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The Secretary to the Code Committee
The Takeover Panel
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Friday 21 July 2023

Dear Code Committee members,

**Review of Rule 21 (Restrictions on Frustrating Action) and Other Matters**

We welcome the opportunity to respond to your consultation on the Review of Rule 21 (Restrictions on Frustrating Action) and Other Matters.

The Quoted Companies Alliance *Legal Expert Group* and *Primary Markets Expert Group* have examined the proposals and advised on this response from the viewpoint of small and mid-sized quoted companies. A list of Expert Group members can be found in Appendix A.

In general, we agree with the Takeover Panel's proposed amendments to Rule 21 (Restrictions on Frustrating Action) and consider them to be appropriate and we commend the Code Committee for its ongoing work in reviewing and updating the Code so as to keep it relevant and appropriate and to reflect developments in the practice of public takeovers.

In particular, we consider the clarification of the start of the 'relevant period' to be a welcome development.

However, we do have concerns with two of the proposed changes which he highlight below.

**Guidance on the early termination of the relevant period**

We refer you to our answers to question 14 (termination of relevant period upon rejection of offer proposal prior to commencement of offer period) where we make a suggestion which would require a binary response from the interested party within the existing two day period and, if continued engagement is favoured by the interested party, would require an updated proposal to be made within a further five days if the protection of Rule 21 is to be retained.

**Issues of securities by an offeree company**

While we acknowledge that the issuing of further securities by the offeree company is a problematic area (the consultation highlights issues such as pricing and bidder cash confirmation), we believe that some level of flexibility beyond that permitted by the proposed carve-outs would be appropriate for offeree companies

who routinely issue securities as currency for making acquisitions or for securing critical hires. In our response to question 2 we suggest that this might be addressed by some guidance on what might be regarded as an "ordinary course" issue and/or by a de-minimis threshold for such issues.

If you would like to discuss our response in more detail, please do not hesitate to contact us.

Yours sincerely,

James Ashton
Chief Executive

**Q1 Should the new definition of "restricted action" be introduced in the new Rule 21.1(c) as proposed?**

We welcome the simplification of the definition of "restricted action" and the introduction of a dual test of materiality and non-ordinary course for transactions and contracts.

**Q2 Should issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities by the offeree company, other than in the ordinary course of business, in any amount be a restricted action, as proposed in the new Rules 21.1(c)(i) to (iii)?**

We agree that, in principle, this approach is the correct one although we would welcome guidance on situations where shares are routinely used by the offeree as a currency for making acquisitions or for securing critical hires. In these circumstances it would be helpful to clarify what will be regarded as an "ordinary course" issue. Consideration might also be given to the concept of a "de-minimis" securities issue.

**Q3 Should the current Note 5 on Rule 21.1 be amended as proposed with regard to employee incentivisation arrangements?**

We agree with this proposed change.

**Q4 Should a redemption or purchase of its own shares by the offeree company in line with defined limits announced or established before the relevant period normally be in the ordinary course of the offeree company's business, as proposed in the new Note 2 on Rule 21.1?**

We agree with this proposed change.

**Q5 Should the Panel be able to have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company when determining whether a disposal or acquisition of assets is of a material amount, as set out in the proposed new Note 3(c) on Rule 21.1?**

We think this flexibility will be helpful in enabling the Panel to come to a fair assessment in individual cases.

**Q6 Should only disposals and acquisitions that are outside the ordinary course of the offeree company's business be included in the calculation when determining if the relevant assets are, in aggregate, of a material amount, as set out in the proposed new Note 3(e) on Rule 21.1?**

We agree that this is a logical extension of the principle.

**Q7 Do you have any comments on the matters that the Executive will consider when determining whether a disposal or acquisition of assets is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?**

We agree with the approach described in the proposed new Practice Statement.

**Q8 Should the Panel normally consider an inducement fee arrangement proposed to be entered into by the offeree company to be a material contract outside the ordinary course of the offeree company's business if: (a) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the new Note 3 on Rule 21.1); or**

**(b) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case)?**

The 1 per cent. test was the historic yard-stick for break fees prior to their virtual abolition as a tool in public bids and its justification is in part attributable to the law relating to financial assistance. That said, we see no reason not to maintain it as a yard-stick for Rule 21 notwithstanding the broader remit of that Rule (in that it applies to assets generally and not just to share transactions). In most circumstances that level of threshold should provide more than sufficient flexibility to offeree companies contemplating transactions which might otherwise be caught by Rule 21.

**Q9 Do you have any comments on the matters that the Executive will consider when determining whether: (a) an individual contract; or (b) a particular type of contract, is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?**

We believe that the criteria proposed have been well thought out and are fit for purpose.

**Q10 Should the Panel be consulted to determine whether entering into offer-related employee retention arrangements that relate to a period that is prior to the end of the offer period would be a restricted action, as proposed in the new Note 1(c) on Rule 21.1?**

Yes, we agree that this is a sensible proposal and aligns with the general principle of Panel consultation on aspects of the Code in all cases where there is uncertainty as to its application.

**Q11 Do you have any comments on the circumstances in which the Executive may consider entering into offer-related employee retention arrangements to be a restricted action, as set out in the draft new Practice Statement No 34?**

The individual elements to be highlighted in the new Practice Statement No. 34 will provide helpful guidance to offeree companies.

**Q12 Should: (a) the current Note 3 on Rule 21.1 (Interim dividends); and (b) the current Note 6 on Rule 21.1 (Pension schemes), be deleted?**

We agree with this deletion and welcome the Panel's willingness to delete parts of the Code which have largely become redundant.

**Q13 Should the restrictions in Rule 21.1(a) apply during the "relevant period", as specified in the proposed new Rule 21.1(b)?**

We welcome the clarification of the start date of the "relevant period".

**Q14 Where no offer period has begun, should the relevant period end at 5.00 pm on the seventh calendar day following the date on which the latest approach is unequivocally rejected?**

We have some concerns over the extension from two to seven calendar days. A possible solution might be to require the potential offeror to indicate within two days of the rejection whether it either (i) wishes to proceed to formulate a revised proposal (and to provide a timeframe for doing so) or (ii) is no longer interested in proceeding. Upon receipt of a "not interested in proceeding" response the restricted period would be regarded as at an end. If the response is that the potential offeror is formulating a revised proposal

then it would have a further five days to submit that proposal and, in the event that it does not do so the relevant period would end. This achieves the same objective whilst also providing an earlier release for the offeree if the interested party has no intention of engaging further.

**Q15 Should the new Note 7 on Rule 21.1 be introduced as proposed to clarify the application of the relevant period where there is more than one offeror?**

Agreed.

**Q16 Should the new Note 9(a) on Rule 21.1 be introduced to provide that, where the offeree board is seeking a potential offeror for the company, the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms?**

Agreed.

**Q17 Should the new Note 9(b) on Rule 21.1 be introduced to provide that, where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company, the Panel should be consulted to determine when the relevant period will begin?**

Agreed.

**Q18 Should presumption (7) of the definition of "acting in concert" be amended to provide that the directors of a company that is subject to an offer or a possible offer (together with their close relatives and the related trusts of any of them) are presumed to be acting in concert with each other from the beginning of the relevant period or, where the proposed new Note 9 on Rule 21.1 applies, the beginning of the offer period?**

We see this as a logical extension of the existing presumption.

**Q19 Should the new Note 8 on Rule 21.1 be introduced as proposed to provide that where an offer or possible offer is a reverse takeover, Rule 21.1 will also apply to the board of the offeror as if the offeror were an offeree company and vice versa?**

This is quite a significant change but one which makes sense.

**Q20 Should: (a) the Panel consent to the restrictions in Rule 21.1(a) not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation, other than in exceptional circumstances; and (b) Note 10 on Rule 21.1 be introduced as proposed?**

We agree with this approach. However, we suggest that the drafting makes it clear that the non-application is specific to the sanctioning of the scheme of arrangement itself and the broad-based restrictions on contracts, disposals, share issues etc will remain in place (notwithstanding that, in practice, this would also be covered as a matter of contract by the relevant cooperation agreement).

**Q21 Do you have any comments on the Executive's guidance as to how it would normally interpret "exceptional circumstances" for the purpose of the new Note 10 on Rule 21.1, as set out in the draft new Practice Statement No 34?**

No comments.

**Q22 Should: (a) an offeror be permitted to extend a mini-long-stop date with the consent of the Panel in a competitive situation; and (b) Sections 3(b) and 5 of Appendix 7 be amended as proposed?**

Yes. This is consistent with ensuring that offeree shareholders have the benefit of ongoing competitive tension and any resulting price improvements.

**Q23 Should the restriction on general enquiries in Note 1 on Rule 21.3 be deleted?**

We agree with this approach.

**Q24 Should Rule 21.3 be amended to require the offeree board to provide promptly to the requesting offeror or bona fide potential offeror both: (a) the information that has been provided to another firm or potential offeror at the time of the request; and (b) any further information that it provides to the other firm or potential offeror in the seven days following the request?**

We agree with this approach and believe that it will have the desired effect of reducing administrative burden (and associated cost) for the offeree company's management.

**Q25 Should Rule 21.4 in relation to management buy-outs be amended so as to require the offeror or potential offeror on request to provide to the independent directors of the offeree company or its advisers any information that it has provided, or subsequently provides, to external providers of finance?**

Agreed.

**Q26 Should the passing of information under Rule 21.3(a) be permitted to be subject to a condition that the potential offeror must seek the offeree company's consent before sharing its information with a potential finance provider, provided that such consent cannot be unreasonably withheld?**

This is a helpful protection for the offeree company. Consideration might be given to a statement that consent should generally be given to onward disclosure where the potential finance provider executes a confidentiality agreement which imposes confidentiality obligations which are aligned with those accepted by the offeror company in its confidentiality agreement with the offeree company.

**Q27 Should the current Note 5 on Rule 21.3 be amended to require an offeree board which commenced discussions in relation to a sale of all or substantially all of the offeree company's assets before the beginning of the "relevant period" (as defined in the proposed new Rule 21.1(b)), on request, to provide an offeror or bona fide potential offeror with the information it passes to the potential asset purchaser after the beginning of the relevant period?**

This is a logical extension of the equality of information principle.

**Appendix A**

**The Quoted Companies Alliance *Legal Expert Group***

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|---|---|
| Mark Taylor (Chair) | Dorsey & Whitney (Europe) LLP |
| Stephen Hamilton (Deputy Chair) | Mills & Reeve LLP |
| Paul Airley | Fladgate LLP |
| Danette Antao | Hogan Lovells International LLP |
| Paul Arathoon | Charles Russell Speechlys LLP |
| Kate Badr | CMS |
| Naomi Bellingham | Practical Law Company Limited |
| Ross Bryson | Mishcon De Reya |
| Philippa Chatterton | CMS |
| Paul Cliff | Gateley |
| Matt Cohen | Stifel |
| Jonathan Deverill | DAC Beachcroft LLP |
| Sarah Dick | Stifel |
| Tunji Emanuel | LexisNexis |
| Kate Francis | Dorsey & Whitney (Europe) LLP |
| Claudia Gizejewski | LexisNexis |
| Sarah Hassan | Practical Law Company Limited |
| David Hicks | Charles Russell Speechlys LLP |
| Kate Higgins | Mishcon De Reya |
| Nichols Jennings | Locke Lord LLP |
| Martin Kay | Blake Morgan |
| Jonathan King | Osborne Clarke |
| Jennifer Lovesy | KPMG |
| Nicholas McVeigh | Mishcon De Reya |
| Catherine Moss | Shakespeare Martineau LLP |
| Hilary Owens Gray | Practical Law Company Limited |
| Emma Plaxton | Mills & Reeve LLP |
| Kieran Rayani | Stifel |
| Jaspal Sekhon | Hill Dickinson LLP |
| Patrick Sarch | Hogan Lovells LLP |
| Donald Stewart | Kepstorn |
| Gary Thorpe | QCA Director |
| Robert Wieder | Faegre Drinker LLP |
| Sarah Wild | Practical Law Company Limited |
| John Young | Kingsley Napley LLP |

**The Quoted Companies Alliance *Primary Market Expert Group***

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|---|---|
| Samantha Harrison (Chair) | Grant Thornton UK LLP |
| Azhic Basirov (Deputy Chair) | Global Alliance Partners Financial Limited |
| Colin Aaronson | Grant Thornton UK LLP |
| Stuart Andrews | Zeus Capital |
| Mark Brady | Spark Advisory Partners Limited |
| Andrew Buchanan | Peel Hunt LLP |
| David Coffman | Novum Securities Limited |
| Richard Crawley | Liberum Capital Ltd |
| Dru Danford | Liberum Capital Ltd |
| David Foreman | Zeus Capital |
| Chris Hardie | W.H. Ireland Group PLC |
| Stephen Keys | Cenkos Securities PLC |
| Nick McCarthy | Shoosmiths LLP |
| Katy Mitchell | W.H. Ireland PLC |
| Hayley Mullens | Radnor Capital Partners Limited |
| Nick Naylor | Allenby Capital |
| Jeremy Osler | Cenkos Securities PLC |
| Niall Pearson | Hybridan LLP |
| Mark Percy | Shore Capital Group Ltd |
| Oliver Pilkington | Shoosmiths LLP |
| George Sellar | Peel Hunt LLP |
| Paul Shackleton | Peel Hunt LLP |
| James Spinney | Strand Hanson |
| Stewart Wallace | Stifel |