

# THE TAKEOVER PANEL

## CODE COMMITTEE

### RESPONSE STATEMENTS 9 AND 10 AND CODE AMENDMENTS

On 16 May, the Code Committee announced that it intended to consider the responses received to Public Consultation Papers 9 and 10 and, in due course, to approve the final text of the proposed amendments to the Code and publish papers setting out the results of the public consultation process. The Code Committee has today issued these papers, Response Statements 9 and 10, and they may be obtained from the Panel's website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk), or by telephoning the Panel on 020 7382 9026.

The proposals in PCPs 9 and 10 will be implemented with some modifications. In particular, in relation to PCP 9, a majority of respondents disagreed with the specific proposal that the trustees of an Employee Benefit Trust should be deemed to be acting in concert with the board when the directors themselves were deemed to be acting in concert. Similarly, there was a majority against the proposal that the trustees should be presumed to be acting in concert with a controlling shareholder where the controlling shareholder in fact exerted a dominant influence over the board. In the light of the views expressed on these two issues, the Code Committee has decided that there should be no presumption of concertedness in such circumstances but that directors themselves being in concert or controlling shareholders exercising influence over the board, if applicable, would be relevant factors which the Panel should take into account in considering whether there was, in fact, concertedness. Otherwise, respondents expressed general support for the proposals set out in PCPs 9 and 10.

The amendments to the Code set out in Response Statements 9 and 10 are set out in the Appendix to this statement and will take effect immediately. The amended pages of the Code will be published in due course.

4 July 2002

## APPENDIX

### 1. Rule 9.1

Replace the existing Note 2 with the following:-

#### 2. *Collective shareholder action*

*The Panel does not normally regard the action of shareholders voting together on a particular resolution as action which of itself indicates that such parties are acting in concert. However, the Panel will normally presume shareholders who requisition or threaten to requisition the consideration of a board control-seeking proposal either at an annual general meeting or at an extraordinary general meeting, in each case together with their supporters as at the date of the requisition or threat, to be acting in concert with each other and with the proposed directors. Such parties will be presumed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal with the result that subsequent purchases of shares by any member of the group could give rise to an offer obligation.*

*In determining whether a proposal is board control-seeking, the Panel will have regard to a number of factors, including the following:*

- (a) the relationship between any of the proposed directors and any of the shareholders proposing or supporting them. Relevant factors in this regard will include:*

- (i) *whether there is or has been any prior relationship between any of the activist shareholders and any of the proposed directors;*
- (ii) *whether there are any agreements, arrangements or understandings between any of the activist shareholders and any of the proposed directors with regard to their proposed appointment; and*
- (iii) *whether any of the proposed directors will be remunerated in any way by any of the activist shareholders as a result of or following their appointment.*

*If, on this analysis, there is no relationship between any of the proposed directors and any of the activist shareholders, or if any such relationship is insignificant, then the proposal will not be considered to be board control-seeking such that the parties will not be presumed to be acting in concert and it will not be necessary for the factors set out at paragraphs (b) to (f) below to be considered. If, however, such a relationship does exist which is not insignificant, then the proposal may be considered to be board control-seeking, depending on the application of the factors set out at paragraph (b) below or, if appropriate, paragraphs (b) to (f) below;*

- (b) *the number of directors to be appointed or replaced compared with the total size of the board.*

*If it is proposed to appoint or replace only one director, then the proposal will not normally be considered to be board control-seeking. If it is proposed to replace the entire board, or if the implementation of the proposal would result in the proposed directors representing a majority of the directors on the board, then the proposal will normally be considered to be board control-seeking.*

*If, however, the implementation of the proposal would not result in the proposed directors representing a majority of the directors on the board, then the proposal will not normally be considered to be board control-seeking unless an analysis of the factors set out at paragraphs (c) to (f) below would indicate otherwise;*

- (c) the board positions held by the directors being replaced and to be held by the proposed directors;*
- (d) the nature of the mandate, if any, for the proposed directors;*
- (e) whether any of the activist shareholders will benefit, either directly or indirectly, as a result of the implementation of the proposal other than through its holding of shares in the company; and*
- (f) the relationship between the proposed directors and the existing directors and/or the relationship between the existing directors and the activist shareholders.*

*In respect of a proposal to replace some or all of the directors and the investment manager of an investment trust company, the relationship between the proposed new investment manager and any of the activist shareholders will also be relevant to the analysis of the factors set out at paragraph (a) above and, if appropriate, paragraphs (c) to (f) above.*

*In determining whether it is appropriate for such parties to be held no longer to be acting in concert, the Panel will take account of a number of factors, including the following:*

- (a) whether the parties have been successful in achieving their stated objective;*

- (b) *whether there is any evidence to indicate that the parties should continue to be held to be acting in concert;*
- (c) *whether there is any evidence of an ongoing struggle between the activist shareholders and the board of the company;*
- (d) *the types of activist shareholders involved and the relationship between them; and*
- (e) *the relationship between the activist shareholders and the proposed/new directors.*

Add a new Note 5 as follows:-

5. *Employee Benefit Trusts*

*The Panel must be consulted in advance of any proposed acquisition of new or existing shares if the aggregate holdings of the directors, any other shareholders acting, or presumed to be acting, in concert with any of the directors and the trustees of an employee benefit trust ("EBT") will, as a result of the acquisition, equal or exceed 30% of the voting rights or, if already exceeding 30%, will increase further. The Panel must also be consulted in any case where a shareholder (or group of shareholders acting, or presumed to be acting, in concert) holds 30% or more (but not more than 50%) of the voting rights and it is proposed that an EBT acquires shares.*

*The mere establishment and operation of an EBT will not by itself give rise to a presumption that the trustees are acting in concert with the directors and/or a controlling shareholder (or group of shareholders acting, or presumed to be acting in concert). The Panel will, however, consider all relevant factors including: the identities of the trustees; the composition of any remuneration committee; the nature of the funding arrangements; the percentage of the issued share capital held by the EBT; the number of shares held to satisfy awards made to directors; the number of shares held in excess of those required to satisfy existing awards; the prices at which, method by which and persons from whom existing shares have been or are to be acquired; the established policy or practice of the trustees as regards decisions to acquire shares or to exercise votes in respect of shares held by the EBT; whether or not the directors themselves are presumed to be in concert; and the nature of any relationship existing between a controlling shareholder (or group of shareholders acting, or presumed to be acting in concert) and both the directors and the trustees. Its consideration of these factors may lead the Panel to conclude that the trustees are acting in concert with the directors and/or a controlling shareholder (or group).*

*No presumption of concertedness will apply in respect of shares held within the EBT but controlled by the beneficiaries.*

Existing Note 5 and Notes 6 to 14 on Rule 9.1 will be renumbered accordingly.

The following consequential amendments will also be made:

in Note 2 on **Rule 2.9**, "9.1 (Note 9)" becomes "9.1 (Note 10)";

in **Rule 5.2(e)**, "Note 11 on Rule 9.1" becomes "Note 12 on Rule 9.1";

in Note 2 on **Rule 5.2**, "*Notes 10 and 12 on Rule 9.1*" becomes "*Notes 11 and 13 on Rule 9.1*"; and

in former Note 10 on **Rule 9.1** (now Note 11), the reference to "*Note 14*" in parentheses at the end of the Note becomes "*Note 15*".

4 July 2002