

Takeover Panel consultation paper PCP 2015/1

Response of the 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

Below are the views of the 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 (the "Working Party") on the Panel Consultation Paper PCP 2015/1.

The Law Society of England and Wales is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The City of London Law Society (CLLS) represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

Introductory comments

In our view, the objective of formalisation and clarification of the treatment of dividends paid by offeree companies to their shareholders is helpful and we welcome it.

Q1 Should Note 4 on Rule 2.5, Note 4 on Rule 2.7 and Note 5 on Rule 24.3 be introduced, and Note 1 on Rule 2.5 amended, as proposed?

We agree with the proposals in so far as they relate to Rule 2.7 announcements and offer documents (save as mentioned below), however we have a particular concern in relation to their application to possible offer announcements.

Where a possible offer announcement includes a price, in our view the intention of the offeror is typically (although not always) that offeree shareholders would not be entitled to retain any subsequent dividend payments (and language may be included, for example, referring to shares being acquired "with all rights attaching thereto" or similar). Assuming the objective of the proposed changes is to provide greater clarity to the market as to whether the price can be reduced in the event of subsequent dividends, rather than imposing a requirement on offerors to include a specific reservation, an alternative approach would be for there to be a presumption that the offeror has a right

to reduce its offer to reflect dividends unless the possible offer announcement specifies to the contrary. This would reduce the risk of possible offerors inadvertently failing to include an appropriate reservation. Alternatively, the wording of the Code could be amended to specify that if a price is included in a possible offer announcement, the offeror must confirm whether or not it reserves the right to reduce the price by reference to any future dividends (with an equivalent requirement also applying to Rule 2.7 announcements and offer documents). Explicitly stating this requirement on the face of the rules would achieve the objective of clarity but would also reduce the risk of offerors inadvertently failing to include an appropriate reservation. If an announcement did not include an appropriate statement, the Panel would be able to require the offeror to issue a clarificatory announcement to the market in the same way as for other failures to comply with Code disclosure requirements.

Our concern is that possible offerors may be in a position neither they nor the market would expect if they inadvertently fail to include the necessary reservation in a possible offer announcement. In that case (as the PCP notes) they would have little ability to restrict the offeree company from making future dividend payments, and may be unable to reduce the offer price in the event such payments are made, resulting in them bearing the financial cost of future dividend payments by the offeree even when the normal expectation would be otherwise. This could leave open the possibility of an offeree board taking advantage of a failure to include the reservation by paying an opportunistic dividend (particularly where the potential offeror is unwelcome and may thereby be discouraged from pursuing an offer).

Q2 Should Note 5 on Rule 2.5 and Note 6 on Rule 32.2 be introduced as proposed?

We assume that, to the extent the price is reduced, the Panel would not view this as a revision to the terms of the offer and therefore that such a reduction could take place at any time during the offer process.

We would also welcome clarification of the approach the Panel would take in the following situation. If an offeror made a possible offer announcement that included a price but they failed to include an appropriate reservation, under the revised rules they would not then be permitted to adjust that price to reflect subsequent dividends. However, it appears that if they went on to make a no increase statement and a dividend was paid by the offeree company they would then be obliged to reduce the price under their offer to take account of this. If our second alternative mentioned above (explicit confirmation of whether or not the offeror reserves the right) were adopted, this potential inconsistency would not arise as the no increase statement would need to be consistent with the initial announcement.

Q3 Should Note 5 on Rule 6, Note 4 on Rule 9.5 and Note 9 on Rule 11.1 be amended as proposed?

Our only minor comment on these proposals is that it may be helpful to clarify the meaning of a dividend being “announced” and whether there should be a distinction between interim and final

dividends in this context, with final dividends being linked to shareholder approval to avoid any suggestion that proposing a final dividend in an AGM notice could be construed as “announcing” it.

Proposed Practice Statement

The inclusion of key guidance and commentary from the consultation paper in the proposed new practice statement is helpful and we welcome it. In general terms, our view is that taking this approach helps companies and their advisers to more easily identify relevant guidance on particular topics, in particular given that the practice statements are now physically included as part of the Code.

We have the following comments on the content of the proposed Practice Statement.

We would welcome further clarification from the Panel in relation to paragraph 2.22 which deals with securities exchange offerors. In particular, how would the Panel deal with a situation where the offeror's share price has significantly declined since the original exchange ratio was set? There could be a risk that using the methodology set out in the Practice Statement for calculating the amount by which the consideration securities are reduced in such circumstances would produce an anomalous result. It would also be helpful to understand the approach the Panel would take to a cash and securities offer – would the reduction in consideration be required to be pro-rata across the two components?