

PCP 2022/1 7 February 2022

THE TAKEOVER PANEL

REMOVAL OF RESTRICTION ON ANONYMOUS ORDER BOOK DEALINGS

PUBLIC CONSULTATION BY THE CODE COMMITTEE



The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 18 March 2022.

Comments may be sent by email to:

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Alternatively, please send comments in writing to:

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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. Removal of restriction on anonymous order book dealings	2
APPENDIX Proposed amendments to the Code	8

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 the removal of the restriction on an offeror purchasing shares in the offeree company through an anonymous order book, as set out in **Rule 4.2(b)** (*Restriction on dealings by the offeror and concert parties*) of the [Takeover Code](#) (the “**Code**”).

(b) Summary

1.2 **Rule 4.2(b)** provides that, during an offer period, an offeror and persons acting in concert with it must not acquire an interest in any securities of the offeree company through any anonymous order book system, or through any other means, unless, in either case, it can be established that the seller, or other party to the transaction in question, is not an exempt principal trader connected with the offeror.

1.3 **Section 2** of this PCP proposes that **Rule 4.2(b)** should be deleted on the basis that it is no longer proportionate for the Code to restrict purchases of offeree company shares by an offeror on an anonymous order book.

1.4 In addition, it is proposed to make consequential amendments to **Rule 38.2** (*Dealings between offerors and connected exempt principal traders*) and minor and clarificatory amendments to **Rule 4.2(a)**.

1.5 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 18 March 2022 and should be sent in the manner set out at the beginning of this PCP.

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

(c) Implementation

1.7 The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in Spring 2022, at the same time as it publishes its response to the consultation on [PCP 2021/1](#) (*Miscellaneous Code amendments*). The Code Committee expects that the amendments would come into effect approximately one month after the publication of the Response Statement.

2. Removal of restriction on anonymous order book dealings

(a) *Relevant provisions of the Code*

(i) *Introduction*

2.1 In summary:

- (a) **Rule 38.2** prohibits an offeror from dealing in shares in the offeree company with an exempt principal trader connected with the offeror; and
- (b) **Rule 4.2(b)**, in effect, underpins **Rule 38.2** and prohibits an offeror from purchasing shares in the offeree company through an anonymous order book system (such as the Stock Exchange Electronic Trading Service (“**SETS**”)), or through any other means, unless the offeror can be certain that the seller is not an exempt principal trader connected with the offeror.

2.2 These provisions are explained in more detail below.

(ii) *Exempt principal traders connected with an offeror*

2.3 The history of the “exempt system” operated by the Panel, and which is applicable to certain principal traders and fund managers, was set out in Section 1 of [PCP 2004/3](#) (*Market-related issues*). The proposals in this PCP 2022/1 relate only to exempt principal traders (and not to exempt fund managers).

2.4 **Rule 38.2** and **Rule 4.2(b)** each refer to “**an exempt principal trader connected with the offeror**”. This phrase is explained in the following paragraphs by reference to various definitions in the Definitions Section of the Code.

2.5 A “**principal trader**” is defined as follows:

“Principal trader

A principal trader is a person who:

- (1) is registered as a market-maker with a recognised investment exchange, or is accepted by the Panel as a market-maker; or
- (2) is a member firm of a recognised investment exchange dealing as principal in order book securities.”.

2.6 The definition of “**connected fund managers and principal traders**” provides that a principal trader will normally be “connected with” an offeror or the offeree company if the principal trader is controlled by, controls or is under the same control as a connected adviser to (as the case may be):

- (a) an offeror or any person acting in concert with it; or
- (b) the offeree company or any person acting in concert with it.

2.7 A “**connected adviser**” is defined as, in summary:

- (a) an adviser which is advising an offeror or the offeree company, or a person acting in concert with it, on the offer; or
- (b) a corporate broker to an offeror or the offeree company.

2.8 The definition of “**acting in concert**” describes various categories of persons who are presumed to be acting in concert with other persons in the same category. Under **presumption (7)** of the definition of “**acting in concert**”, a connected adviser is presumed to be acting in concert with its offeror, or offeree company, client in respect of any shares held by:

- (a) the connected adviser; or
- (b) persons controlling, controlled by or under the same control as the connected adviser, other than an exempt principal trader (or exempt fund manager).

2.9 As indicated in paragraph 2.8(b) above, where a principal trader has been recognised by the Panel as an exempt principal trader, it is not treated as acting in concert with the offeror or offeree company with which it is connected. This is set out in **Note 3** on the definitions of “**exempt fund manager**” and “**exempt principal trader**”, which provides as follows:

“3. The effect of a principal trader ... having exempt status is that presumption (7) of the definition of acting in concert will not apply. However, the principal trader ... will still be regarded as connected with the offeror or offeree company, as appropriate. Connected exempt principal traders ... must comply with Rule 38 [and] with the relevant provisions of Rule 8.”

(iii) *Rules 38.1 and 38.2 – prohibited dealings between offerors and connected exempt principal traders*

2.10 **Rule 38** sets out various provisions with regard to actions undertaken by a connected exempt principal trader, including further safeguards to underpin the grant of exempt status.

2.11 **Rule 38.1** is a general prohibition on an exempt principal trader dealing in securities in order to assist the offeror or the offeree company with which it is connected and the **Note on Rule 38.1** indicates that any such dealings would be likely to result in the Panel suspending the principal trader’s exempt status:

“38.1 PROHIBITED DEALINGS

An exempt principal trader connected with an offeror or the offeree company must not carry out any dealings with the purpose of assisting the offeror or the offeree company, as the case may be.

NOTE ON RULE 38.1

Suspension of exempt status

Any dealings by an exempt principal trader connected with an offeror or the offeree company with the purpose of assisting an offeror or the offeree company, as the case may be, will constitute a serious breach of the Code. Accordingly, if the Panel determines that a principal trader has carried out such dealings, it will be prepared to rule that the principal trader should cease to enjoy exempt status for such period of time as the Panel may consider appropriate in the circumstances.”

- 2.12 **Rule 38.2** is a specific prohibition on an offeror, or any person acting in concert with it, dealing in offeree company securities with an exempt principal trader connected with the offeror during the offer period. Accordingly, during the offer period, an exempt principal trader connected with an offeror will be prohibited from selling shares in the offeree company to the offeror. **Rule 38.2** provides as follows:

“38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the offeree company during the offer period. It will generally be for the advisers to the offeror (including a corporate broker) to ensure compliance with this Rule rather than the principal trader. (See also Rule 4.2(b).)”

- 2.13 The purpose of **Rule 38.2** is to ensure that there is no risk of an exempt principal trader that is connected with an offeror abusing its exempt status by, for example, purchasing shares in the offeree company in the market at above the offer price for delivery to the offeror at or below the offer price, with losses being compensated elsewhere. The safeguards provided by **Rule 38.2**, and the other provisions of **Rule 38**, remain fundamental to the Panel’s willingness to grant exempt status to principal traders.
- 2.14 The requirements of **Rule 38.2** are underpinned by the requirement in **Rule 4.2(b)** that an offeror or any person acting in concert with it must not purchase shares in the offeree company unless it can be established that the seller is not an exempt principal trader connected with the offeror.
- (iv) *Rule 4.2(b) – restriction on anonymous order book dealings by an offeror*
- 2.15 The introduction of **Rule 4.2(b)** into the Code was proposed by the Code Committee in [PCP 2004/3](#) as a codification of a practice previously set out in [Panel Statement 1997/11](#). Paragraphs 3.3 and 3.4 of **PCP 2004/3** stated as follows:

“3.3 If offerors and concert parties thereof were permitted to purchase relevant securities of the offeree company through an anonymous order book system, such as SETS, there would be a potential risk that the prohibition in Rule 38.2 might be circumvented. This would be the case if the offeror or its advisers were to arrange with an exempt principal trader connected with the offeror for the latter to place sell orders on the order book and thereby to enable the offeror to purchase offeree securities from the connected exempt principal trader. Whilst the making of such arrangements would represent a breach of the general prohibition in Rule 38.1 on connected exempt principal traders carrying out dealings with the purpose of assisting the offeror, and of the spirit of Rule 38.2, it could be difficult for the Panel to establish the full facts. In addition, there is merit in addressing this potential risk in order to preserve confidence in the integrity of actions by connected persons. This argues in favour of a prudent approach.

3.4 Accordingly, at the time of the introduction of SETS in 1997, the Panel explained in its 1997/11 statement that, to ensure compliance with Rule 38.2, offerors and persons acting in concert with them must not purchase offeree company securities through SETS or any other anonymous order book system and should not purchase such securities through any other means unless it can be established that the seller is not an exempt principal trader connected with the offeror.”

2.16 **Rule 4.2(b)** was introduced in April 2005 following the publication of [RS 2004/3](#). Since that time, there have been no substantive changes to the rule, which currently provides as follows:

“4.2 RESTRICTION ON DEALINGS BY THE OFFEROR AND CONCERT PARTIES

...

(b) During an offer period, the offeror and persons acting in concert with it must not acquire an interest in any securities of the offeree company through any anonymous order book system, or through any other means, unless, in either case, it can be established that the seller, or other party to the transaction in question, is not an exempt principal trader connected with the offeror.

In the case of dealings through an inter-dealer broker or other similar intermediary, “seller” includes the person who has transferred the securities to the intermediary as well as the intermediary itself. (See also Rule 38.2.)”

(b) Proposed deletion of Rule 4.2(b)

2.17 The Code Committee understands that, over time, there has been a high degree of compliance with **Rule 38.2** and **Rule 4.2(b)** by offerors, persons acting in concert with offerors and exempt principal traders connected with offerors. To the extent that breaches of those rules have occurred, they have been inadvertent and have not resulted in adverse outcomes for offeree company shareholders.

2.18 The Code Committee believes that the restrictions imposed by **Rule 4.2(b)** (which, as explained below, are significant) operate in an unduly burdensome manner where an

offeror is seeking to purchase shares in the offeree company and, as such, are disproportionate.

- 2.19 The Code Committee understands that the effect of **Rule 4.2(b)** is that it is usually difficult, in practice, for an offeror to purchase offeree company shares in the market at the prevailing market price. This is because, in order to comply with the requirements of **Rule 4.2(b)**, the offeror will need to ensure that, whilst the purchasing operation is ongoing, each exempt principal trader which is connected with the offeror ceases any activities that may result in sell orders being entered into the anonymous order book (including, for example, direct electronic access services offered to clients) and this will often not be practicable. In addition, the Code Committee understands that the rules of certain regulatory authorities and trading venues may restrict the ability of an exempt principal trader to withdraw its sell orders from an anonymous order book or similar system.
- 2.20 In addition, as anonymous order book systems are used for high frequency dealings, and given also the regulatory oversight of such systems, the Code Committee considers there now to be a low risk that an exempt principal trader would agree to place sell orders on an anonymous order book to enable an offeror to purchase offeree company shares at or below the offer price where it had acquired those shares at above the offer price.
- 2.21 The Code Committee acknowledges that, if **Rule 4.2(b)** were to be deleted, this might, on occasion, result in an exempt principal trader connected with an offeror selling offeree company shares to the offeror through SETS or another anonymous order book. However, in the absence of a wilful breach of **Rule 38.2**, neither the offeror nor the exempt principal trader would be aware of the identity of its counterparty who would, by definition, be anonymous.
- 2.22 In the light of the above, the Code Committee considers that the costs of the restrictions that **Rule 4.2(b)** imposes on share purchasing operations by offerors are disproportionate to the benefits of using those means to ensure compliance with **Rule 38.2**.
- 2.23 The Code Committee therefore proposes that **Rule 4.2(b)** should be deleted.

(c) Continuing importance of Rule 38

- 2.24 Notwithstanding the proposed deletion of **Rule 4.2(b)**, the Code Committee wishes to re-emphasise the continuing importance of both:
- (a) the general prohibition in **Rule 38.1** on an exempt principal trader assisting an offeror or offeree company with which it is connected; and

- (b) the specific restriction in **Rule 38.2** on an offeror-connected exempt principal trader knowingly dealing with the offeror in shares in the offeree company during the offer period.

2.25 The Code Committee reiterates that a failure to comply with these provisions would represent a serious breach of the Code.

(d) Proposed amendments to Rule 38.2

2.26 If **Rule 4.2(b)** is deleted as proposed, the Code Committee considers that it will be necessary to amend **Rule 38.2** so as to make clear that a dealing through an anonymous order book system would not be in breach of the prohibition on an offeror dealing with a connected exempt principal trader in offeree company shares, provided that neither the offeror nor the principal trader is aware of the identity of its counterparty.

2.27 The Code Committee therefore proposes to amend **Rule 38.2**, as follows:

“38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

(a) An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the offeree company during the offer period. Dealings through an anonymous order book system are, however, permitted provided that neither party to the transaction is aware of the identity of the other party.

(b) It will generally be for the advisers to the offeror (including a corporate broker) to ensure compliance with ~~this~~ Rule 38.2(a) rather than the principal trader. (See also Rule 4.2(b).)

(e) Proposed amendments to Rule 4.2(a)

2.28 In addition, the Code Committee proposes to make certain minor and clarificatory amendments to **Rule 4.2(a)**, which would become new **Rules 4.2(a) to (d)**, as set out in the **Appendix**.

Q Do you have any comments on the proposed deletion of Rule 4.2(b) and the proposed amendments to Rule 38.2 and Rule 4.2(a)?

APPENDIX

Proposed amendments to the Code

Rule 4.2

4.2 RESTRICTION ON DEALINGS BY ~~THE AN~~ OFFEROR AND PERSONS ACTING IN CONCERT PARTIES

(a) During an offer period, ~~the neither an offeror and nor any persons~~ acting in concert with it ~~must not may~~ sell any securities in the offeree company except with the prior consent of the Panel and following 24 hours public notice that such sales might be made.

(b) The Panel will not give consent for sales of securities pursuant to Rule 4.2(a):

(i) where the offeror is making a mandatory offer under Rule 9 is being made; or

(ii) Sales at below the value of the a voluntary offer will not be permitted.

(c) After there has been Following an announcement that sales may be made, pursuant to Rule 4.2(a):

(i) neither the offeror nor any persons acting in concert with it may acquire an interest in any securities of the offeree company; and

(ii) the offer may not be revised other than only in exceptional circumstances and only with the prior consent of will the Panel permit the offer to be revised.

(d) The Panel should must be consulted whenever the if an offeror or any person acting in concert with it proposes to enter into or close out any type of transaction which may result in securities in the offeree company being sold during the offer period either by that party person or by the counterparty to the transaction.

~~(b) During an offer period, the offeror and persons acting in concert with it must not acquire an interest in any securities of the offeree company through any anonymous order book system, or through any other means, unless, in either case, it can be established that the seller, or other party to the transaction in question, is not an exempt principal trader connected with the offeror.~~

~~In the case of dealings through an inter-dealer broker or other similar intermediary, "seller" includes the person who has transferred the securities to the intermediary as well as the intermediary itself. (See also Rule 38.2.)~~

Rule 38.2

38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT PRINCIPAL TRADERS

(a) An offeror and any person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of

the offeree company during the offer period. Dealings through an anonymous order book system are, however, permitted provided that neither party to the transaction is aware of the identity of the other party.

(b) It will generally be for the advisers to the offeror (including a corporate broker) to ensure compliance with ~~this~~ Rule 38.2(a) rather than the principal trader. ~~(See also Rule 4.2(b).)~~