Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

Further comments on PCP 2011/1

1. **Do you have any comments on the proposed new Rule 2.4 and the proposed new Note 3 on Rule 2.2?**

   See the comments in our main response.

   We consider that the words "or withdrawn" should be inserted after "and not unequivocally rejected" as an offeree should not be required to announce an approach from a potential offeror which was withdrawn before any announcement obligation under Rule 2.4(a) arose and an offeror which has clearly withdrawn is not a potential offeror.

2. **Do you have any comments on the proposed new Rule 2.6(a)?**

   As intended by the Code Committee, proposed Rule 2.6(c) makes it clear that it is the offeree alone which has the right to seek an extension of the 28 day PUSU deadline and not the potential offeror. Rule 2.6(a), however, suggests (because of the way it is drafted i.e. the obligations of the potential offeror) that it is a bilateral process (which clearly it is not). It would be helpful if Rule 2.6(a) could be reworded to clarify that seeking an extension is a unilateral process within the absolute control of the offeree but with the potential offeror being required to co-operate in that process.

3. **Do you have any comments on the possible alternative approach to the identification of potential offerors?**

   See the comments in our main response.

4. **Do you have any comments on the proposed new Rules 2.6(b), (d) and (e) and Rule 2.3(d)?**

   No comment.

5. **Do you have any comments on the proposed new Note 2 on Rule 2.6?**

   We note that, in order for the formal sale process exemption to apply, the offeree must say in its announcement that it is seeking potential offerors by means of a formal sale process. We consider this wording to be prescriptive as offerees will typically want to keep their options open in such an announcement by referring to a range of options which might include a formal sale process (more akin to a strategic review announcement as envisaged by Practice Statement No. 6). We believe that the Panel is aware that this will make this an exemption of only limited use in practice.

6. **Do you have any comments on the proposed new Rule 2.6(c) and Note 1 on Rule 2.6?**

We welcome the drafting in Rule 2.6 (c) (and the comment at paragraph 2.37 of the PCP) which make clear that the Panel will normally consent to an extension of the 28 day deadline if requested by the offeree. We also welcome the proposed wording in Note 1 on Rule 2.6 and note that it gives some flexibility on when such a request can be made. Both of these provisions give an important degree of control and flexibility to offeree companies.

We are concerned about the requirement for the offeree to announce the status of negotiations and the anticipated timetable for completion in any announcement about a new deadline. These matters (particularly the status of negotiations) are likely to be commercially sensitive and offerees will be concerned about making such information public, particularly vis a vis other potential bidders. We propose that instead of disclosing the status of negotiations, which could lead to a debate as to whether extensive disclosure is required, offerees be required to "comment on" the status of negotiations.

See also the comment made in answer to Question 2 above.

7. **Do you have any comments on the proposed amendments to Rule 2.8 and to the Note on Rules 35.1 and 35.2?**

We do not consider that a party which has made a statement to which Rule 2.8 applies should need the Panel's consent for the restrictions to fall away in the event that one of the standard carve-outs (particularly those in paragraphs 2(a)–(c)) applies. This is a real change of substance from the current rules which we do not consider to be necessary or desirable. We prefer the current approach of the restrictions falling away if one of the standard carve-outs applies, provided that the potential offeror has included the relevant carve out in its Rule 2.8 announcement. We see that the circumstances in note (d) should require Panel consent, but not those in notes (a), (b), (c) or (e).

8. **Do you have any comments on the proposed framework to be applied in circumstances where, following a requirement to make an offer being triggered under Rule 2.2(c) or (d), a potential offeror ceases actively to consider making an offer, or on the proposed new Note 4 on Rule 2.2?**

See the comments in our main response. Note 4 on Rule 2.2 seems to us problematic. It is one thing if the relevant "potential offeror" was such at the moment of the leak or immediately before (and where a dispensation can be said to be granted by the Panel if no disclosure is required) but quite another if the potential offeror is no longer a potential offeror (eg it ceased to be such some days, weeks, months or even longer beforehand). We suggest that it should be clear that a party that is able to demonstrate that it is clearly not a potential offeror, that no work has been undertaken by it on its behalf at all on a transaction since the relevant rejection or withdrawal, should not be subject to those provisions; it is not a "potential offeror". If this is not accepted, then in respect of a person in this category the three month period applicable where the offeree requests that dispensation be given should not apply.

Other comments on proposed changes to Rule 2 and related amendments (there is no specific question on these):

- How does the proposed additional wording to Note 1 on new Rule 2.5 (that, once an offeror has announced a firm intention to make an offer, it can no longer exercise any right to set aside a statement on the level of consideration or any right to vary the form or mix of consideration) inter-relate with an offeror's right to revise its offer? We assume that this is not intended to preclude the availability of a consideration for a period only, eg via mix and match opportunities or for example an underwritten cash alternative which is closed after a period?

- Why is the proposed amendment to Rule 7.1 limited to potential offerors when named by an offeree? Should it not also apply to when a potential offeror announces a possible offer? The amendments should be consistent with new Note 1 to Rule 2.4 and Note 12 on Rule 8).

9. Do you have any comments on the proposed new Rule 21.2?

We are concerned that the restrictions on offer-related arrangements will operate unfairly on a takeover which is a true "merger of equals" which could be structured so that either party is technically the offeree or the offeror. It would be unsatisfactory and inequitable in these situations for arrangements which impose obligations on the offeror to be permitted but not for reciprocal arrangements to be permitted to be imposed on the offeree. It would be useful if the Panel could reserve the right in such circumstances to give consent to disapplying the restriction (as envisaged by the opening words of proposed Rule 21.2 (a)).

We believe a number of undertakings given by offerees should not be caught under the prohibition.

- undertakings by offerees to provide information to offerors regarding the satisfaction of conditions or the offerors' ability to waive conditions (eg a confirmation on a closing date that no material adverse change has arisen), should be permitted: these commitments pre-date "virtual bids" and implementation agreements and under no circumstances could impede a competing bid or other offeree action

- agreements relating to discretion to be exercised by the offeree in relation to employee share schemes and bonuses are innocuous agreements given that Rule 21.1 will continue to prevent share issues and unusual grants. Again, they could never impede a competing bid or other offeree action beyond their limited remit but the position on discretion exercise is relevant for cash confirmation assumptions so frequently needs clarity up front

- an agreement by an offeree that it will cease to pursue a possible acquisition or disposal should not be prohibited, nor other conduct of offeree business commitments, where the offeror's approach was contingent on that: the frustrating action rules are not broad enough to catch all such circumstances where an offeror could properly need protection to proceed at a particular price with a recommended offer; and

- offeree companies are on occasions asked by potential offerors not to disclose price sensitive information to the offeror during the due diligence process, so as not to prevent the potential offeror from making market purchases as a result of the insider dealing regime. This should, we suggest, be added as another permissible offeree undertaking.

In addition to the examples above, there may well be others and we suggest therefore that there should be an express discretion for the Panel to allow other kinds of agreements on a case-by-case basis. This could be achieved by a new paragraph (f): "(f) any agreement or arrangement entered into with the agreement of the Panel".

The confirmation in paragraph 3.8 of the PCP that the Panel does not intend for agreements which the offeror and offeree enter into in the ordinary course of their businesses to be subject to the general prohibition on offer-related arrangements is helpful and we would ask that it be included in the Code, together with a confirmation that these documents will not need to be disclosed or put on display.

10. Do you have any comments on the proposed new Note 1 on Rule 21.2?

Whilst we welcome the "white knight" exemption, we consider that it should not be limited to one potential white knight. If, for example, offeror 1 makes a hostile announcement of a firm intention to make an offer, the offeree will be able to offer an inducement fee to white knight offeror 2 at the time it makes an announcement of a firm intention to make an offer. If an offeror 3 emerges (whether or not offeror 2 is still an offeror) we see no reason why the offeree should not also be able to offer that offeror an inducement fee at the time it makes an announcement of a firm intention to make an offer, subject to ensuring that the aggregate paid by the offeree does not exceed 1%.

11. Do you have any comments on the proposed new Note 2 on Rule 21.2?

See the comments on the formal sale process exemption made in response to Question 5.

12. Do you have any comments on the proposed new Note 3 on Rule 21.2?

A number of agreements which could fall within the definition of "offer-related arrangement" are usually entered into on a whitewash, for example a placing agreement. We note the comments in paragraph 3.25 of the PCP about sale and purchase and subscription agreements but whitewashes also arise in a number of other situations, for example on a share buyback. We do not think it is satisfactory for the parties to such transactions to have to seek a derogation in order to enter into the agreements and suggest therefore that the proposed Note 3 be amended with an express carve out whereby ordinary course arrangements giving rise to the whitewash will normally be permitted.

13. Do you have any comments on the proposed new Note 4 on Rule 21.2?

No comment.

14. Do you have any comments on the proposed amendments to Appendix 7?

We have a number of comments on the proposed amendments to Section 3 of Appendix 7:

- Paragraph (a) provides that where the offeree board withdraws its recommendation it will have no obligation to send an offer document to shareholders and others. Note 2 on Section 8 provides that in this situation, the offeror will be free to switch to an offer but provides no timetable or long-stop date for doing so.

- Paragraphs (d) and (e) are unclear. Paragraph (d) provides that the requirement on the offeree to implement the scheme in accordance with the published timetable will cease on the occurrence of specified events. Paragraph (e) goes on to provide that if the offeree wants to announce a revised timetable, it must obtain the approval of the offeror. There seem to us to be several points that need to be addressed or clarified. Would the fact that the original timetable will not be adhered to in itself constitute a "new timetable"? Should the announcement of a revised timetable need offeror approval when the announcement of the original timetable does not? What happens if there is a change to the timetable for a reason other than those set out in (d), for example, an event outside of the offeree's control or a change to the timetable after the court sanction hearing? The is a particularly important circumstance to address (ie offeror consent should not always be needed).

On proposed new Section 14, should the references to Rule 13.5(a) and 13.6 be to 13.4(a) and 13.5 respectively?

15. Do you have any comments on the proposed new Note 1 on Rule 25.2 or the related amendments?

No comment.

16. Do you have any comments on the proposed new Rules 24.16(a) and 25.8?

It would be clearer if proposed Rule 24.16(a)(vii) referred to fees and expenses expected to be incurred in relation to "other services". Otherwise it will be unclear if it is opening up detailed disclosure of, for example, post offer integration expenses.

17. Do you have any comments on the proposed new Note 1 on Rule 24.16?

No comment: this is a matter for financing bank comments.

18. Do you have any comments on the proposed new Rule 24.16(b) and Note 2 on Rule 24.16?

No further comment.

19. Do you have any comments on the proposed new Rules 24.16(c) and (d)?

Our members have requested further guidance on the determination of "materiality" under Rules 24.16(c) and (d).

20. Do you have any comments on the proposed deletion of Rule 24.2(b) and Note 6 on Rule 24.2 and the related amendments?

We query whether reference to the "company" in (a) is inappropriate? Should not all offerors be caught?

21. Do you have any comments on the proposed new Rule 24.3(a) and the related amendments?

We query the rationale for deleting the second and third paragraphs of the current definition of "regulated market"? Is the deletion of the second paragraph due to the fact that all relevant countries have implemented Directive 2004/39/EC? We consider that the references to the lists of regulated markets maintained on the EU Commission and Panel websites are useful.

22. Do you have any comments on the decision not to require *pro forma* balance sheets to be included in offer documents?

We support the decision.

23. Do you have any comments on the proposed new Rule 24.3(c) regarding the disclosure of ratings and outlooks?

No comment.

24. Do you have any comments on the proposed new Rule 24.3(f)?

It would be useful to reflect in the Notes to the Code on this Rule the confirmation given in paragraph 6.30 of the PCP about the level of financing disclosure required by private equity bidders.

25. Do you have any comments on the proposed new Rules 26.1 and 26.2 or the related amendments?

We consider that the new requirement in proposed Rule 26.1 to publish a number of documents on the website "from the time of the announcement of a firm intention to make an offer" will be difficult to comply with in practice and believe it should be extended to noon on the next business day (consistent with current Rule 19.11 website requirements) or at least the close of business on the day of announcement.

The comment in paragraph 6.34 of the PCP that financing documents should be put on display without redaction seems to us unduly to fetter the Panel's discretion in this area and is a stricter policy than that applying to other display documents. We believe the Panel should say that this will "generally" be its policy.

26. Do you have any comments on the proposed new Rule 24.2?

No comment.

27. Do you have any comments on the proposed new Note 3 on Rule 19.1?

We consider that requiring a party to adhere to a statement of intention is the wrong approach and instead consider that the rules should reflect the actual test applied by the Panel, namely (as set out in paragraph 7.10 of the PCP) whether, on the basis of the information available to the party and its advisers when the statement was made, it was reasonable for the party to make the statement at that time. We believe that the consequence of this requirement will be to reduce disclosure regarding intentions. This is clearly a "post Kraft" rule, which is unnecessary in policy terms and inappropriate in particular in fettering disclosure of plans for places of business and employees required to be disclosed under the Takeovers Directive. It also risks cutting across merger benefit statements, which reflect intentions but which cannot be guaranteed absent full information.

We think it is important that the Code remains clear that circumstances can arise unexpectedly which justify change of intention.

The reference to "public statement" needs to be clarified. In paragraphs 7.7 and 7.8 of PCP 2011/1, the Code Committee states that the "holding true" requirement should, where appropriate, also apply to statements made ... in the offer document/circular, an announcement **or otherwise** (emphasis added). Could a statement made during discussions with a trade union and/or workforce amount to a "public statement"?

28. Do you have any comments on the proposed new structure for the obligations in relation to the publication, content and display of documents?

We believe the references in new Rule 24.1, Rule 25.1 and Rule 32.1 should probably be to Rule 30.1 (instead of Rule 19.8) and Rule 30.4 (instead of Rule 19.11).

29. Do you have any comments on the proposed new definition of "employee representative"?

This proposed new definition is too wide. Larger companies in particular may, under this definition, have a large number of employee representatives around the world and become under disproportionate obligations to circulate (and pay the costs of) statements. Complying with the Code requirements for informing employee representatives and making documents available to them could prove to be unduly expensive and cumbersome. We recommend that the definition provide that where the obligation would impose disproportionate obligations on the offeree, it can consult the Panel which may grant a dispensation.

30. Do you have any comments on the proposed new Note 6 on Rule 20.1?

No comments

31. Do you have any comments on the proposed new Rules 2.12(a) and (d) and second sentence of Rule 32.1(b)?

No comment.

32. Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6?

The proposed wording in Rule 25.9 and Rule 32.6 is unclear. An offeree will not necessarily know at the time that it receives an employee representative's opinion whether it is within 14 days of the offer becoming or being declared unconditional. It would be clearer for the deadline date to be 14 days before Day 81.

33. Do you have any comments on the proposed new Rule 19.2(a)(iii)?

Changes agreed.

34. Do you agree that the suggested amendments to section 2(a) of the Introduction to the Code would be consistent with the amendments to the Code proposed in this PCP?

Yes.

35. Do you have any comments on the proposed new definition of "offer period"?

Changes agreed.

36. Do you have any comments on the proposed new Rule 13.4?

Changes agreed.

Date: 31 May 2011