

THE TAKEOVER PANEL

CODE COMMITTEE

RESPONSE STATEMENT 2004/4 AND CODE AMENDMENTS

On 10 August 2004, the Code Committee published a Public Consultation Paper on Conditions and Pre-Conditions (PCP 2004/4). The consultation period in respect of PCP 2004/4 ended on 29 October 2004 and the Code Committee has today issued Response Statement 2004/4 (RS 2004/4), which sets out the results of the consultation process and the final text of the proposed amendments to the Code as approved by the Code Committee in respect of PCP 2004/4. Copies of RS 2004/4 may be obtained from the Panel's website at www.thetakeoverpanel.org.uk or by telephoning the Panel on 020 7382 9026.

The amendments to the Code set out in Response Statement 2004/4 are contained in the Appendix to this statement and will take effect immediately.

Response Statement 2004/3 (RS 2004/3), setting out the results of the consultation process in respect of Public Consultation Paper 2004/3 on Market-Related Issues, was published on 16 March. In its accompanying Statement 2005/18, the Code Committee announced that the amendments to the Code and the SARs introduced as a result of Response Statement 2004/3 would take effect on 25 April. Those amendments will therefore also take effect immediately.

Amended pages of the Code and the SARs incorporating the amendments contained in both RS 2004/3 and RS 2004/4 have been published today.

25 April 2005

APPENDIX

Amendments to the Code

Further amendments to the Code, made pursuant to RS 2004/3, published on 16 March 2005 will take effect at the same time as those set out below.

Rule 2.4

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

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NOTES ON RULE 2.4

1. Pre-conditions

The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to the making of an offer. Any such pre-conditional possible offer announcement must:

(a) clearly state whether or not the pre-conditions must be satisfied before an offer can be made or whether they are waivable; and

(b) include a prominent warning to the effect that the announcement does not amount to a firm intention to make an offer and that, accordingly, there can be no certainty that any offer will be made even if the pre-conditions are satisfied or waived.

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Rule 2.5**2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER**

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NOTES ON RULE 2.5

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6. Pre-conditions

The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the posting of the offer will be subject. (See also Rule 13.)

Rule 2.7**2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”**

When there has been an announcement of a firm intention to make an offer, the offeror must normally proceed with the offer unless, in accordance with the provisions of Rule 13.4, the offeror is permitted to invoke a pre-condition to the posting of the offer or would be permitted to invoke a condition to the offer if the offer were made.

NOTE ON RULE 2.7

When there is no need to post

An announced offeror need not proceed with its offer if a competitor has already posted a higher offer or, with the consent of the Panel, in the circumstances set out in Note 5 on Rule 21.1.

Rule 9.3

9.3 CONDITIONS AND CONSENTS

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NOTES ON RULE 9.3

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3. When dispensations may be granted

The Panel will not normally consider a request for a dispensation under this Rule other than in exceptional circumstances, such as:-

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(b) when any official authorisation or regulatory clearance is required before the offer document is posted. The person who has incurred the obligation under Rule 9 must endeavour to obtain authorisation or clearance with all due diligence. If authorisation or clearance is obtained, the offer document must be posted immediately. If authorisation or clearance is not obtained, the same consequences will follow as if the merger were prohibited following a reference to the Competition Commission or the initiation of proceedings by the European Commission (see Rule 9.4).

Rule 13**RULE 13. PRE-CONDITIONS IN FIRM OFFER ANNOUNCEMENTS AND
OFFER CONDITIONS****13.1 SUBJECTIVITY**

An offer must not normally be subject to conditions or pre-conditions which depend solely on subjective judgements by the directors of the offeror or of the offeree company (as the case may be) or the fulfilment of which is in their hands. The Panel may be prepared to accept an element of subjectivity in certain circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition or pre-condition may depend, especially in cases involving official authorisations or regulatory clearances, the granting of which may be subject to additional material obligations for the offeror or the offeree company (as the case may be).

**13.2 THE COMPETITION COMMISSION AND THE EUROPEAN
COMMISSION**

A condition or pre-condition included pursuant to Rule 12.1(c) is not subject to the provisions of Rules 13.1 or 13.4(a).

13.3 ACCEPTABILITY OF PRE-CONDITIONS

The Panel must be consulted in advance if a person proposes to include in an announcement any pre-condition to which the posting of the offer will be subject.

Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition: —

- (a) is included pursuant to Rule 12.1(c); or**

- (b) **involves a material official authorisation or regulatory clearance relating to the offer and:**
- (i) **the offer is publicly recommended by the board of the offeree company; or**
 - (ii) **the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable.**

(See Note 6 on Rule 2.5.)

NOTE ON RULE 13.3

Financing pre-conditions

An offer must not normally be made subject to a condition or pre-condition relating to financing. In exceptional cases, the Panel may be prepared to accept a pre-condition relating to financing either in addition to another pre-condition permitted by this Rule or otherwise: for example where, due to the likely period required to obtain any necessary material official authorisation or regulatory clearance, it is not reasonable for the offeror to maintain committed financing throughout the offer period, in which case:

- (a) the financing pre-condition must be satisfied (or waived), or the offer must be withdrawn, within 21 days after the satisfaction (or waiver) of any other pre-condition or pre-conditions permitted by this Rule; and*
- (b) the offeror and its financial adviser must confirm in writing to the Panel before announcement of the offer that they are not aware of any reason why the offeror would be unable to satisfy the financing pre-condition within that 21 day period.*

13.4 INVOKING CONDITIONS AND PRE-CONDITIONS

(a) **An offeror should not invoke any condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. The acceptance condition is not subject to this provision.**

(b) **Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.**

13.5 INVOKING OFFEREE PROTECTION CONDITIONS

An offeree company should not invoke, or cause or permit the offeror to invoke, any condition to an offer unless the circumstances which give rise to the right to invoke the condition are of material significance to the shareholders in the offeree company in the context of the offer.

NOTES ON RULE 13.5

1. *When an offeree protection condition may be invoked*

The circumstances in which the offeree company will be allowed to invoke, or cause or permit the offeror to invoke, a condition will not necessarily be restricted to those in which the Panel would permit an offeror to invoke a condition. In deciding whether an offeree company may invoke, or cause or permit the offeror to invoke, a condition, the Panel will take into account all relevant factors.

2. *Availability of withdrawal rights*

If the offeree company is not permitted to invoke, or to cause or permit the offeror to invoke, a condition, the Panel may instead determine in the light of all relevant facts that accepting shareholders should have the right to withdraw their acceptances on

such terms as the Panel considers appropriate and, if so, the effect of this on the Code timetable. The ability of the Panel to require the introduction of withdrawal rights in such circumstances and to amend the Code timetable, and also the fact that the offer may cease to be unconditional as to acceptances as a result of such withdrawal rights being introduced, should be incorporated into the terms of the offer.

Rule 23

RULE 23. THE GENERAL OBLIGATION AS TO INFORMATION

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NOTES ON RULE 23

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2. Offers conditional on shareholder action

When an offer has been announced, which is conditional on action by offeree company shareholders (eg the rejection of a proposed acquisition or disposal), the first major circular sent by the potential offeror to those shareholders must normally include the information which would be required by Rule 24 to be included in that circular if it were an offer document.

Rule 24.6

24.6 INCORPORATION OF OBLIGATIONS AND RIGHTS

The offer document must incorporate language which appropriately reflects Notes 4-7 on Rule 10 and those parts of Rules 13.4(a), 13.5 (if applicable), 17 and

31-34 which impose timing obligations or confer rights or impose restrictions on offerors, offeree companies or shareholders of offeree companies.

Rule 34

RULE 34. RIGHT OF WITHDRAWAL

An acceptor must be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by such date become or been declared unconditional as to acceptances. This entitlement to withdraw must be exercisable until the earlier of (a) the time that the offer becomes or is declared unconditional as to acceptances and (b) the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6. An acceptor must also be entitled to withdraw his acceptance if so determined by the Panel in accordance with Note 2 on Rule 13.5.

Rule 35.1

35.1 DELAY OF 12 MONTHS

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NOTE ON RULES 35.1 and 35.2

When dispensations may be granted

(a) ...

(b) *The Panel may also grant consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material official authorisations or regulatory clearances relating to an offer within the Code timetable. ...*

(c) *The restrictions in Rules 35.1(d) and (e) will not normally apply to the extent that the offer lapsed as a result of being referred to the Competition Commission or the European Commission initiating proceedings, or as a result of the offeror failing to obtain another material official authorisation or regulatory clearance relating to the offer within the usual Code timetable, but the offeror is continuing to seek clearance or a decision from the relevant official or regulatory authorities with a view subsequently to making a new offer with the consent of the Panel in accordance with Note (a)(iii) or Note (b) on Rule 35.1.*

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Rule 38.3

38.3 ASSENTING SECURITIES

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NOTE ON RULE 38.3

If withdrawal rights are introduced under Note 2 on Rule 13.5, the acceptances in relation to any securities assented to the offer, after it was unconditional as to acceptances, by an exempt market-maker connected with the offeror must be withdrawn and such securities may not be re-assented to the offer unless, following the period agreed by the Panel for withdrawal rights to run, the offer becomes or is declared unconditional as to acceptances.