

RS 2023/1 27 October 2023

THE TAKEOVER PANEL

RULE 21 (RESTRICTIONS ON FRUSTRATING ACTION) AND OTHER MATTERS

RESPONSE STATEMENT BY THE CODE COMMITTEE



CONTENTS

	Page
1. Introduction and summary	1
2. Restriction on actions by the board of the offeree company	5
3. Period for which Rule 21.1(a) applies	30
4. Application of Rule 21.1 to a reverse takeover	36
5. Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation	38
6. Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel	41
7. Equality of information to competing offerors	43
APPENDIX A Respondents to PCP 2023/1	49
APPENDIX B Amendments to the Code	50
APPENDIX C Practice Statement No 34	61

1. Introduction and summary

(a) Introduction

1.1 On 15 May 2023, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a [Public Consultation Paper](#) (“**PCP 2023/1**” or the “**PCP**”) which proposed amendments to the [Takeover Code](#) (the “**Code**”) in relation to **Rule 21** and other matters, as summarised below.

(b) Summary of proposals

(i) Restriction on actions by the offeree board

1.2 **Section 2** of the PCP proposed to amend **Rule 21.1** so that it would not, in general, restrict an offeree board from taking an action that either is not material or is in the ordinary course of the offeree company’s business, on the basis that:

- (a) such an action is not likely to frustrate an offer or possible offer; and
- (b) it is inappropriate for the Code to prevent an offeree company from carrying on ordinary course business.

1.3 **Section 2** of the PCP also proposed:

- (a) amendments to the **Notes on Rule 21.1** to provide further clarity on the circumstances in which the Panel will normally consider that a proposed action by an offeree board either is not material or is in the ordinary course of the offeree company’s business; and
- (b) a new **Note 1(c) on Rule 21.1** to provide that the Panel may in certain circumstances treat entering into offer-related employee retention arrangements as a restricted action.

(ii) Period for which Rule 21.1(a) applies

1.4 **Section 3** of the PCP proposed:

- (a) an amendment to provide that the restrictions in **Rule 21.1(a)** apply during the “**relevant period**”, which would be defined in the new **Rule 21.1(b)** as the period from the earlier of:
 - (i) an approach by a potential offeror to the offeree board; and
 - (ii) the beginning of the offer period,

until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected; and

- (b) additional **Notes on Rule 21.1** in relation to the relevant period where:
- (i) there is more than one offeror;
 - (ii) the offeree board is seeking one or more potential offerors (whether by way of a formal sale process or otherwise); and
 - (iii) a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

(iii) Application of Rule 21.1 to a reverse takeover

1.5 **Section 4** of the PCP proposed a new **Note 8 on Rule 21.1** to provide that, where an offer is, or a possible offer would be, a reverse takeover, **Rule 21.1** will also apply during the relevant period to the board of the offeror as if the offeror were an offeree company and vice versa.

(iv) Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation

1.6 **Section 5** of the PCP proposed a new **Note 10 on Rule 21.1** to provide that, other than in exceptional circumstances, the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

(v) Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel

1.7 **Section 6** of the PCP proposed amendments to **Sections 3(b)(ii) and 3(b)(iii) of Appendix 7** to provide that, where an offeror is proceeding by way of a scheme of arrangement and has specified within the conditions to the scheme dates by which the shareholder meetings or the court sanction hearing must be held, those “**mini-long-stop dates**” should be capable of being extended not only with the consent of the parties to the offer (as is currently the case) but also, in a competitive situation, with the consent of the Panel.

(vi) Equality of information to competing offerors

1.8 **Section 7** of the PCP proposed to:

- (a) delete **Note 1 on Rule 21.3**, which provides that an offeror may not request information under **Rule 21.3(a)** in general terms, and amend **Rule 21.3(a)** so that it would require the offeree board to provide promptly to an offeror or bona fide potential offeror who makes a request for information under **Rule 21.3(a)** both:
 - (i) all the information that has been provided to another offeror or potential offeror at the time of the request (regardless of whether the information was specifically requested); and
 - (ii) any further information that the offeree board provides to another offeror or potential offeror in the seven days following the request;
- (b) amend **Rule 21.4** so that, in the case of a management buy-out or similar transaction, the offeror or potential offeror would be required, on request, promptly to provide the independent directors of the offeree company or its advisers with any information which has been provided, or is subsequently provided, by the offeror or potential offeror to external providers or potential providers of finance; and
- (c) make other amendments to the **Notes on Rule 21.3** in relation to:
 - (i) the conditions to the passing of information under **Rule 21.3**; and
 - (ii) the application of **Rule 21.3** to information provided after the beginning of the relevant period to a potential purchaser of all or substantially all of the offeree company's assets.

(c) Responses to consultation

1.9 The consultation period in relation to PCP 2023/1 ended on 21 July 2023. Responses were received from the seven respondents listed in **Appendix A** and their responses have been published on the Panel's [website](#). The Code Committee thanks the respondents for their comments.

1.10 The respondents were supportive of the proposals. The principal comments and suggestions made by respondents are summarised in **Sections 2 to 7** below.

(d) The Code Committee's conclusions

1.11 Having considered the responses to the consultation, the Code Committee has adopted the amendments to the Code proposed in the PCP, subject to the minor modifications described in **Sections 2, 6 and 7** below.

(e) Code amendments

1.12 The amendments to the Code which the Code Committee has adopted as a result of the consultation are set out in **Appendix B**. In **Appendix B**, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code. Where new or amended provisions of the Code are set out in the main body of this Response Statement, they are marked to show changes from the provisions as they were proposed to be amended in the PCP.

(f) Implementation

1.13 The amendments to the Code set out in this Response Statement will take effect on Monday, 11 December 2023 (the “**implementation date**”). The Code, as amended, will be applied from the implementation date to all companies and transactions to which it relates, including those on-going transactions which straddle that date, except where to do so would give the amendments retroactive effect.

1.14 Where parties have doubts as to the consequences of the amendments to the Code set out in this Response Statement, in particular their impact on any transaction which is in existence or contemplation, they should consult the Panel prior to the implementation date to obtain a ruling or guidance.

(g) Practice Statements

1.15 The Panel Executive (the “**Executive**”) intends to publish a new **Practice Statement No 34** to provide additional guidance on how it interprets and applies **Rule 21.1**. A draft of the proposed **Practice Statement No 34** was set out in Appendix C to the PCP and, at the request of the Executive, the Code Committee included questions on the Executive’s proposed practice in the PCP.

1.16 Having considered the responses to the consultation, the Executive has made a number of amendments to **Practice Statement No 34**. The final draft **Practice Statement No 34**, marked to show changes from the draft set out in Appendix C to the PCP, is set out in **Appendix C**.

1.17 The Executive will also make minor amendments to **Practice Statement No 2**, **Practice Statement No 29**, **Practice Statement No 30** and **Practice Statement No 31** to reflect the amendments to the Code set out in **Appendix B**.

1.18 The new and amended Practice Statements will be published on the Panel’s website on, and will be effective from, the implementation date. In addition, **Practice Statement No 32** will be withdrawn on the implementation date.

2. **Restriction on actions by the board of the offeree company**

- (a) *Proposed removal of restriction on offeree board actions that either are not material or are in the ordinary course of the offeree company's business*

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

- (i) *Summary of proposals*

2.1 **Section 2(c)** of the PCP proposed to amend **Rule 21.1(a)** so that, during the “**relevant period**” (see **Section 3**), it would restrict the offeree board from taking or agreeing to take:

- (a) any “**restricted action**”, being:
- (i) issuing, or transferring out of treasury, shares or convertible securities, redeeming or buying back shares or convertible securities, or granting options or awards over shares, other than in the ordinary course of business;
 - (ii) disposing of or acquiring assets of a material amount, other than in the ordinary course of business; or
 - (iii) entering into, amending or terminating a material contract, other than in the ordinary course of business; or
- (b) any other action which may result in the frustration of an offer or bona fide possible offer,

except with the approval of the offeree company's shareholders in general meeting or the consent of the Panel.

- (ii) *Proposal to amend Rule 21.1 so that it would not, in general, restrict an offeree board from taking an action that either is not material or is in the ordinary course of the offeree company's business*

2.2 All but one of the respondents supported, or did not object to, the proposal.

- 2.3 One respondent understood the rationale for the proposed amendments but was concerned that they could make it easier for an offeree board to undertake a frustrating action. An offeree board could, for example, seek to transfer shares out of treasury to a shareholder that the offeree board considered was likely to support its position in relation to an offer, such as an employee benefit trust (an “EBT”).
- 2.4 The Code Committee recognises that the proposed amendments will mean that certain offeree board actions that are currently restricted under **Rule 21.1**, including transferring shares out of treasury, will no longer be restricted in all circumstances. However, an offeree board will only be permitted to take such an action where it can demonstrate that the proposed action is in the ordinary course of the offeree company’s business. This is on the basis that an action that is in the ordinary course of the offeree company’s business is not normally likely to frustrate an offer or possible offer.
- 2.5 A transfer of shares out of treasury to an EBT during the relevant period is only likely to be in the ordinary course of the offeree company’s business where the offeree board can demonstrate that those shares are required to satisfy the exercise of options or the vesting of awards:
- (a) that were granted before the beginning of the relevant period, as permitted under the new **Note 1(b) on Rule 21.1**; or
 - (b) that are granted during the relevant period under the new **Note 1(a) on Rule 21.1**.
- 2.6 It is unusual for an offeree board to seek to issue shares or convertible securities for cash during the relevant period and it is unlikely that it would be in the ordinary course of an offeree company’s business to do so. Transferring shares out of treasury to a shareholder other than an EBT is substantively the same as issuing shares for cash and so it is unlikely that it would be in the ordinary course of an offeree company’s business to do so.
- (iii) *Restriction on the offeree board issuing, or transferring out of treasury, shares or convertible securities, redeeming or buying back shares or convertible securities, or granting options or awards over shares, other than in the ordinary course of its business*
- 2.7 One respondent suggested that the references to “shares” in the proposed **Rule 21.1(c)(i) to (iii)** should be limited expressly to shares or securities forming part of the offeree company’s equity share capital.
- 2.8 The Code Committee considers that the references to “shares” in the new **Rule 21.1(c)(i) to (iii)** should include shares or securities that do not form part of the offeree company’s equity share capital and, as a result, an action in relation to such shares or securities could be a restricted action under **Rule 21.1(a)**. However, the Code Committee

understands that, depending on the nature of the rights attaching to the relevant shares or securities, the Executive may treat issuing securities that do not form part of the offeree company's equity share capital in the same way as raising new debt which, as noted in paragraph 4.3 of the new **Practice Statement No 34**, will normally be regarded as being in the ordinary course of the offeree company's business.

- 2.9 One respondent suggested that an offeree board should be permitted to issue a "de minimis" number of shares or convertible securities during the relevant period.
- 2.10 The Code Committee considers that a proposed action that relates to the offeree company's share capital could have an impact on an offer or possible offer, even where the action involves a "de minimis" number of shares.
- 2.11 One respondent asked for guidance on when issuing shares or convertible securities as consideration for an acquisition of assets would be in the ordinary course of the offeree company's business.
- 2.12 Under the amended **Rule 21.1(a)**, the offeree company will be permitted to issue shares or convertible securities where it is in the ordinary course of the offeree company's business. In determining whether it would be in the ordinary course of the offeree company's business to issue shares or convertible securities as consideration for an acquisition of assets, the Executive would consider:
- (a) the frequency with which the offeree company had issued shares or convertible securities as consideration for an acquisition of assets;
 - (b) the size of the proposed issue of shares or convertible securities in comparison to historical issues of shares or convertible securities as consideration for an acquisition of assets;
 - (c) the terms of the proposed issue of shares or convertible securities, including whether they would be issued at market value; and
 - (d) whether the acquisition of assets itself would be in the ordinary course of the offeree company's business, taking into account the matters in paragraph 2.3 of the new **Practice Statement No 34**.

The Executive has amended **Practice Statement No 34** accordingly (see the new paragraphs 2.6 and 2.7).

(iv) *Obligation to consult the Panel*

- 2.13 Two respondents suggested that the proposed **Rule 21.1(d)** should clarify that the offeree board should consult the Panel to confirm whether a proposed action is in the ordinary course of the offeree company's business.
- 2.14 The new **Rule 21.1(d)** states that the Panel must be consulted in advance if a proposed action may be restricted by **Rule 21.1(a)**. If a proposed action may not be in the ordinary course of the offeree company's business, that action could be a restricted action as defined in **Rule 21.1(c)** and, if so, would be restricted by **Rule 21.1(a)**. The Code Committee considers that **Rule 21.1(d)** is clear that the offeree board should consult the Panel if an action could be considered to be outside the ordinary course of the offeree company's business (even if the offeree board itself is of the view that the relevant action is within the ordinary course of the offeree company's business).
- 2.15 The Code Committee also notes that paragraph 1.6 of the new **Practice Statement No 34** states that offeree boards and advisers to offeree companies are encouraged to consult the Executive at an early stage, including to determine whether a proposed action is in the ordinary course of the offeree company's business.

(v) *Code amendments*

- 2.16 In the light of the above the Code Committee has:
- (a) amended **Rule 21.1(a)** as set out in paragraph 2.27(a) of the PCP;
 - (b) introduced the new **Rule 21.1(c)** as set out in paragraph 2.27(b) of the PCP;
 - (c) renumbered the current **Rule 21.1(b)** as **Rule 21.1(d)** and amended it as proposed in paragraph 2.27(c) of the PCP; and
 - (d) renumbered the current **Rule 21.1(c)** as **Rule 21.1(e)** and amended it as proposed in paragraph 2.29 of the PCP.
- (b) ***Employee incentivisation arrangements in the ordinary course of the offeree company's business***

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

(i) *Summary of proposals*

- 2.17 **Section 2(d)** of the PCP proposed amendments to the current **Note 5 on Rule 21.1** (which would become the new **Notes 1(a) and 1(b) on Rule 21.1**) to set out when the

Panel will normally consider employee incentivisation arrangements that are not related to the offer to be in the ordinary course of the offeree company's business.

(ii) Respondents' comments

2.18 The respondents were supportive of the proposals but made a number of requests for guidance on how **Notes 1(a) and 1(b) on Rule 21.1** would be applied to a proposed grant of new share options or awards:

- (a) to a new director or employee;
- (b) which diverges from past practice to address changes in applicable law or best practice;
- (c) under a new incentive scheme or a new form of incentive under an existing incentive scheme; or
- (d) that the offeree board has approved but has not taken steps to implement before the relevant period.

2.19 One respondent asked whether the Panel would take the approach described in the new **Note 1 on Rule 21.1** when determining whether a cash-based incentive award is in the ordinary course of the offeree company's business.

(iii) New directors and employees

2.20 Three respondents noted that it is common for a board to grant options over, or awards in respect of, shares in connection with appointing a new director or hiring a new employee. Such options or awards may be granted to:

- (a) incentivise the new director or employee from the date of their appointment, rather than delaying their incentivisation until the board next grants options or awards to directors and employees in accordance with its normal award cycle; and/or
- (b) replace incentive arrangements that the individual will forfeit on leaving their previous employer.

As a result, the timing or level of such options or awards may not be in accordance with the offeree company's normal practice under an established incentive scheme.

2.21 The Code Committee agrees that the restrictions in **Rule 21.1(a)** should not normally prevent a grant of options over, or awards in respect of, shares in connection with a new appointment or hire. **Note 4 on Rule 21.1** states that an increase in a director's emoluments or a significant improvement in a director's terms of service will normally be

outside the ordinary course of the offeree company's business, unless the increase or improvement results from a genuine promotion or new appointment. The Code Committee considers that **Note 1(a) on Rule 21.1** should provide similar flexibility in respect of a proposed grant of options over, or awards in respect of, shares in connection with a genuine promotion or new appointment or hire and has amended the new **Note 1(a) on Rule 21.1** accordingly.

(iv) Divergence from past practice

2.22 One respondent asked whether the Panel would treat a grant of options over, or awards in respect of, shares as being in the ordinary course of the offeree company's business if any divergence from past practice was to address a change in applicable law or best practice.

2.23 Where the divergence from past practice was disclosed before the relevant period, the Code Committee understands that the Executive would expect to apply the new **Note 1(a)(ii) on Rule 21.1** and treat the grant or award as being in the ordinary course of the offeree company's business, notwithstanding that there has been a change in the offeree company's normal practice rather than the introduction of a new incentive scheme. However, the Code Committee recognises that the offeree board may not have disclosed its change in practice before the relevant period as it may consider that it is necessary to do so only when reporting on the relevant financial year.

2.24 Where a divergence from past practice is required for the offeree company to comply with applicable law, it is likely that a proposed grant of options over, or awards in respect of, shares reflecting that change in practice would be regarded by the Executive as being in the ordinary course of the offeree company's business.

2.25 Where the offeree board proposes to diverge from past practice in order to reflect a change in best practice, the Code Committee understands that the Executive would consider whether a grant of options over, or awards in respect of, shares reflecting that change in practice was in the ordinary course of the offeree company's business in the light of all the relevant circumstances.

(v) New incentive schemes and new forms of incentive

2.26 Two respondents asked if a grant of options over, or awards in respect of, shares under a new incentive scheme would be in the ordinary course of the offeree company's business if it was consistent with the offeree company's past practice under a prior incentive scheme.

2.27 The Code Committee agrees that a grant of options over, or awards in respect of, shares would be in the ordinary course of the offeree company's business under **Note 1(a) on**

Rule 21.1 where the timing and level is consistent with the offeree company's past practice under an existing incentive scheme, even where the grant or award itself is made under the rules of a new or replacement incentive scheme.

- 2.28 When considering whether a grant of options over, or awards in respect of, shares is consistent with the offeree company's past practice, the Code Committee understands that the Executive would take into account both the practice of the offeree company in similar circumstances and the offeree company's normal practice in its annual award cycle.
- 2.29 One respondent suggested that the new **Note 1(a) on Rule 21.1** should also apply to new forms of incentive that may not involve the introduction of a new incentive scheme. For example, a company may operate an "omnibus plan" which allows for the grant of various forms of award. The respondent considered that it should be in the ordinary course of the offeree company's business for the offeree board to grant a different form of award under the rules of the existing omnibus plan, even though granting that form of award arguably would not be consistent with past practice.
- 2.30 The Code Committee understands that the Executive would normally treat a new form of award in the same way as a new incentive plan under **Note 1(a)(ii) on Rule 21.1**, i.e. if the circumstances in which the offeree board would seek to issue the relevant form of award were disclosed before the relevant period, issuing the award would normally be in the ordinary course of the offeree company's business.
- (vi) *Options or awards approved but not implemented before the relevant period*
- 2.31 Two respondents asked how the Panel would consider a situation where the offeree board had approved a grant of options over shares that was not in the ordinary course of the offeree company's business (because it did not meet the requirements of **Note 1(a) on Rule 21.1**) but had not taken any steps to implement the grant before the relevant period began.
- 2.32 **Rule 21.1(e)(v)**, as amended, provides that the Panel will normally consent to a proposed action that would otherwise be restricted by **Rule 21.1(a)** where:
- (a) a decision to take the proposed action had been taken; and
 - (b) that decision had been partly implemented,
- in each case, before the beginning of the relevant period.
- 2.33 If the offeree board had taken the decision to grant the relevant options but had not taken any steps to implement the grant before the relevant period began, the decision would

not have been partly implemented for the purposes of **Rule 21.1(e)(v)**. The Code Committee understands that the Executive would expect the offeree board to have taken steps towards implementing the grant, such as communicating the decision to the recipient of the options or preparing the required documentation, for the decision to be regarded as partly implemented.

2.34 One respondent suggested that an award that had been substantially progressed but had not been publicly disclosed prior to the relevant period should be in the ordinary course of the offeree company's business under **Note 1 on Rule 21.1**.

2.35 The Code Committee understands that the Executive does not consider that such an award would be in the ordinary course of the offeree company's business unless it otherwise satisfied the requirements of **Note 1(a) on Rule 21.1**. However, the Executive may consent to the proposed award under **Rule 21.1(e)(v)**.

(vii) Cash-based incentive awards

2.36 One respondent suggested that the Panel should take the approach described in the new **Note 1 on Rule 21.1** when determining whether a cash-based incentive award would be in the ordinary course of the offeree company's business.

2.37 A cash-based incentive award that is not related to the offer would not normally be restricted by **Rule 21.1(a)** as it would not normally involve the offeree board taking, or agreeing to take, a restricted action or any other action which may result in the frustration of an offer or bona fide possible offer.

2.38 To the extent that a cash-based incentive award could be restricted by **Rule 21.1(a)**, the Code Committee understands that the Executive would take the approach described in the new **Note 1 on Rule 21.1**. However, the Code Committee does not consider that it is necessary to specify this in the Code.

(viii) Other comments

2.39 One respondent asked when the Panel should be consulted in relation to the issue of shares to satisfy the exercise of existing options or the vesting of existing awards.

2.40 As described in **Note 1(b) on Rule 21.1**, the Panel will normally consider the issue of new shares, or the transfer of shares from treasury, to satisfy the exercise of options or the vesting of awards under an incentive scheme to be in the ordinary course of the offeree company's business. The Code Committee understands that, notwithstanding **Rule 21.1(d)**, which requires the offeree board to consult the Panel if a proposed action may be restricted by **Rule 21.1(a)**, the Executive would not normally expect to be

consulted in relation to an issue of new shares, or transfer of shares from treasury, to satisfy the exercise of options or the vesting of awards in accordance with their terms.

2.41 If the offeree board or remuneration committee proposed to accelerate the vesting of options or awards other than in accordance with their terms during the relevant period, the Executive would expect to be consulted and may consider the resulting issue of new shares, or transfer of shares from treasury, to be outside the ordinary course of the offeree company's business. The Code Committee has therefore retained the word "normally" in **Note 1(b) on Rule 21.1**.

2.42 Respondents also suggested that:

- (a) the word "employee" should be removed from the title of **Note 1 on Rule 21.1** to make it clear that the provisions extend to workers who are not employees (such as non-executive directors or consultants); and
- (b) **Note 1** should refer to "incentive schemes" rather than "share incentive schemes" to make it clear that it covers any incentive structure that involves the issue of new shares, the transfer of shares from treasury or the grant of options over, or awards in respect of, shares.

2.43 The Code Committee agrees with these suggestions and has amended **Note 1 on Rule 21.1** accordingly.

(ix) *Code amendments*

2.44 In the light of the above, the Code Committee has renumbered the current **Note 5 on Rule 21.1** as **Note 1 on Rule 21.1** and amended it as proposed in paragraph 2.44(a) of the PCP, subject to the following amendments:

"1. ~~Employee incentive~~ Incentive and retention arrangements

(a) *The Panel will normally consider the proposed grant of options over, or awards in respect of, shares to be in the ordinary course of the offeree company's business if the timing and level are in accordance with:*

(i) *the offeree company's normal practice under an established ~~share~~ incentive scheme; or*

(ii) *the offeree company's proposed practice under a new ~~share~~ incentive scheme, provided that the proposed practice was publicly disclosed before the relevant period.*

or if the grant of options over, or awards in respect of, shares is in connection with a genuine promotion or new appointment or hire.

(b) *The Panel will normally consider the issue of new shares or the transfer of shares from treasury to satisfy the exercise of options or the vesting of awards*

under ~~a share~~ an incentive scheme to be in the ordinary course of the offeree company's business.”.

(c) Redemption or purchase of the offeree company's own shares or convertible securities

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?

(i) Summary of proposals

2.45 **Section 2(d)** of the PCP also proposed a new **Note 2 on Rule 21.1** to provide that a redemption or purchase of its own shares by the offeree company under a programme with defined limits announced or established before the relevant period would normally be in the ordinary course of the offeree company's business.

(ii) Respondents' comments

2.46 All of the respondents were supportive of the proposal.

2.47 One respondent asked when the Panel would consider defined limits to have been “established” for the purposes of the new **Note 2 on Rule 21.1**.

(iii) Code Committee's response

2.48 The Code Committee understands that the Executive would determine whether the limits of a share buyback programme were “established” before the relevant period in the light of all the relevant circumstances.

2.49 In paragraph 2.42 of the PCP, the Code Committee noted that, if a share buyback programme that was announced before the relevant period came to an end and, during the relevant period, the offeree board sought to announce a new share buyback programme operated within similar defined limits as the previous programme, the new share buyback programme would normally be in the ordinary course of the offeree company's business. This is because the limits of the new share buyback programme would have been established by the offeree board's historical practice of operating an on-market share buyback programme and by reference to the previous programme.

2.50 In other circumstances, the offeree board would have to demonstrate that the material terms of the share buyback programme were established before the beginning of the relevant period. The Code Committee understands that the Executive would not normally consider this to be the case if the maximum amount of consideration payable under the programme had not been confirmed.

(iv) *Code amendments*

2.51 In the light of the above, the Code Committee has introduced the new **Note 2 on Rule 21.1** as proposed in paragraph 2.44(b) of the PCP.

(d) ***Disposals and acquisitions of assets of a material amount***

- 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?
- 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?
- 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?

(i) *Summary of proposals*

2.52 **Section 2(e)** of the PCP proposed:

- (a) a new **Note 3(c) on Rule 21.1** to provide that, when determining whether a disposal or acquisition of assets is of a material amount, the Panel may have regard to additional or alternative indicators of materiality (other than those in the current **Note 2(a) on Rule 21.1**) 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; and
- (b) the replacement of the current **Note 2(d) on Rule 21.1** with a new **Note 3(e) on Rule 21.1**, which would provide that only disposals and acquisitions that are outside the ordinary course of the offeree company's business are required to be included in the calculation when determining whether disposals and acquisitions are, in aggregate, of assets of a material amount.

2.53 **Section 2(e)** of the PCP also described how the Executive will normally determine whether a disposal or acquisition is in the ordinary course of the offeree company's business, as set out in Section 2 of the new **Practice Statement No 34**.

(ii) *Respondents' comments on the new Note 3 on Rule 21.1*

- 2.54 All of the respondents supported, or did not object to, the proposal to allow the Panel to have regard to additional or alternative indicators of materiality when determining whether a disposal or acquisition of assets is of a material amount.
- 2.55 One respondent suggested that the new **Note 3(c) on Rule 21.1** should also allow the Panel to have regard to additional or alternative indicators of materiality to take into account the nature of the relevant assets.
- 2.56 All but one of the respondents supported, or did not object to, the introduction of the new **Note 3(e) on Rule 21.1**. The other respondent considered that a number of disposals or acquisitions, each of which is in the ordinary course of the offeree company's business individually, could be outside the ordinary course of the offeree company's business when viewed as a whole.
- 2.57 Although views were not specifically sought on the new **Note 3(d) on Rule 21.1** (i.e. the current **Note 2(c)**), one respondent noted that it provides that a relative value of less than 10% may also be of a material amount if "the assets are of particular significance". The respondent asked whether "significance" would be assessed by reference to the offeree company or the offeror.

(iii) *Code Committee's response*

- 2.58 The Code Committee agrees that **Note 3(c) on Rule 21.1** should allow the Panel to have regard to additional or alternative indicators of materiality to take into account the nature of the relevant assets and has amended it accordingly.
- 2.59 The Code Committee agrees that, if an offeree board agreed to make a large number of disposals and acquisitions (each of which was not restricted by **Rule 21.1(a)** because it was either not material individually or was in the ordinary course of the offeree company's business), the overall level of disposals and acquisitions may then no longer be in the ordinary course of the offeree company's business. Paragraph 2.4 of the new **Practice Statement No 34** states that the cumulative effect of disposals and acquisitions on the offeree company's assets and business as a whole is one of the matters that the Executive will take into account when determining whether an individual disposal or acquisition is in the ordinary course of the offeree company's business. If the Executive concluded that the overall level of disposals or acquisitions was no longer in the ordinary course of the offeree company's business then, for the purpose of **Note 3(e) on Rule 21.1**, all subsequent disposals or acquisitions would be aggregated together with any disposals or acquisitions that the Executive had already agreed should be aggregated under **Note 3(e)** (i.e. any disposal or acquisition entered into earlier in the

relevant period that was not in the ordinary course of the offeree company's business but was not individually material).

2.60 The Code Committee considers that whether "the assets are of particular significance" under **Note 3(d) on Rule 21.1** should be assessed by reference to the offeree company. This is consistent with the general approach taken in **Note 3**, which assesses relative values by reference to the offeree company's equity share capital, assets and operating profit and not by reference to the offeror or the combined group. However, if one of the offeree company's assets was of particular significance to the offeror and the offeree board proposed to dispose of that asset, the proposed disposal could result in the frustration of the offer or possible offer. If so, that disposal would be restricted under **Rule 21.1(a)(ii)**.

(iv) *Code amendments*

2.61 In the light of the above, the Code Committee has renumbered the current **Note 2 on Rule 21.1** as **Note 3 on Rule 21.1** and has amended it as proposed in paragraph 2.64 of the PCP, subject to the following minor amendments to **Notes 3(c) and 3(d)**:

"3. Assets of a material amount

...

(c) The Panel may 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 or the nature of the relevant assets.

(d) A relative value of 10% or more will normally be of a material amount. A relative value of less than 10% may also be of a material amount if the assets are of particular significance to the offeree company."

(v) *Respondents' comments on Practice Statement No 34*

2.62 One respondent suggested that, when considering whether a disposal or acquisition is in the ordinary course of the offeree company's business, the Executive should consider the basis of valuation of the assets in addition to the other matters referred to in paragraph 2.3 of the new **Practice Statement No 34**.

2.63 One respondent considered that, where an offeree board had announced a strategic change, such as exiting a geographic region or business area, a disposal or acquisition to implement that change should not automatically be outside the ordinary course of the offeree company's business.

2.64 Another respondent made a similar comment in relation to a scenario where, for example, an investment trust had announced that it intended to dispose of an "abnormal"

proportion of its investment portfolio in order to implement a change to its investment policy.

(vi) *The Executive's response*

2.65 The Executive agrees that it would take into account the basis of valuation of the assets when considering whether a disposal or acquisition would be in the ordinary course of the offeree company's business and has amended paragraph 2.3 of **Practice Statement No 34** accordingly.

2.66 Paragraph 2.3 of **Practice Statement No 34** sets out certain matters that the Executive will consider when determining whether a disposal or acquisition is in the ordinary course of the offeree company's business, including whether the proposed transaction is part of an ongoing strategy, rather than a strategic change. The Executive agrees that, for example, a disposal that would result in the offeree company exiting a geographic region would not automatically be outside the ordinary course of the offeree company's business. The Executive would consider all the relevant circumstances to determine whether the disposal was in the ordinary course of the offeree company's business.

2.67 Similarly, if an investment trust had announced that it intended to dispose of an "abnormal" proportion of its investment portfolio in order to implement a change to its investment policy, the Executive would take that announcement into account, together with all the relevant circumstances, including:

- (a) the other matters set out in paragraph 2.3 of **Practice Statement No 34**; and
- (b) the cumulative effect of disposals and acquisitions during the relevant period, as described in paragraph 2.4 of **Practice Statement No 34**,

when determining whether an individual disposal was in the ordinary course of the offeree company's business.

2.68 If the Executive determined that a disposal or acquisition was not in the ordinary course of the offeree company's business, the disposal or acquisition would be restricted by **Rule 21.1(a)** only if it was a disposal or an acquisition of assets of a material amount (either individually or in aggregate with other disposals and acquisitions entered into during the relevant period under **Note 3(e) on Rule 21.1**).

2.69 In the light of the comments made by respondents, the Executive has removed the reference to entering or exiting a geographic region or a particular business area from paragraph 2.3(c) of **Practice Statement No 34** to avoid placing undue emphasis on certain disposals or acquisitions. Similarly, the Executive has deleted the previous

paragraph 2.6 of **Practice Statement No 34** which provided a specific example in relation to disposals and acquisitions by an investment trust company.

(e) Contracts

- 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)?**
- 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?**

(i) Summary of proposals

2.70 **Section 2(f)** of the PCP proposed an amendment to the current **Note 7 on Rule 21.1** (which would be renumbered as **Note 5 on Rule 21.1**) to provide that the Panel will normally consider an inducement fee arrangement proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under **Note 1** or **Note 2 on Rule 21.2**) to be a material contract outside the ordinary course of the offeree company's business if the aggregate value of the inducement fee or fees that may be payable is:

- (a) where the inducement fee arrangement is entered into prior to the announcement by an offeror of a firm intention to make an offer, more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with **Note 3 on Rule 21.1**); or
- (b) where the inducement fee arrangement is entered into after the announcement by an offeror of a firm intention to make an offer, more than 1% of the value of the offeree company calculated by reference to the offer price at the time of the announcement (as is currently the case).

2.71 **Section 2(f)** of the PCP also:

- (a) described how the Executive will normally assess whether a contract is in the ordinary course of the offeree company's business; and
- (b) provided examples of the matters that the Executive will take into account when considering whether certain types of contract are in the ordinary course of the offeree company's business,

as set out in Sections 3 and 4 of the new **Practice Statement No 34**.

(ii) Respondents' comments on the amendment to Note 7 on Rule 21.1

2.72 All of the respondents supported, or did not object to, the amendment to the current **Note 7 on Rule 21.1**.

(iii) Code amendments

2.73 In the light of the above, the Code Committee has renumbered **Note 7 on Rule 21.1** as **Note 5 on Rule 21.1** and has amended it as set out in paragraph 2.80 of the PCP.

(iv) Respondents' comments on Practice Statement No 34 and the Executive's responses

2.74 Paragraph 3.2 of the new **Practice Statement No 34** states that the Executive will assess whether a contract is a material contract primarily by reference to its size in comparison to other contracts entered into by the offeree company and that the Executive will apply a low threshold for determining when a contract is material. One respondent requested further guidance in relation to the "low threshold" applied.

2.75 The Executive does not apply a single financial metric when assessing whether a contract is material. In particular, it does not refer to the financial metrics set out in (new) **Note 3 on Rule 21.1**, which are used to assess whether assets are of a material amount for the purposes of (new) **Rule 21.1(c)(iv)**. As a result, the Executive cannot provide any further guidance and should be consulted where necessary to determine whether a contract is material.

2.76 The same respondent requested confirmation that a minor amendment to a material contract will not constitute a restricted action.

2.77 The Executive will normally consider a minor amendment to a material contract to be in the ordinary course of the offeree company's business (even if the contract itself is not in the ordinary course of the offeree company's business) and agrees that such an amendment will not normally be a restricted action. The Executive has added a new paragraph 3.5 to **Practice Statement No 34** to this effect.

- 2.78 One respondent requested guidance on the metrics or data that may be used in assessing whether a contract is of particular importance to the offeree company's business, as referred to in paragraph 3.3(c) of **Practice Statement No 34**.
- 2.79 In making such an assessment, the Executive will seek to understand whether the contract has a disproportionate importance to the offeree company's business, even if the offeree company regularly enters into other similar contracts. For example, an intellectual property licence that the offeree company relies on (as licensee) to provide its day-to-day services would be of particular importance to the offeree company's business even if the offeree company regularly enters into other intellectual property licences, and so seeking to amend or terminate that licence could be restricted by **Rule 21.1(a)**.
- 2.80 With regard to amendments more generally, the Executive will take into account the nature of any proposed amendments to the relevant contract. If the proposed amendments are favourable to the offeree company, the Executive would be more likely to agree that the proposed amendments are not restricted by **Rule 21.1(a)**.
- 2.81 One respondent asked the Executive to confirm that the matters set out in paragraph 3.3 of **Practice Statement No 34** are not exhaustive and that matters such as "the frequency with which the offeree company has entered into similar contracts" will be applied with a degree of flexibility, particularly in relation to a contract that an offeree company may enter into in the ordinary course of being a company but which is not part of its day-to-day business.
- 2.82 The Executive agrees that the matters set out in paragraph 3.3 of **Practice Statement No 34** are not exhaustive. Whilst the Executive will consider each of those matters in determining whether a contract is in the ordinary course of the offeree company's business, some matters may be less important than others depending on the nature of the contract.
- 2.83 Two respondents proposed that a compromise agreement entered into with a departing director or employee should be capable of being a contract entered into in the ordinary course of the offeree company's business.
- 2.84 The Executive agrees that such an agreement will normally be regarded as being in the ordinary course of the offeree company's business and has amended paragraph 4.5 of **Practice Statement No 34** accordingly.
- 2.85 One respondent suggested that, when considering whether entering into a settlement agreement in relation to a commercial dispute is in the ordinary course of the offeree

company's business, the Executive should also take into account any legal advice that the offeree company has received.

2.86 The Executive agrees and has amended paragraph 4.6 of **Practice Statement No 34** accordingly.

(f) Offer-related employee retention arrangements

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?

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?

(i) Summary of proposals

2.87 **Section 2(g)** of the PCP proposed a new **Note 1(c) on Rule 21.1** to provide that the Panel may treat as a restricted action entering into offer-related employee retention arrangements (whether in cash or in the form of options over, or awards in respect of, offeree company shares) that:

- (a) relate to a period that is prior to the end of the offer period (other than arrangements that are considered to be in the ordinary course of the offeree company's business under **Note 1(a)** or **Note 1(b) on Rule 21.1**); and
- (b) are significant in value or relate to directors or senior management.

(ii) Respondents' comments on the new Note 1(c) on Rule 21.1

2.88 All of the respondents supported, or did not object to, the proposed **Note 1(c) on Rule 21.1**.

2.89 Three respondents asked who would be considered to be "senior management" for the purposes of the new **Note 1(c) on Rule 21.1** and noted that **Rule 16.2** (in relation to management incentivisation arrangements put in place by the offeror) refers to "management" (and not "senior management"). One of the respondents suggested that the new **Note 1(c)** should apply to individuals who report directly to the chair or chief executive officer of the offeree company. Another suggested that it should apply to directors and persons discharging managerial responsibility.

- 2.90 Two respondents suggested that an arrangement involving a director or member of senior management should not be a restricted action if it was not significant in value, particularly if the arrangement was a cash bonus.
- 2.91 Two respondents asked how the Panel would approach an offer-related retention arrangement that related to a period partially before and partially after the end of the offer period, e.g. a retention arrangement that would be paid after 12 months (irrespective of when the offer period ended) or, if earlier, three months following the offer becoming unconditional.
- 2.92 One respondent asked if the new **Note 1(c) on Rule 21.1** would be engaged at the point set out in the new **Note 9(a) on Rule 21.1**, i.e. where an offeree board is seeking one or more potential offerors for the company, the time at which a potential offeror makes a proposal with indicative offer terms.

(iii) *Code Committee's response*

- 2.93 Both **Rule 16.2** and the new **Note 1(c) on Rule 21.1** are intended to address the risk that a management incentivisation arrangement or retention arrangement (as applicable) could:
- (a) affect the amount of consideration available to offeree company shareholders under the offer; and/or
 - (b) be perceived to influence the actions of a relevant director or senior manager who benefits from the arrangements.
- 2.94 As the intention behind **Rule 16.2** and **Note 1(c) on Rule 21.1** is the same, the Code Committee agrees that the provisions should apply to the same individuals and has therefore amended the new **Note 1(c)** to refer to "management" rather than "senior management".
- 2.95 Paragraph 3.9 of [RS 2009/2](#) (*Miscellaneous Code amendments*) related to the definition of "management" and stated as follows:
- "The Code Committee understands that the Executive's current practice is not to apply a rigid definition of "management", but that it normally interprets the term as applying to directors and to senior executives who have the power to make managerial decisions affecting the future development and business prospects of the company."
- 2.96 The Code Committee understands that the Executive continues to take the same approach to the term "management" for the purposes of **Rule 16.2** and will take the same approach for the purposes of **Note 1(c) on Rule 21.1**. The individuals who are regarded as "management" will be different for each offeree company but will generally include, as

a minimum, the board of directors and any executive management committee (or similar) and the Executive has not found the term to cause problems for practitioners. The Code Committee expects that advisers will continue to consult the Executive if it is unclear which individuals should be regarded as “management”.

- 2.97 The new **Note 1(c) on Rule 21.1** states that putting in place offer-related retention arrangements may be a restricted action where they are significant in value or relate to directors or management, i.e. an offer-related arrangement in relation to a director or member of management may be a restricted action even where it is not significant in value. One of the concerns that **Note 1(c)** is intended to address is the risk that retention arrangements could be perceived to influence the actions of the directors and members of management who benefit from them. This would be a risk even if the arrangements were not significant in value in the context of the offer as the arrangements could still be significant in value to the individual. Paragraph 5.3 of the new **Practice Statement No 34** sets out various matters that the Executive will consider when determining whether entering into retention arrangements for the benefit of directors or management should be regarded as a restricted action. The Code Committee understands that if, in the light of those matters, the Executive considered that the risk of the retention arrangement influencing the actions of the relevant director or manager was low, it would normally agree that the relevant arrangement should not be regarded as a restricted action.
- 2.98 The Code Committee considers that an offer-related retention arrangement that related to a period partially before and partially after the end of the offer period would be considered on its facts in the light of the origin of the proposal and the date on which the retention arrangement would become payable:
- (a) If the arrangement had been proposed by the offeree board without substantive input from the offeror and would become payable at or around the date on which the offer becomes unconditional, it is likely that the arrangement would be considered solely under **Note 1(c) on Rule 21.1**.
 - (b) If the arrangement had been proposed by the offeror, it is likely that the arrangement would be considered solely under **Rule 16.2**.
 - (c) If the arrangement had been negotiated and agreed between the offeree board and the offeror to provide both parties with comfort in relation to the retention of key employees and would become payable after a fixed period of time following the date on which the offer becomes unconditional, the arrangement might be considered under both **Note 1(c) on Rule 21.1** and **Rule 16.2** (although, if there was only one offeror, the Panel would normally consent to the arrangement for the purposes of **Rule 21.1** under **Rule 21.1(e)(ii)** if that offeror provided its consent).

The Code Committee has made a minor amendment to the new **Note 1(c) on Rule 21.1** to make it clear that it will apply to any offer-related retention arrangement that relates to a period that is, in whole or in part, prior to the end of the offer period.

2.99 The Code Committee confirms that, under the new **Note 9(a) on Rule 21.1**, where an offeree board is seeking one or more potential offerors for the company, the relevant period will not normally begin (and **Rule 21.1(a)** and **Note 1(c) on Rule 21.1** will not apply) until a potential offeror makes a proposal with indicative offer terms.

(iv) *Code amendments*

2.100 In the light of the above, the Code Committee has introduced the new **Note 1(c) on Rule 21.1** as proposed in paragraph 2.91 of the PCP, subject to the following minor amendments:

“1. ~~Employee incentive~~ Incentive and retention arrangements

...

(c) *The Panel must be consulted where the board of the offeree company proposes to put in place offer-related ~~employee~~-retention arrangements (other than arrangements that are considered to be in the ordinary course of the offeree company’s business under Note 1(a) or Note 1(b)) that will relate to a period that is (in whole or in part) prior to the end of the offer period, whether in cash or in the form of options over, or awards in respect of, shares in the offeree company. Where those arrangements are significant in value or relate to directors or ~~senior~~ management, the Panel may ~~not~~ regard entering into those arrangements as a restricted action.”.*

(v) *Respondents’ comments on Practice Statement No 34*

2.101 One respondent proposed that the Executive should also take into account any change to the individual’s role when considering whether an offer-related retention arrangement should be regarded as a restricted action.

2.102 One respondent requested guidance on how the Executive considers that practitioners should distinguish between:

- (a) putting in place offer-related retention arrangements under **Note 1(c) on Rule 21.1**; and
- (b) entering into or amending directors’ service contracts under **Note 4 on Rule 21.1**.

2.103 Two respondents noted that an offeree board and an offeror may agree an unallocated cash bonus pool that can be used by the offeree board in its discretion for cash-based retention arrangements. The respondents asked how the Executive would consider such an arrangement under **Note 1(c) on Rule 21.1**, given that certain of the matters set out

in paragraph 5.3 of the new **Practice Statement No 34** would not be known in relation to the proposed arrangement.

(vi) *The Executive's response*

2.104 The Executive agrees that it would take into account any change to the individual's role when considering whether an offer-related retention arrangement should be regarded as a restricted action and has amended paragraph 5.3 of **Practice Statement No 34** accordingly.

2.105 Where an offer-related retention arrangement is implemented under existing contractual arrangements, such that there is no amendment to the individual's service contract, it would arguably not be restricted under **Rule 21.1(a)** at present. This will now be addressed in the new **Note 1(c) on Rule 21.1**. However, if it was proposed to amend a director's service contract to implement an offer-related retention arrangement that the Executive had agreed was not a restricted action under **Note 1(c)**, the Executive would normally agree that the amendment was in the ordinary course of the offeree company's business under **Note 4 on Rule 21.1**.

2.106 If an offeree board and an offeror agreed an unallocated cash bonus pool for cash-based retention arrangements which was:

- (a) significant in value, i.e. 1% or more of the value of the offeree company calculated by reference to the price of the offer; or
- (b) used for arrangements with directors or management,

the matters in paragraph 5.3 of **Practice Statement No 34** would have to be considered when known.

(g) *Minor and consequential amendments*

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?

(i) *Summary of proposals*

2.107 **Section 2(h)** of the PCP proposed certain minor and consequential amendments to:

- (a) the current **Rule 21.1(d)** and **Rule 21.1(e)**, which would be renumbered as **Rule 21.1(f)** and **Rule 21.1(g)** respectively;
- (b) the current **Note 1 on Rule 21.1** (*Details to be included in circular or announcement*), which would be renumbered as **Note 6 on Rule 21.1**;
- (c) **Note 4 on Rule 21.1** (*Service contracts*); and
- (d) the cross-reference to **Rule 21.1(d)(i)** in **Rule 3.1**.

2.108 In addition, and consistent with the Code Committee's policy of removing provisions from the Code if they are no longer required, **Section 2(h)** proposed to delete the following provisions:

- (a) **Note 3 on Rule 21.1** in relation to interim dividends; and
- (b) **Note 6 on Rule 21.1** in relation to pension schemes.

(ii) Respondents' comments

2.109 The respondents were generally supportive of, or had no comments on, the proposals.

2.110 One respondent considered that **Note 6 on Rule 21.1** in relation to pension schemes should be retained on the basis that it provides helpful context for when the offeree company entering into an arrangement with the trustees of its pension scheme could be a restricted action under **Rule 21.1(a)**, although the respondent acknowledged that such circumstances will rarely arise.

2.111 One respondent proposed that the Code should expressly state that a service contract with a new member of management would be considered to be a contract entered into in the ordinary course of the offeree company's business.

(iii) Code Committee's response

2.112 The Code Committee understands that the Executive is only rarely consulted in relation to the application of **Rule 21.1** to a proposed arrangement between an offeree company and the trustees of its pension scheme. Where the Executive has been consulted in relation to such arrangements, they are typically being proposed in the context of the offeree company's normal management of its pension scheme and are in the ordinary course of the offeree company's business.

2.113 The Code Committee considers that an arrangement between the offeree company and the trustees of the offeree company's pension scheme could, exceptionally, be restricted by **Rule 21.1(a)** as either a material contract entered into outside the ordinary course of

the offeree company's business or an action which may result in the frustration of an offer or possible offer. The Notes on **Rule 21.1** are intended to address common scenarios and the Code Committee considers that, as arrangements with the trustees of the offeree company's pension scheme are entered into by the offeree company during the relevant period only rarely, it is unnecessary for this to be the subject of a Note on **Rule 21.1**.

2.114 If an arrangement between the offeree company and the trustees of the offeree company's pension scheme was restricted by **Rule 21.1(a)**, the Panel would normally give its consent to the offeree company entering into that arrangement if the offeror consented to the offeree company doing so, as provided in **Rule 21.1(e)(ii)**.

2.115 The restrictions in **Rule 21.1(a)** do not apply to an arrangement between an offeror and the trustees of the offeree company's pension scheme (as such an arrangement does not involve an action by the offeree board). The Code Committee understands that such arrangements are common in the context of an offer and does not propose any amendments to the Code in this respect.

2.116 The Code Committee agrees that a service contract with a new member of management would be a contract entered into in the ordinary course of the offeree company's business. The Code Committee has amended **Note 4 on Rule 21.1** so that it refers to both directors' and managers' service contracts, i.e. a new or amended service contract with a manager with terms that constitute an abnormal increase in the individual's emoluments or a significant improvement in the terms of service will not normally be considered to be outside the ordinary course of the offeree company's business where it results from a genuine promotion or new hire.

2.117 If it was proposed to amend a manager's service contract to implement an offer-related retention arrangement that the Executive had agreed was not a restricted action under **Note 1(c) on Rule 21.1**, the Executive would normally agree that the amendment was in the ordinary course of the offeree company's business under **Note 4 on Rule 21.1**.

(iv) *Code amendments*

2.118 In the light of the above, the Code Committee has:

(a) amended **Note 4 on Rule 21.1** as proposed in paragraph 2.92 of the PCP, subject to the following minor amendments:

"4. Service contracts

The Panel will regard entering into or amending a service contract with, or creating or varying the terms of employment or appointment of, a director or manager as entering into or amending a material contract outside the

ordinary course of the offeree company's business for the purpose of Rule 21.1 if the new or amended contract or terms constitute an abnormal increase in the director's or manager's emoluments or a significant improvement in the terms of service, unless the increase or improvement results from a genuine promotion or new appointment or hire.”;

- (b) amended:
 - (i) the current **Rule 21.1(d)** and **Rule 21.1(e)**, which have been renumbered as **Rule 21.1(f)** and **Rule 21.1(g)** respectively;
 - (ii) the current **Note 1 on Rule 21.1**, which has been renumbered as **Note 6 on Rule 21.1**; and
 - (iii) the cross-reference to **Rule 21.1(d)(i)** in **Rule 3.1**,
as proposed in paragraph 2.92 of the PCP; and
- (c) deleted **Note 3** and **Note 6 on Rule 21.1**, as proposed in paragraph 2.93 of the PCP.

3. Period for which Rule 21.1(a) applies

(a) Definition of the “relevant period”

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

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?

(i) Summary of proposals

3.1 **Section 3(c)** of the PCP proposed an amendment to provide that the restrictions in **Rule 21.1(a)** apply during the “**relevant period**”, which would be defined in the new **Rule 21.1(b)** as the period from the earlier of:

- (a) an approach by a potential offeror to the offeree board; and
- (b) the beginning of the offer period,

until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected.

(ii) Respondents’ comments

3.2 All but one of the respondents supported, or did not object to, the proposed new definition of the “relevant period”.

3.3 One respondent proposed as an alternative that a potential offeror should be required to indicate within two days of the unequivocal rejection of its approach by the offeree board whether it either intended to put forward a revised proposal or was no longer considering an offer. If the potential offeror confirmed that it was no longer interested in making an offer, the relevant period would end immediately. If the potential offeror confirmed that it intended to put forward a revised proposal, it would be given a further five days to do so and if it did not do so the relevant period would then end. The respondent considered that this alternative proposal would achieve the same objective as the proposal set out in **Section 3(c)** of the PCP, whilst also providing for an earlier release of the offeree board from the restrictions in **Rule 21.1(a)** if the potential offeror had no intention of making a further approach.

3.4 One respondent who supported the proposed new definition of the relevant period noted that **Practice Statement No 32** (which the Executive proposed to withdraw if the new **Rule 21.1(b)** was introduced as proposed) provides that:

- (a) the Executive “normally” considers that the restrictions in **Rule 21.1(a)** will continue to apply until 5.00 pm on the second business day following the unequivocal rejection of an approach; and
- (b) the Executive should be consulted if the offeree board intends to take any action that may be restricted by **Rule 21.1(a)** following the unequivocal rejection of an approach.

The respondent suggested that the new **Rule 21.1(b)** should be drafted in similar terms to provide the Panel with a degree of flexibility.

(iii) Code Committee’s response

- 3.5 The Code Committee considers that the Executive’s current practice of determining that the restrictions in **Rule 21.1(a)** fall away at 5.00 pm on the second business day following the unequivocal rejection of an approach (as set out in **Practice Statement No 32**) provides too short a window of time for the potential offeror to make a further approach to the offeree board in order to ensure that the restrictions in **Rule 21.1(a)** continue to apply.
- 3.6 Whilst the respondent’s alternative proposal would provide seven days for a rejected potential offeror to complete any work required to support an increased proposal, it would still require a rejected potential offeror to have assessed whether it remained interested in considering an offer within two calendar days (which may in some cases be shorter than the two business day period provided by the Executive’s current practice). If the alternative proposal were implemented, the Code Committee considers that many potential offerors would state that they were still interested in making an offer at the end of the initial two day period in order to take advantage of the additional five day period. This would mean that, in most cases, the restrictions in **Rule 21.1(a)** would continue to apply for seven days following the unequivocal rejection of an approach, i.e. the outcome would, in practice, be the same as the proposal put forward in the PCP. As a result, the Code Committee does not consider that introducing the additional complexity inherent in the alternative proposal would be proportionate.
- 3.7 The Code Committee understands that the Executive normally considers the restrictions in **Rule 21.1(a)** to cease to apply immediately if a rejected potential offeror informs the offeree board that it is no longer interested in making an offer. If a rejected potential offeror chooses to inform the offeree board that it is no longer interested in making an offer before the end of the seven day period referred to in the new **Rule 21.1(b)**, the restrictions in **Rule 21.1(a)** will therefore cease to apply immediately.

3.8 The Code Committee understands that, whilst **Practice Statement No 32** allows for flexibility as to when the Executive will normally agree that the restrictions in **Rule 21.1(a)** cease to apply following the unequivocal rejection of an approach, in practice the Executive has rarely, if ever, utilised this flexibility. The Code Committee agrees with the Executive's practice of determining that the restrictions in **Rule 21.1(a)** should fall away after a fixed period following the offeree board's unequivocal rejection of the approach and considers that providing flexibility within the terms of the new **Rule 21.1(b)** would undermine the clarity that the proposal aims to provide.

(iv) Code amendments

3.9 In the light of the above, the Code Committee has introduced the new **Rule 21.1(b)** as proposed in paragraph 3.19 of the PCP.

3.10 As noted in paragraph 1.18 above, the Executive will withdraw **Practice Statement No 32** on the implementation date.

(b) Competing offerors

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?

(i) Summary of proposals

3.11 **Section 3(d)** of the PCP proposed a new **Note 7 on Rule 21.1** to provide that, where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the offeree board or, if earlier, when that offeror is publicly identified in an announcement.

(ii) Respondents' comments

3.12 All of the respondents supported, or did not object to, the proposed **Note 7 on Rule 21.1**.

(iii) Code amendments

3.13 In the light of the above, the Code Committee has introduced the new **Note 7 on Rule 21.1** as proposed in paragraph 3.28 of the PCP.

(c) Relevant period where the offeree board is seeking a potential offeror or where a purchaser is sought for a controlling interest

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?

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?

(i) Summary of proposals

3.14 **Section 3(e)** of the PCP proposed a new **Note 9 on Rule 21.1** to provide that:

- (a) where the offeree board is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms; and
- (b) the Panel should be consulted at an early stage to determine when the relevant period will begin for a potential offeror where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

(ii) Respondents' comments

3.15 All of the respondents supported, or did not object to, the proposed **Note 9 on Rule 21.1**.

3.16 One respondent sought further guidance on what would constitute "a proposal with indicative offer terms" and asked:

- (a) if the Panel would consider that a potential offeror had made a proposal with indicative offer terms if it had provided a price range or indicative premium to the prevailing share price of the offeree company; and
- (b) whether the restrictions in **Rule 21.1(a)** would apply if a potential offeror had committed resources and incurred costs in relation to due diligence, even if it had not proposed indicative offer terms.

(iii) Code Committee's response

3.17 The Code Committee understands that an offeree board may choose to seek potential offerors as part of a broader strategic review, which may be undertaken when the offeree company is under financial pressure.

3.18 Where the offeree board is seeking a potential offeror for the offeree company, an initial interested response (which would constitute an approach even if it did not contain

indicative offer terms) is likely to be followed by a period of due diligence by the potential offeror. The due diligence process may be lengthy and there can be no certainty that it will lead to the potential offeror making a proposal.

3.19 If the offeree board were to be subject to the restrictions in **Rule 21.1(a)** throughout this period, they could restrict a number of actions that an offeree board might wish to take, including raising capital or disposing of parts of the offeree company's business, even if the offeree board considered that such an action was the best course available to secure the financial stability of the offeree company, with the result that the offeree board might need to seek consent to an action from multiple potential offerors. For that reason, where the offeree board is seeking a potential offeror, the Code Committee considers that the restrictions in **Rule 21.1(a)** should not apply where the potential offeror has begun due diligence but has not proposed indicative offer terms.

3.20 The Code Committee considers that "indicative offer terms" would not be limited to the offeror having proposed a specific offer price and that a price range or a quantified indicative premium to the prevailing share price could constitute indicative offer terms. The offeree board or offeror should consult the Panel if there is any doubt as to whether a proposal contains indicative offer terms.

(iv) Code amendments

3.21 In the light of the above, the Code Committee has introduced the new **Note 9 on Rule 21.1** as proposed in paragraph 3.41 of the PCP.

(d) Minor and consequential amendments

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?

(i) Summary of proposals

3.22 **Section 3(f)** of the PCP proposed minor and consequential amendments to:

- (a) **presumption (7) of the definition of "acting in concert"**; and
- (b) **Note 3 on Rule 9.1.**

(ii) Respondents' comments

3.23 All of the respondents supported, or did not object to, the proposals.

(iii) *Code amendments*

3.24 In the light of the above, the Code Committee has amended:

- (a) **presumption (7) of the definition of “acting in concert”**; and
- (b) **Note 3 on Rule 9.1,**

as proposed in paragraph 3.42 of the PCP.

4. Application of Rule 21.1 to a reverse takeover

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?

(a) Summary of proposals

4.1 **Section 4** of the PCP proposed a new **Note 8 on Rule 21.1** to provide that, where an offer is, or a possible offer would be, 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.

(b) Respondents' comments

4.2 All of the respondents supported, or did not object to, the proposal.

4.3 One respondent asked how the Panel would apply **Rule 21.1** where an offeror in a reverse takeover proposed to pay a dividend during the relevant period. The respondent noted that it was proposed to delete the current **Note 3 on Rule 21.1** (*Interim dividends*) on the basis that, if an offeree board were to agree to pay an interim dividend during the relevant period other than with the agreement of the offeror, the appropriate remedy would be for the offeror or potential offeror to have the right to reduce the offer consideration by the amount of the dividend. The respondent noted that this remedy would not be available to the offeree company in relation to a dividend paid by the offeror in the context of a reverse takeover. The respondent suggested that, in the context of a reverse takeover, the Panel should be willing to grant a dispensation from the restriction on offer-related arrangements in **Rule 21.2** to allow the offeree board to seek a contractual commitment from the offeror in relation to the dividends that the offeror would be permitted to pay during the relevant period.

4.4 The respondent also asked for clarification on how **Rule 21.1** would apply to a share buyback proposed by the offeror in the context of a reverse takeover.

4.5 The same respondent asked for confirmation that, consistent with the new **Rule 21.1(b)** and the new **Note 7 on Rule 21.1**, the new **Note 8 on Rule 21.1** would apply so that the restrictions in **Rule 21.1(a)** would apply to the board of the reverse takeover offeror from the earlier of the offeror:

- (a) making an approach to the offeree board; and
- (b) being publicly identified in an announcement.

(c) Code Committee's response

- 4.6 The Code Committee remains of the view that the current **Note 3 on Rule 21.1** is no longer required insofar as it relates to dividends paid by an offeree company, as the offeror or potential offeror can exercise its right to reduce the offer consideration by the amount of the dividend. However, it agrees with the respondent that this remedy would not be relevant in relation to a dividend paid by the offeror in the context of a reverse takeover. The Code Committee understands that, on reflection, following the introduction of the new **Note 8 on Rule 21.1**, the Executive would normally be willing to grant a limited dispensation from **Rule 21.2** to allow the offeree board to seek a contractual commitment from the offeror in relation to the dividends that the offeror would be permitted to pay during the relevant period.
- 4.7 The Code Committee understands that the Executive would consider a proposed share buyback by a reverse takeover offeror in the same way that it would consider a proposed share buyback by an offeree company. The Executive would consider whether the proposed share buyback would be in the ordinary course of the reverse takeover offeror's business, taking into account the matters set out in the new **Note 2 on Rule 21.1**.
- 4.8 If a reverse takeover offeror had made a "no increase statement", the Executive would consider whether the announcement of the amount of the proposed share buyback was material new information that may have the effect of increasing the value of the offer. If so, as described in **Note 1 on Rule 32.1**, the offeror would not be permitted to announce the share buyback (unless it had specifically reserved the right to set aside the no increase statement in certain circumstances and those circumstances had arisen).
- 4.9 The Code Committee agrees that, consistent with the new **Rule 21.1(b)**, under **Note 8 on Rule 21.1** the restrictions in **Rule 21.1(a)** would apply to the board of the reverse takeover offeror from the earlier of the offeror:
- (a) making an approach to the offeree board; and
 - (b) being publicly identified in an announcement.
- 4.10 If the offeree board made the initial approach to the offeror in relation to a reverse takeover, the Code Committee understands that, consistent with **Rule 21.1(b)** and the new **Note 8 on Rule 21.1**, the Executive would treat the relevant period as beginning upon that approach.

(d) Code amendments

- 4.11 In the light of the above, the Code Committee has introduced the new **Note 8 on Rule 21.1** as proposed in paragraph 4.11 of the PCP.

5. **Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation**

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?

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?

(a) Summary of proposals

5.1 **Section 5** of the PCP proposed a new **Note 10 on Rule 21.1** to provide that, other than in exceptional circumstances, the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

5.2 Paragraph 5.6 of the PCP noted that, in addition to **Rule 21.1**, a number of protections apply in relation to the sanction of a scheme of arrangement, namely:

- (a) in deciding whether to seek to sanction a scheme, the directors of the offeree company are subject to fiduciary duties to act in the best interests of the company and its shareholders;
- (b) any shareholders in the offeree company who do not support the board's decision to seek to sanction the scheme can attend the sanction hearing and make representations to the court as to why the court should not sanction the scheme; and
- (c) most importantly, the court has the discretion to decide whether to sanction the scheme at the hearing. In considering this matter, the court will have regard to any new facts or developments since the date of the shareholder meetings (including the emergence of a new competing offer or the revision of an existing competing offer). Furthermore, at the sanction hearing, counsel for the offeree company is under a duty to draw to the attention of the court any such new facts or developments.

(b) Respondents' comments

5.3 All but one of the respondents:

- (a) supported or did not object to the proposed **Note 10 on Rule 21.1**; and
 - (b) did not have any comments on the Executive's guidance in Section 9 of the new **Practice Statement No 34** as to how it would normally interpret "exceptional circumstances" for the purpose of **Note 10 on Rule 21.1**.
- 5.4 The respondent who disagreed with the proposed **Note 10 on Rule 21.1** considered that the Panel should not be restricted from intervening in the sanctioning of a scheme of arrangement other than in exceptional circumstances and was concerned that the protections described in paragraph 5.6 of the PCP may not be sufficient to protect offeree company shareholders where their implicit consent to the offeree board seeking to sanction the scheme had been given without the benefit of full disclosure about the competing offeror. The respondent considered that the Panel should retain more flexibility to require an additional offeree company shareholder vote under **Rule 21.1** before the offeree board would be permitted to seek to sanction a scheme in a competitive situation.
- 5.5 One respondent who supported the proposal asked for confirmation that, where the Panel consented to the offeree board seeking to sanction a scheme of arrangement in a competitive situation, the restrictions in **Rule 21.1(a)** would continue to apply to other actions proposed by the offeree board.

(c) Code Committee's response

- 5.6 As seen above, there are a number of protections which apply in relation to the sanction of a scheme of arrangement in a competitive situation. If the offeree board sought to sanction the scheme, the court would have regard to any developments since the date of the shareholder meetings and could require a further shareholder approval, which would require a higher level of shareholder support than a shareholder approval required under **Rule 21.1(a)**. As noted in [RS 2022/3](#), certain respondents to [PCP 2022/3](#) (*The offer timetable in a competitive situation*) considered that, given the availability of these protections, the action of an offeree board seeking to sanction a scheme in a competitive situation should not be restricted by **Rule 21.1(a)**.
- 5.7 The Code Committee continues to be of the view that, in many circumstances, these protections will be sufficient to protect offeree company shareholders where a new competitive situation develops or an existing competitive situation changes between the date of offeree company shareholder approval of a scheme of arrangement and the offeree board seeking to sanction that scheme. The Code Committee also considers that it could cause uncertainty if the Panel retained greater flexibility to intervene when an offeree board seeks to sanction a scheme in a competitive situation. Therefore, the Code Committee considers that the restrictions in **Rule 21.1(a)** should apply only in exceptional

circumstances to an offeree board seeking to sanction a scheme in a competitive situation, as proposed in the PCP.

5.8 The Code Committee confirms that, where the Panel has consented to the offeree board seeking to sanction a scheme of arrangement in a competitive situation, the restrictions in **Rule 21.1(a)** will continue to apply in accordance with their terms to other actions proposed by the offeree board.

(d) Code amendments

5.9 In the light of the above, the Code Committee has introduced the new **Note 10 on Rule 21.1** as proposed in paragraph 5.22 of the PCP.

6. **Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel**

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?

(a) Summary of proposals

6.1 **Section 6** of the PCP proposed amendments to **Sections 3(b)(ii) and 3(b)(iii) of Appendix 7** to provide that, where an offeror is proceeding by way of a scheme of arrangement and has specified within the conditions to the scheme dates by which:

- (a) the shareholder meetings; or
- (b) the court sanction hearing,

must be held, those “**mini-long-stop dates**” should be capable of being extended not only with the agreement of the parties to the offer (as is currently the case) but also, in a competitive situation, with the consent of the Panel. A consequential amendment to **Section 5 of Appendix 7** was also proposed.

(b) Respondents’ comments

6.2 All of the respondents supported, or did not object to, the proposal.

(c) Code amendments

6.3 On reflection, the Code Committee considers that:

- (a) the description in **Sections 3(b)(ii) and 3(b)(iii) of Appendix 7** of the circumstances in which a mini-long-stop date may be extended should be clarified as follows (marked to show changes from those provisions as they were proposed to be amended in the PCP):

“a specific date by which the [shareholder meetings/court sanction hearing] must be held (unless extended by the offeror with the agreement of the parties to the offer-offeree company or, in a competitive situation, with the consent of the Panel)”; and

- (b) equivalent amendments to those set out in paragraph (a) above (in relation to the extension of mini-long-stop dates) should be made to **Section 3(b)(i) of**

Appendix 7 (in relation to the extension of long-stop dates), as follows (marked to show changes from the current provision):

“(b) The parties to the offer are permitted to include within the conditions to the scheme:

(i) a long-stop date by which the scheme must become effective (unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel);”, and

(c) equivalent amendments to those set out in paragraphs (a) and (b) above should be made to **Section 3(c)(ii) of Appendix 7** (in relation to the invocation or waiver of long-stop dates and mini-long-stop dates), as follows (marked to show changes from the current provision):

“(c) Any condition referred to in paragraph (b) above:

...

(ii) must not be capable of being invoked or waived after the date specified unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel;”.

The Code Committee has therefore amended those provisions accordingly, as set out in **Appendix B**.

6.4 In addition, the Code Committee has amended **Section 5 of Appendix 7** as proposed in paragraph 6.13(b) of the PCP.

7. Equality of information to competing offerors

(a) *Removal of the restriction on making general enquiries*

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

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?

(i) *Summary of proposals*

7.1 **Section 7(c)** of the PCP proposed to:

- (a) delete the restriction on general enquiries in **Note 1 on Rule 21.3**; and
- (b) amend **Rule 21.3(a)** so that it would require the offeree board to provide promptly to the requesting offeror or bona fide potential offeror both:
 - (i) all the information that has been provided to another offeror or potential offeror at the time of the request (regardless of whether the information was specifically requested); and
 - (ii) any further information that it provides to another offeror or potential offeror in the seven days following the request.

(ii) *Respondents' comments*

7.2 All of the respondents supported, or did not object to, the proposal to delete the restriction on general enquiries in **Note 1 on Rule 21.3**.

7.3 All but one of the respondents supported, or did not object to, the proposed amendment to **Rule 21.3(a)**. The remaining respondent agreed with the proposal in principle, but proposed that the offeree board should be required to continue to provide any information that it provides to another offeror or potential offeror to a requesting potential offeror for so long as it remains a bona fide potential offeror (rather than only for a period of seven days).

7.4 One respondent asked for confirmation that **Rule 21.3(a)** requires only that information that has been provided to another offeror or potential offeror is provided to a requesting offeror or bona fide potential offeror in the same format, i.e. where information has been provided orally in a meeting with the offeree company's management, **Rule 21.3** does

not require that information to be provided to a requesting offeror or bona fide potential offeror in writing.

(iii) *Code Committee's response*

- 7.5 As stated in paragraphs 7.9 and 7.10 of the PCP, the Code Committee considered whether a requesting offeror or bona fide potential offeror should be able to make a single request for information, which would require the offeree board to provide to the requesting party all information that it has given, or subsequently gives, to the other offeror or potential offeror. However, this proposal would, in practice, require the requesting offeror or bona fide potential offeror to inform the offeree board when it ceases to be interested in considering an offer. This is not normally required under the Code. The Code Committee continues to be of the view that a single weekly request creates an appropriate balance between reducing the administrative burden on the parties and ensuring that the offeree board's obligation to share information ceases after a proportionate period of time in the absence of a further request.
- 7.6 If a potential offeror who has made a request for information under **Rule 21.3(a)** chooses to inform the offeree board that it has ceased to be interested in considering an offer, the Code Committee understands that the Executive would consider the offeree board's obligation to share information immediately to come to an end.
- 7.7 The Code Committee confirms that **Rule 21.3(a)** requires that information that has been provided to another offeror or potential offeror is provided to a requesting offeror or bona fide potential offeror in the same format. Accordingly, the Code Committee has retained the requirement in **Rule 21.3(a)** for the offeree board to provide information to a requesting offeror or bona fide potential offeror "equally".
- 7.8 The Code Committee notes that **Practice Statement No 2** (*Rule 21.3 – Site visits and meetings with management*), provides as follows:
- "In the view of the Executive, Rule 21.3 extends to site visits and meetings with offeree company management in addition to information disclosed by other means. Accordingly, if one offeror or potential offeror has been afforded a site visit or granted access to management with a view to discussing the offeree company's business, an equivalent site visit or meeting with management must be granted to another offeror or bona fide potential offeror if it so requests."
- 7.9 The Code Committee understands that the Executive intends to update **Practice Statement No 2** to reflect the amendments made to **Rule 21.3**. In addition, the Executive intends to add the following as a new third paragraph:
- "The Executive considers that Rule 21.3 requires information to be provided to the requesting offeror or bona fide potential offeror in the same way that it was provided to the other offeror or potential offeror. In other words, information that was provided to the other offeror through a discussion with management (and has

not been provided to that offeror in writing) should be provided to the requesting offeror through an equivalent meeting with management.”.

(iv) *Code amendments*

7.10 In the light of the above, the Code Committee has:

- (a) deleted **Note 1 on Rule 21.3** and renumbered the remaining **Notes on Rule 21.3** accordingly, as proposed in paragraph 7.14(a) of the PCP; and
- (b) amended **Rule 21.3** as proposed in paragraph 7.14(b) of the PCP, subject to the retention of the word “equally”, as referred to in paragraph 7.7 above.

(b) **Management buy-outs and similar transactions**

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?

(i) *Summary of proposals*

7.11 **Section 7(d)** of the PCP proposed to amend **Rule 21.4** so that, in the case of a management buy-out or similar transaction, the offeror or potential offeror would be required, on request, promptly to provide the independent directors of the offeree company or its advisers with any information which has been provided, or is subsequently provided, by the offeror or potential offeror to external providers or potential providers of finance.

(ii) *Respondents' comments*

7.12 All of the respondents supported, or did not object to, the proposal.

(iii) *Code amendments*

7.13 In the light of the above, the Code Committee has amended **Rule 21.4** as proposed in paragraph 7.20 of the PCP, subject to the following minor amendment (to reflect the equivalent amendment made to **Rule 21.3(a)** as set out in paragraph 7.10(b)):

“21.4 INFORMATION TO INDEPENDENT DIRECTORS IN MANAGEMENT BUY-OUTS

If the offer or possible offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, equally and promptly provide the independent directors of the offeree company or its advisers with all information which has been, or is subsequently, provided by the offeror or potential offeror to external providers or potential providers of

finance (whether equity or debt) for the management buy-out or similar transaction.”.

(c) Conditions attached to the passing of information under Rule 21.3

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?

(i) Summary of proposals

7.14 **Section 7(e)** of the PCP proposed to amend the current **Note 2 on Rule 21.3** (which would be renumbered as **Note 1 on Rule 21.3**) to permit the passing of information under **Rule 21.3(a)** to be subject to a condition that the offeror or potential offeror receiving the information will not share the information with external providers or potential providers of finance without the consent of the offeree board, provided that such consent may not be unreasonably withheld.

(ii) Respondents’ comments

7.15 All of the respondents supported, or did not object to, the proposal.

7.16 One respondent asked if the offeree board would be considered to be unreasonably withholding its consent to the sharing of information if an offeror or potential offeror agreed to approach no more than a certain number of finance providers.

7.17 Another respondent suggested that **Note 1 on Rule 21.3** should include a statement that the offeree board should normally provide its consent to the onward disclosure of information if the finance provider enters into an agreement with the offeree company which imposes confidentiality obligations which are aligned with those agreed between the offeror or potential offeror and the offeree board.

(iii) Code Committee’s response

7.18 The Panel should be consulted if an offeror or potential offeror considers that an offeree board is unreasonably withholding its consent to the sharing of information with finance providers. The Executive will determine whether this is the case in the light of all the relevant circumstances.

7.19 The Code Committee understands that the Executive might consider an offeree board to be unreasonably withholding its consent if the offeror or potential offeror had agreed to approach no more than a certain number of potential finance providers. However, the appropriate number would depend on the size of the offer and the nature of the offeree company.

7.20 The Code Committee also understands that the Executive agrees that the offeree board should normally provide its consent to the onward disclosure of information if the potential finance provider enters into an agreement directly with the offeree company which imposes confidentiality obligations which are the same as those agreed between the potential offeror and the offeree board. However, the Code Committee does not consider that it is necessary to specify this in the Code.

(iv) Code amendments

7.21 In the light of the above, the Code Committee has amended the current **Note 2 on Rule 21.3** (which has been renumbered as **Note 1 on Rule 21.3**) as proposed in paragraph 7.29 of the PCP.

(d) Information provided to a purchaser of assets

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?

(i) Summary of proposals

7.22 **Section 7(f)** of the PCP proposed to amend the current **Note 5(b) on Rule 21.3** (which would become **Note 4(c) on Rule 21.3**) so that if an offeree board was in discussions regarding the sale of all or substantially all of the offeree company's assets prior to the "relevant period", **Rule 21.3(a)** will apply so as to require the offeree company to provide, on request, to an offeror or bona fide potential offeror only the information provided to the potential asset purchaser(s) after the beginning of the relevant period.

(ii) Respondents' comments

7.23 All of the respondents supported, or did not object to, the proposal.

(iii) Code amendments

7.24 In the light of the above, the Code Committee has amended the current **Note 5 on Rule 21.3** (which has been renumbered as **Note 4 on Rule 21.3**) as proposed in paragraph 7.36 of the PCP.

(e) Minor and consequential amendments

7.25 The Code Committee has made certain minor and consequential amendments to:

(a) the current **Note 3** and **Note 4 on Rule 21.3**, which have been renumbered as **Note 2** and **Note 3 on Rule 21.3**, respectively; and

(b) **Section 1(c) of Appendix 1**,

as proposed in paragraph 7.37 of the PCP.

(f) *Miscellaneous amendment*

7.26 Following the launch of the digital version of the Code, the Code Committee has made a minor amendment to **section 6(a) of the Introduction** to the Code to delete the reference to Practice Statements being available on the Panel's website. Whilst Practice Statements continue to be available on the [Takeover Panel website](#), the principal means of accessing Practice Statements is now via the [Takeover Code website](#) at code.thetakeoverpanel.org.uk.

APPENDIX A**Respondents to PCP 2023/1**

1. Chartered Governance Institute UK & Ireland
2. Institute of Chartered Accountants in England and Wales
3. Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales
4. Quoted Companies Alliance
5. Share Plan Lawyers Group
6. Andrew Tinkler
7. UK Finance

APPENDIX B

Amendments to the Code

INTRODUCTION

6 INTERPRETING THE CODE

...

(a) Interpreting the Code — guidance

...

In addition, the Executive may from time to time publish Practice Statements which provide informal guidance as to how the Executive usually interprets and applies particular provisions of the Code in certain circumstances. Practice Statements do not form part of the Code and, accordingly, are not binding and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. ~~Practice Statements are available on the Panel's website.~~

DEFINITIONS

Acting in concert

...

Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(7) ~~the directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent~~ a possible offer (together with their close relatives and the related trusts of any of them) from the beginning of the relevant period as defined in Rule 21.1(b) or, where Note 9 on Rule 21.1 applies, from the beginning of the offer period. (See also Note 5);

Rule 3

3.1 BOARD OF THE OFFEREE COMPANY

The board of the offeree company must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offer) are fair and reasonable and the substance of such advice must be made known to its shareholders. (See also Rule 15.2 and Rule 21.1(df)(i).)

Rule 9

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

...

NOTES ON RULE 9.1

...

3. Directors of a company

Directors of a company which is subject to an offer or a possible offer will be presumed to be acting in concert ~~during an offer period or when they have reason to believe that a bona fide offer might be imminent~~ from the beginning of the relevant period as defined in Rule 21.1(b) or, where Note 9 on Rule 21.1 applies, from the beginning of the offer period. The normal provisions of this Rule will apply in these circumstances. At other times, directors of a company are not presumed to be acting in concert in relation to control of the company of which they are directors. Subject to the constraints imposed by the Rules, directors are, so far as the Code is concerned, free to deal in the shares of their company. The Panel reserves the right, however, to examine situations closely should the actions of the directors suggest that they may be acting in concert.

Rule 21

21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED RESTRICTION ON ACTIONS BY THE BOARD OF THE OFFEREE COMPANY

(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, Except with the approval of shareholders in general meeting or the consent of the Panel, during the relevant period the board of the offeree company must not, without the approval of the shareholders in general meeting, take or agree to take:

(i) any restricted action; or

(ii) any other action which may result in the frustration of any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits, or;

(b) The "relevant period" is the period from the earlier of:

(i) an approach by a potential offeror to the board of the offeree company; and

(ii) the beginning of the offer period,

until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected. See also Note 7 and Note 9.

(c) A "restricted action" means any of the following, to the extent that it is not in the ordinary course of the offeree company's business:

(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;

(ii) issue or grant options in respect of any unissued shares;

~~(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;~~

(i) issuing, or transferring out of treasury, shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;

(ii) redeeming or purchasing shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;

(iii) granting options over or awards in respect of shares in the offeree company;

~~(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, disposing of or acquiring (in one or more transactions) assets of a material amount; or~~

~~(v) enter entering into, amending or terminating a material contract contracts otherwise than in the ordinary course of business.~~

~~(bd) The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within be restricted by Rule 21.1(a).~~

~~(ee) The Panel will normally agree to disapply give its consent under Rule 21.1(a) if:~~

~~(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(eg));~~

~~(ii) the offeror consents to the taking of the proposed action ~~proposed to be taken by the board of the offeree company;~~~~

~~(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the taking of the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting;~~

~~(iv) the proposed action is in pursuance of a contract entered into before the beginning of the relevant period ~~referred to in Rule 21.1(a)~~ or another pre-existing obligation; or~~

~~(v) a decision to take the proposed action had been taken and ~~before the beginning of the period referred to in Rule 21.1(a) which:~~~~

~~(A) has been partly or fully implemented before the beginning of that the relevant period; or~~

~~(B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business.~~

~~(df) Where shareholder approval is to be sought in general meeting for the taking of a proposed action ~~in accordance with Rule 21.1(a)~~ the board of the offeree company must:~~

~~(i) the board of the offeree company must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable;~~

~~(ii) the Panel must be consulted consult the Panel regarding the date of the general meeting; and~~

(iii) ~~the board of the offeree company must send a circular to shareholders containing the details set out in Note 4.6 as soon as practicable after the announcement of the proposed action.~~

~~(eg) Where the Panel has agreed to disapply Rule 21.1(a) given its consent to a proposed action because the taking of the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must publish an announcement containing the details set out in Note 4.6. (See also Rule 30.1(c), pursuant to which the Panel may require a copy of the announcement (or a document which includes the contents of the announcement) to be sent to the persons referred to in that Rule.)~~

NOTES ON RULE 21.1

51. Established share option schemes~~incentive and retention arrangements~~

~~(a) Where the offeree company proposes to~~ The Panel will normally consider the proposed grant of options over, or awards in respect of, shares, to be in the ordinary course of the offeree company's business if the timing and level of which are in accordance with:

~~(i) its the offeree company's normal practice under an established share option incentive scheme;~~ or

~~(ii) the offeree company's proposed practice under a new incentive scheme, provided that the proposed practice was publicly disclosed before the relevant period.~~

~~the Panel will normally give its consent or if the grant of options over, or awards in respect of, shares is in connection with a genuine promotion or new appointment or hire.~~

~~(b) Likewise, the~~ The Panel will normally give its consent to consider the issue of new shares or to the transfer of shares from treasury to satisfy the exercise of options or the vesting of awards under an established share option incentive scheme to be in the ordinary course of the offeree company's business.

~~(c) The Panel must be consulted where the board of the offeree company proposes to put in place offer-related retention arrangements (other than arrangements that are considered to be in the ordinary course of the offeree company's business under Note 1(a) or Note 1(b)) that will relate to a period that is (in whole or in part) prior to the end of the offer period, whether in cash or in the form of options over, or awards in respect of, shares in the offeree company. Where those arrangements are significant in value or relate to directors or management, the Panel may regard entering into those arrangements as a restricted action.~~

2. Redemption or purchase of own shares

A redemption or purchase of its own shares in line with defined limits announced or established before the relevant period will normally be in the ordinary course of the offeree company's business.

3. Interim dividends

~~The declaration and payment of an interim dividend by the offeree company, otherwise than in the normal course, during an offer period may in certain circumstances be contrary to General Principle 3 and this Rule in that it could effectively frustrate an offer. Offeree companies and their advisers must, therefore, consult the Panel in advance.~~

23. Material Assets of a material amount

(a) In assessing whether a disposal or acquisition is of assets of a material amount, the Panel will normally have regard to:

- (i) ~~the aggregate~~-value of the consideration to be received or given compared with the ~~aggregate~~ market value of ~~all the equity shares~~ share capital of the offeree company; and, where appropriate,
- (ii) ~~the value of the assets to be disposed of or acquired~~ compared with the value of the assets of the offeree company; and
- (iii) ~~the operating profit (i.e. profit before tax and interest and excluding exceptional items) attributable to the assets to be disposed of or acquired~~ compared with ~~that~~ the operating profit of the offeree company.

For these purposes:

“assets” will normally mean total assets less current liabilities (other than short-term indebtedness); and

“equity share capital” will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

- (i) ~~for the market value of the shares~~ equity share capital of the offeree company, ~~the aggregate market value of all the equity shares of the company at the close of business either:~~
 - (A) on the business day immediately preceding the start of the offer period; or
 - (B) if there is no offer period, on the business day immediately preceding the announcement of the transaction; and
- (ii) for assets and profits, the figures stated in the latest published audited consolidated accounts ~~of the offeree company~~ or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

(c) The Panel may 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 or the nature of the relevant assets.

~~(cd) Relative values—A relative value of 10% or more will normally be regarded as being of a material amount, although. A relative values lower value of less than 10% may also be considered of a material amount if the asset is—assets are of particular significance to the offeree company.~~

~~(d) If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.~~

(e) If a number of disposals and/or acquisitions (other than disposals or acquisitions in the ordinary course of the offeree company’s business) are or, following the last proposed action, will be, in aggregate, of a material amount, the last relevant disposal or acquisition and any subsequent relevant disposal or acquisition will be treated as a restricted action. Disposals and acquisitions will be aggregated together disregarding any negative values.

~~(e) — The Panel should be consulted in advance where there may be any doubt as to the application of the above.~~

4. Service contracts

The Panel will regard ~~amending or entering into or amending~~ a service contract with, or creating or varying the terms of employment or appointment of, a director or manager as entering into or amending a material contract “otherwise than in outside the ordinary course of the offeree company’s business” for the purpose of this Rule 21.1 if the new or amended contract or terms constitute an abnormal increase in the director’s or manager’s emoluments or a significant improvement in the terms of service. ~~This will not prevent any such, unless the increase or improvement which results from a genuine promotion or new appointment or hire but the Panel must be consulted in advance in such cases.~~

75. Inducement fees

The Panel will normally ~~consent to the offeree company entering into~~ consider an inducement fee arrangement ~~with a counterparty to a transaction to which Rule 21.1 applies, provided that: proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under Note 1 or Note 2 on Rule 21.2) to be a material contract outside the ordinary course of the offeree company’s business if the aggregate value of the inducement fee or fees that may be payable is:~~

~~(a) — the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and~~

~~(b) — the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no~~

~~(a) — where the inducement fee arrangement is entered into prior to the announcement by an offeror of a firm intention to make an offer, more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with Note 3); or~~

~~(b) — where the inducement fee arrangement is entered into after the announcement by an offeror of a firm intention to make an offer, more than 1% of the value of the offeree company calculated by reference to the price of the offeror’s offer (or, if there are two or more offerors, the first offer) at the time of the announcement made under Rule 2.7.~~

6. Pension schemes

~~This Rule may apply to proposals affecting the offeree company’s pension scheme(s), such as proposals involving the application of a pension scheme surplus, a material increase in the financial commitment of the offeree company in respect of its pension scheme(s) or a change to the constitution of the pension scheme(s). The Panel must be consulted in advance in relation to such proposals.~~

16. Details to be included in circular or announcement

Any circular sent to shareholders ~~in accordance with~~ under Rule 21.1(df)(iii) or announcement published ~~in accordance with~~ under Rule 21.1(eg) must contain the following:

(a) full details of the proposed action;

(b) *the opinion of the board of the offeree company on the proposed action and the board's reasons for forming its opinion;*

(c) *if Rule 21.1(df)(i) applies, the substance of the advice given to the board of the offeree company ~~as to whether the financial terms of the proposed action are fair and reasonable;~~*

(d) *information about the current status of the offer or possible offer; and*

(e) *any other information necessary to enable shareholders to make an informed decision.*

The offeree company must also publish the circular or announcement, and any contracts entered into in connection with the proposed action, on a website. (See also Rule 26.1(a).)

7. Competing offerors

Where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.

8. Reverse takeovers

Where an offer is, or a possible offer would be, a reverse takeover, Rule 21.1 will also apply during the relevant period to the board of the offeror as if the offeror were an offeree company and vice versa.

9. Relevant period where the offeree board is seeking a potential offeror or where a purchaser is sought for a controlling interest

(a) Where the board of an offeree company is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms.

(b) The Panel should be consulted at an early stage to determine when the relevant period will begin for a potential offeror where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

10. Sanction of a scheme of arrangement in a competitive situation

Other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the board of the offeree company seeks to sanction a scheme of arrangement in a competitive situation.

...

21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS

(a) Any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. The board of the offeree company must, on request, equally and promptly provide an offeror or bona fide potential offeror with all information that it has provided, and that it provides in the seven days following the request, to another offeror or potential offeror.

(b) The requirement in Rule 21.3(a) will usually ~~normally~~ only apply when:

(i) ~~there has been a public~~ an announcement of the existence of the offeror or potential offeror to which information has been ~~given~~ provided;
or,

(ii) ~~if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror.~~

NOTES ON RULE 21.3

1. ~~General enquiries~~

~~The less welcome offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor.~~

21. **Conditions attached to the passing of information**

(a) ~~The passing of information pursuant to this~~ under Rule 21.3(a) should not be made subject to any conditions other than those relating to:

(i) ~~the confidentiality of the information passed. This may include a condition that the offeror or potential offeror will not share the information with external providers or potential providers of finance (whether equity or debt) without the consent of the offeree company, provided that such consent may not be unreasonably withheld;~~

(ii) ~~reasonable restrictions forbidding prohibiting the use of the information passed to solicit customers or employees; and, or~~

(iii) ~~the use of the information solely in connection with an offer or potential possible offer.~~

Any such conditions ~~imposed~~ should be no more onerous than those imposed ~~upon~~ on any other offeror or potential offeror.

(b) ~~A requirement that a party~~ the offeror or potential offeror sign a hold harmless letter in favour of a ~~firm of accountants or other~~ third party will normally be acceptable provided that ~~any~~ each other offeror or potential offeror has been required to sign a letter in similar form.

32. **Management buy-outs**

If the offer or possible offer is a management buy-out or similar transaction, the information which ~~this Rule 21.3~~ requires to be given to ~~competing offerors~~ another offeror or potential offerors ~~offeror~~ is that information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror. ~~The Panel expects the directors of the offeree company who are involved in making the offer to~~ must co-operate with the independent directors of the offeree company and its advisers in the assembly of this information.

43. **~~Mergers and reverse~~ Reverse takeovers**

Where an offer or possible offer is a reverse takeover, an offeror or potential offeror for either party to ~~such an offer or possible offer~~ the reverse takeover will be entitled to

receive information which has been given by ~~such that~~ party to the other party to the reverse takeover.

54. Information given provided to a purchaser of assets

(a) ~~If, during the relevant period (as defined in Rule 21.1(b)), the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its the offeree company's assets (excluding cash and cash equivalents) during an offer or following the date on which the board of the offeree company has reason to believe that a bona fide offer might be imminent, information given provided by the board of the offeree company to the potential asset purchaser(s) must, on request, be given provided on the basis set out in Rule 21.3 to an offeror or bona fide potential offeror.~~

(b) This requirement will usually normally only apply when:

(i) there has been a public an announcement of the discussions between the offeree company and the potential asset purchaser(s); or,

(ii) if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the board of the offeree company and the potential asset purchaser(s) are having such discussions.

~~(bc) If a the board of the offeree company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its the offeree company's assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s) (including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror the relevant period, Rule 21.3(a) will apply only in relation to information provided to the potential asset purchaser(s) after the beginning of the relevant period.~~

21.4 INFORMATION TO INDEPENDENT DIRECTORS IN MANAGEMENT BUY-OUTS

If the offer or possible offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, equally and promptly provide the independent directors of the offeree company or its advisers with all information which has been, or is subsequently, provided by the offeror or potential offeror to external providers or potential providers of finance (whether equity or debt) for the buy-out management buy-out or similar transaction.

Appendix 1

APPENDIX 1

RULE 9 WAIVERS

...

1 INTRODUCTION

...

- (c) Rule 19, Rule 20, Rule 21.3, Rule 24.15, Rule 26, and Rule 30, where relevant, apply equally to documents, and announcements and information published, and information provided, in connection with a transaction which is the subject of the Rule 9 waiver.

Appendix 7

APPENDIX 7

SCHEMES OF ARRANGEMENT

...

3 EXPECTED SCHEME TIMETABLE

...

- (b) The parties to the offer are permitted to include within the conditions to the scheme:

(i) a long-stop date by which the scheme must become effective (unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel);

(ii) a specific date by which the shareholder meetings must be held (unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the shareholder meetings to be set out in the scheme circular; and

(iii) a specific date by which the court sanction hearing must be held (unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the court sanction hearing to be set out in the scheme circular.

- (c) Any condition referred to in paragraph (b) above:

...

(ii) must not be capable of being invoked or waived after the date specified unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel; and

...

5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME

- (a) If the parties to the offer include any condition to the scheme in accordance with Section 3(b) above and any such condition is not capable of being satisfied by the date specified in that condition, the offeror must make an announcement as soon as practicable and, in any event, by no later than 8.00 am on the business day following the date so specified, stating whether the offeror has invoked that condition, waived that condition or, with the agreement of the offeree company or

with the consent of the Panel, specified a new date by which that condition may be satisfied.

APPENDIX C

Practice Statement No 34

PRACTICE STATEMENT NO 34

RULE 21.1 – RESTRICTION ON ACTIONS BY THE BOARD OF THE OFFEREE COMPANY

1. Introduction

- 1.1 Rule 21.1(a) of the Takeover Code provides that, during the relevant period, the board of the offeree company must not, ~~without~~ except with the approval of shareholders in general meeting or the consent of the Panel, take or agree to take:
- (a) any restricted action; or
 - (b) any other action which may result in the frustration of any offer or bona fide possible offer.
- 1.2 Rule 21.1(b) defines the “relevant period” for the purposes of Rule 21.1.
- 1.3 Rule 21.1(c) sets out certain actions that are a “restricted actions action” unless to the extent that the relevant action is not in the ordinary course of the offeree company’s business.
- 1.4 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to the taking of a proposed action that would otherwise be restricted by Rule 21.1(a).
- 1.5 This Practice Statement provides guidance on:
- (a) matters that the Panel Executive will take into account when determining:
 - (i) whether an action listed in ~~paragraphs (i) to (v) of Rule 21.1(c)~~ (i) to (v) is in the ordinary course of the offeree company’s business; and
 - (ii) whether to give its consent to a proposed action that would be restricted under Rule 21.1(a) on the basis that a decision to take the proposed action had been taken and partly implemented before the beginning of the relevant period, as described in Rule 21.1(e)(v);
 - (b) how the Executive applies Note 7 on Rule 21.1, which describes how Rule 21.1 will apply where there is more than one offeror;
 - (c) how the Executive applies Note ~~9(b)~~ on Rule 21.1, ~~which provides that the Panel must be consulted determine when in relation to the relevant period will begin where the offeree board is seeking a potential offeror or where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a controlling interest in a company; and~~
 - (d) how the Executive normally interprets “exceptional circumstances” when determining under Note 10 on Rule 21.1 whether it will consent to the restrictions in Rule 21.1(a) not being applied ~~under Note 10 on Rule 21.1~~ where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.
- 1.6 Rule 21.1(d) provides that the Panel must be consulted in advance if any proposed action may be restricted by Rule 21.1(a). Offeree boards and advisers to offeree companies are

encouraged to consult the Executive at an early stage, including to determine whether a proposed action is in the ordinary course of the offeree company's business.

2. Disposals and acquisitions of assets

(a) Disposals and acquisitions of assets for cash

- 2.1 Rule 21.1(c)(iv) provides that disposing of or acquiring (in one or more transactions) assets of a material amount, other than in the ordinary course of the offeree company's business, is a restricted action.
- 2.2 Note 3 on Rule 21.1 describes how the Panel will assesses whether assets being disposed of or acquired are of a material amount.
- 2.3 The matters that the Executive will consider when determining whether a disposal or acquisition is in the ordinary course of the offeree company's business include whether:
- (a) the proposed transaction falls within the established business model of the offeree company, taking into account:
 - (i) the frequency of similar transactions and the size of the proposed transaction in comparison to previous similar transactions; and
 - (ii) how the offeree company describes its business strategy to its shareholders;
 - (b) the terms of the proposed transaction and the basis of valuation are in line with normal practice by reference to either a broader market (for example, where the offeree company proposes to dispose of or acquire liquid securities) or previous transactions entered into by the offeree company or its peers; and
 - (c) the proposed transaction is part of an ongoing strategy, rather than a strategic change ~~such as entering or exiting a geographic region or a particular business area.~~
- 2.4 The Executive will also take into account the cumulative effect of disposals and acquisitions during the relevant period on the offeree company's assets and business as a whole. Where the offeree company has agreed to make a large number of disposals or acquisitions during the relevant period, each of which is not restricted by Rule 21.1(a) because it is:
- (a) not material individually; ~~and or~~
 - (b) in the ordinary course of the offeree company's business,
- the Executive may nonetheless consider that the ~~offeree company's~~ overall level of disposals and acquisitions is no longer in the ordinary course of ~~its~~ the offeree company's business.
- 2.5 If so, any subsequent disposal or acquisition would ~~no longer not~~ be regarded as being in the ordinary course of the offeree company's business ~~and, if also of a material amount (either individually or when aggregated with other disposals and acquisitions entered into outside the ordinary course of the offeree company's business during the relevant period), would be a restricted action.~~ As a result, for the purpose of Note 3(e) on Rule 21.1, all subsequent disposals and/or acquisitions would be aggregated together with any disposals and/or acquisitions that the Executive had already agreed should be aggregated under Note 3(e) (i.e. any disposal and/or acquisition entered into earlier in the relevant period that was not in the ordinary course of the offeree company's business but was not individually material).

~~2.6 This means that, for example, an investment trust company:~~

- ~~(a) would generally be able to carry out its normal disposals and acquisitions of investments; but~~
- ~~(b) would not be able to sell an abnormal proportion of its investment portfolio without seeking the Executive's consent under Rule 21.1(e).~~

(b) Acquisitions of assets for the issue of shares or convertible securities

2.6 Rule 21.1(c)(i) provides that issuing shares or convertible securities, other than in the ordinary course of the offeree company's business, is a restricted action.

2.7 The Executive will consider the following matters when determining whether the issue of shares or convertible securities as consideration for an acquisition of assets is in the ordinary course of the offeree company's business:

- (a) the frequency with which the offeree company has issued shares or convertible securities as consideration for an acquisition of assets;
- (b) the size of the proposed issue of shares or convertible securities in comparison to historical issues of shares or convertible securities as consideration for an acquisition of assets;
- (c) the terms of the proposed issue of shares or convertible securities, including whether they will be issued at market value; and
- (d) whether the acquisition of assets itself would be in the ordinary course of the offeree company's business, taking into account the matters set out in paragraph 2.3.

3. Contracts - general

3.1 Rule 21.1(c)(v) provides that entering into, amending or terminating a material contract, other than in the ordinary course of the offeree company's business, is a restricted action.

3.2 The Executive will ~~assesses~~ whether a contract is a material contract primarily by reference to its ~~financial~~ size in comparison to other contracts entered into by the offeree company. The Executive ~~applies~~ will apply a low threshold for determining when a contract is material.

3.3 If a contract is a material contract, the Executive will assess whether it is in the ordinary course of the offeree company's business by reference to all the relevant circumstances, including:

- (a) the frequency with which the offeree company has entered into similar contracts;
- (b) the size of the contract in comparison to similar contracts entered into by the offeree company;
- (c) whether the contract is of particular importance to the offeree company's business;
- (d) the terms of the contract and whether any non-market terms are onerous on the offeree company; and
- (e) if relevant, the costs associated with terminating or amending the contract.

3.4 The application of the approaches described in paragraphs 3.2 and 3.3(b) means that the size of a contract will be relevant in assessing both whether it is a material contract

and (if so) whether it is in the ordinary course of the offeree company's business. For example, if a contract represents a large proportion of the offeree company's revenue (and is therefore a material contract), its size may mean that it is not in the ordinary course of business even though the contract relates to the offeree company's normal products or services (such that the offeree company regularly enters into smaller similar contracts).

3.5 The Executive will normally consider a minor amendment to a material contract to be in the ordinary course of the offeree company's business (even if the contract itself is not in the ordinary course of the offeree company's business). As a result, a minor amendment to a material contract will not normally be a restricted action.

4. Contracts - specific examples

(a) Introduction

4.1 In addition to the matters relevant to all contracts set out in Section 3, the Executive will take into account additional matters, as set out below, when considering whether certain types of contract are in the ordinary course of the offeree company's business.

(ab) Capital expenditure

4.2 Regular or maintenance capital expenditure will normally be regarded as being in the ordinary course of the offeree company's business. In considering material "growth" capital expenditure (for example, capital expenditure required to enter a new product area or geographical market), the Executive will take into account the offeree company's historical approach to capital expenditure and whether the proposed capital expenditure and/or the related strategic decision had been publicly disclosed before the start of the relevant period.

(bc) Refinancing or raising new debt

4.3 Refinancing or raising new debt on normal market terms will ~~generally normally~~ be regarded as being in the ordinary course of the offeree company's business. The Executive may treat issuing new shares or securities that do not form part of the offeree company's equity share capital in the same way as raising new debt, depending on the nature of the rights attaching to the relevant shares or securities.

(cd) Property leases

4.4 Normal property lease management will ~~generally normally~~ be regarded as being in the ordinary course of the offeree company's business.

(de) Settlement agreements

4.5 ~~The Executive considers that~~ Rule 21.1(a) should not normally compromise the ability of the offeree board to achieve the best outcome for shareholders in relation to a commercial dispute and ~~it is likely that~~ entering into a settlement agreement in relation to a commercial dispute or a compromise agreement with a departing director or employee will normally be regarded as being in the ordinary course of the offeree company's business.

4.6 When considering whether that is the case, the Executive will take into account:

- (a) the financial impact of the settlement agreement or compromise agreement;
- (b) whether the relevant costs have been provided for in the offeree company's accounts or are covered by insurance; ~~and~~

(c) any legal advice received by the offeree company; and

(ed) any other likely impact on the offeree company.

5. Offer-related ~~employee~~ retention arrangements

5.1 Note 1(c) on Rule 21.1 provides that the Panel may ~~treat~~ regard as a restricted action entering into offer-related ~~employee~~ retention arrangements that:

(a) relate to a period that is (in whole or in part) prior to the end of the offer period ~~(and are not other than arrangements that are considered to be in the ordinary course employee incentivisation arrangements of the offeree company's business under Note 1(a) or Note 1(b) on Rule 21.1); and~~

(b) are significant in value or relate to directors or ~~senior~~ management.

5.2 The Executive ~~considers that will not normally regard~~ new offer-related ~~employee~~ retention arrangements ~~will not normally be regarded as~~ being significant in value where the aggregate value of the arrangements is no more than 1% of the value of the offeree company calculated by reference to the price of the offer.

5.3 Where the arrangements are for the benefit of directors or ~~senior~~ management or are significant in value, additional matters may be relevant in determining whether entering into the proposed arrangements ~~is~~ should be regarded as a restricted action. These may include:

(a) the change to the offeree company's aggregate employment costs;

(b) the terms of each individual retention arrangement, including the absolute value of the award;

(c) the proportion of the individual's annual remuneration that the proposed award represents;

(d) the expected offer timetable and the time at which the offeree board proposes to grant the award;

(e) the normal practice in the relevant industry or sector;

(f) the importance of the individual to the offeree company's business; ~~and~~

(g) any change to the individual's role within the offeree company's business; and

(gh) the views of the Rule 3 adviser.

6. Partial implementation of a decision to take a proposed action

6.1 Rule 21.1(e)(v) provides that the Panel will normally consent to a proposed action that would be restricted by Rule 21.1(a) where:

(a) a decision to take the proposed action had been taken; and

(b) that decision ~~has~~ had been partly implemented,

in each case, before the beginning of the relevant period.

6.2 In considering whether a decision to take a proposed action had been taken by the offeree board, the Executive will normally seek to determine whether the board had made an "in principle" decision.

- 6.3 If it had then, in ~~In~~ considering whether that “in principle” decision ~~has had~~ been partly implemented, the Executive will normally seek to determine whether the substantial commercial terms, and in particular the financial terms, ~~have had~~ been agreed between the parties. In some cases, the commercial terms may have been agreed at the time of the “in principle” decision and in other cases they may not have been agreed ~~at~~ until a later stage.
- 6.4 By way of example, in the context of a proposed disposal of assets by the offeree company by means of a competitive auction, the Executive considers that:
- (a) indicative, first round, non-binding bids based on only an assessment of an information memorandum will not normally be a sufficient basis for an “in principle” decision to undertake the proposed disposal to be partly implemented; and
 - (b) second round, binding bids which follow the completion of due diligence and have been accepted as a basis for entering into a sale and purchase contract will normally be a sufficient basis for an “in principle” decision to undertake the proposed disposal to be partly implemented.
- 6.5 Where the relevant action does not involve an agreement with a third party, the Executive will consider whether steps have been taken towards implementing the “in principle” decision. For example, in the context of a decision by the offeree board to grant options over shares, the Executive would consider whether the offeree board had taken steps towards implementing the grant, such as communicating the decision to the recipient of the options or preparing the required documentation.
- 7. ~~Application of Rule 21.1 where there is more than one~~ Competing offerors**
- 7.1 The restrictions in Rule 21.1(a) apply during the relevant period. Under Rule 21.1(b), the relevant period begins upon the earlier of:
- (a) an approach by a potential offeror to the board of the offeree company; and
 - (b) the beginning of the offer period.
- 7.2 Note 7 on Rule 21.1 provides that, where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.
- 7.3 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to a proposed action that would be restricted by Rule 21.1(a). The effect of Note 7 on Rule 21.1 is that, where there is more than one offeror, the Executive may agree to give its consent to a proposed action based on a combination of the circumstances set out in Rule 21.1(e).
- 7.4 For example, the offeree board may continue to take steps towards implementing a proposed action after it has received an approach from a potential offeror and later receive an approach from a second potential offeror. In such circumstances, the Executive may determine that the decision to take that action had been taken and partly implemented at a point in time after the offeree board received the approach from the first offeror, such that the decision was not partly implemented before the beginning of the relevant period for the first offeror. However, the decision may have become partly implemented before the offeree board received the approach from the second offeror, such that it was partly implemented before the beginning of the relevant period for the second offeror.
- 7.5 If, on the facts of the relevant case, the Executive determined that the decision to take the proposed action had been taken and partly implemented at a point in time between

the approach from the first offeror and the approach from the second offeror, it could permit the proposed action on the basis of a combination of, for example:

- (a) the first offeror having consented to the proposed action under Rule 21.1(e)(ii); and
- (b) the decision to take the proposed action having been taken and partly implemented under Rule 21.1(e)(v) before the approach from the second offeror.

7.6 Similarly, the disposals and/or acquisitions that are required to be aggregated for the purpose of Note 3(e) on Rule 21.1 are only those entered into during the relevant period. As the effect of Note 7 on Rule 21.1 is to give each competing offeror its own relevant period, the offeree board may therefore be required to aggregate different disposals and/or acquisitions for the purpose of Note 3(e) on Rule 21.1 for each offeror.

8. Relevant period where the offeree board is seeking a potential offeror or where a purchaser a buyer is being sought for a controlling stake interest

8.1 Note 9(a) on Rule 21.1 provides that where the offeree board is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms.

8.2 An offeror is not required to propose a specific offer price in order to be considered to have made a proposal with indicative offer terms. A proposal that included a price range or a quantified indicative premium to the prevailing share price could constitute a proposal with indicative offer terms. The offeree board or offeror should consult the Executive if there is any doubt as to whether a proposal contains indicative offer terms.

8.43 Note 9(b) on Rule 21.1 provides that the Panel should be consulted at an early stage to determine when the relevant period will begin where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

8.24 ~~By analogy with Note 9(a) on Rule 21.1, which provides when the relevant period will begin where an offeree board is seeking one or more potential offerors, the Executive considers that, in such circumstances, the relevant period will normally begin for a potential offeror when it makes a proposal to the selling shareholder setting out indicative terms for the purchase (i.e. indicative offer terms).~~

8.35 ~~However, if the offeree board is not aware that a buyer is being sought for a controlling stake, or is not aware of the current status of the discussions between the selling shareholder and potential purchasers, the Executive may agree that the restrictions in Rule 21.1(a) will apply only once the offeree board is made aware that the potential offeror has made an indicative proposal setting out terms.~~

8.46 The offeree board or the controlling shareholder should consult the Executive to discuss when the relevant period will begin where a ~~buyer~~ purchaser is being sought for a controlling stake interest.

9. Application of Rule 21.1(a) where an offeree board seeks to sSanction of a scheme of arrangement in a competitive situation

9.1 Note 10 on Rule 21.1 provides that, other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

9.2 The Executive will consider in the light of all the relevant facts whether there are exceptional circumstances, such that the restrictions in Rule 21.1(a) should apply to the offeree board seeking to sanction a scheme of arrangement in a competitive situation. Exceptional circumstances might exist if, for example, the Executive considered that the

offeree board was acting in a clearly unreasonable manner in seeking to sanction the scheme.

- 9.3 The Executive considers that the fact that the offeree board is seeking to sanction the lower of two competing offers, or that the competing offeror has had a limited time in which to make or revise its offer, would not of itself be regarded as exceptional circumstances.
- 9.4 If a competing offeror does not approach the offeree board, or does not otherwise make its interest in making an offer known, until after the shareholder meetings to approve the scheme of arrangement, the Executive will normally consent to the restrictions in Rule 21.1(a) not being applied under Rule 21.1(e)(v) on the basis that the offeree board's decision to seek to sanction the scheme was partly implemented before the beginning of the relevant period for the competing offeror (as determined in accordance with Note 7 on Rule 21.1).