Takeover Panel consultation paper PCP2016/1

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 2016/1 (the **PCP**).

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.

Q1 Should the proposed new Rule 20.1(a) apply to information and opinions relating to an offer or a party to an offer?

Yes – we agree with the proposals.

Q2 Should material new information or significant new opinions relating to an offer or a party to an offer which an offeror or the offeree company publishes, or which it provides to shareholders, other relevant persons or the media, be required to be published via a RIS at the same time?

Generally we agree, subject to the points made in the response to Q3 as regards information relating to a party to an offer. As a general point we assume, in line with current market practice, that reference to “material” new information or “significant” new opinions relating to a party to an offer should be interpreted as material or significant in the context of the offer, but it would be helpful if the Panel could confirm this approach.

Q3 Should documents provided by an offeror or the offeree company to shareholders or other relevant persons, and written communications provided to and published by the media, be required to be published on a website?

Although we agree with the proposals in general, we would point out the following concerns.

Proposed Rule 20.1(c)(i) covers (*inter alia*) presentations or documents relating to an offer or a party to an offer provided or used at any meeting with persons interested in the debt securities of the offeror or offeree. We do not think that this will always be the correct approach to take. For example, companies may be obliged, under the terms of instruments such as private placement securities, to provide certain information to the holders in confidence much of which will potentially be irrelevant in the context of the offer. They may also be in confidential discussions with the holders of debt instruments in relation to, for example, a re-financing of the relevant debt. We would suggest that where information is disclosed to holders of debt securities (in their capacity as such) in confidence, and there is no evidence of that confidence being breached, it should not have to be announced under Rule 20.1(b) or (where it takes the form of a presentation or document provided or used in a meeting) published on a website under Rule 20.1(c). The same principles should apply to presentations or documents relating to negotiations which are carried out on a confidential basis and which are not otherwise required to be made public under the Takeover Code or the rules of any relevant stock exchange.

It would be helpful if it could be made clear in the Notes that the approach set out in Note 6 to Rule 20.1 would apply in respect of meetings with target shareholders for the purpose of sounding them out about a possible or competitive offer and their willingness to provide an irrevocable undertaking.

We assume that there is no intention to change the well-established practice (pursuant to Practice Statement 25) in respect of information provided to members of debt syndicates that hold/may hold shares and that such information would not need to be published on a website provided that effective information barriers remained in place as envisaged under section 4 of the Practice Statement, but it would be helpful to have confirmation on this point.

We also assume that nothing in the proposed rule changes is intended to change current practice in respect of situations where a company has a major shareholder who is entitled to receive certain non-public information (in confidence) under a relationship agreement or similar arrangement and that certain derogations to the rules may be available from the Panel in appropriate circumstances.

In respect of communications with the media, as currently drafted the rule would seem to extend to cover all media releases made by a party to an offer, even where they were immaterial and had no relevance to the offer (for example advertisements or press briefings in relation to new products). We assume that this is not the Panel's intention, and would therefore suggest that the rules are clarified to include similar exemptions to current Rule 19.4 for product and corporate image advertisements.

We agree with the proposal that, where there are multiple versions of a presentation or document, only the latest need be published on a website and that no announcement will be required unless the new version contains any material new information or significant new opinion. However, we would suggest that, where new versions are published and announcement is not made, the publication of the new version (identifying the changes made) is notified both to the Panel and (where the document or presentation is published by an offeror) to any competing offerors or identified potential competing offerors. This will provide an opportunity for challenge should there be disagreement as to whether the revised version in fact includes material new information or opinions.

Q4 Do you have any comments on the proposed new Note 7 on Rule 20.1 with regard to employee communications or the proposed new Note 8 on Rule 20.1 with regard to presentations and other documents?

We note that the wording included in proposed Note 5 on Rule 20.2 requiring consultation with the Panel where an employee is interested in a significant number of relevant securities is not included in new Note 7 on Rule 20.1 and wonder whether the Panel would expect to be consulted in relation to employee communications where an employee is interested in a significant number of relevant securities.

In respect of proposed Note 8 on Rule 20.2, we assume that the Panel would permit a party to omit relevant information/opinions in circumstances where that information/opinion was or has become incorrect/misleading, but it would be helpful to have confirmation of this.

Q5 Do you have any comments on the proposed new Note 6 on Rule 20.1 with regard to the provision of information prior to the commencement of an offer period or prior to the announcement of a firm or revised offer?

We have no comments.

Q6 Should all announcements required to be made under the Code be required to be published via a RIS and, if the relevant RIS is not open for business, be distributed to not less than two national newspapers in the UK and two newswire services operating in the UK?

We note that revised Rule 30.5 refers to documents, announcements or information published outside normal business hours. It would be helpful for a definition of “normal business hours” to be included in the Notes to Rule 30.5 (for example to clarify whether this means normal business hours in the UK and, if so, what the Panel considers these to be).

We also assume that there would be scope (on a case-by-case basis) to obtain Panel dispensation from using the out of hours process in respect of minor or immaterial announcements provided these are released via RIS as soon as the service opens for business, but we should be grateful for confirmation on this point.

We are also unclear as to why the Panel has proposed the deletion of the final sentence of Rule 30.5(c). Is this because the point is considered to be dealt with under Rule 30.5(b) (although we note there is a difference in language between Rule 30.5(b) which refers to documents etc. published "in connection with an offer" and Rule 30.5(c) which refers to all documents, announcements etc.)?

Q7 Should the Panel have the ability to require a copy of an announcement (or a document which includes the contents of the announcement) to be sent to the offeree company's shareholders, employee representatives and pension scheme trustees?

We agree with this proposal.

Q8 Do you have any other comments on the amendments to the Code proposed in Section 2 of the PCP?

We have no further comments other than those outlined above.

Q9 Should a reference in the proposed new Rule 20.2 to a meeting include any telephone call or meeting held by electronic means?

We agree with this proposal.

Q10 Should the proposed new Rule 20.2 apply to meetings attended by (a) a representative of, or adviser to, an offeror or the offeree company and (b) a shareholder in, or other person interested in relevant securities of, an offeror or the offeree company, or any investment manager, investment adviser or investment analyst?

We agree with this proposal.

Q11 Should the proposed new Rule 20.2 apply to (a) all meetings which take place during the offer period and (b) meetings which take place prior to the commencement of the offer period, but only if the meeting relates to a possible offer or if it would not be taking place but for the possible offer?

We agree with these proposals in general, however we would note that there are certain types of meeting that occur and in respect of which we assume (as currently) the Panel may be prepared to grant dispensations to certain of the rules on a case-by-case basis in appropriate circumstances. For example, certain of the proposed requirements (including that names and functions of all attending individuals be confirmed to the Panel) could be problematic in the context of industry conferences or similar events. Given that their work could arguably be said to involve investment analysis, clarification of whether the Panel would treat credit reference agencies as falling within the scope of the Rule would be helpful. In addition, it would be useful to have confirmation as to whether, on transactions involving lengthy offer periods, the Panel would in principle be prepared to consent to

certifications being provided on an aggregate weekly basis rather than individually following each meeting.

It would be helpful for the Code to expressly permit self-policing of meetings held prior to a Rule 2.4 announcement where the presence of a financial adviser would have the effect of tipping off attendees about a possible offer. Although the proposed rules state that, prior to commencement of the offer period, the meeting need only be supervised if it "relates to a possible offer or would not be taking place but for the possible offer", it is conceivable a company could want to meet with its shareholders without discussing the possible offer specifically – in those cases, there could be an argument that the meeting would not be taking place "but for" the possible offer, but the attendance of a financial adviser would effectively tip the shareholders off than an offer could be forthcoming.

Q12 Do you have any other comments on the scope of the proposed new Rule 20.2?

The reference in Note 2(b) to the Panel withdrawing a dispensation if "some other material development occurs" is unhelpful as it would require a continuing assessment of events and also assumes that material events would necessarily have a bearing on the dispensation. We would suggest that this reference is unnecessary and the position is better dealt with by the Panel on a case by case basis.

We also have the following minor drafting comments:

- Rule 20.2(c)(ii) should presumably refer to information etc. provided at the meeting "by, or by any representative of, or adviser to, the offer or the offeree company…".
- The final line in Note 1(b) on Rule 20.2 "…announcement of the firm or revised offer".
- We would suggest that the reference in Note 3(b)(iv) to a "senior" adviser attending is omitted as this is arguably unhelpful and could give rise to questions over status.

Q13 Should the proposed new Rule 20.2 provide that (a) any meeting to which the Rule applies must be supervised by an appropriate financial adviser or corporate broker to the offeror or offeree company (as appropriate) and (b) no material new information or significant new opinion relating to the offer or a party to the offer may be provided during the meeting?

We agree with this proposal.

Q14 Should a supervisor of a meeting to which the proposed new Rule 20.2 applies be required to confirm the names and functions of the individuals who attended the meeting in addition to the matters required to be confirmed under the current Note 3 on Rule 20.1?

We agree with this proposal, subject to the comments raised above.

Q15 Do you have any comments on the proposed Note 1 on the new Rule 20.2 in relation to meetings which take place prior to the commencement of an offer period or prior to the announcement of a firm or revised offer?

No.

Q16 Do you have any comments on the proposal to give the Panel the ability to grant dispensations from the provisions of the proposed new Rule 20.2 in relation to meetings following the announcement of a recommended firm offer?

Where transactions involve lengthy offer periods, see our response to Q11 above in relation to provision of aggregate certifications. See also our comment in response to Q12 above in respect of the adviser that attends.

Q17 Should the requirement for a confirmation in writing to be provided to the Panel by not later than 12 noon on the business day following a meeting be disapplied in the case of meetings attended only by one or more financial advisers or corporate brokers and one or more relevant third parties?

We agree with this proposal.

Q18 Do you have any comments on the proposed treatment of meetings attended only by one or more advisers to an offeror or the offeree company (other than a financial adviser or corporate broker) and one or more "sell-side" investment analysts (as described in paragraph 3.39(b) of this PCP)?

No – we have no comments on these proposals.

Q19 Do you have any comments on the proposed new Rule 20.2?

We agree with these proposals. However, additional clarification on the reference in Note 2 on Rule 20.2 to there being "no competitive situation" would be helpful – in particular, how would this apply where there is a "private" competitive situation (i.e. a potential competing bidder who has not been identified)? If this is treated as a competitive situation for these purposes, a requirement for meetings to be policed by the financial adviser could (where the original bidder is not aware of the existence of a potential competing bidder) effectively result in them being tipped off to the existence of another potential bidder.

Q20 Should the new Rule 20.3 in relation to the use of videos be introduced as proposed?

We have only the following minor comments on the proposed rule:

- For consistency with the wording of other Rules, we would suggest that Rule 20.3(a) refers to videos published by "or on behalf of" an offeror or the offeree company.

- We assume that it would be helpful for a transcript to be published with any relevant videos and would suggest that this is reflected in the Rule.

Q21 Should the new Rule 20.4 in relation to the use of social media be introduced as proposed?

It would be helpful, to ensure consistency of approach, for the provisions of Rule 20.4 to be extended to also cover employee representatives and pension scheme trustees such that they are limited to the same restrictions as the offeror/offeree company when communicating in respect of the offer.

We note that the proposed changes do not include a definition of "social media". We recognise that it may not be appropriate to include a specific definition in the rules given that account will need to be taken of changes and developments in this area, but it is a concept that can be interpreted very widely and it would be helpful to have some guidance on where the Panel would draw the boundaries. For example, potential grey areas could include texts, Yammer and on-line forums.

Q22 Should the amendments to Rule 26 in relation to the publication of documents on a website be made as proposed?

We would suggest that the wording use the formulation "promptly, and in any event no later than 12 noon on the business day following the date of the relevant document…". Timing issues can arise in this respect where the relevant party is in a materially different time zone and we would not wish there to be an argument as to what "promptly" meant in this context.

Q23 Should Rule 19.4 (Advertisements) be amended (and renumbered as Rule 20.5) as proposed?

We agree with these proposals, however we would suggest that wording is included in the Notes to the effect that the Panel may, in appropriate circumstances, permit an advertisement to be published by parties not subject to the UKLA Rules notwithstanding this does not strictly fall within Rule 20.5(v) – for example, in the case of overseas bidders where it is required or permitted under the listing rules or regulations to which they are subject. Although we agree with the deletion of category (viii) (advertisements which are notices relating to a scheme of arrangement) we would note that there are some circumstances where this could remain relevant (e.g. new holding company schemes where the use of a cancellation scheme is still permitted).

We would also suggest that the Note on Rule 30.2 explicitly refers to the fact that acceptance forms, withdrawal forms, proxy forms etc. should not be published in newspapers (as set out in current Note 5 on Rule 19.4 which is proposed to be deleted).

Q24 Should Rule 19.2 (Responsibility) and Note 1 on Rule 3.2 be amended, and Note 5 on Rule 19.1 (Use of other media) be deleted, as proposed?

We agree with these proposals.

Q25 Should Rule 19.5 (Telephone campaigns) be amended (and renumbered as Rule 20.6) as proposed?

We agree with these proposals subject to the following minor drafting point. Note(b) on Rule 20.6 should refer to the "…start of their involvement in the campaign…".

Q26 Do you have any comments on the minor and consequential amendments to the Code proposed in Section 6 of this PCP?

Our only comment on these amendments is in respect of new Rule 2.11(c). We are not convinced that the requirement for a shareholder enquiry line to be provided in all cases is proportionate, given the cost involved in doing this.

Transitional provisions

As a general comment, it would be helpful to understand how the revised rules will apply in respect of transactions that are already on-going at the time the rules come into effect – will any transitional provisions apply in these circumstances?