

PRACTICE STATEMENT NO 29

RULE 21.2 – OFFER-RELATED ARRANGEMENTS

1. Introduction

- 1.1 Rule 21.2(a) of the Takeover Code provides that, except with the consent of the Panel, neither the offeree company nor any person acting in concert with it may enter into an offer-related arrangement with either the offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation. Rule 21.2(b) defines an “offer-related arrangement” as being any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or other arrangement having a similar or comparable financial or economic effect. However, certain agreements and commitments, which are listed in paragraphs (i) to (vii) of Rule 21.2(b), are excluded from this prohibition.
- 1.2 The Code Committee introduced Rule 21.2 into the Code in its present form in September 2011 following concerns that it had become standard practice in the context of recommended offers for offerors to insist on various deal protection measures which could have detrimental effects for offeree company shareholders by:
- (a) deterring competing offerors from making an offer, thereby denying offeree company shareholders the possibility of deciding on the merits of a competing offer; and/or
 - (b) leading to competing offerors making an offer on less favourable terms than they would otherwise have done.
- 1.3 This Practice Statement provides guidance on the Panel Executive’s interpretation and application of Rule 21.2 in relation to:
- (a) certain of the exclusions to the prohibition on offer-related arrangements provided in paragraphs (i) to (vii) of Rule 21.2(b);
 - (b) agreements between an offeror and the offeree company relating to the conduct, implementation and/or terms of an offer (“Bid Conduct Agreements”);
 - (c) agreements under which an offeree company may agree to pay an inducement fee to an offeror in the limited circumstances set out in Notes 1 and 2 on Rule 21.2; and
 - (d) “whitewash” transactions, as envisaged by Note 3 on Rule 21.2.

PRACTICE STATEMENT NO 29 CONTINUED**2. Commitments to maintain the confidentiality of information**

- 2.1 Rule 21.2(b)(i) permits an offeree company to enter into a commitment to maintain the confidentiality of information provided that it does not include any other provisions prohibited by Rule 21.2(a) or Rule 2.3(d) or otherwise under the Code.
- 2.2 The Executive considers that Rule 21.2(b)(i) permits an offeree company to enter into a confidentiality agreement which requires it to keep confidential information that it may receive from an offeror or potential offeror. Such information could include, for example, information relating to an offeror which the offeree company requires in order to conduct due diligence on the offeror in the context of a securities exchange offer or information regarding the existence or terms of any proposal submitted by the offeror in relation to a possible offer.
- 2.3 However, as required by Rule 2.3(d), the terms of any such confidentiality agreement must not restrict the board of an offeree company from making an announcement relating to a possible offer, or from publicly identifying the potential offeror, at any time the board considers appropriate. Rule 2.3(d) prohibits the offeror from seeking to prevent the offeree company from making any announcement relating to a possible offer, including in relation to the terms of a possible offer.

3. Commitments to provide information or assistance for the purpose of obtaining any official authorisation or regulatory clearance**(a) “Official authorisation or regulatory clearance”**

- 3.1 Rule 21.2(b)(iii) permits an offeree company to enter into a commitment with an offeror to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance. The Executive interprets “any official authorisation or regulatory clearance” to comprise authorisations and clearances from governmental and regulatory bodies upon receipt of which the offer is conditional and which relate to the question of whether the offeror is permitted to acquire the offeree company or one or more of its assets.
- 3.2 In addition, where the approval of the offer by the offeror’s shareholders is required or, if the offer is a securities exchange offer, where the offeror is required to obtain the approval of a regulatory body in relation to a prospectus, circular or other similar document which the offeror is required to publish, the Executive considers that the offeree company would be permitted to enter into a commitment to provide information relating to the offeree company to the extent that such information is required to be included in the relevant document in order to obtain any required approval of the document from a relevant authority.

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- 3.3 However, the Executive does not interpret Rule 21.2(b)(iii) as permitting agreements, arrangements or commitments to assist with other matters, for example assistance with an offeror's application to a tax authority in order to obtain a specific tax treatment or with the preparation of a bond prospectus which the offeror may be required to publish in relation to refinancing the bank facilities which provide the cash consideration payable under the offer. An offeree company may, if it so wishes, provide assistance to the offeror in relation to such matters, but the offeree company is prohibited by Rule 21.2 from entering into an agreement, arrangement or commitment to do so.
- 3.4 In addition, the Executive does not interpret Rule 21.2(b)(iii) as permitting the offeree company to enter into a commitment to pay all or part of the costs of the offeror in obtaining an official authorisation or regulatory clearance.

(b) Agreements relating to the invocation of conditions to an offer

- 3.5 The Executive considers that it is permissible under Rule 21.2 for an offeror to commit to the offeree company that the offeror will seek to invoke a condition only in certain circumstances, as such a commitment would impose an obligation only on the offeror (see section 5 below). For example, the offeror may agree that it will only seek to invoke a condition relating to a competition authority consent if disposals of assets worth more than a certain value are required by the relevant authority as a condition to giving its consent.
- 3.6 However, the Executive does not interpret Rule 21.2(b)(iii) as permitting an offeree company to agree that a condition may be invoked by an offeror, or that the offeree company will not object to an offeror seeking to invoke a condition, if certain circumstances were to arise.

4. Directors' irrevocable commitments and letters of intent

- 4.1 The prohibition in Rule 21.2(a) extends to offer-related arrangements entered into between a director of the offeree company (being a person acting in concert with the offeree company) and an offeror. However, Rule 21.2(b)(iv) provides that irrevocable commitments and letters of intent are excluded from the definition of an offer-related arrangement.
- 4.2 The Executive considers that Rule 21.2(b)(iv) permits an offeree company shareholder who is also a director of the offeree company to enter into an irrevocable commitment or letter of intent to accept an offer (or to vote in favour of a scheme of arrangement) with respect to the shares in the offeree company held or controlled by the individual concerned. However, the Executive considers that Rule 21.2(b)(iv) does not permit

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an offeree company shareholder who is also a director of the offeree company to enter into other kinds of offer-related arrangements with the offeror or any person acting in concert with the offeror.

- 4.3 Provisions which have previously appeared in irrevocable commitments given by offeree company shareholders who are also directors of the offeree company and which the Executive regards as being in breach of Rule 21.2 have included commitments:
- (a) not to solicit a competing offer;
 - (b) to recommend an offer to offeree company shareholders;
 - (c) to notify the offeror if the director becomes aware of a possible competing offer or the terms of a possible competing offer;
 - (d) to convene board meetings and/or vote in favour of board resolutions which are necessary to implement the offer;
 - (e) to provide information in relation to the offeree company for due diligence or other purposes (or to provide a warranty in respect of any such information);
 - (f) to assist the offeror with the satisfaction of its offer conditions;
 - (g) to assist the offeror with the preparation of its offer documentation; and
 - (h) to conduct the offeree company's business in a particular manner prior to an offer becoming unconditional.
- 4.4 The Executive regards commitments of the kind referred to in paragraph 4.3 above as extending beyond the relevant individual's decision to accept an offer (or to vote in favour of a scheme of arrangement). The Executive regards such commitments as having been entered into in the relevant individual's capacity as a director of the offeree company and, as such, to be in breach of Rule 21.2. This would be the case even if the commitments were stated to be subject to the relevant director's fiduciary or statutory duties.
- 4.5 The Executive does, however, interpret Rule 21.2(b)(iv) to permit the inclusion in an irrevocable commitment or a letter of intent of provisions which are designed solely to give effect to a commitment to accept the offer (or to vote in favour of the scheme of arrangement). Such permitted provisions may include, for example:
- (a) an undertaking not to dispose of the shares or withdraw an acceptance of the offer;

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- (b) an undertaking to elect for a particular form of consideration when alternative forms of consideration are offered; and
- (c) representations regarding title to the shares to which the commitment relates.

5. Agreements, arrangements or commitments which impose obligations only on an offeror or any person acting in concert with it

- 5.1 Rule 21.2(b)(v) permits the parties to an offer to enter into an agreement, arrangement or commitment which imposes obligations only on an offeror or any person acting in concert with it, other than in the context of a reverse takeover (as defined in the Code).
- 5.2 The Executive is occasionally required to consider the application of Rule 21.2(b)(v) to a break fee which is payable by an offeror to the offeree company in specified circumstances (a so-called “reverse break fee”), such as where the offer lapses because the offeror fails to obtain a consent from a competition authority or because the offeror’s shareholders fail to approve the offer. In particular, the Executive has been required to consider whether an offeror’s obligation to pay a reverse break fee in such circumstances may be made conditional upon the offeree company taking or not taking certain action.
- 5.3 Other than in the context of a reverse takeover, Rule 21.2(b)(v) permits an offeror to commit to pay a reverse break fee to the offeree company. In addition, the Executive considers that it would be permissible for an offeror’s obligation to pay a reverse break fee in the specified circumstances to be made conditional upon the offeree company having taken or not having taken certain action, provided that there is no obligation on the offeree company to take, or not to take, that action.
- 5.4 However, the Executive considers that such conditions would not be permissible if they could have the effect of deterring potential competing offerors from making an offer, or of leading to an offeror making an offer on less favourable terms than they would otherwise have done, as this would undermine the purpose and spirit of Rule 21.2. The Executive considers that such conditions would include, for example, conditions that the offeree company:
- (a) does not engage in discussions with competing offerors;
 - (b) does not provide information to competing offerors beyond the information which is required to be provided in accordance with Rule 21.3;

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- (c) notifies the offeror who has entered into the reverse break fee arrangement (the “first offeror”) of any approach by a competing offeror and/or the terms of any such approach; or
 - (d) affords the first offeror an opportunity to match or improve upon a higher competing offer before the offeree company board recommends to offeree company shareholders that they should accept the competing offer.
- 5.5 However, the Executive considers that it would normally be permissible for an obligation of an offeror to pay a reverse break fee to be made conditional upon the offeree company board continuing to recommend the offeror’s offer. Whilst a commitment by the offeree company board to recommend the offer would not be permitted under Rule 21.2, the Executive accepts that it would normally be inappropriate for the offeror to be required to pay a reverse break fee to the offeree company upon the lapsing of its offer in circumstances where the offeree company board had withdrawn its recommendation to offeree company shareholders that they should accept the offer.
- 5.6 The Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a proposed condition to a reverse break fee (or any other obligation of an offeror) is prohibited under Rule 21.2.

6. Agreements relating to any existing employee incentive arrangement

- 6.1 Rule 21.2(b)(vi) provides that any agreement relating to any existing employee incentive arrangement is excluded from the prohibition of offer-related arrangements. The Executive interprets Rule 21.2(b)(vi) as only permitting an agreement relating to how existing awards under the offeree company’s employee incentive arrangements will be treated in connection with the offer. For example, the parties to an offer would be permitted to agree how any discretion on the part of the board of the offeree company as to the number of shares to be issued in respect of existing share-based incentive awards will be exercised in order to provide certainty to the parties to the offer and to the employees in question regarding the number of shares to be issued under those awards.
- 6.2 As referred to by the Code Committee in paragraph 3.7 of Panel Statement 2012/8, the Executive considers that an agreement that the offeree company will not grant any new options to employees under its established share option schemes is not permitted under the exception in Rule 21.2(b)(vi). Similarly, the Executive considers that Rule 21.2(b)(vi) does not permit an offeree company to enter into agreements, arrangements

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or commitments relating to other aspects of employee remuneration or incentives, for example the payment (or non-payment) of bonuses or salary increases.

- 6.3 The Executive is aware that, occasionally, the parties to an offer may wish to enter into an agreement regarding the extent to which an offeror consents to the offeree company granting new awards under the offeree company's incentive arrangements. The Executive understands that such a provision is normally intended to ensure that, to the extent that the grant of such incentive awards would constitute "frustrating action" under Rule 21.1, the offeror's consent is forthcoming so that the Panel will normally waive the restrictions that would otherwise apply under Rule 21.1 in respect of the proposed awards in accordance with Note 1 on Rule 21.1. The Executive considers that such a provision is permitted under Rule 21.2, provided that it only constitutes an agreement by the offeror to consent to the grant of the awards referred to in the provision and that it does not restrict the offeree company's ability to grant awards or to adopt any other incentive arrangements (although the Executive notes that the offeree company may nevertheless be subject to the restrictions imposed by Rule 21.1).

7. Bid Conduct Agreements

- 7.1 The Executive recognises that the parties to an offer may enter into a Bid Conduct Agreement, as referred to in paragraph 1.3 above. The provisions of a Bid Conduct Agreement will be "offer-related arrangements" prohibited under Rule 21.2(a) unless they are permitted under one or more of paragraphs (i) to (vii) of Rule 21.2(b).
- 7.2 It is therefore important that parties to an offer who wish to enter into a Bid Conduct Agreement, and their advisers, ensure that the agreement only contains provisions which are permitted by one of the exclusions listed in paragraphs (i) to (vii) of Rule 21.2(b). Provisions which the Executive regards as being prohibited by Rule 21.2(a), and which are not permitted by any of the exclusions in Rule 21.2(b), include, for example:
- (a) an obligation on the offeree company to co-operate with the offeror in implementing the offer or to assist with the preparation of the offer documentation (save to the extent described in paragraph 3.2 above);
 - (b) an obligation relating to the conduct of the offeree company's business prior to an offer becoming unconditional (or a scheme becoming effective);
 - (c) a warranty in relation to information which may have been provided by the offeree company to the offeror;

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- (d) a commitment by the offeree company to publish a scheme document by a certain date or to hold meetings by a certain date. However, the parties to the offer are permitted to include within the conditions to the scheme a long-stop date by which the scheme must become effective and other conditions of the kind referred to in Section 3(b) of Appendix 7 of the Code;
 - (e) a restriction on the offeree company's ability to make announcements or to communicate with shareholders or others in relation to the offer (save to the extent described in paragraph 2 above);
 - (f) a restriction on the payment of dividends by an offeree company; and
 - (g) an obligation on the offeree company to assist the offeror with integration planning.
- 7.3 The Executive notes that Rule 21.2 does not prohibit an offeree company from providing assistance to the offeror in relation to the implementation of the offer. The Rule only prohibits the offeree company from entering into agreements, arrangements and commitments to do so unless they are expressly excluded from the prohibition under one or more of paragraphs (i) to (vii) of Rule 21.2(b).
- 7.4 In addition, the Executive considers that Rule 21.2 does not prohibit an offeree company from entering into an agreement, arrangement or commitment which is conditional upon the offer becoming or being declared unconditional. This is because the Executive considers that such an agreement, arrangement or commitment would not have the effect of deterring a competing offeror.
- 7.5 It is not the Executive's practice to review draft Bid Conduct Agreements in advance of their execution in order to identify provisions which are prohibited by Rule 21.2. The Executive considers that this is the responsibility of the parties to an offer and their advisers. However, the Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a provision which is proposed to be included in a Bid Conduct Agreement is in compliance with Rule 21.2.
- 7.6 If, after publication of a Bid Conduct Agreement on a website in accordance with Rule 26, the Executive identifies any provision of a Bid Conduct Agreement which it considers to be in breach of Rule 21.2, the Executive will initiate remedial action and may initiate disciplinary action.
- 7.7 The Executive considers that, in order to ensure that the parties to a Bid Conduct Agreement are able to comply with a direction made by the Panel, it is best practice to include the following clause in the agreement:

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“The parties agree that, if the Takeover Panel determines that any provision of this agreement that requires the offeree company to take or not to take action, whether as a direct obligation or as a condition to any other person’s obligation (however expressed), is not permitted by Rule 21.2 of the Takeover Code, that provision shall have no effect and shall be disregarded.”.

8. Inducement fees payable by the offeree company to an offeror

8.1 Notwithstanding the general prohibition of offer-related arrangements, Note 1 (“*Competing offerors*”) and Note 2 (“*Formal sale process*”) on Rule 21.2 explain that, in certain limited circumstances, the Panel may permit an offeree company to enter into one or more inducement fee arrangements with an offeror (or offerors) provided that:

- (a) the aggregate value of the inducement fee or fees that may be payable by the offeree company is *de minimis* (i.e. normally no more than 1% of the value of the offeree company calculated by reference to the price of the offer or competing offer (or, if there are two or more competing offerors, the first competing offer) at the time of the announcement made under Rule 2.7); and
- (b) any inducement fee is capable of becoming payable only if an offer becomes or is declared unconditional.

8.2 In determining the maximum amount permitted for an inducement fee, the Executive will normally consider that:

- (a) the 1% limit can be calculated on the basis of the fully diluted equity share capital of the offeree company, but taking into account only those options and warrants that are “in the money”. When determining the value of the fully diluted equity share capital, the Executive will consider the value attributable to options and warrants to be their “see through” value (being their value by reference to the value of the offer for the shares to which they relate, net of any exercise price). The Executive will consider the value attributable to convertible securities to be the offer price for the shares into which the convertible securities may be converted multiplied by the appropriate conversion ratio;
- (b) any VAT payable as a result of the payment of an inducement fee to an offeror should be taken into account in determining whether the 1% limit would be exceeded (except to the extent that such VAT is recoverable by the offeree company); and

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- (c) in a securities exchange offer, the value of the offeree company will be fixed by reference to the value of the offer as stated in the firm offer announcement and will not fluctuate as a result of subsequent movements in the price of the consideration securities.
- 8.3 The Executive also interprets Note 1 on Rule 21.2 as permitting an offeree company to agree inducement fees with multiple offerors or potential offerors, provided that the aggregate amount payable by the offeree company in respect of all such inducement fees does not exceed 1% of the value of the offeree company calculated on the basis described above.

9. “Whitewash” transactions

- 9.1 Note 3 (“*Whitewash transactions*”) on Rule 21.2 explains that the prohibition on offer-related arrangements also applies in the context of a “whitewash” transaction, i.e. a transaction involving the issue of new securities as consideration for an acquisition or a cash subscription, as referred to in Note 1 of the Notes on Dispensations from Rule 9.
- 9.2 The Executive will, however, normally be willing to grant a dispensation from Rule 21.2 in respect of offer-related arrangements which are necessary in order to effect such a transaction. The Executive recognises, for example, that it will likely be necessary for the offeree company to enter into certain commitments in relation to the issuance of the new securities and the terms of the sale and purchase of any assets. It is not the intention of the Executive to prohibit such transactions or to prevent them from becoming legally effective.
- 9.3 When granting a dispensation from Rule 21.2 the Executive will be concerned to ensure that the transaction in question should not properly be characterised as an offer and that the primary objectives of Rule 21.2, as described in paragraph 1.2 of this Practice Statement, are not offended.
- 9.4 In particular, this means that any arrangements to be entered into by the offeree company in connection with the transaction should not:
- (a) restrict the ability of the board of the offeree company to consider or pursue an offer, as an alternative to the transaction, should it so wish; or
 - (b) result in a competing offeror incurring any undue costs if it were to make a successful offer for the offeree company.

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- 9.5 It is not the Executive's practice to review draft agreements entered into in connection with a whitewash transaction in advance of their execution in order to identify whether any provisions are not capable of benefiting from the dispensation from Rule 21.2 described above. The Executive considers that this is the responsibility of the parties to the transaction and their advisers. However, the Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a provision which is proposed to be included in such an agreement is capable of benefiting from such a dispensation.
- 9.6 In order to ensure that the parties to a whitewash transaction are able to comply with any relevant direction made by the Panel, it is best practice to include in any relevant agreement(s) the clause prescribed in paragraph 7.7 above.

10. Consulting the Executive

The Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a proposed agreement, arrangement or commitment is prohibited under Rule 21.2. In addition, the Executive should be consulted at the earliest opportunity in all cases where it is proposed that an offeree company should enter into one or more inducement fee arrangements.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

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