The City of London Law Society

The Law Society

PCP 2022/4 Miscellaneous Code Amendments

13 January 2023

Introduction

1. The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

2. The CLLS represents approximately 17,000 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, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers.

FOR FURTHER INFORMATION PLEASE CONTACT:

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Response

Q1 Should section 2(c) of the Introduction to the Code be amended to provide greater flexibility for the Panel to grant a dispensation from a requirement of the Code in order to facilitate the rescue of a company which is in serious financial difficulty and in other exceptional circumstances?

5. Yes – we agree with these proposed amendments.

Q2 Should Note 3 of the Notes on Dispensations from Rule 9 be amended as proposed to remove the limitations on the Panel's flexibility to waive the requirement for a mandatory offer where an urgent rescue operation is the only way to save a company in serious financial difficulty?

6. Yes – we agree with these proposed amendments.

Q3 Should Note 2 on Rule 2.2 be deleted as proposed?

7. We do not object to these proposed amendments. However, it would be helpful if the Panel could confirm (a) that the changes would not result in an announcement being required in circumstances where the "potential bidder" was not in active consideration and (b) a potential bidder that was in active consideration would be able to seek a "downing tools" dispensation in the usual way.

Q4 Should Note 3 on Rule 9.5 be amended as proposed so as to require an adjusted mandatory offer price to be "appropriate"?

8. Yes – we agree with these proposed amendments.

Q5 Should Note 3 on Rule 9.5 be amended as proposed in relation to the publication of a decision to adjust the mandatory offer price?

9. Yes – we agree with these proposed amendments. It may also be helpful for the Note to clarify the timing of the Panel publicising any decision to adjust (which we assume would be immediately following the decision being made and communicated to the bidder and/or its advisers).

Q6 Should there be a requirement for the board of the offeree company to make a recommendation to shareholders and to holders of Rule 15 securities as to the action that they should take in respect of an offer (including any alternative offers) or a Rule 15 offer or proposal? Do you have any comments on the proposed amendments to Rule 25.2 and Rule 15.2 and the related provisions of the Code?

10. We are not aware of the current position giving rise to difficulties in practice and would query why an amendment to the rules in this area is considered necessary.

11. In the context of a requirement to make a recommendation in respect of an alternative proposal, we would also query whether these would necessarily be of material practical use to target company shareholders. For example, in a cash offer with a listed equity alternative (or vice versa) the board's opinion in respect of the alternative is frequently either no recommendation or may be phrased in "dynamic" terms – i.e. by reference to the shareholder's individual circumstances and the relative value of the two forms of consideration (which could fluctuate as a result of changes in the trading price of the listed equity during the offer period). In this example, setting out the advantages and disadvantages of the listed equity alternative will assist shareholders in making their decision and such decision can be made with reference to the board's recommendation (where possible to give) for the cash offer on a dynamic basis.

12. In the context of R15 proposals, whilst people do (where possible) provide a recommendation we would note that there are a number of factors which can make this a more complex/difficult area including because the most appropriate course of action may be particularly dependent on the individual's personal tax position or their intention to remain with the enlarged business over coming months/years and, in the context of options, the attractiveness of the proposals will depend upon the offer value relative to the exercise price at the time of exercise (not at the time R15 proposals are made).This is particularly relevant where the offer is a securities exchange offer and the bidder's share price is also relevant, or where currency fluctuations can impact deal value. A requirement to make a recommendation as to a R15 proposal therefore risks asking the target board to express an opinion on a set of facts and circumstances they are not well placed to assess.

13. If the amendments are adopted, it would be helpful if the Panel could provide examples of what it views as acceptable and unacceptable (i.e. too heavily caveated) recommendation language.

14. We note that as currently drafted, the amendments require the board of the target to form an opinion on <u>each</u> offer or proposal put to R15 security holders, rather than form an opinion on the offers/proposals when viewed as a package. This seems unduly onerous. We suggest a more balanced approach might be to maintain that the target board's role is limited to confirming publicly the R15 offers/proposals (per type of R15 security) are fair and reasonable, and Rule 15 is amended to add guidance that, in order to do this, the target board would need to be satisfied that the R15 offer/proposal(s) provide at least one course of action that would allow the R15 security holder to obtain see-through-value for their securities, should they wish to do so.

15. We also note that the revised N2 on R25.2 (in relation to positions where there is no clear opinion or there is a divergence of views) is not expressed to apply in relation to revised R15.2.

16. Finally, for completeness, it would be helpful if the Panel could confirm our understanding that the requirements under the proposed amendments would not apply in the context of mix and match elections given that (per R33.2) these are not regarded as an alternative offer.

Q7 Should the offeree board circular be required to state details of the directors' intentions in relation to any alternative offers and, where required by the Panel, the reasons for a director's decision to elect for a particular alternative? Do you have any comments on the proposed amendments to Rule 25.4(a)?

17. We have no comments on these proposed changes other than to ask what the position would be if the directors have not made a decision as to which form of consideration to elect for at the time the circular is posted?

Q8 Should Note 2 on Rule 3.1, Note 2 on Rule 3.3 and Note 3 on Rule 25.2 be deleted as proposed?

18. We have no comments on these proposed changes.

Q9 Should the Code be amended so that, if details of an irrevocable commitment or letter of intent are announced under Rule 2.10, the underlying irrevocable commitment or letter of intent must be published on a website by the same deadline?

19. Yes – we agree with these proposed amendments.