) an announcement of clearance (including clearance subject to conditions) or prohibition by the CMA or the Secretary of State (as appropriate); or~~

~~(b) the issuance of a decision under Article 8(1), Article 8(2) or Article 8(3) of Council Regulation 139/2004/EC; or~~

~~(c) the expiry of the time limits set out in Article 10(3) of Council Regulation 139/2004/EC with no decision having been issued by the European Commission and the offer thereby being deemed compatible with the internal market under Article 10(6) of the Regulation.~~

...

Day 14

Day 14 means the 14th day following the date on which the initial offer document is published (see Rule 25.1(a)).

Day 21

Day 21 means the 21st day following the date on which the initial offer document is published (see Rule 31.2).

Day 39

Day 39 means the 21st day prior to Day 60 (see Rule 31.8).

Day 46

Day 46 means the 14th day prior to Day 60 (see Rule 32.1(c)).

Day 53

Day 53 means the seventh day prior to Day 60 (see Rules 2.6(d) and (e)).

Day 60

Day 60 means the 60th day following the publication of the initial offer document or such later date as is set pursuant to Rule 31.3.

Dealings

...

NOTES ON DEALINGS

1. Indemnity and other dealing arrangements

Dealing arrangements of the kind referred to in Note 11 on the definition of acting in concert in relation to relevant securities which are entered into during the offer period by any offeror, the offeree company or a person acting in concert with any offeror or the offeree company must be disclosed as required by Rule 2.7(c)(~~ix~~xii), Notes 5 and 6 on Rule 8, Rule 24.13 and Rule 25.6.

...

Material official authorisation or regulatory clearance

An official authorisation or regulatory clearance is a material official authorisation or regulatory clearance if the Panel is satisfied that the failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

NOTE ON MATERIAL OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE

A determination by the Panel that an official authorisation or regulatory clearance is a material official authorisation or regulatory clearance should not be taken as an indication that the Panel would agree that the failure to obtain the authorisation or clearance would result in circumstances of material significance to the offeror in the context of the offer for the purposes of Rule 13.5(a).

...

Offer period

...

Subject to Note 32, an offer period will end when an announcement is made that an offer has become or has been declared unconditional ~~as to acceptances~~, that a scheme of arrangement has become effective, that all announced offers have been withdrawn or have lapsed or following certain other announcements having been made (such as all publicly identified potential offerors having made a statement to which Rule 2.8 applies).

NOTES ON OFFER PERIOD

...

~~2. Competition reference periods~~

~~See Rule 12.2.~~

~~32. First closing date~~Unconditional offers

~~Where an offer is unconditional from the outset, or becomes or is declared unconditional as to acceptances prior to the first closing date~~ Day 21, the offer period will nevertheless continue until ~~the first closing date~~ Day 21.

...

~~Phase 2 CMA reference~~

~~A reference of an offer or possible offer to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.~~

~~Phase 2 European Commission proceedings~~

~~Proceedings initiated by the European Commission under Article 6(1)(c) of Council Regulation 139/2004/EC in respect of an offer or possible offer.~~

...

Unconditional date

The unconditional date is Day 60 or any earlier date specified by an offeror as being the latest date by which all of the conditions to the offer must be satisfied or waived.

Rule 2

2.5 TERMS AND PRE-CONDITIONS IN POSSIBLE OFFER ANNOUNCEMENTS

...

(c) The Panel must be consulted in advance if, ~~prior to announcing a firm intention to make an offer,~~ a potential offeror proposes to ~~announce~~ include in a possible offer announcement any pre-conditions to the ~~making of announcement of a firm intention to make~~ an offer. Any such pre-conditional possible offer announcement must:

- (i) clearly state whether or not the pre-conditions must be satisfied before ~~an a firm intention to make an offer can be made~~ announced or whether they are waivable; and
- (ii) include a prominent warning to the effect that the announcement does not amount to a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-conditions are satisfied or waived.

...

2.6 TIMING FOLLOWING A POSSIBLE OFFER ANNOUNCEMENT

...

(d) When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement of the first offer), the potential offeror must, by 5.00 pm on Day 53 ~~the 53rd day following the publication of the first offeror's initial offer document,~~ either:

...

(e) When an offeror has announced a firm intention to make an offer and the offeree company subsequently refers to the existence of a potential competing offeror which has not been identified, the potential competing offeror so referred to must, by 5.00 pm on Day 53 ~~the 53rd day following the publication of the first offeror's initial offer document,~~ either:

...

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

...

(b) Following an announcement of a firm intention to make an offer, the offeror must proceed to make the offer unless, in accordance with the provisions of Rule 13.5, it is permitted to invoke a pre-condition to the making of the offer or would be permitted to invoke a condition to the offer if the offer were made. However, with the consent of the Panel, an offeror need not make the offer if a competing offeror subsequently announces a firm intention to make a higher offer.

(c) When a firm intention to make an offer is announced, the announcement must include:

- (i) the terms of the offer;
- (ii) the identity of the offeror;
- (iii) all conditions or pre-conditions to which the offer or the making of an offer is subject;
- (iv) language which appropriately reflects that the offeror may only invoke any condition or pre-condition which is subject to Rule 13.5(a) with the consent of the Panel;
- (v) a statement as to which conditions and pre-conditions are not subject to Rule 13.5(a) (see Rule 13.5(c));
- (vi) a statement that any condition or pre-condition that is subject to Rule 13.5(a) may be waived by the offeror (see Rule 13.5(d));
- ~~(iv) the intentions of the offeror with regard to the business, employees and pension scheme(s) of the offeree company (see Note 1);~~
- (vii) details of any agreements or arrangements ... ;
- (viii) the intentions of the offeror with regard to the business, employees and pension scheme(s) of the offeree company (see Note 1);
- (vix) details of any relevant securities of the offeree company in which the offeror or any person acting in concert with it has an interest ... ;
- (viix) details of any irrevocable commitment ... ;
- (viixi) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent ... ;
- ~~(ixxii)~~ details of any dealing arrangement ... ;
- (xiii) a summary of the provisions of Rule 8 ... ;
- (xiv) a summary of any offer-related arrangement ... ;
- (xiiv) a list of the documents published on a website... ; and
- (xviii) a statement that the offeror will have the right to reduce the offer consideration by the amount of any dividend

...

NOTES ON RULE 2.7

1. *Intentions of the offeror with regard to the business, employees and pension scheme(s)*

(a) For the purpose of Rule 2.7(c)(~~iv~~viii), the offeror must explain the long-term commercial justification for the offer and must state:

...

~~2.~~ Conditions and pre-conditions

~~The Panel must be consulted in advance if a person proposes to include in an announcement:~~

~~(a) any pre-condition to which the making of an offer will be subject (see Rule 13.3);~~

~~(b) a condition or pre-condition relating to financing (see Rule 13.4); or~~

~~(c) any conditions which are not entirely objective (see Rule 13.1).~~

~~32.~~ Persons acting in concert with the offeror

...

~~43.~~ Reservations to a previous statement in relation to the terms of a possible offer

...

2.10 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

...

NOTES ON RULE 2.10

1. Disclosure in firm offer announcement

Where the details required to be announced under Note 3 on Rule 2.10 are, pursuant to Rule 2.7(c)(~~vi~~ix), included in an announcement of a firm intention to make an offer which is published no later than 12 noon on the business day following the date on which the irrevocable commitment or letter of intent is procured, no separate announcement is required under Rule 2.10(a) or (b).

Rule 4.5

4.5 RESTRICTION ON THE OFFEREE COMPANY ACCEPTING AN OFFER IN RESPECT OF TREASURY SHARES*

An offeree company may not accept an offer in respect of treasury shares until after the offer is unconditional ~~as to acceptances~~.

Rule 5.2

5.2 EXCEPTIONS TO RESTRICTIONS

The restrictions in Rule 5.1 do not apply to an acquisition of an interest in shares carrying voting rights in a company by a person:

(a) at any time from a single shareholder if it is the only such acquisition within any period of 7 days (see also Rules 5.3 and 5.4). This exception will not apply when the person has announced a firm intention to make an offer ~~and there is no pre-condition to which the making of an offer is subject~~; or

(b) immediately before the person announces a firm intention to make an offer ~~(whether or not there is any pre-condition to which the making of an offer is subject)~~, provided that the offer will be publicly recommended by, or the acquisition is made with the agreement of, the board of the offeree company and the acquisition is conditional upon the announcement of the offer; or

(c) after the person has announced a firm intention to make an offer provided that, ~~at the time of the acquisition, there is no pre-condition to which the making of an offer is subject and:~~

...

(iii) ~~the first closing date~~ Day 21 of that offer₁ or of any competing offer₁ has passed; or

(iv) that offer is unconditional ~~in all respects~~; or

Rule 6

RULE 6. ACQUISITIONS RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

...

NOTES ON RULE 6

...

~~10. Competition reference period~~

~~When, under Rule 12.2(b)(ii), a new offer period begins at the time the competition reference period ends, the three month period referred to in Rule 6.1(a) will be deemed to be the competition reference period.~~

Rule 8

RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

...

NOTES ON RULE 8

...

3. Method of disclosure**(a) Public disclosures**

Public disclosures under Rule 8 must be made to a RIS in typed format by electronic delivery and may be made by the person concerned or by an agent acting on its behalf. See also the Note on Rule 30.1 with regard to unquoted public companies and relevant private companies.

...

11. Unquoted public companies and relevant private companies

The requirements to disclose dealings and positions under Rule 8 apply also in respect of the relevant securities of public companies whose securities are not admitted to trading and of relevant private companies. See also the Note on Rule 30.1.

...

14. Irrevocable commitments and letters of intent

See Rule 2.7(c)(~~ix~~) and Rule 2.10.

Rule 9**9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**

Except with the consent of the Panel, when:

...

such person shall extend offers, on the basis set out in Rules 9.3, ~~9.4~~ and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any other class of transferable securities carrying voting rights. Offers for different classes of equity share capital must be comparable; the Panel should be consulted in advance in such cases.

...

NOTES ON RULE 9.1

...

9. Triggering Rule 9 during an offer period*

If it is proposed to incur an obligation under this Rule during the course of a non-mandatory offer, the Panel must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule must be announced immediately. ~~If the cash is~~

~~dependent upon a securities exchange, Note 3 on Rule 9.3 will be relevant.~~ (See also Rule 7.1.)

~~Subject to Note 3 on Rule 9.3, w~~Where no change in the consideration is involved it will be sufficient, following the announcement, simply to send a notification to offeree company shareholders and persons with information rights setting out the new number of shares in which the offeror and persons acting in concert with it are interested, of the fact that the acceptance condition (in the form required by Rule 9.3) is the only condition remaining and of the period for which the offer will remain open following the publication of the document.

An offer made in compliance with this Rule must remain open for not less than 14 days following the date on which the document is published and as required by Rules 31.42 and 33.1.

...

10. Convertible securities, warrants and options

...

Where there are conversion or subscription rights currently capable of being exercised, this Rule is invoked at a level of 30% of the existing voting rights. Where they are capable of being exercised during an offer period, Notes 2 and 3 on Rule 10.1 will be relevant.

...

9.3 RESTRICTION ON CONDITIONS AND CONSENTS

NB This Rule should be read in conjunction with Appendix 4.

Except with the consent of the Panel (see ~~Note 3~~ the Note on Rule 9.4),:

~~(a)—an offers made under Rule 9 must be conditional only upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding shares carrying more than 50% of the voting rights in the offeree company;~~ and

~~(b)—no acquisition of any interest in shares which would give rise to a requirement for an offer under this Rule may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.~~

NOTES ON RULE 9.3

1. When more than 50% is held

An offer made under ~~this Rule 9~~ should normally be unconditional when the offeror and persons acting in concert with it hold shares carrying more than 50% of the voting rights before the offer is made.

2. Acceptance condition

Notes 2-7 on Rule 10.1 also apply to offers under Rule 9.

In the event that an offer under Rule 9 lapses because a purchase may not be counted as a result of Note 5 on Rule 10.1 and subsequently the purchase is completed, the Panel should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the percentage of shares in which the offeror and persons acting in concert with it are interested. (See also Rule 9.7.)

...

~~3. When dispensations may be granted~~

The Panel will not normally consider a request for a dispensation under this Rule other than in exceptional circumstances, such as:

(a) when the necessary cash is to be provided, wholly or in part, by an issue of new securities. The Panel will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the other conditions required by Rule 13.4(b) are not satisfied within the time required by Rule 31.7, and as a result the offer lapses, the offeror will immediately announce a firm intention to make a new cash offer in compliance with this Rule at the price required by Rule 9.5 (or, if greater, at the cash price offered under the lapsed offer); and

(b) when any official authorisation or regulatory clearance is required before the offer document is published. If authorisation or clearance is obtained, the offer document must be published immediately. If authorisation or clearance is not obtained, the same consequences will follow as if the merger were prohibited following a Phase 2 CMA reference or Phase 2 European Commission proceedings (see Rule 9.4).

When a dispensation is given, the offeror must endeavour to fulfil all the other conditions with all due diligence.

(See also Rule 9.7.)

9.4 THE CMA AND THE EUROPEAN COMMISSION

Offers under this Rule must, if appropriate, contain the terms required by Rule 12.1(a) and (b).

NOTES ON RULE 9.4

~~1. If an offer lapses pursuant to Rule 12.1(a) or (b)~~

If an offer under Rule 9 lapses pursuant to Rule 12.1(a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30% or to its original level before the obligation to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12.1(a) or (b) to proceed with all due diligence before the CMA or the European Commission. (See also Rule 9.7.) However, if, with the consent of the Panel and within a limited period, an offeror reduces the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30%, or to its original level before the obligation to offer was incurred if that was 30% or more, the Panel will regard the obligation as having lapsed.

2. Further acquisitions

~~While the CMA or the European Commission is considering the case (following a Phase 2 CMA reference or the initiation of Phase 2 European Commission proceedings) where an obligation to make an offer under this Rule has been incurred, the offeror or persons acting in concert with it may not acquire any interest in further shares in the offeree company.~~

9.4 RESTRICTION ON ACQUISITIONS

Except with the consent of the Panel, no acquisition of any interest in shares which would give rise to a requirement for an offer under Rule 9 may be made if the making or implementation of that offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or on any other conditions, consents or arrangements.

NOTE ON RULE 9.4

When a dispensation may be granted

(a) The Panel will normally only grant a dispensation under Rule 9.4 if the share purchase agreement in relation to the acquisition of the interest in shares which would give rise to a requirement for an offer under Rule 9 is made subject to a condition relating to a material official authorisation or regulatory clearance, which is also included as a condition or pre-condition to the offer, and to no other conditions.

(b) An announcement in compliance with Rule 2.7 will be required to be made under Rule 2.2(b) immediately upon the entering into of the share purchase agreement, following which the offeror must use all reasonable efforts to ensure the satisfaction of the condition(s) to the share purchase agreement (see Rule 13.2).

(c) The terms of the share purchase agreement must provide that the condition relating to the material official authorisation or regulatory clearance may only be invoked with the consent of the Panel, which consent will normally only be given if the circumstances which give rise to the right to invoke the condition are considered by the Panel to be of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

9.5 CONSIDERATION TO BE OFFERED

...

(d) The cash offer or the cash alternative must remain open for not less than 14 days after the offer has become unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.42).

...

9.6 OBLIGATIONS OF DIRECTORS

(a) When directors (or their close relatives or the related trusts of any of them) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under Rule 9.1, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his-its obligations under the Rule.

(b) ~~In addition, e~~Except with the consent of the Panel, such directors should not resign from the board until ~~the first closing date of the offer~~ Day 21 or the date when the offer becomes wholly unconditional, whichever is the later.

Rule 10

RULE 10. THE ACCEPTANCE CONDITION*

NB This Rule should be read in conjunction with Appendix 4.

10.1 REQUIREMENT FOR 50% ACCEPTANCE CONDITION

~~It must be a condition of a~~Any offer for voting equity share capital or for other transferable securities carrying voting rights which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting rights of the offeree company must include an acceptance condition that is not capable of being satisfied that the offer will not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights.

NOTES ON RULE 10.1

...

2. New shares

For the purpose of the acceptance condition, the offeror must take account of all shares carrying voting rights which are unconditionally allotted or issued before the offer becomes or is declared unconditional as to acceptances acceptance condition is satisfied, whether pursuant to the exercise of conversion or subscription rights or otherwise. If in any case, for example, as a result of a rights issue, shares have been allotted in renounceable form (even if provisionally), the Panel should be consulted.

...

4. Acceptances

NB 1 Attention is drawn to Note 6 below which will be relevant if an acceptance condition is to be fulfilled before the ~~final closing date~~ unconditional date.

...

An acceptance may not be counted towards fulfilling an acceptance condition unless:

(a) *if it is to be effected by means of CREST without an acceptance form, the transfer to the relevant member's escrow account has settled in respect of the relevant number of shares on or before the ~~last time for acceptance set out in the offeror's relevant document or announcement~~ unconditional date; or,*

if it is to be effected by means of an acceptance form, both:

(b) *it is received by the offeror's receiving agent on or before the ~~last time for acceptance set out in the offeror's relevant document or announcement~~ unconditional date*

and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received or relevant escrow transfers identified; and

(c) the acceptance form is completed to a suitable standard (see below) and is:

...

(iii) from a registered holder or his personal representatives (but only up to the amount of the registered holding as at the ~~final time for acceptance~~ unconditional date and only to the extent that the acceptance relates to shares which are not taken into account under another sub-paragraph of this paragraph (c)); or

...

If the acceptance form is executed by a person other than the registered holder, appropriate evidence of authority (eg grant of probate or certified copy of a power of attorney) must be produced as required by the practice set out in the ICSA Manual.

An acceptance which has been withdrawn must not be counted towards fulfilling an acceptance condition.

5. Purchases

NB Attention is drawn to Note 6 below which will be relevant if an acceptance condition is to be fulfilled before ~~the final closing date~~ unconditional date, and also to Note 8 below which will be relevant if the offeror has borrowed any offeree company shares.

...

6. ~~Offers becoming or being declared unconditional as to acceptances~~ Satisfaction of the acceptance condition before the final closing date unconditional date

In determining whether an acceptance condition has been fulfilled before the ~~final closing date~~ unconditional date, all acceptances and purchases that comply with the requirements of Notes 4 and 5 on Rule 10.1 may be counted, other than those which fall within paragraph (c)(iii) of Note 4 or Note 8.

7. Offeror's receiving agent's certificate

~~Before an offer may become or be declared unconditional as to acceptances the acceptance condition can be satisfied,~~ the offeror's receiving agent must have issued a certificate to the offeror or its financial adviser which states the number of acceptances which have been received which comply with Note 4 on Rule 10.1 and the number of shares otherwise acquired, whether before or during an offer period, which comply with Note 5 on Rule 10.1 and, in each case, if appropriate, Note 6 on Rule 10.1, but which do not fall within Note 8 on Rule 10.1.

...

10.2 SATISFACTION OF THE ACCEPTANCE CONDITION

Except with the consent of the Panel, the acceptance condition must not be capable of being satisfied until all of the other conditions to the offer have been either satisfied or waived.

NOTE ON RULE 10.2

When a dispensation may be granted

The Panel will normally grant a dispensation from the requirement in Rule 10.2 where another condition is not capable of being satisfied until after the acceptance condition has been satisfied (such as a condition relating to the admission to listing and/or admission to trading of the securities being offered as consideration).

Rule 11

11.1 WHEN A CASH OFFER IS REQUIRED

...

NOTES ON RULE 11.1

...

~~12. Competition reference period~~

~~If an offer is announced pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for cash during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of Rule 11.1(b).~~

11.2 WHEN A SECURITIES OFFER IS REQUIRED

...

NOTES ON RULE 11.2

...

7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 2, 5, 6, 7, 8, 10 and 11 on Rule 11.1 which may be relevant.

~~In addition, if an offer is announced pursuant to Rule 12.2(b)(ii), any acquisitions of interests in offeree company shares for securities during the competition reference period will be deemed to be acquisitions during the new offer period for the purposes of this Rule.~~

Rule 12

~~RULE 12. THE CMA AND THE EUROPEAN COMMISSION~~**~~12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER~~**

~~(a) Where an offer comes within the statutory provisions for a possible Phase 2 CMA reference, it must be a term of the offer that:~~

~~(i) in the case of a contractual offer, the offer will lapse if there is a Phase 2 CMA reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or~~

~~(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if there is a Phase 2 CMA reference before the shareholder meetings (as defined in Appendix 7).~~

~~(b) Where an offer would give rise to a concentration with an EU dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that if Phase 2 European Commission proceedings are initiated, or there is a Phase 2 CMA reference following a referral by the European Commission under Article 9(1) to a competent authority in the United Kingdom:~~

~~(i) in the case of a contractual offer, the offer will lapse if this occurs before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later; or~~

~~(ii) in the case of an offer being implemented by way of a scheme of arrangement, the offer will lapse and the scheme will not become effective if this occurs before the shareholder meetings (as defined in Appendix 7).~~

~~(c) Except in the case of an offer under Rule 9, the offeror may, in addition, make the offer conditional on a decision being made that there will be no Phase 2 CMA reference, initiation of Phase 2 European Commission proceedings or referral by the European Commission under Article 9(1) of the Council Regulation 139/2004/EC. In such a case, the condition may state that the decision must be on terms satisfactory to the offeror.~~

~~NOTE ON RULE 12.1~~**~~The effect of lapsing*~~**

~~The offer document must make it clear that the reference to the offer lapsing means not only that the offer will cease to be capable of further acceptance but also that shareholders and the offeror will thereafter cease to be bound by prior acceptances.~~

~~12.2 COMPETITION REFERENCE PERIODS~~

~~(a) When there is a Phase 2 CMA reference or Phase 2 European Commission proceedings are initiated, the offer period will end except in the following circumstances:~~

~~(i) — when the offer was announced subject to a pre-condition as permitted under Rule 13.3(b); or~~

~~(ii) — in the case of an offer being implemented by way of a scheme of arrangement, where the Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings does not cause the offer to lapse as a result of a term included pursuant to Rule 12.1(a) or (b) or upon a condition included pursuant to Rule 12.1(c) being invoked.~~

~~(b) — If the offer period ends in accordance with Rule 12.2(a):~~

~~(i) — during the competition reference period, except with the consent of the Panel, neither the offeror, nor any person who acted in concert with the offeror in relation to the referred offer or possible offer, nor any person who is subsequently acting in concert with any of them may:~~

~~(A) — announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);~~

~~(B) — acquire any interest in shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer;~~

~~(C) — acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person, together with any persons acting in concert with it, would be interested and the shares in respect of which it, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;~~

~~(D) — make any statement which raises or confirms the possibility that an offer might be made for the offeree company;~~

~~(E) — take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the offeror and its immediate advisers; or~~

~~(F) — purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are significant in relation to the offeree company;~~

~~(ii) — at the end of the competition reference period, if the offer is allowed to proceed (whether conditionally or unconditionally):~~

~~(A) — any cleared offeror or potential offeror must, normally within 21 days of the offer's being allowed to proceed, clarify its intentions with regard to the offeree company by making an announcement either of a firm intention to make an offer for the offeree company in accordance with Rule 2.7 or that it does not intend to make an offer for the offeree company, in which latter case the announcement will be treated as a statement to which Rule 2.8 applies; and~~

~~(B) — a new offer period will begin and, if no announcement of a new offer is made within the 21 day period referred to above, will end when each cleared offeror or potential offeror has announced that it does not intend to make an offer; and~~

~~(iii) — where the competition reference period ends when either the CMA or the Secretary of State issues a prohibition decision or when the European Commission issues a decision under Article 8(3) of Council Regulation 139/2004/EC, no new offer period will begin. The offeror or potential offeror whose offer is prohibited, together with any person acting in concert with it, will, except with the consent of the Panel, be subject to the restrictions in Rule 2.8 for six months from the date on which the relevant decision is issued.~~

~~NOTES ON RULE 12.2~~

~~1. — Certain restrictions disapplied while clearance is being sought~~

~~The restrictions in Rule 12.2(b)(i)(D) and (E) will not normally apply to the extent that the offeror is continuing to seek clearance or a decision from the relevant authority with a view subsequently to making a new offer in accordance with Rule 12.2(b)(ii)(A).~~

~~NB Rule 2.2(e) will continue to apply in these circumstances.~~

~~2. — After a reference or initiation of proceedings~~

~~Following the ending of an offer period on a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings, General Principle 3 and Rule 21.1 will normally continue to apply (see also Rule 19.7 and the Notes on Rules 6.1, 11.1, 11.2, 20.1, 21.3 and 38.2).~~

~~3. — Offers announced subject to a pre-condition as permitted under Rule 13.3(b)~~

~~When an offer was announced subject to a pre-condition as permitted under Rule 13.3(b) and either a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period will not end. However, during the competition reference period, the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so.~~

~~4. — Offerors and potential offerors who decide not to pursue clearance or a decision from the relevant authority~~

~~Following the commencement of a competition reference period, if an offeror or potential offeror decides not to pursue clearance or a decision from the relevant authority, it must announce its decision and that it does not intend to make an offer for the offeree company. Such an announcement will be treated as a statement to which Rule 2.8 applies; the competition reference period will end on the date of the announcement and no new offer period will begin.~~

~~5. — Significant asset purchases~~

~~In assessing whether assets are significant for the purpose of Rule 12.2(b)(i)(F), the Panel will have regard to the tests set out in Note 5 on Rule 2.8.~~

RULE 12. LONG-STOP DATE*

12.1 INCLUSION OF A LONG-STOP DATE

(a) The offeror must include a term in the firm offer announcement and in the offer document that the offer will not proceed, will lapse or will be withdrawn on a specific date (a “long-stop date”):

(i) if sufficient acceptances have not been received so as to enable to acceptance condition to be satisfied (in the case of a conditional offer); or

(ii) with the consent of the Panel, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived.

(b) If the offer is not recommended by the board of the offeree company, the Panel must be consulted prior to the publication of the firm offer announcement as to the date of the long-stop date. In such circumstances, the Panel will normally require the long-stop date to be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied.

12.2 WHEN CONSENT MAY BE GIVEN UNDER RULE 12.1

The Panel will normally give its consent under Rule 12.1(a)(ii) if it is satisfied, as at the long-stop date, that the outstanding official authorisation or regulatory clearance is a material official authorisation or regulatory clearance, and provided that either:

(a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or

(b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

12.3 EXTENSION OF A LONG-STOP DATE

Except with the consent of the Panel, the long-stop date may only be extended by the offeror with the agreement of the offeree company.

NOTE ON RULE 12

Where a determination under Rule 12 remains outstanding on the long-stop date

If a question as to whether the Panel will give its consent under Rule 12.1(a)(ii) remains outstanding on the long-stop date, the offeror will not normally be permitted to lapse or withdraw the offer pending the final determination of the issue.

*Rule 12 is disapplied in a scheme. See Appendix 7.

Rule 13

**RULE 13. ~~PRE-CONDITIONS IN FIRM OFFER ANNOUNCEMENTS AND OFFER~~
CONDITIONS AND PRE-CONDITIONS TO AN OFFER**

...

~~13.2 THE CMA AND THE EUROPEAN COMMISSION~~

~~Neither a condition included pursuant to Rule 12.1(c) nor a pre-condition included pursuant to Rule 13.3(a) or (b) will be subject to the provisions of Rules 13.1 or 13.5(a).~~

13.2 REQUIREMENT TO USE ALL REASONABLE EFFORTS

Following the announcement of a firm intention to make an offer, an offeror must use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.

13.3 ACCEPTABILITY OF PRE-CONDITIONS

(a) The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the making of an offer will be subject.

(b) Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition:

~~(a) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings;~~

~~(b) relates to a decision that there will be no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings or, if there is such a reference or initiation of proceedings, a decision by the relevant authority to allow the offer to proceed (the decision may, in each case, be stated to be on terms satisfactory to the offeror); or~~

~~(c) involves another material an official authorisation or regulatory clearance relating to the offer and either:~~

~~(i) the offer is publicly recommended by the board of the offeree company agrees to the pre-condition; or~~

~~(ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable is a material official authorisation or regulatory clearance.~~

~~{See Note 2 on Rule 2.7.}~~

...

13.5 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) An offeror ~~should not~~ may only invoke any a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the

Panel. The firm offer announcement and the offer document must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise. The acceptance condition is not subject to this provision.

~~(b) Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.~~

(b) The following will not be subject to Rule 13.5(a):

(i) the acceptance condition (see Rules 9.3 and 10.1);

(ii) a condition relating to the approval of a scheme of arrangement by the offeree company's shareholders or to the sanctioning of the scheme by the court;

(iii) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);

(iv) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities (see also Rule 24.10);

(v) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association (or equivalent), for the offeror's shareholders to approve the implementation of the offer;

(vi) a term relating to the long-stop date of a contractual offer (see Rule 12.1);

(vii) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (see Sections 3(b) and (c) of Appendix 7); and

(viii) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.

(c) The firm offer announcement and the offer document must state which conditions and, in the case of a firm offer announcement, pre-conditions are not subject to Rule 13.5(a).

(d) The firm offer announcement and the offer document must state that any condition or, in the case of a firm offer announcement, pre-condition that is subject to Rule 13.5(a) may be waived by the offeror.

13.6 INVOKING OFFEREE PROTECTION CONDITIONS

~~An offeree company should not invoke, or cause or permit the offeror to invoke, any condition to an offer unless the circumstances which give rise to the right to invoke~~

~~the condition are of material significance to the shareholders in the offeree company in the context of the offer.~~

NOTES ON RULE 13.6

1. — ~~When an offeree protection condition may be invoked~~

~~The circumstances in which the offeree company will be allowed to invoke, or cause or permit the offeror to invoke, a condition will not necessarily be restricted to those in which the Panel would permit an offeror to invoke a condition. In deciding whether an offeree company may invoke, or cause or permit the offeror to invoke, a condition, the Panel will take into account all relevant factors.~~

2. — ~~Availability of withdrawal rights*~~

~~If the offeree company is not permitted to invoke, or to cause or permit the offeror to invoke, a condition, the Panel may instead determine in the light of all relevant facts that accepting shareholders should have the right to withdraw their acceptances on such terms as the Panel considers appropriate and, if so, the effect of this on the Code timetable. The ability of the Panel to require the introduction of withdrawal rights in such circumstances and to amend the Code timetable, and also the fact that the offer may cease to be unconditional as to acceptances as a result of such withdrawal rights being introduced, should be incorporated into the terms of the offer.~~

Rule 17

RULE 17. ANNOUNCEMENT OF ACCEPTANCE LEVELS

17.1 ~~TIMING AND CONTENTS~~

(a) An offeror must make an announcement including the details set out in Rule 17.2 B ~~by 8.00 am at the latest on the business day following the day on which an offer is due to expire, or becomes or is declared unconditional as to acceptances, or is revised or extended, an offeror must make an appropriate announcement. each of the following days:~~

- (i) Day 21 and every seventh day thereafter;
- (ii) each of the five business days leading up to, and including, the unconditional date;
- (iii) any day on which an acceptance condition invocation notice expires;
- (iv) any other day on which the offer is declared unconditional or lapses;
and
- (v) any day on which, as at 5.00 pm, the total percentage of shares which the offeror may count towards satisfaction of the acceptance condition has increased or decreased to, or through, any of the following thresholds:
 - (A) the percentage threshold to which the acceptance condition is currently subject;

(B) 75% of the shares carrying voting rights in the offeree company;
and

(C) if the threshold in (A) can be reduced to a specified minimum threshold, that threshold.

(b) An offeror must also include the details set out in Rule 17.2 in any announcement which includes:

(i) an acceptance condition invocation notice;

(ii) an acceleration statement; or

(iii) a revision of the offer.

17.2 CONTENTS

(a) The An announcement made pursuant to Rule 17.1 must state:

(a) the number of shares for which acceptances of the offer have been received, specifying the extent to which acceptances have been received from persons acting in concert with the offeror or in respect of shares which were subject to an irrevocable commitment or a letter of intent procured by the offeror or any person acting in concert with the offeror;

(bii) details of any relevant securities of the offeree company in which the offeror or any person acting in concert with it has an interest or in respect of which he has a right to subscribe, in each case specifying the nature of the interests or rights concerned (see Note 5 on Rule 8). Similar details of any short positions (whether conditional or absolute and whether in the money or otherwise), including any short position under a derivative, any agreement to sell or any delivery obligation or right to require another person to purchase or take delivery, must also be stated;

(ciii) details of any relevant securities of the offeree company in respect of which the offeror or any person acting in concert with it has an outstanding irrevocable commitment or letter of intent (see Note 3 on Rule 2.10); and

(div) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent, save for any borrowed shares which have been either on-lent or sold,

and must specify the percentages of each class of relevant securities represented by these figures. ~~(See also Rule 31.2.)~~

(b) Any announcement made pursuant to this Rule 17.1 must include a prominent statement of the total numbers of shares which the offeror may count towards the satisfaction of its acceptance condition and must specify the percentages of each class of relevant securities represented by these figures. The Panel should be consulted if the offeror wishes to make any other statement about acceptance levels in any announcement made pursuant to this Rule.

17.3 GENERAL STATEMENTS ABOUT ACCEPTANCE LEVELS

If, during an offer, any statement, either oral or in writing, is made by an offeror or its advisers about the level of acceptances of the offer or the number or percentage of shareholders who have accepted the offer, an immediate announcement must be made in conformity with Rule 17.2.

NOTES ON RULE 17.1

~~1. Acceptances of cash underwritten alternatives~~

~~Acceptances of cash underwritten alternatives do not come within this Rule.~~

~~2. General statements about acceptance levels~~

~~If, during an offer, any statements, either oral or in writing, are made by an offeror or its advisers about the level of acceptances of the offer or the number or percentage of shareholders who have accepted the offer, an immediate announcement must be made in conformity with this Rule.~~

~~3. Alternative offers~~

~~An announcement under this Rule is also required on the business day following the day on which an alternative offer is due to expire, even if the offer itself is not due to expire at that time.~~

~~4. Unlisted companies~~

~~In the case of companies whose securities are not admitted to listing or admitted to trading, it will normally be permissible to send a notification to all shareholders and persons with information rights instead of making an announcement.~~

51. Statements about withdrawals

When the offeree company is proposing to draw attention to withdrawals of acceptance, the Panel must be consulted before any announcement is made.

62. Incomplete acceptances and offeror purchases

Acceptances not complete in all respects and purchases must only be included in the statement required under this Rule of the total number of shares which the offeror may count towards the satisfaction of its acceptance condition where they could be counted towards fulfilling an acceptance condition under Notes 4, 5 and 6 on Rule 10.1.

17.2 CONSEQUENCES OF FAILURE TO ANNOUNCE

~~(a) If an offeror, having announced the offer to be unconditional as to acceptances, fails by 3.30 pm on the relevant day to comply with any of the requirements of Rule 17.1, immediately thereafter any acceptor will be entitled to withdraw his acceptance. Subject to Rule 31.6, this right of withdrawal may be terminated not less than 8 days after the relevant day by the offeror confirming, if such is the case, that the offer is still unconditional as to acceptances and complying with Rule 17.1.~~

~~(b) For the purpose of Rule 31.4, the offer must remain open for acceptance for not less than 14 days after the date of such confirmation and compliance.~~

Rule 18

RULE 18. THE USE OF PROXIES AND OTHER AUTHORITIES IN RELATION TO ACCEPTANCES*

An offeror may not require a shareholder as a term of his-its acceptance of an offer to appoint a proxy to vote in respect of his-its shares in the offeree company or to exercise any other rights or take any other action in relation to those shares unless the appointment is on the following terms, which must be set out in the offer document:

(a) the proxy may not vote, the rights may not be exercised and no other action may be taken unless the offer is ~~wholly~~-unconditional or, in the case of voting by the proxy, the resolution in question concerns the last remaining condition of the offer (other than any condition covered by Rule 24.10) and the offer will become ~~wholly~~ unconditional (save, where relevant, for the satisfaction of any condition covered by Rule 24.10) or lapse depending upon the outcome of that resolution;

Rule 19.7

~~19.7 INFORMATION PUBLISHED FOLLOWING THE ENDING OF AN OFFER PERIOD PURSUANT TO RULE 12.2~~

~~The requirements of the Code relating to the publication of information do not normally apply once an offer period has ended pursuant to Rule 12.2(a). However, if thereafter the merger is allowed and, as a result, the offeror announces a further offer, the Panel may require that statements (including valuations of assets) made during the competition reference period be substantiated or, if this is not possible, withdrawn. Consequently, the parties to an offer must take care to ensure that any statements made during the competition reference period are capable of substantiation.~~

Rule 20

20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS AND PERSONS WITH INFORMATION RIGHTS

...

NOTES ON RULE 20.1

...

4. *Investment analyst publications*

...

~~(c) When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). Firms to which this Note applies must, however, consult the Panel about the publication of information during the reference or proceedings. The Panel will normally apply the restrictions in this Note in the period of one month before the relevant authority is expected to make its recommendation or issue its decision as the case may be.~~

...

20.5 ADVERTISEMENTS

...

(c) The categories are as follows:

...

(iii) advertisements which contain only factual information in relation to an offer (for example, reminders as to ~~closing dates and times the unconditional date~~ or the value of an offer) and not any argument or opinion in relation to an offer;

Rule 21

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED

...

NOTES ON RULE 21.1

...

2. Material amount

...

~~(c) Subject to Note 4, r~~Relative values of 10% or more will normally be regarded as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.

...

~~4. The CMA and the European Commission~~

~~When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). The Panel will, however, normally consider that General Principle 3 and Rule 21.1 apply during the competition reference period, but on a more flexible basis. For example, issues of shares, which do not increase the equity share capital or the share capital carrying voting rights as at the end of the offer period by, in aggregate, more than 15%, would normally not be restricted; and for the purpose of Note 2, a 15% rather than a 10% test would normally be applied.~~

54. Service contracts

...

65. Established share option schemes

...

76. Pension schemes

...

87. Inducement fees

...

21.2 OFFER-RELATED ARRANGEMENTS

...

NOTES ON RULE 21.2

...

1. Competing offerors

...

(b) any inducement fee is capable of becoming payable only if an offer becomes or is declared ~~wholly unconditional~~.

...

21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS

...

NOTES ON RULE 21.3

...

~~5. The CMA and the European Commission~~

~~When a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated, the offer period may end in accordance with Rule 12.2(a). The Panel will, however, continue to apply Rule 21.3 during the reference or proceedings and, therefore, for the purposes of this Rule alone, will normally deem the referred offeror to be a bona fide potential offeror.~~

65. Information given to a purchaser of assets

...

Rule 24

24.1 THE OFFER DOCUMENT

...

NOTE ON RULE 24.1

Pre-conditional offers

Where an offeror announces a firm intention to make an offer subject to one or more pre-conditions in accordance with Rule 13.3, the Panel will normally require the offer document to be published within 28 days of the last remaining pre-condition being either satisfied or waived.

...

24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

...

(d) the offer document (including, where relevant, any revised offer document) must include:

...

(v) the terms of the offer, including the consideration offered for each class of security, the total consideration offered and particulars of the way in which the consideration is to be paid in accordance with Rule 31.89 or, in the case of a scheme of arrangement, Section 10 of Appendix 7;

...

(vii) language which appropriately reflects that the offeror may only invoke any condition which is subject to Rule 13.5(a) with the consent of the Panel;

(viii) a statement as to which conditions are not subject to Rule 13.5(a) (see Rule 13.5(c));

(ix) a statement that any condition that is subject to Rule 13.5(a) may be waived by the offeror (see Rule 13.5(d));

(viiix) particulars of all documents required, and procedures to be followed, for acceptance of the offer ...;

(viiiixi) the middle market quotations for the securities to be acquired ...;

(ixxii) details of any agreements or arrangements ...;

(xiii) details of any irrevocable commitment ...;

(xiv) in the case of a securities exchange offer, full particulars of the securities being offered ...;

- (xiiy) a summary of the provisions of Rule 8 ...;
- (xviii) the national law which will govern contracts ...;
- (xivii) the compensation (if any) offered for the removal of rights pursuant to Article 11 of the Directive ...;
- (xviii) any post-offer undertaking ...;
- (xvix) a summary of any offer-related arrangement ...;
- (xviix) a list of the documents which the offeror has published on a website ...; and
- (xviiixi) any profit forecast or quantified financial benefits statement ...;

...

24.7 INCORPORATION OF OBLIGATIONS AND RIGHTS*

The offer document must state the time allowed for acceptance of the offer and any alternative offer and must incorporate language which appropriately reflects Notes 4–8 on Rule 10.1 and those parts of Rules 13.5(a), 13.6 (if applicable), 17 and 31–34 which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.

NOTES ON RULE 24.7

1. *Incorporation by reference*

A suitable cross reference to Notes 4–6 and Note 8 on Rule 10.1 is regarded as being sufficient appropriately to reflect those Notes but cross references to other provisions of the Code are not permitted.

2. *Rule 31.67(db)*

Rule 24.7 does not apply to the requirement, imposed by Rule 31.67(db), that an announcement as to whether the offer is unconditional ~~as to acceptances~~ or has lapsed should be made by 5.00 pm on ~~the final closing date~~ unconditional date. Accordingly this requirement should not be reflected in the terms of the offer.

...

~~24.14 CASH UNDERWRITTEN ALTERNATIVES WHICH MAY BE SHUT OFF*~~

~~The procedure for acceptance of a cash underwritten alternative which is capable of being shut off must be prominently stated in relevant documents and acceptance forms. In particular, it must be made clear (in the offer document, the acceptance form and any subsequent documents) whether shareholders must lodge their certificates by the closing date of the cash underwritten alternative, in addition to their completed acceptance forms, in order to receive cash.~~

...

24.174 DIVIDENDS

...

Rule 25

25.1 THE OFFEREE BOARD CIRCULAR

(a) Except with the consent of the Panel, the board of the offeree company must, ~~within 14 days of the publication of the offer document~~ by no later than Day 14, send a circular to shareholders in the offeree company and persons with information rights, in accordance with Rule 30.2.

...

25.9 EMPLOYEE REPRESENTATIVES' OPINION AND PENSION SCHEME TRUSTEES' OPINION

...

(b) Where any such opinion is received but not in good time before publication of the offeree board circular, the offeree company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared ~~wholly unconditional~~.

Rule 26

RULE 26. DOCUMENTS TO BE PUBLISHED ON A WEBSITE

...

26.2 DOCUMENTS TO BE PUBLISHED ON A WEBSITE FOLLOWING THE ANNOUNCEMENT OF A FIRM OFFER

The following documents must be published on a website promptly following the publication of the announcement of a firm intention to make an offer (or, if later, the date of the relevant document) and in any event by no later than 12 noon on the following business day:

...

(e) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer (Rule 2.7(c)(vii)).

...

NOTES ON RULE 26

1. *Period for which documents etc. to be made available*

Each document, announcement or information required to be published on a website under Rule 26 must continue to be made available on a website free of charge until the end of the offer (including any related competition reference period). Documents, announcements and information published following the end of the offer period which do not relate directly to the offer will not be required to be published on the website.

Rule 27.2

27.2 SUBSEQUENT DOCUMENTS

...

(b) In the case of an offeror, the matters referred to in Rule 27.2(a)(ii) are as follows:

...

(vi) any agreements or arrangements which relate to the invocation of the conditions to its offer (Rule 24.3(d)(~~ix~~xii));

(vii) irrevocable commitments and letters of intent (Rule 24.3(d)(xiii));

(viii) post-offer undertakings (Rule 24.3(d)(xviii));

(ix) any offer-related arrangements etc. permitted under, or excluded from, Rule 21.2 (Rule 24.3(d)(~~xvi~~x));

(x) profit forecasts and quantified financial benefits statements (Rule 24.3(d)(~~xviii~~xi));

Rule 30.1

30.1 ANNOUNCEMENTS TO BE PUBLISHED VIA A RIS

...

NOTE ON RULE 30.1

Unquoted public companies and relevant private companies

The Panel will normally grant a dispensation from the requirement for announcements to be published via a RIS where the relevant securities in the offeree company are not admitted to trading, provided that the offeree company agrees to publish all relevant announcements on its website. Any such dispensation will not apply to the announcements which commence and end the offer period, which must be published in accordance with Rule 30.1(a).

In such circumstances, the Panel will also normally grant a dispensation from the requirements of Note 3 on Rule 8, such that public disclosures made under Rule 8 may be made to the offeree company and published on its website rather than being made via a RIS.

Rule 31

RULE 31. TIMING OF THE OFFER*

**This Rule is disapplied in a scheme. See Appendix 7.*

31.1 DAY 60 AND THE UNCONDITIONAL DATE

(a) Except with the consent of the Panel, all of the conditions to an offer must be satisfied or waived, or the offer must lapse, by midnight on Day 60.

(b) An offeror which wishes to specify an unconditional date in the initial offer document which is earlier than Day 60 must consult the Panel in advance and will normally be treated as having made an acceleration statement.

31.12 ~~FIRST CLOSING DATE~~PERIOD FOR WHICH THE OFFER MUST REMAIN OPEN FOR ACCEPTANCE

(a) An offer must initially be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses for at least 21 days following the date on which the offer document is published.

31.2 ~~FURTHER CLOSING DATES TO BE SPECIFIED~~

~~In any announcement of an extension of an offer, either the next closing date must be stated or, if the offer is unconditional as to acceptances, a statement may be made that the offer will remain open until further notice. In the latter case, or if the offer will remain open for acceptances beyond the 70th day following the publication of the offer document, at least 14 days' notice must be given, before the offer is closed, to those shareholders who have not accepted by sending a notification to offeree company shareholders and persons with information rights.~~

31.3 ~~NO OBLIGATION TO EXTEND~~

~~There is no obligation to extend an offer if the acceptance condition has not been satisfied by the first or any subsequent closing date.~~

31.4 ~~OFFER TO REMAIN OPEN FOR 14 DAYS AFTER UNCONDITIONAL AS TO ACCEPTANCES~~

(b) In addition, ~~After an offer has becomes or is declared unconditional as to acceptances, the offer it~~ must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired (see Rules 33.1 and 33.2) and the offeror must give at least 14 days' notice before the offer is closed.

(c) Subject to paragraph (a), ~~When, however, an offer is unconditional as to acceptances from the outset, a 14 day extension is not required but not subject to an acceptance condition, it is not required to remain open for acceptance in accordance with paragraph (b), provided that~~ the position should be is set out clearly and prominently in the offer document.

(d) When an offer becomes or is declared unconditional and remains open for acceptance until further notice, a notification must be sent to offeree company

shareholders and persons with information rights at least 14 days before the offer is closed.

31.3 EXTENSIONS TO DAY 60

The Panel will normally only extend Day 60 beyond the 60th day following the publication of the initial offer document:

- (a) if a competing firm offer has been announced (see Note 1); or
- (b) if the board of the offeree company consents to an extension; or
- (c) as provided for in Rule 31.4 (Suspension of offer timetable if an official authorisation or regulatory clearance remains outstanding); or
- (d) as provided for in Rule 31.8 (Offeree company announcements after Day 39); or
- (e) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.1.

NOTES ON RULE 31.3

1. Timetable for competing firm offers

If a competing firm offer has been announced, Day 60 for both offerors will normally be set by reference to the publication of the later offer document. In addition, the Panel may extend Day 60 to allow for any auction procedure under Rule 32.5. See also the Note on Rule 31.4.

2. Day 46

If the Panel extends Day 60 after Day 46 has passed, the offeror will normally be able to revise its offer by no later than the new Day 46, provided that it is not prevented from doing so by the terms of an acceleration statement or a no increase statement.

The Panel will not normally extend Day 60 under Rule 31.3(b) after Day 46 has passed where competing offers have been made.

31.4 SUSPENSION OF OFFER TIMETABLE IF AN OFFICIAL AUTHORISATION OR REGULATORY CLEARANCE REMAINS OUTSTANDING

(a) If one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5.00 pm on the second day prior to Day 39, the Panel will normally suspend the offer timetable:

- (i) at the joint request of the offeror and the offeree company; or
- (ii) at the request of either the offeror or the offeree company, provided that at least one of the outstanding conditions relates to a material official authorisation or regulatory clearance.

(b) A suspended offer timetable will resume on the date on which the last condition relating to a relevant official authorisation or regulatory clearance is satisfied or waived, which will normally become the 28th day prior to Day 60.

(c) With the consent of the offeree company, a suspended offer timetable may be resumed without the offeror being required to waive any unsatisfied condition relating to an official authorisation or regulatory clearance, in which case the offer timetable will normally resume on the 28th day prior to Day 60.

(d) Where an offer timetable resumes in accordance with paragraph (b) or (c), the offeror must make an immediate announcement confirming the new Day 60.

NOTE ON RULE 31.4

Competing offers

If there are two or more competing offers and the offer timetable is suspended under Rule 31.4(a), the offer timetable will normally be suspended for all the offerors and will normally only resume when it is resumed by the last offeror in accordance with Rule 31.4(b) or (c). Alternatively, an offeror may bring forward the unconditional date of its offer by making an acceleration statement.

31.5 ~~NO EXTENSION~~ ACCELERATION STATEMENTS

~~(a) A “no extension statement” is a statement that an offer will not be extended beyond a specified date unless it is unconditional as to acceptances.~~

(a) Where an offeror makes an acceleration statement, the new unconditional date must be not less than 14 days from the date on which the acceleration statement is made.

(b) An acceleration statement must state that the offeror has waived any and all unsatisfied conditions relating to any official authorisation or regulatory clearance.

(c) If an offeror makes an acceleration statement:

(i) Rule 31.8(a) will not apply and there will therefore be no restriction on the date by which the board of the offeree company may announce any material new information; and

(ii) Rules 2.6(d) and (e) will not apply and there will therefore be no requirement for a potential competing offeror to clarify its position by a particular date.

~~(bd) If an offeror (or its directors, officials or advisers) makes a no extension an acceleration statement, and that statement is not withdrawn immediately if incorrect, the offeror will not be allowed subsequently to extend its offer beyond the stated date set the statement aside, except:~~

~~(i) where the right to do so in certain circumstances is specifically reserved at the time the no extension acceleration statement is made and those circumstances subsequently arise; or~~

~~(ii) in wholly exceptional circumstances.~~

~~(ee) If an offeror wishes to include a reservation to a no extension an acceleration statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2.~~

(f) If any of an offeror's directors, officials or advisers makes a statement that a new unconditional date will be set, and that statement is not withdrawn immediately if incorrect, the offeror will be required to make an acceleration statement.

~~(d) The provisions of Rule 31.4 will apply in any event.~~

NOTES ON RULE 31.5

~~(See also Rule 31.6)~~

1. Reservation of the right to set a no-extension-an acceleration statement aside

~~(a) A no-extension~~ An acceleration statement must not be subject to a reservation to set the statement aside which depends solely on subjective judgements by the offeror or its directors or the fulfilment of which is in their hands.

~~(b) The first document published in connection with an offer in which mention is made of the no-extension-acceleration statement must contain prominent reference to any reservation to set it aside (precise details of which must also be included in the document). Any subsequent mention by the offeror of the no-extension-acceleration statement must be accompanied by a reference to the reservation or, at the least, to the relevant sections in the document containing the details.~~

~~(c) Notes 32 and 43 describe examples of specific types of reservation to set a no-extension-an acceleration statement aside. However, other types of reservation may also be made (for example, a reservation relating to the recommendation of an increased or improved offer by the board of the offeree company), provided that they comply with the requirements of this Note 1.~~

~~2. Wholly exceptional circumstances~~

~~If the right to set aside a no-extension statement has not been specifically reserved, the offeror will be allowed to extend its offer only in wholly exceptional circumstances (except as required by Rule 31.4).~~

32. Competitive situations

~~If the circumstances specified in a reservation made in accordance with Rule 31.5(bd)(i) relate to a competitive situation arising and such a situation arises, an offeror which wishes to set aside its no-extension-acceleration statement must:~~

~~(a) make an announcement to this effect as soon as possible (and in any event within 4 business days after the day-date of the firm announcement of the competing offer) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity; and~~

~~(b) give any shareholders who accepted the offer after the date of the no-extension statement a right of withdrawal for a period of 8 days following the date on which the announcement is made.~~

~~(For the purpose of this Note a competitive situation will normally arise following a public announcement of the existence of a new offeror or potential offeror whether publicly identified or not. Other circumstances, however, may also constitute a competitive situation.)~~

43. Rule 31.98 announcements

An offeror may reserve the right to set aside a ~~no extension~~ an acceleration statement in the event of the offeree company making an announcement of the kind referred to in Rule 31.98 after the 39th day following the publication of the initial offer document Day 39 only if the ~~no extension~~ acceleration statement is made after that day. If such an announcement is subsequently made by the offeree company and the offeror wishes to set aside its ~~no extension~~ acceleration statement, the offeror must make an announcement to this effect as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity.

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 published. The Panel's consent will normally only be given:~~

~~(i) if a competing firm offer has been announced (see Note 2); or~~

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

~~(iii) if there is a significant delay in the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings (see Note 5); or~~

~~(iv) as provided for in Rule 31.9; or~~

~~(v) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10; or~~

~~(vi) when withdrawal rights are introduced under Rule 13.6.~~

~~(b) Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders and persons with information rights.~~

~~(c) 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 electronic instructions or 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 (iv) above, acceptances or purchases in respect of which relevant electronic instructions or 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.~~

~~(d) 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. The requirement to make an announcement by 5.00 pm should not be reflected in the terms of the offer pursuant to Rule 24.7, but, if there is any question of a delay in the announcement, 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.~~

NOTES ON RULE 31.6

1. ~~Consequential changes to the offer timetable~~

~~Where the Panel consents to an extension in accordance with any of Rules 31.6(a)(i) to (iv), it will normally also grant an extension to or, if appropriate, re-set "Day 39" (see Rule 31.9), "Day 46" (see Rule 32.1(c)) and "Day 53" (see Rules 2.6(d) and (e)).~~

2. ~~Timetable for competing firm offers~~

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

3. ~~No extension under Rule 31.6(a)(ii) after "Day 46" of a competing firm offer~~

~~Where competing firm offers have been made, the Panel will not normally give its consent to an extension of "Day 60" under Rule 31.6(a)(ii) unless its consent is sought before the 46th day following the publication of the competing offer document (see also Rule 32.5).~~

4. ~~Extension of "Day 60" after "Day 46"~~

~~The Panel will normally grant an extension to "Day 60" (with a corresponding extension to, or re-setting of, "Day 46") of an offeror's timetable where the board of the offeree company consents to such an extension. Therefore, provided that such consent is obtained, and subject to no unreserved "no extension statement" (see Rule 31.5) or "no increase statement" (see Rule 32.2) having been made, the offeror will normally be able to revise its offer, notwithstanding that the original "Day 46" has passed.~~

~~Where an offeror has made an offer and it has been announced that a potential offeror might make a competing offer (see Rules 2.6(d) and (e)), the Panel will normally, at the request of the first offeror and with the consent of the board of the offeree company, consent to an extension of "Day 60" (with a corresponding extension to, or re-setting of, "Day 46") as described above. In such cases, the Panel will normally also require a corresponding extension to, or re-setting of, "Day 53", being the date by which the potential competing offeror is required to confirm its position in accordance with Rule 2.6(d) or (e) (as applicable).~~

5. ~~The CMA and the European Commission~~

~~In the case of an extension in accordance with Rule 31.6(a)(iii), the Panel will normally extend "Day 39" to the second day following the announcement of the decision on whether there is to be a Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings.~~

~~6. — Where a Code matter remains outstanding on the final closing date~~

~~When 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), consent to the offer being extended, but with no extension of the time by which all relevant electronic instructions or 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(c) and Rule 31.1.~~

31.6 ACCEPTANCE CONDITION INVOCATION NOTICE

(a) If an offeror intends to invoke the acceptance condition so as to cause the offer to lapse on a date which is:

- (i) on or after Day 21; and**
- (ii) earlier than the unconditional date,**

it must publish a notice of its intention to do so, specifying the relevant date (an “acceptance condition invocation notice”).

(b) An acceptance condition invocation notice must:

- (i) be published at least 14 days prior to the relevant date;**
- (ii) be irrevocable;**
- (iii) specify the level of acceptances which must be received in order for the offer not to lapse on the relevant date, which level cannot be changed prior to or on the relevant date; and**
- (iv) be sent to all offeree company shareholders and persons with information rights.**

(c) If the required level of acceptances has not been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will be regarded as being incapable of satisfaction and the offer must lapse.

(d) If the required level of acceptances has been received by 1.00 pm on the relevant date specified in an acceptance condition invocation notice, the acceptance condition will not be regarded as having been satisfied at that time unless all other conditions to the offer have been either satisfied or waived (see Rule 10.2).

31.7 TIME FOR FULFILMENT OF ALL OTHER CONDITIONS

~~Except with the consent of the Panel, all conditions must be fulfilled or the offer must lapse within 21 days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances, whichever is the later. The Panel's consent will normally only be granted if the outstanding condition involves a material official authorisation or regulatory clearance relating to the offer and it had not been possible to obtain an extension under Rule 31.6.~~

NOTES ON RULE 31.7

1. — The effect of lapsing

The Note on Rule 12.1 also applies to this Rule.

2. — Extensions

Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders and persons with information rights.

31.7 PROCEDURAL MATTERS ON THE UNCONDITIONAL DATE

(a) 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 electronic instructions or documents (as required by Notes 4 and 5 on Rule 10.1) 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 unconditional date. In the event of an extension to Day 60 in circumstances other than those set out in paragraphs (a) to (d) of Rule 31.3, acceptances or purchases in respect of which relevant electronic instructions or 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.

(b) Except with the consent of the Panel, on the unconditional date an announcement should be made by 5.00 pm as to whether:

(i) the offeror has received sufficient acceptances for the acceptance condition to be satisfied; and, if so

(ii) all other conditions to the offer have been either satisfied or waived.

Such announcement should include, if possible, the details required by Rule 17.2 but in any event must include a statement as to the current position in the count. The requirement to make an announcement by 5.00 pm should not be reflected in the terms of the offer pursuant to Rule 24.7, but, if there is any question of a delay in the announcement, 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.

NOTE ON RULE 31.7

Where a Code matter remains outstanding on the unconditional date

When there is a Code matter outstanding on the unconditional date, the offer will not normally be permitted to become or be declared unconditional or to lapse pending the final determination of the issue. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.3, consent to the offer being extended, but with no extension of the time by which all relevant electronic instructions or documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule 31.7(a) and Rule 34.1.

31.89 SETTLEMENT OF CONSIDERATION

Except with the consent of the Panel, the consideration must be sent to accepting shareholders within 14 days of the later of:

- (a) ~~the first closing date of the offer,~~ Day 21;
- (b) the date the offer becomes or is declared wholly unconditional; ~~or and~~
- (c) the date of receipt of an acceptance complete in all respects.

NOTE ON RULE 31.89

Extensions

Any extension to which the Panel consents must be announced by the offeror. The Panel should be consulted as to whether a notification in respect of the extension should also be sent to offeree company shareholders.

31.98 OFFEREE COMPANY ANNOUNCEMENTS AFTER DAY 39

(a) The board of the offeree company should not, except with the consent of the Panel (which should be consulted in good time), announce any material new information, including trading results, profit forecasts (including ordinary course profit forecasts), dividend forecasts, asset valuations, quantified financial benefits statements and proposals for dividend payments or for any material acquisition or disposal, after the 39th day following the publication of the initial offer document Day 39.

(b) Where a matter which might give rise to such an announcement being made after the 39th day Day 39 is known to the offeree company, every effort should be made to bring forward the date of the announcement, but, where this is not practicable or where the matter arises after that date, the Panel will normally give its consent to a later announcement.

(c) If an announcement of the kind referred to in paragraph (a) is made after the 39th day Day 39, the Panel will normally be prepared to consent to an extension to "Day 46" (see Rule 32.1(c)), "Day 53" (see Rules 2.6(d) and (e)) and/or re-set "Day 60", (see Rule 31.65(a)) as appropriate.

~~(See also Note 5 on Rule 31.6.)~~

31.10 RETURN OF DOCUMENTS OF TITLE

If an offer lapses, all documents of title and other documents lodged with forms of acceptance must be returned as soon as practicable (and in any event within 14 seven days of the lapsing of the offer) and the receiving agent should immediately give instructions for the release of securities held in escrow.

Rule 32

32.1 PUBLICATION OF REVISED OFFER DOCUMENT

...

(c) The offer must be kept open for at least 14 days following the ~~date on which publication of the revised offer document is published~~. Therefore, no revised offer document may be published after Day 46 or, where the offeror has made an acceleration statement, after the date which is 14 days prior to the unconditional date in the 14 days ending on the last day the offer is able to become unconditional as to acceptances.* (See also Rule 31.6 and the Notes on Rule 31.6.)

NOTES ON RULE 32.1

...

3. When revision is not permissible*

~~Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is published, an offeror will generally not be able to revise its offer, and An offeror must not place itself in a position where it would be required to revise its offer; in the 14 days ending on the last day its offer is able to become unconditional as to acceptances (see also Rule 31.6 and the Notes on Rule 31.6). Nor must an offeror place itself in a position where it would be required to revise its offer~~

(a) after the date referred to in Rule 32.1(c); or

(b) if it has made a no increase statement as defined in Rule 32.2.

...

5. ~~Extension of “Day 60” after “Day 46”~~

~~The Panel will normally grant an extension to “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) of an offeror’s timetable where the board of the offeree company consents to such an extension. Therefore, provided that such consent is obtained, and subject to no unreserved “no extension statement” (see Rule 31.5) or “no increase statement” (see Rule 32.2) having been made, the offeror will normally be able to revise its offer, notwithstanding that the original “Day 46” has passed.~~

~~Where an offeror has made an offer and it has been announced that a potential offeror might make a competing offer (see Rules 2.6(d) and (e)), the Panel will normally, at the request of the first offeror and with the consent of the board of the offeree company, consent to an extension of “Day 60” (with a corresponding extension to, or re-setting of, “Day 46”) as described above. In such cases, the Panel will normally also require a corresponding extension to, or re-setting of, “Day 53”, being the date by which the potential competing offeror is required to confirm its position in accordance with Rule 2.6(d) or (e) (as applicable).~~

32.2 NO INCREASE STATEMENTS

...

(c) If an offeror wishes to include a reservation to a no increase statement, the Panel must be consulted. See also Rule 35.1(f) and Note 1(a)(i) on Rules 35.1 and 35.2

NOTES ON RULE 32.2

1. Reservation of the right to set a no increase statement aside

...

(c) Notes ~~32~~ and ~~43~~ describe examples of specific types of reservation to set a no increase statement aside. However, other types of reservation may also be made (for example, a reservation relating to the recommendation of an increased or improved offer by the board of the offeree company), provided that they comply with the requirements of this Note 1.

~~2.~~ Wholly exceptional circumstances

~~If the right to set aside a no increase statement has not been specifically reserved, the offeror will be allowed to increase or amend its offer only in wholly exceptional circumstances. The agreement of the board of the offeree company or the fact that the offer is wholly unconditional will not be regarded as wholly exceptional circumstances.~~

~~32.~~ Competitive situations

If the circumstances specified in a reservation made in accordance with Rule 32.2(b)(i) relate to a competitive situation arising and such a situation arises, an offeror which wishes to set aside its no increase statement must:

~~(a)—make an announcement to this effect as soon as possible (and in any event within 4 business days after the day-date of the firm announcement of the competing offer) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity; and~~

~~(b)—give any shareholders who accepted the offer after the date of the no increase statement a right of withdrawal for a period of 8 days following the date on which the announcement is made.*~~

...

~~*Paragraph (b) of Note 3 is disapplied in a scheme.~~

~~43.~~ Rule 31.98 announcements~~†~~*

An offeror may reserve the right to set aside a no increase statement in the event of the offeree company making an announcement of the kind referred to in Rule 31.98 ~~after the 39th day following the publication of the initial offer document~~ Day 39 only if the no increase statement is made after that day. If such an announcement is subsequently made by the offeree company and the offeror wishes to set aside its no increase statement, the offeror must make an announcement to this effect as soon as possible (and in any event within 4 business days after the date of the offeree company announcement) and send a notice to offeree company shareholders and persons with information rights at the earliest opportunity.

~~†*This Note is disapplied in a scheme.~~

~~54.~~ Schemes of arrangement

...

~~65.~~ Dividends

...

32.6 THE OFFEREE BOARD'S OPINION AND THE OPINIONS OF THE EMPLOYEE REPRESENTATIVES AND THE PENSION SCHEME TRUSTEES

...

(b) Where ...

(i) ...

(ii) ...

any such opinion must be appended to the circular. Where any such opinion is received but not in good time before publication of the offeree board circular, the offeree company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional.

Rule 33

RULE 33. ALTERNATIVE OFFERS*

33.1 TIMING AND REVISION

~~In general, the~~ The provisions of Rules 31 and 32 apply equally to alternative offers, including cash alternatives.

NOTES ON RULE 33.1

~~1. Elections~~

33.2 "MIX AND MATCH" ELECTIONS

~~For the purpose of this Rule, an~~ An arrangement under which shareholders elect, subject to the election of other shareholders, to vary the proportion in which they are to receive different forms of consideration is not regarded as an alternative offer. Any such arrangement must remain open so that shareholders may make elections until the date on which the offer becomes or is declared unconditional and may be closed without notice thereafter. on any closing date; ~~This must be clearly stated in the offer document.~~

~~2. Shutting off~~

~~Normally, except as permitted by Rule 33.2, if an offer has become or is declared unconditional as to acceptances, all alternative offers must remain open in accordance with Rule 31.4.~~

~~In accordance with Rule 31.3, if on a closing date an offer is not unconditional as to acceptances, an alternative offer (except a cash alternative provided to satisfy the requirements of Rule 9) may be closed without prior notice. However, if, on the first closing date on which an offer is capable of being declared unconditional as to acceptances, the offer is not so declared and is extended, all alternative offers must, except as permitted by Rule 33.2, remain open for 14 days thereafter but may then be closed without prior notice.~~

~~33.2 SHUTTING OFF CASH UNDERWRITTEN ALTERNATIVES~~

~~Where the value of a cash underwritten alternative provided by third parties is, at the time of announcement, more than half the maximum value of the offer, an offeror will not be obliged to keep that alternative open in accordance with Rules 31.4 or 33.1 if it has sent a notification to offeree company shareholders and persons with information rights that it reserves the right to close it on a stated date, being not less than 14 days after the date on which the notification is published, or to extend it on that stated date. Notice under this Rule may not be given between the time when a competing offer has been announced and the end of the resulting competitive situation. (See also Rule 24.14.)~~

~~NOTES ON RULE 33.2~~

~~1. Further notifications~~

~~Where a notification has been published pursuant to this Rule and the alternative is not closed on the stated date but extended, the offeror must send a further notification to shareholders and persons with information rights if it wishes to take advantage of this Rule.~~

~~2. Rule 9 offers~~

~~This Rule will not apply to a cash alternative provided to satisfy the requirements of Rule 9.~~

~~33.3 REINTRODUCTION OF ALTERNATIVE OFFERS~~

~~Where a firm statement has been made that an alternative offer will not be extended or reintroduced and that alternative has ceased to be open for acceptance, neither that alternative, nor any substantially similar alternative, may be reintroduced. Where, however, such a statement has not been made and an alternative offer has closed for acceptance, an offeror will not be precluded from reintroducing that alternative at a later date. Reintroduction would constitute a revision of the offer and would, therefore, be subject to the requirements of, and only be permitted as provided in, Rule 32.~~

**This Rule is disappplied in a scheme. See Appendix 7.*

Rule 34

34.1 WHEN THE RIGHT OF WITHDRAWAL MAY BE EXERCISED

An accepting shareholder must be entitled to withdraw his an acceptance from the date which is 21 days after the first closing date of the initial offer at any time, if the offer has not by such date become or been declared unconditional as to acceptances unless the offer is unconditional from the outset. This entitlement to withdraw must be exercisable until the earlier of:

- (a) the time that the offer becomes or is declared unconditional as to acceptances the acceptance condition is satisfied; and
- (b) the final latest time for lodgement the receipt of acceptances on the unconditional date which can be taken into account in accordance with Rule 31.6.

34.2 OFFEREE PROTECTION CONDITIONS

~~An accepting shareholder must be entitled to withdraw his acceptance if so determined by the Panel in accordance with Rule 13.6.~~

34.32 RETURN OF DOCUMENTS OF TITLE

If a shareholder withdraws his ~~an~~ acceptance, all documents of title and other documents lodged with the form of acceptance must be returned as soon as practicable following the receipt of the withdrawal (and in any event within ~~44~~ seven days) and the receiving agent should immediately give instructions for the release of securities held in escrow.

Rule 35

35.1 DELAY OF 12 MONTHS

Except with the consent of the Panel, where an offer has been announced or made but has not become or been declared ~~wholly unconditional~~ and has been withdrawn or has lapsed ~~otherwise than pursuant to Rule 12.1~~, 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:

...

35.2 PARTIAL OFFERS

The restrictions in Rule 35.1 will also apply following a partial offer:

(a) which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared ~~wholly unconditional~~. When such an offer has become or been declared ~~wholly unconditional~~, the period of 12 months runs from that date; and

(b) for more than 50% of the voting rights of the offeree company which has not become or been declared ~~wholly unconditional~~.

...

NOTES ON RULES 35.1 and 35.2

1. When consent may be given

~~(a)~~—The Panel will normally only give its consent under this Rule if:

(ia) the board of the offeree company so agrees. Such consent will not normally be given within three months of the lapsing of an earlier offer in relation to which the offeror made a no increase statement or an acceleration statement which was not subject to a reservation of the right to set the statement aside in the event of an increased or improved offer being recommended by the board of the offeree

~~company circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement;~~

(iib) a third party announces a firm intention to make an offer for the offeree company;

(iiic) the offeree company announces a “whitewash” proposal (see Note 1 of the Notes on Dispensations from Rule 9) or a reverse takeover; or

(ivd) the Panel determines that there has been a material change of circumstances.

~~(b) The Panel may also give consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material official authorisations or 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.~~

~~(c) The restrictions in Rules 35.1(d) and (e) will not normally apply to the extent that the offer lapsed as a result of the offeror failing to obtain a material official authorisation or regulatory clearance relating to the offer within the usual Code timetable, but the offeror is continuing to seek clearance or a decision from the relevant official or regulatory authorities with a view subsequently to making a new offer with the consent of the Panel in accordance with Note (b) on Rule 35.1.~~

~~NB Rule 2.2(e) will continue to apply in these circumstances.~~

...

35.3 DELAY OF 6 MONTHS BEFORE ACQUISITIONS ABOVE THE OFFER VALUE

Except with the consent of the Panel, if a person, together with any person acting in concert with him, holds shares carrying more than 50% of the voting rights of a company, neither that person nor any person acting in concert with him may, within 6 months of the closure of any previous offer made by him to the shareholders of that company which became or was declared wholly unconditional, make a second offer to any shareholder in that company, or acquire any interest in shares in that company, on more favourable terms than those made available under the previous offer (see also Rule 6.2(a)). For this purpose the value of a securities exchange offer shall be calculated as at the date the offer closed. In addition, special deals with favourable conditions attached may not be entered into during this 6 months period (see also Rule 16.1).

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 person acting in concert with that offeror, may acquire any interest in shares in the offeree company on more favourable terms than those made available under its lapsed offer until each of the competing offers has either become or 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.

NOTE ON RULES 35.3 and 35.4

Determination of price

...

(b) *that call option is exercised:*

(i) ...

(ii) *before any competing offer has either become or been declared unconditional ~~in all respects or~~ has itself lapsed (in the case of Rule 35.4),*

Rule 36.4

36.4 OFFER FOR BETWEEN 30% AND 50%

When an offer is made which could result in the offeror and persons acting in concert with it being interested in shares carrying not less than 30% but not holding shares carrying more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional ~~as to acceptances~~ unless acceptances are received for not less than that number.

Rule 38

38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

...

~~NOTE ON RULE 38.2~~

~~Competition reference periods~~

~~During a competition reference period the restrictions in this Rule will also apply to an offeror subject to the reference and to any person acting in concert with it.~~

38.3 ASSENTING SECURITIES AND DEALINGS IN ASSENTED SECURITIES

An exempt principal trader connected with the offeror must not assent offeree company securities to the offer or purchase such securities in assented form until the offer is unconditional ~~as to acceptances~~.

NOTES ON RULE 38.3

~~1. — Withdrawal rights under Rule 13.6~~

~~If withdrawal rights are introduced under Rule 13.6, the acceptances in relation to any securities assented to the offer after it was unconditional as to acceptances by an exempt principal trader connected with the offeror must be withdrawn and such securities may not be re-assented to the offer unless, following the period agreed by the Panel for withdrawal rights to run, the offer becomes or is declared unconditional as to acceptances.~~

2.—Schemes of arrangement

See Section 12 of Appendix 7.

Appendix 2

APPENDIX 2

FORMULA OFFERS GUIDANCE NOTE

...

3 DATE ON WHICH THE FORMULA CRYSTALLIZES

In all circumstances, the consideration payable under the formula should be determined as at the day the offer becomes or is declared unconditional ~~as to acceptances~~ or, in the case of a scheme of arrangement, as at a date which is a fixed number of days prior to the court sanction hearing (in either case, the “FAV calculation date”).

...

9 OFFEREE BOARD OBLIGATIONS

There is no ...

Once an offer is ~~wholly~~ unconditional, ...

Appendix 4

APPENDIX 4

RECEIVING AGENTS' CODE OF PRACTICE

NB 1 This Appendix should be read in conjunction with Rules 9.3 and 10.1 and, in particular, Notes 4 — 8 on Rule 10.1.

...

1 INTRODUCTION

...

It is essential when determining the result of an offer under the Code that appropriate measures are adopted such that all parties to the offer may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates areas of doubt. This Code of Practice is designed to ensure that those acceptances and purchases which may be counted towards fulfilling the acceptance condition and thus included in the certificate are properly identified to enable the receiving agent to provide the certificate required by Note 7 on Rule 10.1. Receiving agents are also required to establish appropriate procedures such that

acceptances and purchases can be checked against each other and between different categories so that no shareholding will be counted twice.

...

3 THE PROVISION OF THE OFFEREE COMPANY'S REGISTER

...

(c) From the date following the day on which a firm intention to make an offer is announced, the CREST operator will, after the appropriate request, make available to the offeror's receiving agent copies of all RURs generated in relation to the offeree company.

As far as certificated holdings are concerned, the registrar must provide updates, on a daily basis, to the register within two business days after notification of the transfer and, in addition, copies of all documents, including CREST stock deposits, which would lead to a change in the last copy register provided to the offeror must be provided as rapidly. On the day which is two days prior to the unconditional date (the "final register day*") any such information received by the offeree company's registrar but not yet provided to the offeror's receiving agent must be made available electronically, where possible, or for collection by the offeror's receiving agent, at the latest, by noon on the day preceding the ~~final closing date† of the offer~~ unconditional date.

From the final register day* until the time that the ~~offer becomes or is declared unconditional as to acceptances~~ acceptance condition is satisfied or the offer lapses, the offeree company's registrar should continue to update the register on a daily basis so that all transfers and other documents which have been received by the offeree company's registrar by 1.00 pm on the ~~final closing date† of the offer~~ unconditional date are processed by 5.00 pm that day at the latest. In addition, copies of these documents should be sent immediately and electronically, where possible, to the offeror's receiving agent insofar as not previously notified.

(d) Arrangements should be made to ensure that the offeror's receiving agent has access to the offeree company's registrar at all times, which includes weekends and Bank Holidays, during the period between the final register day* and the time the ~~offer becomes or is declared unconditional as to acceptances~~ acceptance condition is satisfied or the offer lapses, in order that any queries arising from acceptances and purchases can be investigated and accurate decisions taken.

~~*† See definitions at end of Appendix~~

...

5 COUNTING OF ACCEPTANCES

The offeror's receiving agent must ensure that all acceptances counted as valid meet the requirements set out in Note 4 on Rule 10.1 and, if appropriate, Note 6 on Rule 10.1.

6 COUNTING OF PURCHASES

The offeror's receiving agent must ensure that all purchases counted as valid meet the requirements (subject to Note 8 on Rule 10.1) set out in Note 5 on Rule 10.1 and, if appropriate, Note 6 on Rule 10.1.

7 ~~OFFERS BECOMING OR BEING DECLARED UNCONDITIONAL AS TO ACCEPTANCES SATISFACTION OF THE ACCEPTANCE CONDITION BEFORE THE UNCONDITIONAL DATE FINAL CLOSING DATE~~

~~Prior to an offer becoming or being declared unconditional as to acceptances Before the acceptance condition can be satisfied before the final closing date~~ unconditional date, the offeror's receiving agent must ensure that the requirements of Note 6 on Rule 10.1 have been satisfied.

~~† See definitions at end of Appendix~~

8 DISCLAIMERS IN RECEIVING AGENTS' CERTIFICATES

...

(iii) confirmation from the offeror of the validity of shares recorded as registered holdings and purchases in the context of Note 8 on Rule 10.1.

...

DEFINITIONS

~~*final register day — the day two days prior to the final closing date† of an offer.~~

~~†final closing date — the 60th day or other date beyond which the offeror has stated that its offer will not be extended.~~

Appendix 6

APPENDIX 6

BID DOCUMENTATION RULES FOR THE PURPOSES OF SECTION 953 OF THE COMPANIES ACT 2006

...

“Offer document rules”

Article	Those parts of the Rule set out below which give effect to the Article
----------------	--

...

<i>Article 6(3)(e)</i>	Rule 24.3(d)(xivii)
------------------------	---------------------

...

Article 6(3)(k)

Rule 24.3(d)(xiv)

...

Article 6(3)(n)

Rule 24.3(d)(xviii)

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

3 EXPECTED SCHEME TIMETABLE

...

(g) Except with the consent of the Panel, the offeror must:

(i) prior to the court sanction hearing, confirm to the offeree company and the Panel that all of the conditions to the offer have been either satisfied or waived, other than any conditions which are capable of being satisfied only upon or following the scheme being sanctioned (which conditions should normally be specified in the scheme circular); and

(ii) at the court sanction hearing, undertake to the court to be bound by the terms of the scheme insofar as it relates to the offeror.

The requirements in paragraphs (i) and (ii) will not apply if a condition relating to a material official authorisation or regulatory clearance is outstanding, provided that either:

(A) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or

(B) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the offeror in the context of the offer (see Rule 13.5(a)).

NOTE ON SECTION 3

Where a determination under Section 3(g) remains outstanding on the long-stop date

If a question as to whether the proviso to Section 3(g) has been satisfied remains outstanding on the long-stop date, the parties to the offer will normally be required to agree an extension to the long-stop date pending the final determination of the issue.

...

11 RETURN OF DOCUMENTS OF TITLE

If an offer being implemented by way of a scheme lapses or is withdrawn, or if a shareholder withdraws ~~his~~its election for a particular form of consideration, all documents of title and other documents lodged with any form of election must be returned as soon as practicable (and in any event within ~~14~~seven days of such lapsing or withdrawal) and the receiving agent should immediately give instructions for the release of securities held in escrow.

...

14 INCORPORATION OF OBLIGATIONS AND RIGHTS

In addition to the relevant requirements of Rules 24 and 25, the scheme circular must incorporate language which appropriately reflects those parts of ~~Rule 13.5(a) and 13.6 (if applicable) and of this Appendix 7~~ which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.

16 PROVISIONS DISAPPLIED IN A SCHEME

The following provisions of the Code do not apply to a scheme of arrangement:

...

~~(d) the Note on Rule 12.1 (the effect of lapsing);~~

~~(e) Note 2 on Rule 13.6 (availability of withdrawal rights);~~

(d) Rule 12.1 (long-stop date);

~~(fe) Rules 17.1 and 17.2 (announcement of acceptance levels);~~

~~(gf) ...~~

~~(hg) Rule 24.7 (incorporation of obligations and rights) and Rule 24.14 (cash underwritten alternatives which may be shut off);~~

~~(ih) ...~~

~~(ji) ...~~

(kj) Rule 32.1(c), Notes 3 (first sentence) and 4 on Rule 32.1, paragraph (b) of Note 3 on Rule 32.2 and Note 43 on Rule 32.2 (revision);

~~(lk) Rules 33.1 to 33.3 (alternative offers); and~~

~~(ml) ...~~

Appendix 8**APPENDIX 8****AUCTION PROCEDURE FOR THE RESOLUTION OF COMPETITIVE SITUATIONS****DEFINITIONS AND INTERPRETATION**

...

Day 46

~~The 46th day following the publication by~~ Day 46 (as defined in the Definitions Section of the Code) of the second competing offeror's offer ~~of its offer document~~ or, if the second competing offeror is proceeding by means of a scheme of arrangement, such date as the Panel shall determine.

APPENDIX B

List of questions

- Q1** Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?
- Q2** Should the Panel have the ability to suspend an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39, as proposed?
- Q3** Should an offer timetable which has been suspended under the proposed new Rule 31.4(a) normally resume on the 28th day prior to Day 60 when the last relevant condition is satisfied or waived?
- Q4** Do you have any comments on the proposals in relation to a suspended offer timetable resuming with the consent of the offeree company?
- Q5** Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?
- Q6** Should an offeror continue to be able to announce an offer subject to pre-conditions in accordance with Rules 13.3 and 13.4?
- Q7** Should an offeror be required to set a “long-stop date” for a contractual offer, as proposed?
- Q8** Should there be a requirement for an offeror to take the procedural steps necessary for a scheme of arrangement to become effective, as proposed?
- Q9** Should the requirement for an offer to include a “mandatory lapsing term” if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated be removed from the Code?
- Q10** Should the exemption from the “material significance” requirement in Rule 13.5(a) for CMA and European Commission clearance conditions and pre-conditions be removed?
- Q11** Should a pre-condition relating to a clearance from the CMA or the European Commission be treated in the same way as a pre-condition relating to any other official authorisation or regulatory clearance?
- Q12** Should an offeror be required to serve an “acceptance condition invocation notice” in the form proposed if it wishes to lapse its offer on the acceptance condition prior to the unconditional date?
- Q13** Do you have any comments on the proposals relating to the removal from the Code of references to “closing dates”?
- Q14** Should an offeror be required to make announcements as to acceptance levels as proposed in the amended Rule 17.1?
- Q15** Should there be a single latest date (i.e. Day 60) for the satisfaction of (a) the acceptance condition and (b) the other conditions to an offer?

- Q16** Should the Code provide that the acceptance condition must not be capable of being satisfied until all of the other conditions have been satisfied or waived, subject to the ability of the Panel to grant dispensation where this is not possible?
- Q17** Do you have any comments on the proposals in relation to the period for which an offer must remain open for acceptance and the closing of the offer?
- Q18** Should Rule 13.6 in relation to invoking offeree protection conditions be deleted as proposed?
- Q19** Do you have any comments on the proposed amendments to the Code in relation to withdrawal rights?
- Q20** Do you have any comments on the proposed amendments to Rule 13.5(a) with regard to the invocation of conditions and pre-conditions?
- Q21** Do you have any comments on the proposed new Rule 13.5(b), with regard to the conditions and pre-conditions to which Rule 13.5(a) does not apply, or on the proposed new Rules 13.5(c) and (d), with regard to the disclosures to be made in the firm offer announcement and the offer document?
- Q22** Should the Panel be able to grant a dispensation from the restriction on a person triggering a conditional mandatory offer where the triggering share purchase would itself be subject to a condition relating to a material official authorisation or regulatory clearance, as proposed in the new Note on Rule 9.4?
- Q23** Do you have any comments on the miscellaneous amendments proposed in Section 11 of the PCP?

APPENDIX C

Draft of revised Practice Statement No 5

RULE 13.5(a) – INVOCATION OF CONDITIONS

1. Introduction

1.1 It is standard market practice in the UK for offers (other than mandatory offers, where the provisions of Rule 9 of the Takeover Code apply) to be stated as being conditional upon the satisfaction, or waiver, of a number of conditions.

1.2 In a typical offer, the conditions can be broken down into four broad categories as follows:

- (a) the acceptance condition – (i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer) or, in the case of a scheme of arrangement, the shareholder approval condition and the court sanction condition;
- ~~• UK or European Commission competition clearances;~~
- ~~• other, effectively mandatory, conditions designed to give effect to some supervening regulatory requirement – for example, a listing condition on a securities exchange offer; and~~
- (b) conditions designed to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association, relating to the listing and/or admission to trading of the consideration securities or to the approval of the implementation of the offer by the offeror's shareholders;
- (c) specific or general conditions relating to the obtaining of an official authorisation or regulatory clearance and bespoke conditions relating to the (non-)occurrence of a specific event or circumstances in relation to the offeree company; and
- (d) other conditions, principally general protective conditions (including a included for the benefit of the offeror in order to give it the right not to proceed with the offer in the circumstances stipulated. There is a wide range of conditions which fall within this category, although one of those frequently encountered is the "material adverse change" (or "MAC") condition), whereby the offeror can lapse its offer in the event of a material adverse change in the business or prospects of the offeree company in the period after announcement of the offer.

2. Application of Rule 13

2.1 The principal provision of the Code applicable to conditions is Rule 13.

2.2 Rule 13.1 provides that offer conditions must not normally be in subjective terms.

2.3 ~~In addition, Rule 13.5(a) provides that, except for the acceptance condition:~~

"An offeror should not may only invoke any a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel. The firm offer announcement and the offer document

must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise.”

~~Rule 13.2 provides further that neither a UK nor a European Commission competition condition will be subject to either Rule 13.1 or Rule 13.5(a).~~

2.4 Rule 13.5(b) provides that the following will not be subject to Rule 13.5(a):

- (a) the acceptance condition;
- (b) a condition relating to the approval of a scheme of arrangement by the offeree company’s shareholders or to the sanctioning of the scheme by the court;
- (c) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);
- (d) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities;
- (e) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror’s articles of association (or equivalent), for the offeror’s shareholders to approve the implementation of the offer;
- (f) a term relating to the long-stop date of a contractual offer;
- (g) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held; and
- (h) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.

3. “Material significance”

3.1 The purpose of Rule 13.5(a) is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of ~~then Note 2 on Rule 13 (which is now Rule 13.5(a))~~ was considered by the Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was a ~~MAC~~ “material adverse change” condition. The Panel concluded that the necessary test of “material significance” was not met and in its decision stated that:

“... meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous ... to something that would justify frustration of a legal contract.”

3.2 The Panel Executive is aware that certain practitioners interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer ~~(other than the acceptance condition or any UK~~

~~or European Commission competition condition~~). The Executive does not consider this interpretation to be correct.

3.3 In applying Rule 13.5(a) in the light of the Panel's decision set out in Panel Statement 2001/15, the ~~Panel~~ Executive's practice is as follows:

- (a) as set out in Rule 13.5(a), the appropriate test for the invocation of a condition is whether the relevant circumstances upon which the offeror is seeking to rely are of material significance to it in the context of the offer. ~~— which~~ This must be judged by reference to the facts of each case at the time the relevant circumstances arise and taking account of the views of all relevant parties;
- (b) in the case of a ~~MAC, or similar, condition referred to in paragraph 1.2(d) above,~~ whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and
- (c) whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.

4. Factors to be taken into account

4.1 ~~In accordance with RS 2004/4, in~~ considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive's practice to take into account all relevant factors, including ~~whether~~:

- (a) whether the condition was the subject of negotiation with the offeree company;
- (b) whether the condition was expressly drawn to offeree company shareholders' attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; ~~and~~
- (c) whether the condition was included to take account of the particular circumstances of the offeree company;
- (d) whether the circumstances could not have reasonably been foreseen at the time of firm offer announcement and, if they could, the likelihood of the circumstances occurring;
- (e) the actions taken by the offeror since the firm offer announcement and, in particular, since the occurrence of the circumstances on which the offeror is seeking to rely in order to invoke the condition; and
- (f) the views of the board of the offeree company.

4.2 In considering whether a condition relating to the obtaining of an official authorisation or regulatory clearance may be invoked, additional factors to be taken into account will include:

- (a) the significance of the authorisation or clearance to the offeror;
- (b) what action, if any, the offeror would need to take in order to obtain the authorisation or clearance and the strategic consequences for the offeror if it were to take that action; and

(c) the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance.

4.3 In the case of a condition relating to there being no Phase 2 CMA reference (or equivalent reference or process), the factors that will be taken into account will also include:

(a) whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company; and

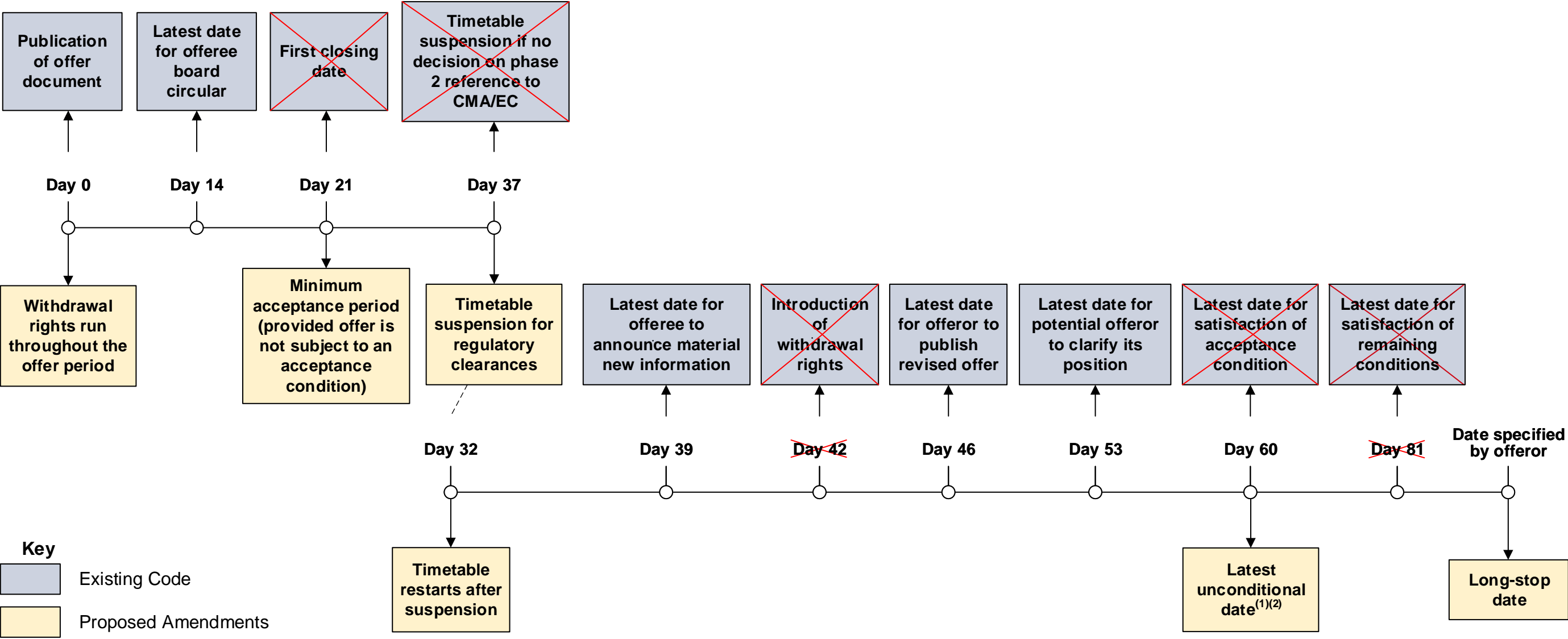
(b) the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low.

5. Pre-conditions

This Practice Statement applies in the same way to the invocation of pre-conditions permitted under Rule 13.43.

~~The Executive should be consulted in cases of doubt.~~

APPENDIX D ILLUSTRATIVE OFFER TIMETABLE



(1) An offeror may bring forward the unconditional date by making an “acceleration statement”, in which case (a) it will be required to waive its regulatory conditions and (b) the requirements which are normally imposed on Days 39 and 53 will not be applied

(2) An offeror which wishes to invoke the acceptance condition prior to the unconditional date may serve an “acceptance condition invocation notice”