

PRACTICE STATEMENT NO 30

RULE 21.3 – INFORMATION REQUIRED FOR THE PURPOSE OF OBTAINING REGULATORY CONSENTS

1. Introduction

- 1.1 Under Rule 21.3 of the Takeover Code, any information given to one offeror or potential offeror (the “first offeror”), whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror (a “competing offeror”) even if the competing offeror is less welcome.
- 1.2 The Panel Executive understands that, in certain circumstances, an offeree company may consider it necessary to provide a limited amount of commercially sensitive information (“Restricted Information”) to certain lawyers or economists advising the first offeror on an “outside counsel only” basis for the purposes of enabling them to consider the need for and, where necessary, obtain an official authorisation or regulatory clearance, but may not wish to provide (or may be constrained by applicable law or regulation from providing) the Restricted Information directly to the first offeror or any competing offeror.
- 1.3 This Practice Statement explains how the Executive considers that the requirements of Rule 21.3 may be complied with in such circumstances.

2. Application of Rule 21.3 to Restricted Information

- 2.1 Where it is proposed that Restricted Information is to be provided by the offeree company only to the first offeror’s competition or regulatory lawyers or economists on an outside counsel only basis for the purposes described in paragraph 1.2 above, the Executive’s practice is normally to agree that the requirements of Rule 21.3 will be satisfied if, upon the Restricted Information being requested by a competing offeror, it is provided to the competition or regulatory lawyers or economists advising the competing offeror on the same restricted, outside counsel only, basis. If this is done, the Executive will not require the Restricted Information to be provided directly to the competing offeror. In order for the Executive to agree to apply Rule 21.3 in this manner, the Executive will wish to be satisfied that appropriate measures have been implemented in order to ensure that the Restricted Information will not be obtained by the first offeror or its other advisers, as explained in this Practice Statement.
- 2.2 If an offeree company wishes the Executive to agree to apply Rule 21.3 in the manner set out in this Practice Statement, the consent of the Executive must be obtained before any Restricted Information is provided to any adviser to the first offeror.

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3.1 In considering whether to agree to apply Rule 21.3 in the manner set out in paragraph 2.1 in any specific case, the Executive will consider all relevant factors including, without limitation, the following:

(a) Recipients of the Restricted Information

3.2 The Executive considers that the Restricted Information should only be provided to a small number of identified lawyers and/or economists who are specifically engaged to provide advice to the relevant offeror in relation to the competition or other regulatory aspects only of the offer (the “Clean Team”). The Clean Team must not include any director or employee of the offeror or any other adviser to the offeror (including the individuals advising on the offer itself).

3.3 The Executive acknowledges that it may be necessary for the Clean Team to include lawyers or economists from firms in the jurisdictions where official authorisations or regulatory clearances are or may be required. However, the Executive expects the number of individuals included in the Clean Team to be kept to an absolute minimum.

(b) Arrangements to protect the confidentiality of the Restricted Information

3.4 The Executive considers that the establishment of effective procedures and information barriers is essential to ensuring that the Restricted Information is not obtained by anyone outside the Clean Team. The Executive does not believe that it is appropriate for it to specify detailed requirements for such effective procedures and information barriers but considers that the Restricted Information must be stored in protected files (electronic or otherwise) which may only be accessed by members of the Clean Team.

3.5 Any advice or communication by any member of the Clean Team to an offeror (or anyone else outside the Clean Team) must not disclose any Restricted Information or any other information which enables a person to deduce the Restricted Information. The Executive considers that, where the Clean Team comprises individuals in different firms or offices in relevant jurisdictions, all advice to be provided to an offeror by any member of the Clean Team should be reviewed in advance by a designated responsible member of the Clean Team at the principal firm advising on the relevant regulatory issues to ensure that this requirement is adhered to.

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- 3.6 In addition, any Restricted Information included in the application forms or correspondence to be sent to the relevant regulatory authorities must be redacted from any drafts of those forms or correspondence which are to be reviewed or approved by an offeror or any of its advisers who are not members of the Clean Team.
- 3.7 If an offeror or any of its advisers (other than members of the Clean Team) are to participate in any meetings or telephone calls with the relevant regulatory authorities, or receive correspondence from the relevant regulatory authorities, appropriate arrangements must be put in place (including informing the relevant regulatory authority of the need to protect the confidentiality of the Restricted Information) to ensure that no Restricted Information is provided to them.

4. Details to be provided to the Executive

- 4.1 The following details and confirmations should be given to the Executive in writing in order for it to consider whether to apply Rule 21.3 in the manner set out in this Practice Statement:
- (a) a list of the key individuals proposed to be included in the Clean Team, including their positions and roles on the transaction (the Executive's consent should also be obtained if it is subsequently proposed to add any individuals to the Clean Team);
 - (b) the name of the individual at each firm represented on the Clean Team who has taken responsibility for ensuring that the procedures and information barriers will be implemented and complied with by that firm (and, in the case of the principal firm advising on the relevant regulatory matters, the name of the individual who will review all advice to be provided by any member of the Clean Team to the offeror to ensure that it does not disclose any Restricted Information or any other information which enables the offeror to deduce the Restricted Information);
 - (c) confirmation from the offeror that:
 - (i) it waives any rights to request the Restricted Information from any member of the Clean Team and waives any legal or professional obligations of disclosure which any member of the Clean Team may owe to the offeror in respect of the Restricted Information;
 - (ii) no director or employee of the offeror will receive or have access to any Restricted Information until the offer becomes unconditional; and

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- (iii) it will promptly inform the Executive if any Restricted Information comes into its possession; and
- (d) confirmation from each firm represented on the Clean Team that:
 - (i) it will not disclose any Restricted Information, or other information which enables a person to deduce the Restricted Information, to the offeror or any person outside the Clean Team other than the relevant regulatory authorities;
 - (ii) effective information barriers and procedures have been implemented in order to ensure that the Restricted Information may only be accessed by members of the Clean Team; and
 - (iii) it will promptly inform the Executive if it becomes aware that any Restricted Information has come into the possession of anyone other than the members of the Clean Team.

5. Equality of treatment of other offerors

- 5.1 As explained in paragraph 2.1 above, if the Executive agrees to apply Rule 21.3 in the manner set out in this Practice Statement, the offeree company will be required, on request, promptly to provide the Restricted Information to the competing offeror's regulatory lawyers and/or economists on the same restricted basis (and subject to the competing offeror satisfying the requirements set out in this Practice Statement).
- 5.2 Rule 21.3 only requires the same information as provided to the first offeror to be provided to any competing offeror on request. Accordingly, the offeree company is not required to provide information to the Clean Team advising a competing offeror which was not provided to the Clean Team advising the first offeror (for example, any specific information which may be relevant to the particular competition issues relating to the competing offeror's offer, but which is not relevant to the first offeror's offer), nor is the offeree company required to provide information which was provided to the Clean Team advising the first offeror but not requested by the competing offeror.
- 5.3 In the event that, notwithstanding any arrangements implemented in accordance with this Practice Statement, any of the Restricted Information is provided to, or accessed or deduced by, an offeror or any of its advisers other than the Clean Team, the Executive must be informed promptly. The Executive considers that, in these circumstances, Rule 21.3 would then normally be applied to the relevant Restricted Information in the usual way and such Restricted Information would need to be provided, on request, directly to a competing offeror.

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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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