

PCP 2023/1 15 May 2023

## **THE TAKEOVER PANEL**

# **REVIEW OF RULE 21 (RESTRICTIONS ON FRUSTRATING ACTION) AND OTHER MATTERS**

**PUBLIC CONSULTATION BY  
THE CODE COMMITTEE**



The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 21 July 2023.

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All responses to formal consultation will be published on the Panel’s website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk) unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

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## 1. Introduction and summary

### (a) Introduction

1.1 In this Public Consultation Paper (“**PCP**”), the Code Committee of the Takeover Panel (the “**Code Committee**”) proposes certain amendments to the [Takeover Code](#) (the “**Code**”) in relation to **Rule 21** (*Restrictions on frustrating action*) and other matters, as summarised below.

1.2 The restriction of frustrating action by the board of an offeree company has been a principle of the Code since its introduction and is now set out in **General Principle 3** and **Rule 21**.

### (b) Background

#### (i) Rule 21.1

1.3 **Rule 21.1** restricts the board of an offeree company, without the approval of the offeree company’s shareholders, from taking any action which may result in an offer or bona fide possible offer being frustrated and from taking certain other specified actions. If an offeree board were to take one of the specified actions, it could lead to an offeror either:

- (a) no longer being willing to make, or to proceed with, an offer; or
- (b) only being willing to make an offer on less favourable terms than it would otherwise have done,

in each case to the disadvantage of shareholders in the offeree company.

1.4 In addition, where the action reduces the value of the offeree company to an offeror, the offeror is disadvantaged if it is committed to offer terms because it has announced either:

- (a) indicative offer terms which are subject to **Rule 2.5(a)**; or
- (b) a firm intention to make an offer under **Rule 2.7**.

1.5 **Rule 21.1** has developed over time to take account of new issues that have arisen and evolving market practice. However, it has not previously been the subject of a discrete review by the Code Committee.

1.6 This PCP is focused primarily on **Rule 21.1**. The Code Committee considers that, for the most part, **Rule 21.1** operates satisfactorily and accordingly the PCP does not propose fundamental amendments to the Rule. However, the Code Committee considers that it would be helpful for **Rule 21.1**, and the **Notes on Rule 21.1**, to be amended so as to provide increased flexibility for offeree companies to carry on their ordinary course

activities, including where these activities involve buying and selling assets, and to provide greater clarity as to the actions that will and will not be restricted.

- 1.7 The Panel Executive (the “**Executive**”) has informed the Code Committee that, if the amendments proposed in this PCP are adopted, it intends to publish a new Practice Statement to provide additional guidance. This guidance is also summarised in this PCP.
- 1.8 The Code Committee believes that, whilst an offeree board will still be required to consult the Executive to determine whether a proposed action would be in the ordinary course of the offeree company’s business, this additional clarity and guidance will reduce the circumstances in which the offeror or potential offeror will have to be consulted before the Executive can conclude that a proposed action by an offeree board is not restricted by **Rule 21.1(a)**.

(ii) *Rule 21.2*

- 1.9 **Rule 21.2** restricts an offeree company, and any person acting in concert with it, from entering into any offer-related arrangement with an offeror, or any person acting in concert with it, subject to certain limited exceptions. The Rule was adopted in 2011 in response to the increasing demands by offerors regarding the obligations and restrictions to be placed on offeree companies in an implementation agreement as a condition to the offeror announcing an offer. These restrictions and obligations had the potential effect of:

- (a) deterring a competing offeror from making an offer, thereby denying offeree company shareholders the possibility of deciding on the merits of a competing offer; and
- (b) leading to a competing offeror making an offer on less favourable terms than it would otherwise have done.

- 1.10 The Code Committee considers that **Rule 21.2** (as applied by the Executive as described in [Practice Statement No 29](#)) is operating satisfactorily and it is therefore not proposing that any amendment should be made to the Rule.

(iii) *Rule 21.3 and Rule 21.4*

- 1.11 **Rule 21.3** requires any information provided to an offeror to be provided on request to another offeror or bona fide potential offeror, so as to prevent the directors of an offeree company from being able to frustrate a competing offer by providing important information only to the “preferred” offeror.

1.12 In the case of a management buy-out or similar transaction, **Rule 21.4** requires any information provided to external providers of finance to be provided, on request, to the independent directors of the offeree company or its advisers. This is intended to address the potential imbalance in access to information about the offeree company between the management buy-out team, which is likely to include the persons who know the business best, and the independent directors, who may be less involved in the day-to-day management of the business.

1.13 The Code Committee has proposed a number of amendments to **Rules 21.3** and **21.4** to:

- (a) ensure that an offeror or bona fide potential offeror is not denied access to the offeree company's information on a technicality, whilst enhancing the offeree company's ability to protect its commercially sensitive information in a proportionate manner; and
- (b) reduce the administrative burden on the parties to an offer where an offeror or bona fide potential offeror makes, or the independent directors make, a request for information under **Rule 21.3** or **Rule 21.4**, respectively.

**(c) *Restriction on actions by the board of the offeree company***

1.14 **Section 2** proposes to amend **Rule 21.1** so that it would not, in general, restrict an offeree board from taking an action that either is not material or is in the ordinary course of the offeree company's business, on the basis that:

- (a) such an action is not likely to frustrate an offer or possible offer; and
- (b) it is inappropriate for the Code to prevent an offeree company from carrying on ordinary course business.

1.15 **Section 2** also proposes:

- (a) amendments to the **Notes on Rule 21.1** to provide further clarity on the circumstances in which the Panel will normally consider that a proposed action by an offeree board either is not material or is in the ordinary course of the offeree company's business; and
- (b) a **new Note 1(c) on Rule 21.1** providing that the Panel may in certain circumstances treat entering into offer-related employee retention arrangements as a restricted action.

**(d) *Period for which Rule 21.1(a) applies***

1.16 **Section 3** proposes:

- (a) an amendment to provide that the restrictions in **Rule 21.1(a)** apply during the “**relevant period**”, being the period from the earlier of:
- (i) the offeree board receiving an approach regarding a possible offer by a potential offeror; and
  - (ii) the beginning of the offer period,
- until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected by the offeree board; and
- (b) additional **Notes on Rule 21.1** in relation to the relevant period where:
- (i) there is more than one offeror;
  - (ii) the offeree board is seeking one or more potential offerors (whether by way of a formal sale process, a private sale process or otherwise); and
  - (iii) a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

**(e) *Application of Rule 21.1 to a reverse takeover***

1.17 **Section 4** proposes a **new Note 8 on Rule 21.1** to provide that, where an offer or possible offer is a reverse takeover, **Rule 21.1** will also apply to the board of the offeror as if the offeror were an offeree company and vice versa.

**(f) *Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation***

1.18 **Section 5** proposes a **new Note 10 on Rule 21.1** to provide that, other than in exceptional circumstances, the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation.



**(g) Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel**

1.19 **Section 6** proposes amendments to **Sections 3(b)(ii) and (iii) of Appendix 7** to provide that, where an offeror is proceeding by way of a scheme of arrangement and has specified within the conditions to the scheme dates by which:

- (a) the shareholder meetings; or
- (b) the court sanction hearing,

must be held, those “**mini-long-stop dates**” should be capable of being extended not only with the consent of the parties to the offer (as is currently the case) but also, in a competitive situation, with the consent of the Panel.

**(h) Equality of information to competing offerors**

1.20 **Section 7** proposes to:

- (a) delete the **current Note 1 on Rule 21.3**, which provides that an offeror may not request information under **Rule 21.3(a)** in general terms, and amend **Rule 21.3(a)** so that it would require the offeree board to provide promptly to an offeror or bona fide potential offeror who makes a request for information under **Rule 21.3(a)** both:
  - (i) all the information that has been provided to another firm or potential offeror at the time of the request (regardless of whether the information was specifically requested); and
  - (ii) any further information that the offeree board provides to another firm or potential offeror in the seven days following the request;
- (b) amend **Rule 21.4** so that it would require the offeror or potential offeror, in the case of a management buy-out or similar transaction, to provide on request to the independent directors of the offeree company or its advisers any information that it has provided, or subsequently provides, to external providers or potential providers of finance; and
- (c) make other amendments to the **Notes on Rule 21.3** in relation to:
  - (i) the conditions to the passing of information under **Rule 21.3**; and
  - (ii) the application of **Rule 21.3** to information provided to a potential purchaser of all or substantially all of the offeree company’s assets after the beginning of the relevant period.

**(i) Assessment of the impact of the proposals**

1.21 **Section 8** provides an assessment of the impact of the proposals.

**(j) Invitation to comment**

1.22 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 21 July 2023 and should be sent in the manner set out at the beginning of this PCP.

1.23 The proposed amendments to the Code are set out in **Appendix A**, which shows the Code following the amendments that will take effect on Monday, 22 May 2023. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted. A list of the questions that are put for consultation is set out in **Appendix B**.

**(k) Draft Practice Statement No 34**

1.24 As mentioned above, the Executive has informed the Code Committee that it intends to publish a **new Practice Statement No 34** setting out how the Executive:

- (a) will normally interpret and apply **Rule 21.1** if it is amended as proposed in this PCP; and
- (b) interprets and applies certain other aspects of **Rule 21.1** that the Code Committee does not propose to amend.

1.25 The Code Committee has summarised the Executive's proposed interpretation of the amended rules in **Section 2** and, at the request of the Executive, has included questions on the Executive's proposed practice as set out in the draft **new Practice Statement No 34**. A draft of the proposed **new Practice Statement No 34** is set out in **Appendix C**.

**(l) Implementation**

1.26 The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in Autumn 2023. The Code Committee expects that the amendments would come into effect approximately one month after the publication of the Response Statement.

## 2. Restriction on actions by the board of the offeree company

### (a) Introduction

2.1 The proposals set out in **Section 2** would:

- (a) amend **Rule 21.1** so that it would not, in general, restrict an offeree board from taking an action that either is not material or is in the ordinary course of the offeree company's business, on the basis that:
  - (i) such an action is not likely to frustrate an offer or possible offer; and
  - (ii) it is inappropriate for the Code to prevent an offeree company from carrying on ordinary course business; and
- (b) provide further clarity on the circumstances in which the Panel will normally consider that a proposed action by an offeree board either is not material or is in the ordinary course of the offeree company's business.

### (b) Background

2.2 **Rule 21.1** restricts the offeree board from taking certain actions without the approval of the offeree company's shareholders, on the basis that those actions might result in an offer or possible offer being frustrated.

2.3 It is derived from **General Principle 3**, which provides as follows:

**"The board of directors of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the takeover bid."**

2.4 **Rule 21.1(a)** provides as follows:

#### **"21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED**

**(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits, or:**

- (i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;**
- (ii) issue or grant options in respect of any unissued shares;**
- (iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;**

**(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or**

**(v) enter into contracts otherwise than in the ordinary course of business.”.**

2.5 This implements the rules required by [paragraph 17](#) of Schedule 1C to the Companies Act 2006 (the “Act”). However, **Rule 21.1(a)** is drafted more broadly than the minimum standards required by the Act because it states that the offeree board must not, without shareholder approval, either:

(a) act so as to frustrate an offer or bona fide possible offer; or

(b) take any of the specific actions listed in **Rules 21.1(a)(i) to (v)**, which are more extensive than the actions expressly required to be restricted under the Act.

2.6 **Rule 21.1(c)** sets out the circumstances in which the Panel will normally agree to disapply **Rule 21.1(a)**, as follows:

**“(c) The Panel will normally agree to disapply Rule 21.1(a) if:**

**(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(e));**

**(ii) the offeror consents to the action proposed to be taken by the board of the offeree company;**

**(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting;**

**(iv) the proposed action is in pursuance of a contract entered into before the beginning of the period referred to in Rule 21.1(a) or another pre-existing obligation; or**

**(v) a decision to take the proposed action had been taken before the beginning of the period referred to in Rule 21.1(a) which:**

**(A) has been partly or fully implemented before the beginning of that period; or**

**(B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business.”.**

**(c) Proposed removal of restriction on offeree board actions that either are not material or are in the ordinary course of the offeree company's business**

*(i) Introduction*

2.7 **Section 2(c)** proposes to amend **Rule 21.1(a)** so that, during the “**relevant period**” (see **Section 3**), it would restrict the offeree board from taking or agreeing to take:

(a) any “**restricted action**”, being:

- (i) issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities, other than in the ordinary course of business;
- (ii) undertaking disposals or acquisitions of assets of a material amount, other than in the ordinary course of business; or
- (iii) entering into, amending or terminating material contracts, other than in the ordinary course of business; or

(b) any other action that may result in an offer or bona fide possible offer being frustrated,

except with the approval of the offeree company's shareholders in general meeting or the consent of the Panel.

*(ii) Issues with the current Rule 21.1(a)*

2.8 **Rule 21.1(a)** currently provides that the offeree board must not, without shareholder approval, either:

- (a) act so as to frustrate an offer or bona fide possible offer; or
- (b) take any of the specific actions listed in **Rules 21.1(a)(i) to (v)**.

2.9 The principal issue with this approach is that the specific restrictions in **Rules 21.1(a)(i) to (v)** can hinder the ability of an offeree company to carry on its normal activities, which is not in keeping with the overall purpose of **Rule 21.1** (i.e. avoiding the frustration of an offer by the offeree board). For example, **Rules 21.1(a)(i) to (v)** can restrict the offeree board from taking an action:

- (a) that is an inherent part of the offeree company's ordinary course business (for example, the sale of a property by a real estate investment trust);

- (b) that the offeree company may undertake in the ordinary course of being a company but which may not be considered to be in the ordinary course of its day-to-day business (for example, refinancing debt or entering into a new office lease);  
or
- (c) that is outside the ordinary course of the offeree company's business but is not material to the offeree company (for example, a contractual commitment to make a small amount of capital expenditure in relation to a potential new business area).

- 2.10 This is a particular issue for an offeree company whose business involves the buying and selling of assets. Disposals and acquisitions by an offeree company of assets of a material amount, either individually or in aggregate, are restricted under **Rule 21.1(a)(iv)**. This means that, for example, an infrastructure investment company, whose business model is to invest in and manage large infrastructure projects before selling its interest in those projects in order to invest in new projects, may be restricted from disposing of its existing investments or acquiring additional investments even where it is proposing to do so in a manner that is in accordance with its ordinary course business. The disposal and acquisition of infrastructure investments is an integral part of such a company's business model and, in many cases, the timing of the disposal of an interest is planned in advance as part of a long-term reinvestment cycle, whilst the timing of an acquisition may be driven by the seller of the asset. When an infrastructure investment (or similar) company is subject to the restrictions set out in **Rule 21.1(a)**, it may not therefore be able to operate its ordinary course business. The Code Committee considers that this is a more extensive restriction than is required to meet the aim of **Rule 21.1** and that it would not be a desirable outcome for either shareholders in the offeree company or a successful offeror.
- 2.11 The specific restrictions set out in **Rules 21.1(a)(i) to (v)** have been largely unchanged since the Code's inception. However, offer timetables have become increasingly protracted, owing primarily to extended and more detailed regulatory reviews. Restrictions which were appropriate when an offer period generally lasted two to three months can now have a greater impact on an offeree company than has historically been the case and, in the view of the Code Committee, are no longer proportionate.
- 2.12 The application of **Rule 21.1(a)** can also have an impact on the commercial discussions between the parties to a possible offer. If an offeree board were to breach **Rule 21.1(a)** by taking or agreeing to take a restricted action without shareholder approval, or if an offeror were to persuade the Hearings Committee of the Panel to overturn a dispensation from **Rule 21.1(a)** granted by the Executive, it would in many cases be extremely difficult, or even impossible, to reverse that action in order to remedy the breach. For example, if shares had been issued or an asset had been sold, it would not be possible to unwind

the transaction with the third party to put the offeree company in the position that it would have been in had the offeree board not breached **Rule 21.1(a)**.

2.13 As a result, save in the circumstances expressly contemplated in the **Notes on Rule 21.1** (for example, a disposal or acquisition of a non-material amount of assets in accordance with the **current Note 2**), in cases where the Executive is minded to determine that **Rule 21.1(a)** should not restrict a proposed action (or is minded to grant a dispensation) but there is room for debate, the Executive will typically ask the offeree board to inform each firm or potential offeror of its intention to take the relevant action at least 24 hours before doing so. This provides the offeror(s) with an opportunity to make its/their views known to the Executive before the action is taken so that the Executive can give an unconditional ruling (which, if necessary, can be reviewed by the Hearings Committee before the relevant agreement is entered into by the offeree company).

2.14 Whilst the Executive's practice mitigates the risks resulting from the difficulty of remedying a breach of **Rule 21.1(a)**, it can disrupt the commercial dynamics between the parties to an offer, either by requiring the offeree board to initiate a discussion with a potential offeror at a point when it would not otherwise choose to do so or by giving a potential offeror some perceived leverage in negotiating with the offeree board. This approach may also require the offeree board to disclose commercially sensitive information to the offeror which it would not otherwise have shared.

2.15 The Code Committee:

(a) does not consider that the Code should interfere in the commercial dynamics between the parties to an offer unless there is a strong justification for doing so; and

(b) considers that it would be beneficial to provide more clarity on the proposed actions that are permitted under **Rule 21.1(a)** so that, whilst an offeree board would still be required to consult the Executive to determine whether a proposed action would be in the ordinary course of the offeree company's business, it would be less likely that the offeror's views are required before the Executive can either conclude that **Rule 21.1(a)** does not restrict a proposed action or grant a dispensation from the restrictions in **Rule 21.1(a)**.

(iii) *Proposed amendments to the actions restricted by Rule 21.1(a)*

2.16 The Code Committee considers that **Rule 21.1** should strike an appropriate balance between:

(a) the principle that offeree company shareholders should not be denied the opportunity to consider an offer, either because, as a result of the actions of the

offeree board, an offeror is permitted to invoke a condition to its offer or because the offer is not made in the first place (i.e. **General Principle 3**);

- (b) **General Principle 6**, which provides that an offeree company should not be hindered in the conduct of its affairs for longer (and arguably, by extension, to a greater extent) than is reasonable by an offer; and
- (c) the firm or potential offeror's interest in ensuring that the offeree company does not significantly change in value or nature after the time at which the offeror is held (under **Rule 2.5**) or committed (under **Rule 2.7**) to offer terms.

2.17 The principal objective of **Rule 21.1** is to prevent the offeree board from frustrating an offer or possible offer or denying shareholders the chance to consider an offer. The Code Committee considers that an action that is either:

- (a) in the ordinary course of the offeree company's business; or
- (b) not material,

is not normally likely to frustrate an offer or possible offer.

2.18 The Code Committee therefore considers that it will not normally be appropriate for the provisions of the Code to hinder an offeree company's conduct of its business if a proposed action is in the ordinary course of its business. This is on the basis that the shareholders in the offeree company and, if it is successful, the firm or potential offeror are likely to have a shared interest in the offeree company continuing to operate its ordinary course business in a manner consistent with its normal practice.

2.19 Similarly, the Code Committee considers that in most cases **Rule 21.1(a)** should not restrict an action that is not material. However, the Code Committee considers that a proposed action that relates to the offeree company's share capital could have an impact on an offer or possible offer, even where the action does not have a material effect on the offeree company's share capital.

2.20 Under **Rule 2.7(d)** and **Rule 24.8**, where an offer is for cash or includes an element of cash, the financial adviser to the offeror, or another appropriate third party, is required to confirm that resources are available to the offeror to satisfy full acceptance of the offer (i.e. a "cash confirmation"). If the offeree company issues additional shares or securities carrying rights of conversion into or subscription for shares ("**convertible securities**"), or grants additional options or awards over shares, during the relevant period (see **Section 3**), this would be likely to increase the cash resources required by the offeror to fund the offer, even if the issue or grant was not material. This could lead to an offeror



being required to extend the scope of its financing arrangements, which could be expensive or difficult to achieve.

2.21 In addition, an offeree board could issue new shares to offeree company shareholders who are supportive of the board's view, or selectively acquire shares held by offeree company shareholders who are not supportive of the board's view, in order to increase the likelihood that the board will achieve its preferred outcome. This means that any new issue or repurchase of shares, even if not material, could have a direct impact on the outcome of an offer.

2.22 Given these risks, the Code Committee considers that it is appropriate to take a stricter approach to proposed actions involving the issue of shares or convertible securities, the grant of options or awards over shares, or the redemption or repurchase of its own shares or convertible securities by the offeree company. It therefore proposes that such actions in any amount would be restricted actions unless in the ordinary course of the offeree company's business. This means that, for example, a proposed issue of new shares in the ordinary course of the offeree company's business would be permitted but any other issue of new shares would be a restricted action, even if not material.

2.23 For the above reasons, the Code Committee proposes to amend **Rule 21.1(a)** so that, during the "relevant period" (see **Section 3**), **Rule 21.1(a)** would restrict the offeree board from taking or agreeing to take:

- (a) any "restricted action", being:
  - (i) issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities, other than in the ordinary course of business;
  - (ii) undertaking disposals or acquisitions of assets of a material amount, other than in the ordinary course of business; or
  - (iii) entering into, amending or terminating material contracts, other than in the ordinary course of business; or
- (b) any other action that may result in an offer or bona fide possible offer being frustrated,

except with the approval of the offeree company's shareholders in general meeting or the consent of the Panel.

2.24 In other words, if **Rule 21.1(a)** is amended as proposed:

- (a) disposals and acquisitions of assets would only be restricted if they are both outside the ordinary course of the offeree company's business and of a material amount; and
- (b) entering into, amending or terminating a contract would only be restricted if the contract is both outside the ordinary course of the offeree company's business and material; but
- (c) issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities in any amount would be a restricted action unless in the ordinary course of the offeree company's business.

2.25 The Code Committee considers that it is unlikely that issuing new shares or convertible securities for cash during the relevant period would be in the ordinary course of an offeree company's business. Other proposed actions that relate to the offeree company's share capital are considered in **Section 2(d)**.

2.26 Offeree boards and their advisers would still be expected to consult the Executive if any proposed action may be restricted by **Rule 21.1(a)**, including to determine whether a proposed action is in the ordinary course of the offeree company's business. The Executive will consider:

- (a) whether a proposed action is material in size; and
- (b) whether a proposed action is in the ordinary course of the offeree company's business,

as two separate tests. However, as described in paragraph 2.78, they may be linked, i.e. where a proposed action is of a sufficiently large size, the Executive may consider that it is not in the ordinary course of the offeree company's business even though the offeree company regularly enters into smaller similar contracts.

(iv) *Proposed amendments to the Code*

2.27 In the light of the above, the Code Committee proposes to:

- (a) amend **Rule 21.1(a)**, as follows:

~~"21.1 WHEN SHAREHOLDERS' CONSENT IS  
REQUIRED RESTRICTION ON ACTIONS BY THE BOARD OF  
THE OFFEREE COMPANY~~

~~(a) During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, Except with the approval of shareholders in general meeting or the consent of the Panel, during the relevant period the board of the offeree company must not, without the approval of the shareholders in general meeting, take or agree to take:~~

~~(i) any restricted action; or~~

~~(ii) any other action which may result in the frustration of any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits, or;~~

(b) introduce a new Rule 21.1(c), as follows:

**“(c) A restricted action means any of the following, to the extent that it is not in the ordinary course of the offeree company’s business:**

~~(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;~~

~~(ii) issue or grant options in respect of any unissued shares;~~

~~(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;~~

**(i) issuing, or transferring out of treasury, shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;**

**(ii) redeeming or purchasing shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;**

**(iii) granting options over or awards in respect of shares in the offeree company;**

~~(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, disposing of or acquiring (in one or more transactions) assets of a material amount; or~~

~~(v) enter entering into, amending or terminating a material contract contracts otherwise than in the ordinary course of business.”; and~~

(c) renumber the current Rule 21.1(b) as Rule 21.1(d) and amend it as follows:

**“(b) The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within be restricted by Rule 21.1(a).”.**

2.28 In addition, the Code Committee proposes to:

- (a) delete the reference to “fully implemented” decisions in the **current Rule 21.1(c)(v)(A)** as, if the offeree board is required to take any further steps in relation to a proposed action that has been fully implemented before the relevant period, it will be in pursuance of a pre-existing obligation and the Panel will give its consent under the **current Rule 21.1(c)(iv)** (which would become the **new Rule 21.1(e)(iv)**);
- (b) delete the **current Rule 21.1(c)(v)(B)**, which would become unnecessary as ordinary course actions will no longer be restricted by **Rule 21.1(a)**; and
- (c) make minor amendments to the remainder of the **current Rule 21.1(c)**, which would be renumbered as the **new Rule 21.1(e)**.

2.29 **Rule 21.1(c)** would therefore be amended as follows:

~~“(ee) The Panel will normally agree to disapply give its consent under Rule 21.1(a) if:~~

~~(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(eg));~~

~~(ii) the offeror consents to the taking of the proposed action proposed to be taken by the board of the offeree company;~~

~~(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the taking of the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting;~~

~~(iv) the proposed action is in pursuance of a contract entered into before the beginning of the relevant period referred to in ~~Rule 21.1(a)~~ or another pre-existing obligation; or~~

~~(v) a decision to take the proposed action had been taken and before the beginning of the period referred to in Rule 21.1(a) which:~~

~~(A) has been partly or fully implemented before the beginning of that the relevant period; or~~

~~(B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business.”.~~

Q1 Should the new definition of “restricted action” be introduced in the new Rule 21.1(c) as proposed?

Q2 Should issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities by the offeree company, other than in the ordinary course of business, in any amount be a restricted action, as proposed in the new Rules 21.1(c)(i) to (iii)?

2.30 The remainder of this **Section 2** proposes amendments to the **Notes on Rule 21.1**. The Code Committee considers that the proposed amendments to the **Notes on Rule 21.1** and the guidance provided by the Executive in the draft **new Practice Statement No 34** will address some of the practical issues with the application of the restrictions in **Rule 21.1(a)**.

2.31 The Code Committee also proposes to renumber the **Notes on Rule 21.1** to reflect the structure of the amended **Rule 21.1**.

**(d) Restricted actions in relation to offeree company shares or convertible securities**

*(i) Introduction*

2.32 **Section 2(d)** proposes:

(a) amendments to the **current Note 5 on Rule 21.1** (which would become the **new Notes 1(a) and 1(b) on Rule 21.1**) to set out when the Panel will normally consider employee incentivisation arrangements that are not related to the offer to be in the ordinary course of the offeree company's business; and

(b) a **new Note 2 on Rule 21.1** to provide that a redemption or purchase of its own shares by the offeree company under a programme with defined limits announced or established before the relevant period would normally be in the ordinary course of the offeree company's business.

*(ii) Employee incentivisation arrangements in the ordinary course of the offeree company's business*

2.33 If **Rule 21.1(a)** is amended as proposed in **Section 2(c)**, issuing shares or convertible securities, granting options or awards over shares, or redeeming or repurchasing shares or convertible securities, other than in the ordinary course of the offeree company's business, would be a restricted action.

2.34 It is unusual for an offeree board to seek to issue shares or convertible securities for cash during a period when **Rule 21.1(a)** applies and, as noted above, it is unlikely that it would be in the ordinary course of an offeree company's business to do so. However, offeree boards frequently seek to grant options over, or awards in respect of, shares to the offeree company's employees under existing employee share incentive schemes during such a period in line with the offeree board's normal practice.

2.35 The **current Note 5 on Rule 21.1** provides that the Panel will normally consent to:

(a) the grant of options over shares, the timing and level of which are in accordance with the offeree company's normal practice under an established share option

scheme (i.e. by way of exception to the restriction in the **current Rule 21.1(a)(ii)**);  
and

- (b) the issue of new shares, or the transfer of shares from treasury, by the offeree company to satisfy the exercise of options under an established share option scheme (i.e. by way of exception to the restriction in the **current Rule 21.1(a)(ii)**).

2.36 If **Rule 21.1** is amended as proposed in **Section 2(c)**, the Code Committee considers that the **current Note 5 on Rule 21.1** (which would be renumbered as the **new Notes 1(a)** and **1(b) on Rule 21.1**) should be amended to state that these actions will normally be considered by the Panel to be in the ordinary course of the offeree company's business. As a result, they would not normally be restricted actions.

2.37 From time to time, the Executive is consulted by an offeree board that has recently adopted one or more new share incentive schemes for the benefit of the offeree company's employees. If the offeree company has not yet issued share options or awards under that new incentive scheme, it will not be able to refer to any normal practice in order to seek the Executive's consent to a proposed grant of options or awards during the relevant period. In order to address this issue, the Code Committee proposes that the **new Note 1(a) on Rule 21.1** should also provide that the Panel will normally consider a grant of options or awards over shares under a new employee share incentive scheme to be in the ordinary course of the offeree company's business if it is consistent with the company's proposed practice under that scheme, provided that the proposed practice was publicly disclosed before the relevant period, for example, in a prospectus for an initial public offering of the offeree company's shares, a shareholder circular or the offeree company's annual report.

*(iii) Redemption or purchase of the offeree company's own shares or convertible securities*

2.38 If **Rule 21.1(a)** is amended as proposed in **Section 2(c)**, it would be a restricted action for the offeree company to redeem or purchase its own shares or convertible securities, other than in the ordinary course of its business.

2.39 Some listed companies operate regular on-market share buyback programmes in order to return cash to shareholders. A buyback programme of this nature is not likely to frustrate an offer or possible offer for the offeree company because the shares will be acquired by the offeree company at market value from any shareholders who choose to participate, so the repurchase does not represent an inappropriate transfer of value to selected shareholders or a way to remove selected shareholders who are not supportive of the offeree board's views as described in paragraph 2.21.

2.40 Where an offeree company proposes to purchase its own shares on market, it will normally make an announcement setting out the details of its proposals. This announcement will normally set out defined limits for the buyback programme, including:

- (a) the maximum cash amount that the offeree company intends to allocate to the programme;
- (b) the maximum number of shares that the offeree company intends to acquire through the programme; and
- (c) the date by which the offeree company intends to complete the programme.

2.41 If, before the relevant period, the offeree company has announced a share buyback programme to be operated within such defined limits, the Code Committee considers that the resulting purchases of shares would normally be in the ordinary course of the offeree company's business and, therefore, would not be a restricted action.

2.42 If a share buyback programme that was announced before the relevant period comes to an end and, during the relevant period, an offeree board seeks to announce a new share buyback programme operated within similar defined limits as the previous programme, the Code Committee considers that the new share buyback programme would also normally be in the ordinary course of the offeree company's business. If an offeree company has historically operated an on-market share buyback programme but only on an irregular basis, the Code Committee understands that the Executive would consider whether a new share buyback programme would be in the ordinary course of the offeree company's business in the light of all the relevant circumstances.

2.43 The Code Committee proposes to introduce a **new Note 2 on Rule 21.1** to provide that a redemption or purchase of its own shares by the offeree company in line with defined limits announced or established before the relevant period will normally be in the ordinary course of the offeree company's business.

(iv) *Proposed amendments to the Code*

2.44 In the light of the above, the Code Committee proposes to:

- (a) renumber the **current Note 5 on Rule 21.1** as the **new Note 1 on Rule 21.1** and amend it, as follows:

**"51. ~~Established share option schemes~~ Employee incentive and retention arrangements**

**(a) ~~Where the offeree company proposes to~~ The Panel will normally consider the proposed grant of options over, or awards in respect of, shares, to be in the**

ordinary course of the offeree company's business if the timing and level of which are in accordance with:

(i) ~~its the offeree company's normal practice under an established share option-incentive scheme;~~ or

(ii) the offeree company's proposed practice under a new share incentive scheme, provided that the proposed practice was publicly disclosed before the relevant period.

~~the Panel will normally give its consent.~~

(b) ~~Likewise, the The Panel will normally give its consent to consider the issue of new shares or to the transfer of shares from treasury to satisfy the exercise of options or the vesting of awards under an established a share option-incentive scheme to be in the ordinary course of the offeree company's business.~~; and

- (b) introduce a **new Note 2 on Rule 21.1**, as follows:

**"2. Redemption or purchase of own shares**

A redemption or purchase of its own shares in line with defined limits announced or established before the relevant period will normally be in the ordinary course of the offeree company's business."

**Q3** Should the current Note 5 on Rule 21.1 be amended as proposed with regard to employee incentivisation arrangements?

**Q4** Should a redemption or purchase of its own shares by the offeree company in line with defined limits announced or established before the relevant period normally be in the ordinary course of the offeree company's business, as proposed in the new Note 2 on Rule 21.1?

**(e) Disposals and acquisitions of assets of a material amount**

(i) Introduction

2.45 **Section 2(e)** proposes:

- (a) a **new Note 3(c) on Rule 21.1** to provide that, when determining whether a disposal or acquisition of assets is of a material amount, the Panel may have regard to additional or alternative indicators of materiality (other than those in the **current Note 2(a) on Rule 21.1**) that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company; and
- (b) the replacement of the **current Note 2(d) on Rule 21.1** with a **new Note 3(e) on Rule 21.1**, which would provide that only disposals and acquisitions that are outside the ordinary course of the offeree company's business are required to be aggregated when determining whether such disposals and acquisitions are, in aggregate, of assets of a material amount.



2.46 **Section 2(e)** also describes how the Executive will normally determine whether a disposal or acquisition is in the ordinary course of the offeree company's business, as set out in the draft **new Practice Statement No 34**.

(ii) *Assets of a material amount*

2.47 If **Rule 21.1(a)** is amended as proposed in **Section 2(c)**, disposing of or acquiring (in one or more transactions) assets of a material amount, other than in the ordinary course of the offeree company's business, would be a restricted action.

2.48 The **current Note 2 on Rule 21.1** describes how the Panel will assess whether a disposal or acquisition of assets is of a material amount by reference to certain financial tests set out in **Note 2(a)**, being:

- (a) the value of the consideration for the disposal or acquisition compared with the market value of the equity share capital of the offeree company; and, where appropriate,
- (b) the value of the assets being disposed of or acquired compared with the assets of the offeree company; and
- (c) the operating profit attributable to the assets to be disposed of or acquired compared with the operating profit of the offeree company.

2.49 The **current Note 2(c) on Rule 21.1** provides as follows:

*“(c) Relative values of 10% or more will normally be regarded as being of a material amount, although relative values lower than 10% may be considered material if the asset is of particular significance.”.*

2.50 In some situations, one or more of the financial tests in **Note 2(a)** can produce an anomalous result. For example:

- (a) if the operating profit in the offeree company's most recent audited accounts or half-yearly financial report, which is used as the denominator for the “profits test”, is unusually small (or negative), the test might not accurately reflect the potential impact of the disposal or acquisition on the underlying profits of the offeree company; or
- (b) if the consideration for a disposal or acquisition is agreed on a debt-free basis, the “consideration test” might not appropriately reflect the size of a disposal or acquisition relative to the size of the company because the consideration would be compared with the offeree company's (leveraged) market capitalisation rather than its enterprise value.

2.51 The Code Committee considers that the Panel should have the ability to consider other appropriate indicators of materiality in addition, or as an alternative, to the financial tests set out in the **current Note 2(a) on Rule 21.1**.

2.52 This could include:

- (a) an alternative or additional indicator of materiality to take account of the particular circumstances of the offeree company. For example, if the most recent financial period of an offeree company was impacted by an exceptional event that is not expected to be repeated in subsequent financial years, it may be appropriate for the Panel to consider a measure of underlying profits or to take an average figure over several financial years rather than applying the current “profits test”; and
- (b) an indicator of materiality that is appropriate in the context of the relevant industry. For example, for a real estate investment company, which typically enters into disposals or acquisitions on a debt-free basis as described in paragraph 2.50(b), the gross consideration for the disposal or acquisition compared with the enterprise value of the offeree company may be a more appropriate test than the current “consideration test”.

2.53 The Code Committee expects that the Executive would normally be prepared to consider other appropriate indicators of materiality in circumstances where a relative value of 10% or more under one or more of the tests set out in the **current Note 2(a) on Rule 21.1** is considered anomalous. In these circumstances, the effect of this proposal could be to allow the Executive to determine that a disposal or acquisition is of a material amount, notwithstanding that one or more of the tests in the **current Note 2(a)** produces a relative value of 10% or more. The Executive may, however, also consider it appropriate to use an alternative indicator of materiality in circumstances where a disposal or acquisition is not of a material amount based on the financial tests set out in **current Note 2(a)**, but where the Executive nonetheless considers the disposal or acquisition to be of a material amount based on such an alternative indicator of materiality.

2.54 In the light of the above, the Code Committee proposes to:

- (a) renumber the **current Note 2 on Rule 21.1** as **Note 3 on Rule 21.1**; and
- (b) introduce a **new Note 3(c) on Rule 21.1** to provide that, when determining whether a disposal or acquisition of assets is of a material amount, the Panel may have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company.

(iii) *Aggregation*

2.55 The **current Note 2(d) on Rule 21.1** provides as follows:

*“(d) If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.”.*

2.56 **Note 2(d)** is often referred to as a “taxi meter” because it requires the offeree board to aggregate all transactions not individually of a material amount entered into during the period for which **Rule 21.1** applies.

2.57 If **Rule 21.1(a)** is amended as proposed in **Section 2(c)**, a disposal or acquisition would only be a restricted action if:

- (a) the assets being disposed of or acquired are of a material amount, either individually or in aggregate; and
- (b) the disposal or acquisition is not in the ordinary course of the offeree company’s business.

2.58 Given that it considers that:

- (a) an action that is in the ordinary course of the offeree company’s business is not likely to frustrate a firm or possible offer; and
- (b) it is inappropriate for the Code to prevent an offeree company from carrying on ordinary course business,

the Code Committee considers that it would not be appropriate to require the offeree board to aggregate disposals and acquisitions that are in the ordinary course of the offeree company’s business for the purposes of the **current Note 2(d) on Rule 21.1**.

2.59 The Code Committee proposes to delete the **current Note 2(d) on Rule 21.1** and introduce a **new Note 3(e) on Rule 21.1**, which would provide that only disposals and acquisitions that are outside the ordinary course of the offeree company’s business are required to be aggregated when determining whether such disposals and acquisitions are, in aggregate, of assets of a material amount.

(iv) *Disposals and acquisitions in the ordinary course of the offeree company’s business*

2.60 The draft **new Practice Statement No 34** states that the matters that the Executive will consider when determining whether a disposal or acquisition is in the ordinary course of the offeree company’s business will include whether:

- (a) the proposed transaction falls within the established business model of the offeree company, taking into account:
  - (i) the frequency of similar transactions and the size of the proposed transaction in comparison to previous similar transactions; and
  - (ii) how the offeree company describes its business strategy to its shareholders;
- (b) the terms of the proposed transaction are in line with normal practice by reference to either a broader market (for example, where the offeree company proposes to dispose of or acquire liquid securities) or previous transactions entered into by the offeree company or its peers; and
- (c) the proposed transaction is part of an ongoing strategy, rather than a strategic change such as entering or exiting a geographic region or a particular business area.

2.61 The draft **new Practice Statement No 34** also states that the Executive will take into account the cumulative effect of disposals and acquisitions during the relevant period on the offeree company's assets and business as a whole. Where the offeree company has agreed to make a large number of disposals or acquisitions during the relevant period, each of which is:

- (a) not material individually; and
- (b) in the ordinary course of the offeree company's business,

the Executive may nonetheless consider that the offeree company's overall level of disposals and acquisitions is no longer in the ordinary course of its business.

2.62 If so, any subsequent disposal or acquisition would no longer be regarded as being in the ordinary course of the offeree company's business and, if also of a material amount (either individually or when aggregated with other disposals and acquisitions entered into outside the ordinary course of the offeree company's business during the relevant period), would be a restricted action.

2.63 This would mean that, for example, an investment trust company:

- (a) would generally be able to carry out its normal disposals and acquisitions of investments; but
- (b) would not be able to sell an abnormal proportion of its investment portfolio without seeking the Executive's consent under the **new Rule 21.1(e)**.

(v) Proposed amendments to the Code

2.64 In the light of the above, the Code Committee proposes to renumber the **current Note 2 on Rule 21.1** as the **new Note 3 on Rule 21.1** and make the following amendments:

**“23. Material Assets of a material amount**

(a) In assessing whether a disposal or acquisition is of assets of a material amount, the Panel will normally have regard to:

(i) ~~the aggregate~~ value of the consideration to be received or given compared with the ~~aggregate~~ market value of ~~all the equity shares~~ share capital of the offeree company; and, where appropriate,

(ii) the value of the assets ~~to be disposed of or acquired~~ compared with the value of the assets of the offeree company; and

(iii) the operating profit (i.e. profit before tax and interest and excluding exceptional items) attributable to the assets ~~to be disposed of or acquired~~ compared with ~~that the operating profit~~ of the offeree company.

For these purposes:

“assets” will normally mean total assets less current liabilities (other than short-term indebtedness); and

“equity share capital” will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for ~~the market value of the shares~~ equity share capital of the offeree company, the ~~aggregate market value of all the equity shares of the company~~ at the close of business ~~either~~:

(A) on the business day immediately preceding the start of the offer period; or

(B) if there is no offer period, on the business day immediately preceding the announcement of the transaction; and

(ii) for assets and profits, the figures stated in the latest published audited consolidated accounts ~~of the offeree company~~ or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

(c) The Panel may have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company.

~~(ed) Relative values—A relative value of 10% or more will normally be regarded as being of a material amount, although, A relative values lower value of less than 10% may also be considered of a material amount if the asset is—assets are of particular significance.~~

~~(d) If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.~~

(e) If a number of disposals and/or acquisitions (other than disposals or acquisitions in the ordinary course of the offeree company's business) are or, following the last proposed action, will be, in aggregate, of a material amount, the last relevant disposal or acquisition and any subsequent relevant disposal or acquisition will be treated as a restricted action. Disposals and acquisitions will be aggregated together disregarding any negative values.

~~(e) The Panel should be consulted in advance where there may be any doubt as to the application of the above."~~

- Q5** Should the Panel be able to have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company when determining whether a disposal or acquisition of assets is of a material amount, as set out in the proposed new Note 3(c) on Rule 21.1?
- Q6** Should only disposals and acquisitions that are outside the ordinary course of the offeree company's business be included in the calculation when determining if the relevant assets are, in aggregate, of a material amount, as set out in the proposed new Note 3(e) on Rule 21.1?
- Q7** Do you have any comments on the matters that the Executive will consider when determining whether a disposal or acquisition of assets is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?

**(f) Contracts**

**(i) Introduction**

2.65 **Section 2(f)** proposes an amendment to the **current Note 7 on Rule 21.1** (which would become the **new Note 5 on Rule 21.1**) to provide that an inducement fee arrangement proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under **Note 1** or **Note 2 on Rule 21.2**), of itself, will normally be considered to be a material contract outside the ordinary course of the offeree company's business where:

- (a) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the **new Note 3 on Rule 21.1**); or
- (b) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case).

2.66 It also:

- (a) describes how the Executive normally determines whether a contract is in the ordinary course of the offeree company's business; and
- (b) provides examples of how the Executive normally determines whether particular types of contract are in the ordinary course of the offeree company's business,

as set out in the draft **new Practice Statement No 34**.

(ii) *Inducement fee arrangements*

2.67 The **current Note 7 on Rule 21.1** relates to inducement fee arrangements in relation to, for example, a disposal or acquisition of assets and provides as follows:

**“7. Inducement fees**

*The Panel will normally consent to the offeree company entering into an inducement fee arrangement with a counterparty to a transaction to which Rule 21.1 applies, provided that:*

*(a) the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and*

*(b) the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no more than 1% of the value of the offeree company calculated by reference to the price of the offeror’s offer (or, if there are two or more offerors, the first offer) at the time of the announcement made under Rule 2.7.”.*

2.68 **Note 7 on Rule 21.1** does not apply to an inducement fee arrangement in relation to an offer, which is governed by **Rule 21.2**.

2.69 If **Rule 21.1(a)** is amended as proposed in **Section 2(c)**, the Code Committee proposes to amend the **current Note 7** so that it would state when an inducement fee arrangement proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under **Note 1** or **Note 2 on Rule 21.2**), of itself, will normally be considered to be a material contract outside the ordinary course of an offeree company’s business, in which case entering into that inducement fee arrangement would be a restricted action.

2.70 The Code Committee considers that **paragraph (a) of the current Note 7** can be unduly restrictive, particularly where the value of the relevant transaction is low. Where a company is not subject to restrictions under **Rule 21.1**, it would not be uncommon for an inducement fee to be larger than 1% of the value of the transaction. In addition, the Code Committee considers that it would be more appropriate to determine whether the inducement fee is material by reference to the value of the offeree company itself rather than the value of the transaction in respect of which the inducement fee is proposed.

2.71 The Code Committee also understands that, where the offeree board has received an approach but the offer period has not begun (because no announcement of an offer or possible offer has been made), it can be difficult for the offeree company to ensure that an inducement fee in relation to a disposal or acquisition does not exceed the amount set out in **paragraph (a) of the current Note 7**. If the offeree company was not subject

to the restrictions in **Rule 21.1(a)**, there would be no reason for it to seek to negotiate an inducement fee restricted to 1% of the value of the transaction and doing so could tip off the counterparty that the offeree company had received an approach from a potential offeror.

2.72 If the **new paragraph (a) of Note 7** is introduced so as to determine what is material by reference to the value of the offeree company itself, in most cases the offeree company will be permitted to agree a higher inducement fee than is currently the case, which will reduce the likelihood of the circumstances described above arising. The Code Committee recognises that there is still a risk that the offeree company may agree in principle an inducement fee that exceeds the amount that would ultimately be permitted under the new **paragraph (a)** before it receives an approach from a potential offeror. However, where that inducement fee is material by reference to the value of the offeree company, the Code Committee considers that it is possible that, by subsequently entering into the inducement fee arrangement, the offeree board could frustrate a firm or possible offer, and therefore that it is proportionate to impose such a limit on the freedom of the offeree board to act.

2.73 The Code Committee understands that the Executive's practice is to consider the transaction in respect of which the inducement fee has been agreed and the inducement fee itself separately for the purposes of **Rule 21.1**. This means that, even if the transaction itself is not restricted by **Rule 21.1(a)** (because, for example, it is a disposal or acquisition of assets that are not of a material amount), the inducement fee arrangement could be restricted by **Note 7 on Rule 21.1**. The Code Committee agrees with this practice and proposes to amend **Note 7 on Rule 21.1** to make that clear.

2.74 The Code Committee proposes to:

- (a) amend the **current Note 7 on Rule 21.1** to provide that an inducement fee arrangement proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under **Note 1** or **Note 2 on Rule 21.2**), of itself, will normally be considered to a material contract outside the ordinary course of the offeree company's business where:
  - (i) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the **new Note 3 on Rule 21.1**); or
  - (ii) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case); and



(b) renumber the **current Note 7 on Rule 21.1** as the **new Note 5 on Rule 21.1**.

(iii) *Other ordinary course contracts*

2.75 If **Rule 21.1** is amended as proposed in **Section 2(c)**, entering into, amending or terminating a material contract, other than in the ordinary course of the offeree company's business, would be a restricted action under the **new Rule 21.1(c)(v)**.

2.76 The draft **new Practice Statement No 34** states that the Executive will assess whether a contract is a material contract primarily by reference to its financial size in comparison to other contracts entered into by the offeree company. The Executive applies a low threshold for determining when a contract is material. The Executive does not therefore expect the introduction of the **new Rule 21.1(c)(v)** to make a significant difference to the proposed contracts in respect of which offeree boards currently consult the Executive under the **current Rule 21.1(a)(v)**.

2.77 If a contract is a material contract, the Executive will assess whether it is in the ordinary course of the offeree company's business by reference to all the relevant circumstances, including:

- (a) the frequency with which the offeree company has entered into similar contracts;
- (b) the size of the contract in comparison to similar contracts entered into by the offeree company;
- (c) whether the contract is of particular importance to the offeree company's business;
- (d) the terms of the contract and whether any non-market terms are onerous on the offeree company; and
- (e) if relevant, the costs associated with terminating or amending the contract.

2.78 The application of the approaches described in paragraphs 2.76 and 2.77(b) means that the size of a contract will be relevant in assessing both whether it is a material contract and (if so) whether it is in the ordinary course of the offeree company's business. For example, if a contract represents a large proportion of the offeree company's revenue (and is therefore a material contract), its size may mean that it is not in the ordinary course of business even though the contract relates to the offeree company's normal products or services (such that the offeree company regularly enters into smaller similar contracts).

2.79 In addition to the matters relevant to all contracts set out in paragraph 2.77, the draft **new Practice Statement No 34** states that the Executive will take into account additional

matters, as set out below, when considering whether certain types of contract are in the ordinary course of the offeree company's business:

- (a) **Capital expenditure:** Regular or maintenance capital expenditure will normally be regarded as being in the ordinary course of the offeree company's business. In considering material "growth" capital expenditure (for example, capital expenditure required to enter a new product area or geographical market), the Executive will take into account the offeree company's historical approach to capital expenditure and whether the proposed capital expenditure and/or the related strategic decision had been publicly disclosed before the start of the relevant period.
  - (b) **Refinancing or raising new debt:** Refinancing or raising new debt on normal market terms will generally be regarded as being in the ordinary course of the offeree company's business.
  - (c) **Property leases:** Normal property lease management will generally be regarded as being in the ordinary course of the offeree company's business.
  - (d) **Settlement agreements:** The Executive considers that **Rule 21.1(a)** should not normally compromise the ability of the offeree board to achieve the best outcome for shareholders in relation to a commercial dispute and it is likely that entering into a settlement agreement in relation to a commercial dispute will be regarded as being in the ordinary course of the offeree company's business. When considering whether that is the case, the Executive will take into account:
    - (i) the financial impact of the settlement agreement;
    - (ii) whether the relevant costs have been provided for in the offeree company's accounts or are covered by insurance; and
    - (iii) any other likely impact on the offeree company.
- (iv) *Proposed amendments to the Code*

2.80 In the light of the above, the Code Committee proposes to make the following amendments to the **current Note 7 on Rule 21.1**, which would be renumbered as the **new Note 5 on Rule 21.1**:

**75. Inducement fees**

*The Panel will normally ~~consent to the offeree company entering into~~ consider an inducement fee arrangement ~~with a counterparty to a transaction to which Rule 21.1 applies, provided that:~~ proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under Note 1 or Note 2 on Rule 21.2) to be a material contract outside the ordinary course*

of the offeree company's business if the aggregate value of the inducement fee or fees that may be payable is:

~~(a) — the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and~~

~~(b) — the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no~~

(a) where the inducement fee arrangement is entered into prior to the announcement by an offeror of a firm intention to make an offer, more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with Note 3); or

(b) where the inducement fee arrangement is entered into after the announcement by an offeror of a firm intention to make an offer, more than 1% of the value of the offeree company calculated by reference to the price of the offeror's offer (or, if there are two or more offerors, the first offer) at the time of the announcement made under Rule 2.7."

**Q8 Should the Panel normally consider an inducement fee arrangement proposed to be entered into by the offeree company to be a material contract outside the ordinary course of the offeree company's business if:**

- (a) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the new Note 3 on Rule 21.1); or
- (b) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case)?

**Q9 Do you have any comments on the matters that the Executive will consider when determining whether:**

- (a) an individual contract; or
- (b) a particular type of contract,

**is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?**

**(g) Offer-related employee retention arrangements**

(i) Introduction

2.81 **Section 2(g)** proposes a **new Note 1(c) on Rule 21.1** providing that the Panel may treat as a restricted action entering into offer-related employee retention arrangements (whether in cash or in the form of options over, or awards in respect of, offeree company shares) that:

- (a) relate to a period that is prior to the end of the offer period (and are not ordinary course employee incentivisation arrangements permitted under the proposed **new Notes 1(a) and (b) on Rule 21.1**); and
- (b) are significant in value or relate to directors or senior management.

(ii) *Application of Rule 21.1 to certain offer-related employee retention arrangements*

2.82 **Rule 16.2** relates to management incentivisation arrangements put in place by or at the direction of the offeror, which will apply only following the end of the offer period. **Rule 16.2** was introduced following [PCP 2009/2](#) (*Miscellaneous Code amendments*). Paragraph 3.6 of PCP 2009/2 sets out the reasons for regulating such management incentivisation arrangements and states as follows:

“3.6 The Code Committee considers that, in addition to concerns relating to General Principle 1, management incentivisation arrangements may be relevant to shareholders for two principal reasons:

- (a) first, there is a risk that an incentivisation arrangement could have the intention, and/or the effect, of encouraging a director or other senior employee who may be able to influence the outcome of the board’s consideration of a proposed offer to use that influence in support of the proposed offer. The larger or more unusual the incentivisation arrangement, the greater the corresponding risk; and
- (b) secondly, offerors may set a limit on the total value they are prepared to pay to acquire a company and, to the extent that incentivisation arrangements are negotiated in respect of management, the amount available for non-management shareholders may be reduced. Consequently, incentivisation arrangements may directly or indirectly affect the amount of consideration available to shareholders under the offer.”.

2.83 Similar concerns could arise in relation to offer-related employee retention arrangements put in place by the offeree board which relate to a period that is prior to the end of the offer period and are intended to address uncertainty caused by the offer period. The Code Committee considers that:

- (a) such arrangements could be perceived to influence the actions of a relevant director or senior manager if, for example, a bonus will be paid only if the offeree company remains independent;
- (b) if:
  - (i) an offeror has made a firm offer announcement under **Rule 2.7**; or
  - (ii) a potential offeror is held to offer terms under **Rule 2.5**,

before the offeree board puts such arrangements in place, the offeror may be required to proceed with its offer at a price that does not reflect the impact of such arrangements on the value of the offeree company; and

- (c) a potential offeror who is not held to offer terms under **Rule 2.5** may consider that offer-related employee retention arrangements in effect reduce the value of the offeree company, which may result in any offer being made on lower terms than would otherwise be the case or being frustrated.

2.84 The Code Committee therefore considers that, in some circumstances, offer-related employee retention arrangements put in place by the offeree company that relate to a period that is prior to the end of the offer period should be restricted by **Rule 21.1(a)**.

2.85 The Executive is regularly consulted under the **current Rule 21.1(b)** about new offer-related employee retention arrangements proposed to be put in place by the offeree board. However, some offer-related employee retention arrangements may be implemented under existing contractual arrangements with the relevant employees, for example, through the offeree board exercising an existing discretion to grant an additional cash bonus. Where the offeree company does not enter into or amend a contract in order to implement the offer-related employee retention arrangements, they would arguably not be restricted under **Rule 21.1(a)** at present.

2.86 The Code Committee considers that it is neither appropriate for some offer-related employee retention arrangements to fall outside the scope of the restrictions in **Rule 21.1(a)** as a result of the means by which they are implemented nor relevant whether the arrangements are implemented:

- (a) through cash bonuses or in the form of options over, or awards in respect of, offeree company shares;
- (b) under existing or new employee share incentive plans; or
- (c) through the offeree board exercising its discretion to grant additional bonuses or awards under existing arrangements with the relevant employee.

2.87 The Code Committee therefore proposes to add a **new Note 1(c) on Rule 21.1** providing that the Panel may treat as a restricted action entering into offer-related employee retention arrangements that:

- (a) relate to a period that is prior to the end of the offer period (and are not ordinary course employee incentivisation arrangements permitted under the proposed **new Notes 1(a) and (b) on Rule 21.1**); and

(b) are significant in value or relate to directors or senior management.

2.88 Where entering into proposed offer-related employee retention arrangements is a restricted action under **Rule 21.1(a)**, the offeree company will be able to enter into the relevant arrangements if it obtains:

- (a) the approval of its shareholders in general meeting; or
- (b) the consent of the Panel, which will normally be given in the circumstances set out in the **new Rule 21.1(e)**, including where the offeree board has obtained the offeror's consent.

2.89 The draft **new Practice Statement No 34** states that the Executive considers that new offer-related employee retention arrangements will not normally be regarded as being significant in value where the aggregate value of the arrangements is no more than 1% of the value of the offeree company calculated by reference to the price of the offer.

2.90 The draft **new Practice Statement No 34** also states that, where the arrangements are for the benefit of directors or senior management or are significant in value, additional matters may be relevant in determining whether entering into the proposed arrangements is a restricted action. These may include:

- (a) the change to the offeree company's aggregate employment costs;
- (b) the terms of each individual retention arrangement, including the absolute value of the award;
- (c) the proportion of the individual's annual remuneration that the proposed award represents;
- (d) the expected offer timetable and the time at which the offeree board proposes to grant the award;
- (e) the normal practice in the relevant industry or sector;
- (f) the importance of the individual to the offeree company's business; and
- (g) the views of the Rule 3 adviser.

(iii) *Proposed amendments to the Code*

2.91 In the light of the above, the Code Committee proposes to introduce a **new Note 1(c) on Rule 21.1**, as follows:

**“51. Established share option schemes Employee incentive and retention arrangements**

...

(c) The Panel must be consulted where the board of the offeree company proposes to put in place offer-related employee retention arrangements (other than arrangements that are considered to be in the ordinary course of the offeree company’s business under Note 1(a) or Note 1(b)) that will relate to a period that is prior to the end of the offer period, whether in cash or in the form of options over, or awards in respect of, shares in the offeree company. Where those arrangements are significant in value or relate to directors or senior management, the Panel may treat entering into those arrangements as a restricted action.”.

**Q10 Should the Panel be consulted to determine whether entering into offer-related employee retention arrangements that relate to a period that is prior to the end of the offer period would be a restricted action, as proposed in the new Note 1(c) on Rule 21.1?**

**Q11 Do you have any comments on the circumstances in which the Executive may consider entering into offer-related employee retention arrangements to be a restricted action, as set out in the draft new Practice Statement No 34?**

**(h) Minor and consequential amendments**

2.92 The Code Committee proposes to make certain minor and consequential amendments to:

- (a) the **current Rule 21.1(d)** and **Rule 21.1(e)**, which would be renumbered as the **new Rule 21.1(f)** and **Rule 21.1(g)** respectively;
- (b) the **current Note 1 on Rule 21.1** (*Details to be included in circular or announcement*), which would be renumbered as the **new Note 6 on Rule 21.1**;
- (c) **Note 4 on Rule 21.1** (*Service contracts*); and
- (d) the cross-reference to **Rule 21.1(d)(i)** in **Rule 3.1**,

as set out in **Appendix A**.

2.93 In addition, consistent with its policy of removing provisions from the Code if they are no longer required, the Code Committee proposes to delete the following provisions, as set out in **Appendix A**:

- (a) the **current Note 3 on Rule 21.1** (*Interim dividends*): the Code Committee considers that, if an offeree board were to agree to pay an interim dividend during the relevant period other than with the agreement of the offeror, the appropriate remedy would be for the firm or potential offeror to have the right to reduce the offer consideration by the amount of the dividend. As this is addressed in **Note 4 on Rule 2.5**, **Rule 2.7(c)(xvi)** and **Rule 24.14**, the Code Committee considers that

it is unnecessary for the payment of an interim dividend to be subject to the restrictions in **Rule 21.1(a)**; and

- (b) the **current Note 6 on Rule 21.1** (*Pension schemes*): whilst the Code Committee considers that an arrangement between the offeree company and the trustees of the offeree company's pension scheme could, exceptionally, be restricted by the **new Rule 21.1(c)(v)** as either a material contract entered into outside the ordinary course of the offeree company's business or an action which may result in the frustration of an offer or possible offer, it considers that it is unnecessary for this to be expressly specified in the Code.

**Q12 Should:**

- (a) the **current Note 3 on Rule 21.1** (*Interim dividends*); and
- (b) the **current Note 6 on Rule 21.1** (*Pension schemes*),  
be deleted?



### 3. Period for which Rule 21.1(a) applies

#### (a) Introduction

##### 3.1 Section 3 proposes:

- (a) an amendment to provide that the restrictions in **Rule 21.1(a)** apply during the “**relevant period**”, being the period from the earlier of:
  - (i) the offeree board receiving an approach regarding a possible offer by a potential offeror; and
  - (ii) the beginning of the offer period,

until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected by the offeree board;
- (b) a **new Note 7 on Rule 21.1** to provide that, where there is more than one offeror, the relevant period for any new offeror or potential offeror will be treated as beginning upon an approach by that offeror to the offeree board or, if earlier, when the new offeror is publicly identified in an announcement; and
- (c) a **new Note 9 on Rule 21.1** to provide that:
  - (i) where the offeree board is seeking one or more potential offerors (whether by way of a formal sale process, a private sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms; and
  - (ii) where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company, the Panel should be consulted to determine when the relevant period will begin.

#### (b) Background

3.2 The restrictions in **Rule 21.1(a)** apply from the point at which “*the board of the offeree company has reason to believe that a bona fide offer might be imminent*”. [Practice Statement No 32](#) states that the Executive normally considers that an offeree board will have reason to believe that a bona fide offer might be imminent following an approach regarding a possible offer by a potential offeror.

3.3 Although this is not expressly stated, where an offer period commences, the restrictions in **Rule 21.1(a)** will normally be applied until the end of the offer period (unless the offeree

board receives an additional approach from a new potential offeror before the end of the offer period which has not been publicly disclosed, in which case **Rule 21.1(a)** will continue to apply after the end of the offer period in relation to the undisclosed potential offeror).

- 3.4 Where an offeree board unequivocally rejects an approach at a time when an offer period has not commenced, the offeree board may not know whether the rejected potential offeror continues to be interested in making an offer. This raises the question of whether, and if so for how long, the offeree board should then be considered to have reason to believe that a bona fide offer might be imminent. **Practice Statement No 32** states that the Executive normally considers that **Rule 21.1(a)** will continue to apply until 5.00 pm on the second business day following the date on which the approach is unequivocally rejected unless before that time the rejected potential offeror has given the offeree board reason to believe that it continues to be interested in making an offer (in which case **Rule 21.1(a)** will continue to apply).
- 3.5 Where **Rule 21.1(a)** ceases to be applied following the unequivocal rejection of the approach and then is applied again following receipt of a new approach, the offeree board is not required, for the purposes of the **current Note 2 on Rule 21.1**, to aggregate:
- (a) any disposals or acquisitions that are not individually of a material amount that the offeree company entered into before **Rule 21.1(a)** ceased to apply; with
  - (b) disposals or acquisitions entered into in the new period.
- 3.6 In other words, the “taxi meter” described in paragraph 2.56 will be “cleared” following the expiry of the two business day period referred to in paragraph 3.4 and will re-start at zero if a new approach is subsequently made and **Rule 21.1** is re-engaged.

**(c) Definition of the “relevant period”**

*(i) Beginning of the relevant period*

- 3.7 As **Rule 21.1(a)** places restrictions on the actions of an offeree board, the Code Committee considers that it should apply during a clearly identifiable period. This would ensure that, in accordance with **General Principle 6**, the offeree company is not hindered in the conduct of its affairs for longer than is reasonable by an offer or possible offer. The Code Committee therefore proposes to amend **Rule 21.1(a)** to provide that it applies during the “**relevant period**” which would be defined in a **new Rule 21.1(b)**.
- 3.8 The Code Committee considers that it would be disproportionate to expect an offeree board to comply with the restrictions in **Rule 21.1(a)** as a result of, for example, rumour and speculation in relation to a possible offer of which it was otherwise unaware. It

therefore proposes that the relevant period should begin when the offeree board becomes aware of a possible offer.

3.9 Save where the offeree board is seeking one or more potential offerors or a purchaser is being sought for interests carrying in aggregate 30% or more of the voting rights of the company (which is considered further in **Section 3(e)**), the offeree board will become aware of a possible offer when either:

- (a) it receives an approach from a potential offeror; or
- (b) a potential offeror publishes an announcement of a possible offer.

3.10 The Code Committee proposes that the **new Rule 21.1(b)** should state that the relevant period begins at such time.

(ii) *End of the relevant period*

3.11 If an offer is successful, the offer period ends when an announcement is made that the offer has become or been declared unconditional or, if the offer is implemented by way of a scheme of arrangement, that the scheme has become effective. As the offer is complete, it can no longer be frustrated by an action by the offeree board. In addition, the offeror would hold shares carrying over 50% of the voting rights of the offeree company. As a result, the offeror would have the ability to change members of the offeree board to its preferred nominees and so would not require any protection that may result from the restrictions in **Rule 21.1(a)**.

3.12 If an offer is not successful, the offer period ends when an announcement is made that the offer has been withdrawn or has lapsed. Similarly, where an offer period begins with a possible offer announcement, it ends if all publicly identified potential offerors have made a “no intention to bid” statement to which **Rule 2.8** applies. At such time, there is no ongoing offer or possible offer that could be frustrated and so the restrictions in **Rule 21.1(a)** are no longer required.

3.13 The Code Committee therefore considers that, where an offer period has commenced, the appropriate time for the relevant period to end is the end of the offer period (unless the offeree board receives an approach from a new potential offeror before the end of the offer period which has not been publicly disclosed, in which case **Rule 21.1(a)** will continue to apply after the end of the offer period in relation to the undisclosed potential offeror).

3.14 Where the relevant period begins following an approach by a potential offeror and no offer period has begun, the Code Committee agrees with the Executive’s practice of determining that the restrictions in **Rule 21.1(a)** should fall away after a fixed period after

the offeree board unequivocally rejects the approach. The Code Committee considers that it would be appropriate to include such a fixed period in the Code.

- 3.15 However, the Code Committee considers that the Executive's practice of determining that the restrictions in **Rule 21.1(a)** fall away at 5.00 pm on the second business day following the unequivocal rejection of an approach (as set out in **Practice Statement No 32**) provides too short a period. This gives a rejected potential offeror only a short window of time in which to make a further approach to the offeree board in order for the restrictions in **Rule 21.1(a)** to continue to apply. It is common for a rejected potential offeror to re-approach only once it has a revised proposal to put forward and it may be challenging for a rejected potential offeror to complete any work required to support an increased proposal within two business days.
- 3.16 The rationale for the Executive's practice is that it might be difficult for an offeree board to delay entering into a contract or transaction for more than a short period. This is most likely to arise in relation to a disposal or acquisition. If the offeree board seeks to delay signing the definitive agreements for a transaction, it could tip off the counterparty that the offeree board has received an approach or result in the offeree company losing that transaction even where the approach does not result in a firm offer.
- 3.17 Having considered the competing factors set out in paragraphs 3.15 and 3.16, the Code Committee considers that the relevant period should continue until 5.00 pm on the seventh calendar day following the unequivocal rejection of an approach (unless before that time the rejected potential offeror has made a further approach to the offeree board). The Code Committee considers that this would strike a fair balance between:
- (a) the requirements of **General Principle 6** (particularly given that **Rule 21.1(a)** would no longer restrict an action that is in the ordinary course of the offeree company's business); and
  - (b) avoiding a possible offer being frustrated in the window of time between approaches.
- 3.18 Where a potential offeror makes an approach but subsequently informs the offeree board that it is no longer interested in making an offer (without the offeree board having unequivocally rejected the approach), the Code Committee understands that the Executive normally considers the restrictions in **Rule 21.1(a)** to cease to apply immediately. The Code Committee agrees with this practice.

(iii) *Proposed amendments*

- 3.19 In the light of the above, the Code Committee proposes to introduce a **new Rule 21.1(b)**, as follows:

**“(b) The relevant period is the period from the earlier of:**

**(i) an approach by a potential offeror to the board of the offeree company; and**

**(ii) the beginning of the offer period,**

**until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected. See also Note 7 and Note 9.”<sup>1</sup>.**

3.20 If the **new Rule 21.1(b)** is introduced as proposed, the Code Committee understands that the Executive would withdraw **Practice Statement No 32** as it would no longer be required.

**Q13 Should the restrictions in Rule 21.1(a) apply during the “relevant period”, as specified in the proposed new Rule 21.1(b)?**

**Q14 Where no offer period has begun, should the relevant period end at 5.00 pm on the seventh calendar day following the date on which the latest approach is unequivocally rejected?**

**(d) Competing offers**

*(i) Approach to determining the relevant period for a competing offeror*

3.21 The **current Rule 21.1(c)** (which would become the **new Rule 21.1(e)**) sets out the circumstances in which a proposed action that is restricted by **Rule 21.1(a)** will normally be permitted. Certain of these circumstances relate to the status of the proposed action at the beginning of the relevant period, including:

- (a) where the proposed action is in pursuance of a contract entered into before the beginning of the relevant period (the **current Rule 21.1(c)(iv)**); and
- (b) where a decision to take the proposed action had been taken and partly implemented before the beginning of the relevant period (the **current Rule 21.1(c)(v)(A)**).

3.22 Where, at the beginning of the relevant period:

- (a) the offeree company has not entered into a contract in relation to the proposed action; and

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<sup>1</sup> See Sections 3(d) and 3(e).

- (b) the proposed action is insufficiently advanced for the offeree company to demonstrate that the decision to take the action has been taken and partly implemented,

the offeree board will often seek consent to the proposed action from each firm or potential offeror under the **current Rule 21.1(c)(ii)** as an alternative to seeking shareholder approval.

- 3.23 The application of these rules could lead to some odd outcomes where an offeror (a “**second offeror**”) does not approach the offeree board and is not publicly identified until after the beginning of the offer period. As the restrictions in **Rule 21.1(a)** applied to the offeree board before it was aware of the second offeror, the offeree board would not be able to request that the Panel disapply **Rule 21.1(a)** based on the circumstances set out in paragraph 3.21 in relation to a proposed transaction that was insufficiently advanced at the beginning of the relevant period (i.e. when the restrictions in **Rule 21.1(a)** first applied), even if the proposed transaction had become sufficiently advanced so as to fall within those circumstances by the time the second offeror made an approach or was publicly identified. If **Rule 21.1(a)** were to be applied universally on the basis of a single relevant period, the offeree board would have to seek the second offeror’s consent for that proposed transaction despite the fact that the proposed transaction would be at a more advanced stage than at the time of the first offeror’s approach.
- 3.24 The Code Committee does not consider that outcome to be appropriate, as it would allow the second offeror to have a consent right over the offeree board’s actions purely as a result of the first offeror having caused the relevant period to begin. This could cause particular difficulties if, for example, the offeree board had obtained consent from the first offeror and entered into a contract in relation to the action before it was aware of the second offeror, as it may not be possible to terminate that contract if the second offeror did not provide its consent.
- 3.25 If, on the facts of the relevant case, the Panel determined that the decision to take the proposed action had been taken and partly implemented at a point in time between the approach from the first offeror and the approach from the second offeror, the Code Committee considers that the Panel should be able to permit the proposed action on the basis of a combination of:
- (a) the first offeror having consented to the proposed action under the **current Rule 21.1(c)(ii)** (which would become the **new Rule 21.1(e)(ii)**); and
  - (b) the decision to take the proposed action having been taken and partly implemented under the **current Rule 21.1(c)(v)(A)** (which would become the **new Rule 21.1(e)(v)**) before the approach from the second offeror.

3.26 The Code Committee therefore proposes to introduce a **new Note 7 on Rule 21.1** providing that, where there is more than one offeror, the Panel will normally treat the relevant period for the second offeror as beginning upon that offeror's approach to the offeree board or, if earlier, when that offeror is first publicly identified in an announcement.

3.27 The practical effect of the **new Note 7** is to give each competing offeror its own relevant period (and, for example, its own taxi meter under the **current Note 2 on Rule 21.1**). This means that the Panel may agree to give its consent to a proposed action based on a combination of the circumstances set out in the **current Rule 21.1(c)** as described in paragraph 3.25, provided that at least one of the circumstances set out in the **current Rule 21.1(c)** applies in relation to each of the offerors in respect of whom **Rule 21.1(a)** applies at the time of the proposed action.

(ii) *Proposed amendments to the Code*

3.28 In the light of the above, the Code Committee proposes to introduce a **new Note 7 on Rule 21.1**, as follows:

**7. Competing offerors**

*Where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.*

**Q15 Should the new Note 7 on Rule 21.1 be introduced as proposed to clarify the application of the relevant period where there is more than one offeror?**

(e) ***Relevant period where an offeree board is seeking potential offerors or where a buyer is being sought for a controlling stake***

(i) *Beginning of the relevant period where an offeree board is seeking potential offerors*

3.29 If an offeree board announces that it is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), an offer period begins. This may occur before the offeree board has entered into discussions with any potential offerors or when discussions with potential offerors are still at an early stage. In particular, if the offeree board decides to initiate a formal sale process (as referred to in, for example, **Note 2 on Rule 21.2**), the offer period may begin before any potential offeror has expressed an interest in making an offer.

3.30 If **Rule 21.1** is amended as proposed in **Section 3(c)**, under the **new Rule 21.1(b)** the relevant period would begin when the offeree board announces that it is seeking potential offerors (which would commence an offer period). Consequently, the offeree board could become restricted from taking or agreeing to take a restricted action even where it is

actively seeking a potential offeror but is not yet in discussions with any interested parties.

3.31 Similar consequences could arise under the **current Rule 21.1(a)**, which provides that it applies from the point at which the offeree board has reason to believe that a bona fide offer might be imminent. It is arguable that the offeree board has reason to believe that a bona fide offer might be imminent when it begins to seek potential offerors, in which case the restrictions in the **current Rule 21.1(a)** would apply from that time even if the offeree board is not yet in discussions with any interested parties.

3.32 However, the Code Committee understands that the Executive has historically taken the view that the act of the offeree board seeking to initiate discussions with a number of potential offerors (whether by way of a formal sale process or otherwise) is not sufficient to indicate that a bona fide offer might be imminent because it is possible that no potential offeror may want to consider the opportunity. The Executive's current practice is therefore that **Rule 21.1(a)** is not engaged, even following the commencement of the offer period, until the offeree board has received at least one interested response.

3.33 The Code Committee agrees with the Executive's practice of treating **Rule 21.1(a)** as being engaged at a later stage where the offeree board is seeking one or more potential offerors. However, the Code Committee understands that an initial interested response is likely to be followed by a period of due diligence by the potential offeror and may not lead to an indicative proposal of offer terms. In addition, an offeree board may choose to seek potential offerors through a formal sale process as part of a broader strategic review, which may be undertaken when the offeree company is under financial pressure. **Rule 21.1(a)** could restrict a number of actions that an offeree board might wish to take in those circumstances, including raising capital or disposing of parts of the offeree company's business.

3.34 The Code Committee therefore proposes to introduce a **new Note 9(a) on Rule 21.1** providing that, where the offeree board is seeking one or more potential offerors (whether by way of a formal sale process, a private sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms. The potential offeror could propose those terms privately, through an approach to the offeree board, or by making a possible offer announcement including terms (which would be an announcement to which **Rule 2.5** would apply).

(ii) *Application of Rule 21.1 to the sale of a controlling interest*

3.35 An offer period can also begin as a result of a shareholder or shareholders seeking a purchaser for interests in shares carrying in aggregate 30% or more of the voting rights of an offeree company. If the selling shareholder is successful in finding a purchaser,



that purchaser will be required to make an offer to all the remaining shareholders in the offeree company to acquire their shares.

- 3.36 In these circumstances, it would arguably be offensive to **General Principle 6** to apply the restrictions in **Rule 21.1(a)** from the beginning of the offer period (i.e. when the selling shareholder announces that it is seeking a purchaser). This is because the offeree company cannot end the sale process and does not have the protection of the “put up or shut up” regime under **Rule 2.6(a)**, meaning that it has no way to bring the offer period to an end.
- 3.37 In addition, the offeree board may not be aware that the interest is for sale unless and until the selling shareholder makes an announcement (whether voluntarily or because it is required to do so under **Rule 2.2(f)**). Even once the offeree board is aware that the selling shareholder is exploring a proposed sale in principle, it may not know when a potential purchaser indicates an interest in acquiring the controlling interest to the seller. It may therefore not be possible practically to apply the restrictions in **Rule 21.1(a)** to the actions of the offeree board from the time at which the selling shareholder receives an approach from a potential purchaser.
- 3.38 The Code Committee understands that, by analogy with its practice where the offeree board is seeking one or more potential offerors, the Executive’s current approach is that **Rule 21.1(a)** should normally apply only once the selling shareholder has received at least one indication of interest from a potential purchaser (and will apply only for so long as at least one potential purchaser continues to show interest). This practice does, however, require the selling shareholder to keep the offeree board informed of any discussions with potential purchasers and so requires a degree of cooperation between the parties. Where that is not the case, the Executive may agree that the restrictions in **Rule 21.1(a)** will apply only once the offeree board is made aware that a potential purchaser has made an indicative proposal setting out offer terms.
- 3.39 If the **new Note 9(a) on Rule 21.1** is introduced as proposed, the Executive would update its current practice where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of an offeree company in the same way. This would mean that the Executive would normally agree that the relevant period would begin for a potential offeror when it makes a proposal to the selling shareholder setting out indicative terms for the purchase (i.e. indicative offer terms). If the offeree board is not aware that a buyer is being sought for a controlling stake, or is not aware of the current status of the discussions between the selling shareholder and potential purchasers, the Executive may agree that the restrictions in **Rule 21.1(a)** will apply only once the offeree board is made aware that the potential offeror has made an indicative proposal setting out terms. This practice is set out in the draft **new Practice Statement No 34**.

3.40 As the approach will depend on the extent to which the offeree board is involved in the sale of the controlling shareholder's interest, the Code Committee proposes to add a **new Note 9(b) on Rule 21.1** providing that the Panel should be consulted to determine when the relevant period should begin. This would allow the Panel to make a determination taking into account all the relevant circumstances of the case.

(iii) *Proposed amendments to the Code*

3.41 In the light of the above, the Code Committee proposes to introduce a new **Note 9 on Rule 21.1** as follows:

**"9. Relevant period where the offeree board is seeking a potential offeror or where a purchaser is sought for a controlling interest**

*(a) Where the board of an offeree company is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms.*

*(b) The Panel should be consulted at an early stage to determine when the relevant period will begin for a potential offeror where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company."*

**Q16 Should the new Note 9(a) on Rule 21.1 be introduced to provide that, where the offeree board is seeking a potential offeror for the company, the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms?**

**Q17 Should the new Note 9(b) on Rule 21.1 be introduced to provide that, where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company, the Panel should be consulted to determine when the relevant period will begin?**

(f) *Minor and consequential amendments*

3.42 The Code Committee proposes to make minor and consequential amendments, as set out in **Appendix A** to:

- (a) **presumption (7) of the definition of "acting in concert"**; and
- (b) **Note 3 on Rule 9.1,**

each of which refers to the directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer may be imminent being presumed to be acting in concert with each other.

3.43 In the light of the proposed **new Rule 21.1(b)**, the Code Committee proposes that the directors of a company that is subject to an offer or a possible offer (together with their close relatives and the related trusts of any of them) should instead be presumed to be

acting in concert with each other from the beginning of the relevant period or, where the proposed **new Note 9 on Rule 21.1** applies, the beginning of the offer period (as, in the circumstances described in the **new Note 9 on Rule 21.1**, the relevant period may begin after the offer period).

- Q18** Should presumption (7) of the definition of “acting in concert” be amended to provide that the directors of a company that is subject to an offer or a possible offer (together with their close relatives and the related trusts of any of them) are presumed to be acting in concert with each other from the beginning of the relevant period or, where the proposed new Note 9 on Rule 21.1 applies, the beginning of the offer period?

#### 4. Application of Rule 21.1 to a reverse takeover

##### (a) Background

- 4.1 **Rule 21.1(a)** may restrict actions of the offeree board but does not restrict the actions of the board of an offeror, even where the offeror is the smaller company and is making a securities exchange offer for the offeree company (such that the shareholders in the offeree company will come to hold a majority of the issued share capital of the enlarged group).
- 4.2 In these circumstances, the offeree board may wish to seek protection against the offeror board taking action equivalent to that restricted by **Rule 21.1(a)**.
- 4.3 **Rule 21.2** provides as follows:

#### **“21.2 OFFER-RELATED ARRANGEMENTS**

**(a) Except with the consent of the Panel, neither the offeree company nor any person acting in concert with it may enter into any offer-related arrangement with either the offeror or any person acting in concert with it during an offer period or when an offer is reasonably in contemplation.**

**(b) An offer-related arrangement means any agreement, arrangement, or commitment in connection with an offer, including any inducement fee arrangement or other arrangement having a similar or comparable financial or economic effect, but excluding:**

...

**(v) any agreement, arrangement or commitment which imposes obligations only on an offeror or any person acting in concert with it, other than in the context of a reverse takeover;**” (emphasis added).

- 4.4 Save as provided in **Rule 21.2(b)(v)**, there is no restriction under the Code on an offeror entering into any agreement, arrangement or commitment with the offeree company which imposes obligations only on the offeror. Therefore, the offeree board may seek to include this protection in a cooperation agreement entered into with the offeror.
- 4.5 However, the combined effect of **Rule 21.2(a)** and **Rule 21.2(b)(v)** is that an offeror, and any person acting in concert with it, is restricted from entering into an offer-related arrangement (as defined in **Rule 21.2(b)**) with the offeree company, or any person acting in concert with it, which imposes obligations on the offeror in the context of a “reverse takeover”.
- 4.6 The definition of “**reverse takeover**” provides as follows:

#### **“Reverse takeover**

A transaction will be a reverse takeover if an offeror might as a result need to increase its existing issued voting equity share capital by more than 100%.

### **NOTE ON REVERSE TAKEOVER**

*The definition is of relevance only in circumstances where the offeror is a company that falls within section 3(a)(i) or (ii) of the Introduction.”.*

- 4.7 The Code Committee understands that it has been argued to the Executive that, in the context of a reverse takeover, it is inequitable for the board of the (larger) offeree company to be subject to the restrictions in **Rule 21.1(a)** but to be unable to impose equivalent restrictions on the board of the (smaller) offeror in the cooperation agreement.
- 4.8 The Code Committee understands that, in the context of a reverse takeover, the Executive, by way of dispensation from the restrictions in **Rule 21.2(a)** (which, in the context of a reverse takeover, restrict offer-related arrangements which impose obligations only on the offeror), has consented to the cooperation agreement including obligations on the offeror which mirror the restrictions in **Rule 21.1(a)**.
- 4.9 The Code Committee agrees that the offeror and offeree company should be put in the equivalent position in such circumstances but considers that it would be preferable to achieve this outcome under the Code rather than through a combination of **Rule 21.1(a)** and contractual arrangements between the parties to the reverse takeover. The Code Committee therefore proposes to introduce a **new Note 8 on Rule 21.1** to provide that, where an offer or possible offer is a reverse takeover, **Rule 21.1** will also apply to the board of the offeror as if the offeror were an offeree company and vice versa.
- 4.10 The Code Committee does not propose to amend **Rule 21.2(b)(v)**. If the **new Note 8 on Rule 21.1** is introduced as proposed, the Code Committee understands that, as the restrictions in **Rule 21.1(a)** will apply to actions of the board of the offeror, the Executive would no longer be likely to grant a dispensation from **Rule 21.2(a)** to allow, in the case of a reverse takeover, the inclusion of obligations on the offeror in relation to the conduct of its business during the offer period in the cooperation agreement between the offeror and the offeree company.

#### **(b) Proposed amendments to the Code**

- 4.11 In the light of the above, the Code Committee proposes to introduce a **new Note 8 on Rule 21.1** as follows:

#### **8. Reverse takeovers**

*Where an offer is, or a possible offer would be, a reverse takeover, Rule 21.1 will also apply during the relevant period to the board of the offeror as if the offeror were an offeree company and vice versa.”.*

- Q19 Should the new Note 8 on Rule 21.1 be introduced as proposed to provide that where an offer or possible offer is a reverse takeover, Rule 21.1 will also apply to the board of the offeror as if the offeror were an offeree company and vice versa?**

## 5. Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation

### (a) Introduction

5.1 Section 5 proposes a new Note 10 on Rule 21.1 to provide that, other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation.

### (b) Background – PCP 2022/3 and RS 2022/3

#### (i) Introduction

5.2 In Section 2(c) of [PCP 2022/3](#) (*The offer timetable in a competitive situation*), it was explained how, in a competitive situation, the “faster” offeror (in terms of being the first to obtain its official authorisations and regulatory clearances)<sup>2</sup> could seek to complete its offer prior to the Panel introducing an auction procedure under Rule 32.5.

5.3 Paragraph 2.10 of PCP 2022/3 noted that if:

- (a) the “faster” offeror was proceeding by way of a scheme of arrangement (which had been approved by shareholders in the offeree company); and
- (b) the offeree board, with the agreement of the “faster” offeror, wished to seek to sanction the scheme prior to the Panel introducing an auction procedure under Rule 32.5,

the Panel should be consulted as to whether the action of the offeree board seeking to sanction the scheme would, without an additional shareholder vote, be restricted by Rule 21.1. This was on the basis that the sanction of the scheme would result in the “slower” offeror’s offer being frustrated.

#### (ii) Respondents’ comments on PCP 2022/3

5.4 Although views were not specifically sought on this issue, certain respondents commented on the application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation.

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<sup>2</sup> In Section 5 of this PCP, references to the “faster” or “slower” offeror are to the first or last offeror, respectively, to obtain its official authorisations and/or regulatory clearances.

5.5 In particular, one respondent did not consider that the sanction of a scheme in a competitive situation constituted frustrating action by the offeree board. This was on the basis that the shareholders in the offeree company will have approved the scheme and authorised the board to take such action as it considers appropriate to implement it. The respondent argued that, if shareholder approval was given in the knowledge of the final terms of the competing offer, it is clear that the sanctioning of the scheme should not be regarded as frustrating action. The respondent contended that the position should not be any different where the shareholder approval was given before the final terms of the competing offer were known.

5.6 The respondent also noted that there are a number of protections which apply in relation to the sanction of a scheme and argued that, as a result, there is no need for the restrictions in **Rule 21.1(a)** to apply in these circumstances. These protections include that:

- (a) in deciding whether to seek to sanction a scheme, the directors of the offeree company are subject to fiduciary duties to act in the best interests of the company and its shareholders;
- (b) any shareholders in the offeree company who do not support the board's decision to seek to sanction the scheme can attend the sanction hearing and make representations to the court as to why the court should not sanction the scheme; and
- (c) most importantly, the court has the discretion to decide whether to sanction the scheme at the hearing. In considering this matter, the court will have regard to any new facts or developments since the date of the shareholder meetings (including the emergence of a new competing offer or the revision of an existing competing offer). Furthermore, at the sanction hearing, counsel for the offeree company is under a duty to draw to the attention of the court any such new facts or developments.

(iii) *The Code Committee's conclusions in RS 2022/3*

5.7 The [Response Statement to PCP 2022/3](#) ("RS 2022/3") stated that:

- (a) in making the statement in paragraph 2.10 of the PCP, the Code Committee wished to draw attention to the fact that the Panel should be consulted about the possibility that a further shareholder vote may be required under **Rule 21.1** in the event that the offeree board should seek to sanction a scheme of arrangement in a competitive situation. This is because the sanction of the scheme would inevitably result in the failure of the competing offer and the action of an offeree

board seeking to sanction the scheme could therefore constitute frustrating action in respect of the competing offer. Although the Code Committee agreed with the respondent referred to in paragraph 5.5 above that, where the scheme is approved by shareholders in the knowledge of the final terms of the competing offer, this approval will satisfy the requirements of **Rule 21.1**, it recognised that the position may not be considered to be the same where shareholder approval is given before the final terms of the competing offer are known. For example, if the competing offeror materially increases the terms of its offer, it may be argued that the approval given by shareholders for the purposes of **Rule 21.1** is superseded by this revision;

- (b) the Code Committee acknowledged the argument made by the respondent referred to in paragraph 5.6 above and, accordingly, that it intended to give further consideration to the extent to which the restrictions in **Rule 21.1(a)** should be applied to the action of an offeree board seeking to sanction a scheme in a competitive situation and to consult further on this subject as part of its general review of **Rule 21**; and
- (c) this consultation was likely to propose that, in such circumstances, either:
  - (i) the restrictions in **Rule 21.1(a)** should not apply at all to this action; or
  - (ii) the restrictions in **Rule 21.1(a)** should continue to apply to this action but that the Panel should withhold its consent to the taking of this action only in exceptional circumstances.

5.8 The Code Committee considers that the decision as to which of these approaches should be adopted is finely balanced and has therefore set out below the arguments in favour of and against each of them.

**(c) *The restrictions in Rule 21.1(a) should not apply at all***

*(i) Arguments in favour*

5.9 The principal arguments in favour of amending the Code so that the restrictions in **Rule 21.1(a)** do not apply at all where an offeree board seeks to sanction a scheme of arrangement in a competitive situation are:

- (a) all parties, and the court, would be in no doubt that the offeree board can seek to sanction a scheme of arrangement without any restriction under the Code;
- (b) were the restrictions in **Rule 21.1(a)** to apply, the circumstances in which the Panel might withhold its consent where the offeree board seeks to sanction a scheme would be likely to be the same circumstances as those in which the court would



apply particular scrutiny to the question as to whether it should sanction the scheme (such that it would be unnecessary for the Panel also to have a role in this matter); and

(c) the protections described in paragraph 5.6 already apply.

5.10 A further argument is that, if the restrictions in **Rule 21.1(a)** were to apply in these circumstances, the only measure available to the Panel, if it decided not to consent to the offeree board seeking to sanction a particular scheme, would be to require the offeree board to obtain approval of this action by shareholders in general meeting. However:

(a) the court could also require, in the light of a new competitive situation having developed or an existing competitive situation having changed, that the court sanction hearing be adjourned to a later date or that a further shareholder meeting be convened to approve the scheme. In the case of the latter, this would require a higher level of shareholder support than a shareholder approval required under **Rule 21.1(a)** given that:

(i) a further vote required by the court would require the approval of a majority in number of shareholders voting, holding 75% in value of the shares voted (whereas **Rule 21.1(a)** requires the approval of a simple majority); and

(ii) shares held by the offeror would not be permitted to be voted at a meeting convened by the court (whereas they would be permitted to be voted at a meeting required under **Rule 21.1(a)**); and

(b) even if required, the approval of shareholders under **Rule 21.1(a)** would not necessarily bring finality to the matter given that there would be no restriction on the competing offeror revising its offer between the shareholder meeting and the court sanction hearing.

(ii) *Argument against*

5.11 The key argument against amending the Code so that the restrictions in **Rule 21.1(a)** do not apply at all where an offeree board seeks to sanction a scheme in a competitive situation is that the sanctioning of a scheme would inevitably result in the failure of the competing offer and the action of the board seeking the sanction of the scheme could therefore constitute frustrating action in respect of the competing offer.

**(d) The restrictions in Rule 21.1(a) should continue to apply but the Panel should withhold its consent only in exceptional circumstances**

*(i) Introduction*

5.12 Alternatively, the restrictions in **Rule 21.1(a)** could continue to apply where an offeree board seeks to sanction a scheme in a competitive situation but the Code could be amended to make clear that the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied other than in exceptional circumstances, for example where the Panel considered that the offeree board was acting in a clearly unreasonable manner in seeking to sanction the scheme. If this approach were to be adopted, the Executive would consider this in the light of all the relevant facts but, by way of example, the fact that the offeree board was seeking to sanction the lower of two competing offers, or that the competing offeror had a limited time in which to make or revise its offer, would not of itself be regarded as exceptional circumstances.

*(ii) Argument in favour*

5.13 The key argument in favour of the approach described in paragraph 5.12 above is that, where the circumstances justify this, the Panel would retain the ability to require an additional shareholder vote under **Rule 21.1(a)** in order for an offeree board to seek to sanction a scheme in a competitive situation. Nonetheless, it would be clear that the Panel would normally agree to disapply the restrictions in **Rule 21.1(a)** with respect to the taking of this action by the offeree board and that the Panel would require an additional shareholder vote only in exceptional circumstances.

*(iii) Argument against*

5.14 The key argument against the approach described in paragraph 5.12 is that providing that **Rule 21.1(a)** should apply to the action of an offeree board seeking to sanction a scheme in a competitive situation (albeit only in exceptional circumstances) would itself cause uncertainty. Further, the protections referred to in paragraph 5.6 should, in and of themselves, be sufficient to protect offeree company shareholders.

**(e) Ability for the Panel to disapply the restrictions in Rule 21.1(a) for actions which are partly implemented before Rule 21.1 is engaged**

*(i) Introduction*

5.15 Under the **current Rule 21.1(c)(v)(A)** (which, if the amendments proposed in this PCP are adopted, would become the **new Rule 21.1(e)(v)**), the Panel will normally agree to disapply the restrictions in **Rule 21.1(a)** if a decision to take a proposed action had been

taken before the beginning of the period referred to in **Rule 21.1(a)** and has been partly or fully implemented before the beginning of that period.

5.16 Two respondents to PCP 2022/3 contended that, where, in a competitive situation, an offeree board seeks to sanction a scheme which has been approved by shareholders, the Panel should disapply the restrictions in **Rule 21.1(a)** under **Rule 21.1(c)(v)(A)**.

5.17 In RS 2022/3, the Code Committee noted that the Panel's ability to disapply the restrictions in **Rule 21.1(a)** under **Rule 21.1(c)(v)(A)** would be relevant only where a competing offeror does not approach the offeree board until after the scheme had been approved by shareholders. This is on the basis that, in these circumstances, it may be argued that the decision by the offeree board to seek the sanction of the scheme has been partly implemented by the approval of the scheme at the shareholder meetings, which approval would have been granted before the approach from the competing offeror and therefore before **Rule 21.1** applied in relation to the competing offeror.

5.18 As explained in **Section 3(d)**, it is proposed that a **new Note 7 on Rule 21.1** should be introduced to make clear that, in the case of competing offers, the Panel will normally treat the relevant period for any new offeror as beginning upon an approach by that offeror or, if earlier, when that offeror is publicly identified in an announcement.

(ii) *Ability for the Panel to disapply the restrictions in Rule 21.1(a) under Rule 21.1(c)(v)(A)*

5.19 The Code Committee has been informed by the Executive that it would interpret and apply **Rule 21.1(c)(v)(A)** in the manner described in paragraph 5.17. Therefore, if the approach referred to in paragraph 5.12 were to be adopted, a competing offeror which wished to argue that the Executive should withhold its consent to the action of an offeree board seeking to sanction a scheme in a competitive situation could only make that argument if it approached the offeree board, or otherwise made its interest in making an offer known, prior to the shareholder meetings to approve the scheme. If, however, the competing offeror did not approach the offeree board, or did not otherwise make its interest known, until after the shareholder meetings, the Executive would normally agree to disapply the restrictions in **Rule 21.1(a)** under **Rule 21.1(c)(v)(A)** on the basis that the offeree board's decision to seek to sanction the scheme would have been partly implemented by the time that **Rule 21.1(a)** started to apply in relation to the competing offeror.

5.20 In view of the above, it may be argued that a consequence of the approach referred to in paragraph 5.12, combined with the application of **Rule 21.1(c)(v)(A)** as described above, might be to incentivise a person which is considering making a competing offer to approach the offeree board, or otherwise to make its interest known, before, as opposed to after, the shareholder meetings. As noted in paragraph 2.10 of RS 2022/3, the Code

Committee believes that this sequence of events will normally result in the most satisfactory outcome for the parties involved in a takeover as, among other matters, it enables shareholders in the offeree company to decide whether to approve the offer being implemented by way of a scheme in the knowledge of the competing offer.

**(f) The Code Committee's conclusions**

5.21 The Code Committee has concluded, on balance, that the approach referred to in paragraph 5.12 should be preferred and that, accordingly:

- (a) the restrictions in **Rule 21.1(a)** should continue to apply where an offeree board seeks to sanction a scheme of arrangement in a competitive situation; but
- (b) the Code should be amended to make clear that the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied to the taking of this action other than in exceptional circumstances.

5.22 Therefore, the Code Committee proposes to introduce a **new Note 10 on Rule 21.1**, as follows:

**"10. Sanction of a scheme of arrangement in a competitive situation**

Other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the board of the offeree company seeks to sanction a scheme of arrangement in a competitive situation.

**Q20 Should:**

- (a) the Panel consent to the restrictions in Rule 21.1(a) not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation, other than in exceptional circumstances; and
- (b) Note 10 on Rule 21.1 be introduced as proposed?

**Q21 Do you have any comments on the Executive's guidance as to how it would normally interpret "exceptional circumstances" for the purpose of the new Note 10 on Rule 21.1, as set out in the draft new Practice Statement No 34?**

**6. Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel**

**(a) Introduction**

6.1 **Section 6** proposes amendments to **Sections 3(b)(ii) and (iii) of Appendix 7** to provide that, where an offeror is proceeding by way of a scheme of arrangement and has specified within the conditions to the scheme dates by which:

(a) the shareholder meetings; or

(b) the court sanction hearing,

must be held, those “**mini-long-stop dates**” should be capable of being extended not only with the consent of the parties to the offer (as is currently the case) but also, in a competitive situation, with the consent of the Panel.

**(b) Background**

6.2 Section 2 of PCP 2022/3 proposed that **Note 2 on Rule 32.5** should be amended to provide, among other matters, that the Panel would not introduce an auction procedure under **Rule 32.5** until after the last condition in relation to a relevant official authorisation or regulatory clearance had been satisfied or waived by each of the offerors. This amendment was adopted by the Code Committee as described in Section 3 of RS 2022/3.

6.3 One of the respondents to PCP 2022/3 enquired whether the approach proposed in PCP 2022/3 to the date on which the Panel would introduce an auction procedure under **Note 2 on Rule 32.5** would lead to the Panel amending its approach to the circumstances in which an offeror proceeding by way of a scheme of arrangement would be permitted to extend the mini-long-stop dates to its scheme. In particular, the respondent suggested that, in appropriate circumstances, an offeror should be permitted to extend a mini-long-stop date in a competitive situation, even if the extension was not agreed with the offeree company.

6.4 In RS 2022/3, the Code Committee noted that implementing the suggestion made by the respondent would require the Code to be amended and that this was not a matter which was subject to consultation in PCP 2022/3. The Code Committee stated that it would consider this matter further.

**(c) Background**

6.5 Under **Section 3(b) of Appendix 7**, the parties to an offer being implemented by way of a scheme are permitted to include within the conditions to the scheme:

- (a) a specific date by which the shareholder meetings must be held (unless extended with the agreement of the parties to the offer), provided that the date specified must be more than 21 days after the expected date of the shareholder meetings to be set out in the scheme circular (**Section 3(b)(ii) of Appendix 7**); and
  - (b) a specific date by which the court sanction hearing must be held (unless extended with the agreement of the parties to the offer), provided that the date specified must be more than 21 days after the expected date of the court sanction hearing to be set out in the scheme circular (**Section 3(b)(iii) of Appendix 7**).
- 6.6 The rationale for allowing a scheme to be subject to such mini-long-stop dates is to give the offeror the ability to lapse its offer in the event that the offeree board adjourns the shareholder meetings or the court sanction hearing for 22 days or more beyond the date specified in the scheme circular. Without the mini-long-stop dates, the offeror might not be able to lapse its offer in these circumstances until the long-stop date for the offer.
- 6.7 The Code Committee understands that the most common reasons for the offeree board adjourning the shareholder meetings or a court sanction hearing would be in order to allow more time for either:
- (a) a potential competing offeror to clarify its position by announcing a firm offer under **Rule 2.7**; or
  - (b) a firm offeror to increase its offer (in an auction procedure introduced under **Rule 32.5** or otherwise).
- (d) The respondent's arguments**
- 6.8 The respondent referred to in paragraph 6.3 submitted that where an offeror ("**Offeror 1**") announces an offer to be implemented by way of a scheme and, following the publication of the scheme circular, a third party ("**Offeror 2**") announces a competing offer, as a result of which, the offeree board:
- (a) withdraws its recommendation of Offeror 1's offer in favour of Offeror 2's offer;
  - (b) adjourns the shareholder meetings in relation to Offeror 1's offer; and
  - (c) does not agree to extend the mini-long-stop date by which the shareholder meetings to approve Offeror 1's offer must be held,

Offeror 1 should not be required, on the relevant mini-long-stop date, to make a binary decision either to invoke the relevant condition to the scheme and lapse its offer or to waive the relevant condition to the scheme (with the result that it might not be able to lapse its offer until the long-stop date).

6.9 The respondent submitted that, instead, Offeror 1 should be permitted to extend the mini-long-stop date to a date which reflects the new offer timetable – for example, to the date of the mini-long-stop date specified for the shareholder meetings to approve Offeror 2’s offer (if Offeror 2 is also proceeding by way of a scheme).

6.10 The respondent raised a similar issue in relation to the adjournment by the offeree board of the court sanction hearing to a date which is later than the relevant mini-long-stop date.

**(e) The Code Committee’s conclusions**

6.11 The Code Committee considers that, in the circumstances described above, it should be permissible for Offeror 1 to extend its mini-long-stop date to the same date as the mini-long-stop date set by Offeror 2 (if Offeror 2 is also proceeding by way of a scheme), even if the offeree board does not agree to this extension. Otherwise, Offeror 1 is at a competitive disadvantage by comparison to Offeror 2. If Offeror 2 is proceeding by way of a contractual offer, Offeror 1 should be permitted to extend its mini-long-stop date to a date agreed with the Panel.

6.12 Therefore, the Code Committee considers that the Code should be amended to provide that, in a competitive situation, a mini-long-stop date may be extended with the consent of the Panel, even if the extension is not agreed with the offeree board.

6.13 In the light of the above, the Code Committee proposes to:

(a) amend **Section 3(b) of Appendix 7**, as follows:

**“3 EXPECTED SCHEME TIMETABLE**

...

**(b) The parties to the offer are permitted to include within the conditions to the scheme:**

...

**(ii) a specific date by which the shareholder meetings must be held (unless extended with the agreement of the parties to the offer or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the shareholder meetings to be set out in the scheme circular; and**

**(iii) a specific date by which the court sanction hearing must be held (unless extended with the agreement of the parties to the offer or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the court sanction hearing to be set out in the scheme circular.”; and**

- (b) amend **Section 5 of Appendix 7**, as follows:

**“5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME**

(a) If the parties to the offer include any condition to the scheme in accordance with **Section 3(b)** above and any such condition is not capable of being satisfied by the date specified in that condition, the offeror must make an announcement as soon as practicable and, in any event, by no later than 8.00 am on the business day following the date so specified, stating whether the offeror has invoked that condition, waived that condition or, with the agreement of the offeree company or with the consent of the Panel, specified a new date by which that condition may be satisfied.”.

**Q22 Should:**

- (a) an offeror be permitted to extend a mini-long-stop date with the consent of the Panel in a competitive situation; and
- (b) Sections 3(b) and 5 of Appendix 7 be amended as proposed?



## 7. Equality of information to competing offerors

### (a) Introduction

#### 7.1 Section 7 proposes to:

- (a) delete the **current Note 1 on Rule 21.3**, which provides that an offeror may not request information under **Rule 21.3(a)** in general terms, and amend **Rule 21.3(a)** so that it would require the offeree board to provide promptly to an offeror or bona fide potential offeror who makes a request for information under **Rule 21.3(a)** both:
  - (i) all the information that has been provided to another firm or potential offeror at the time of the request (regardless of whether the information was specifically requested); and
  - (ii) any further information that the offeree board provides to another firm or potential offeror in the seven days following the request;
- (b) amend **Rule 21.4** so that it would require the offeror or potential offeror, in the case of a management buy-out or similar transaction, to provide on request to the independent directors of the offeree company or its advisers any information that it has provided, or subsequently provides, to external providers or potential providers of finance;
- (c) amend the **current Note 2 on Rule 21.3** to permit the passing of information under **Rule 21.3(a)** to be subject to a condition that the firm or potential offeror receiving the information must obtain the offeree company's consent before sharing the information with potential finance providers, provided that such consent cannot be unreasonably withheld by the offeree company; and
- (d) amend the **current Note 5 on Rule 21.3** to require an offeree board which commenced discussions in relation to a sale of all or substantially all of the offeree company's assets before the beginning of the relevant period (as defined in the proposed **new Rule 21.1(b)**) to provide, on request, to a firm offeror or bona fide potential offeror the information it passes to the potential asset purchaser after the beginning of the relevant period.

### (b) Background

#### 7.2 Rule 21.3 provides as follows:

#### **"21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS**

- (a) Any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly

to another offeror or bona fide potential offeror even if that other offeror is less welcome.

(b) The requirement in Rule 21.3(a) will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror.”.

7.3 **Rule 21.3** is derived from **General Principle 3** and is intended to ensure that the offeree board is not able to assist one “favoured” offeror in preference to another “less favoured” offeror by providing the former, but not the latter, with additional information on the offeree company, as this could potentially deny offeree company shareholders the opportunity to consider an offer from the “less favoured” offeror. If an offeror or bona fide potential offeror makes a request under **Rule 21.3(a)**, the offeree board is required to provide it with all relevant information that it has provided to another firm or potential offeror at the time of the request (subject to the requirements of **Rule 21.3(b)**).

7.4 **Section 1(c) of Appendix 1** provides that **Rule 21.3** also applies to information provided to a potential controller in connection with a transaction which is the subject of a Rule 9 waiver.

(c) **Removal of the restriction on making general enquiries**

(i) *Background*

7.5 **Note 1 on Rule 21.3** provides as follows:

**“1. General enquiries**

*The less welcome offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor.”.*

7.6 The rationale behind **Note 1 on Rule 21.3** is that if one offeror requests and receives an important piece of information, other firm or potential offerors should not be able to benefit from that offeror’s good commercial judgement in requesting that information.

7.7 However, the Code Committee understands that, where an offeror or bona fide potential offeror considers that it might not receive equal access to information and requests information under **Rule 21.3**, in practice it will:

- (a) submit a daily request for information to the offeree board. This is because **Rule 21.3(a)** applies only to information that has been provided to another firm or potential offeror at the time of the request; and

- (b) include a long list of specific information requests. This is to ensure that it specifically requests any information that any other offeror may have received as a result of the restriction on general enquiries in **Note 1 on Rule 21.3**.

(ii) *Proposal*

- 7.8 The Code Committee considers that the practice of submitting detailed daily information requests under **Rule 21.3(a)** creates an unnecessary administrative burden for both the firm offeror or bona fide potential offeror requesting the information and the offeree board. In addition, the Code Committee considers that it is not appropriate for an offeree board to be able to seek to interpret a detailed information request in an overly technical manner in order to avoid providing a less welcome offeror with information that it has given to another offeror.
- 7.9 The Code Committee has considered whether a requesting offeror or bona fide potential offeror should be able to make a single request for information, which would require the offeree board to provide to the requesting party all information that it has given, or subsequently gives, to the other offeror or potential offeror. However, this would create a risk that the offeree board would be required to continue to provide information to the requesting party even when it is no longer interested in making an offer. The Code Committee does not consider that to be appropriate.
- 7.10 The Code Committee considered whether it could address this risk by requiring a potential offeror that has requested information under **Rule 21.3(a)** to inform the offeree board if it is no longer interested in making an offer, which would bring the offeree board's obligation to provide information under **Rule 21.3(a)** to an end. However, a potential offeror is not normally required to inform the offeree board if it ceases to consider making an offer.
- 7.11 On balance, the Code Committee therefore considers that a requesting offeror or bona fide potential offeror should be able to make a single weekly request for information given to another offeror or potential offeror, which could be phrased in general terms. The Code Committee considers that this would reduce the administrative burden on the parties (as the current practice of submitting a daily request would no longer be required) whilst ensuring that the offeree board's obligation to share information would cease after an appropriate period of time (i.e. seven days) in the absence of a further request.
- 7.12 By way of example, if an offeror or bona fide potential offeror submitted an initial request for information under **Rule 21.3(a)**, the offeree board would be required to provide promptly to the requesting party any information that it has previously provided to another firm or potential offeror and any information that it subsequently provides to another firm or potential offeror in the seven days following the request. At the end of that seven day

period, the offeror or bona fide potential offeror could submit a further request for information under **Rule 21.3** so that the offeree board would be required to provide promptly any information that it provides to another firm or potential offeror in the seven days following that second request.

7.13 The Code Committee therefore proposes to:

- (a) delete the restriction on general enquiries in **Note 1 on Rule 21.3**; and
- (b) amend **Rule 21.3(a)** so that it would require the offeree board to provide promptly to the requesting offeror or bona fide potential offeror both:
  - (i) all the information that has been provided to another firm or potential offeror at the time of the request (regardless of whether the information was specifically requested); and
  - (ii) any further information that it provides to another firm or potential offeror in the seven days following the request.

(iii) *Proposed amendments to the Code*

7.14 In the light of the above, the Code Committee proposes to:

- (a) delete **Note 1 on Rule 21.3** and renumber the remaining **Notes on Rule 21.3** accordingly; and
- (b) amend **Rule 21.3** as follows:

**"21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS**

(a) ~~Any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome.~~ The board of the offeree company must, on request, promptly provide an offeror or bona fide potential offeror with all information that it has provided, and that it provides in the seven days following the request, to another offeror or potential offeror.

(b) The requirement in Rule 21.3(a) will ~~usually~~ normally only apply when:

(i) ~~there has been a public~~ an announcement of the existence of the offeror or potential offeror to which information has been ~~given~~ provided; or;

(ii) ~~if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror."~~

**Q23 Should the restriction on general enquiries in Note 1 on Rule 21.3 be deleted?**

**Q24 Should Rule 21.3 be amended to require the offeree board to provide promptly to the requesting offeror or bona fide potential offeror both: (a) the information that has been provided to another firm or potential offeror at the time of the request; and (b) any further information that it provides to the other firm or potential offeror in the seven days following the request?**

**(d) Management buy-outs and similar transactions**

*(i) Background*

7.15 **Rule 21.4** provides as follows:

**“21.4 INFORMATION TO INDEPENDENT DIRECTORS IN MANAGEMENT BUY-OUTS**

**If the offer or possible offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, promptly provide the independent directors of the offeree company or its advisers with all information which has been provided by the offeror or potential offeror to external providers or potential providers of finance (whether equity or debt) for the buy-out.”.**

7.16 Like **Rule 21.3**, **Rule 21.4** only applies to information already provided by the firm or potential offeror to external providers or potential providers of finance at the time of the request and could create a similar administrative burden for the parties in terms of the independent directors being required to submit, and the offeror or potential offeror being required to respond to, daily information requests.

*(ii) Proposal*

7.17 The purpose of **Rule 21.4** is to address the fact that, in the case of a management buy-out or similar transaction, the persons who understand the business best have “switched” from the offeree camp to the offeror camp. **Rule 21.4** addresses this imbalance by requiring this offeror, on request, to provide the independent directors of the offeree company and its advisers with all information which has been provided by the offeror or potential offeror to its external providers of finance.

7.18 As the information would remain within the offeree company (moving only from the management buy-out team to the independent directors), the Code Committee considers that it is not necessary to “switch off” the firm or potential offeror’s obligation to share information after a certain period of time as it has proposed for **Rule 21.3**. In addition, unlike a potential offeror, a management buy-out team will typically inform the independent directors if it ceases to be interested in making an offeror.

7.19 The Code Committee therefore proposes to amend **Rule 21.4** so that it would require the offeror or potential offeror to provide promptly, on request, to the independent directors of the offeree company or its advisers both:

- (a) all the information that has been provided to external providers or potential providers of finance at the time of the request; and
- (b) any further information that it subsequently provides to external providers or potential providers of finance,

such that the independent directors would only be required to make a single request for information under **Rule 21.4**.

(iii) *Proposed amendments to the Code*

7.20 In the light of the above, the Code Committee proposes to amend **Rule 21.4** as follows:

**“21.4 INFORMATION TO INDEPENDENT DIRECTORS IN MANAGEMENT BUY-OUTS**

**If the offer or possible offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, promptly provide the independent directors of the offeree company or its advisers with all information which has been, or is subsequently, provided by the offeror or potential offeror to external providers or potential providers of finance (whether equity or debt) for the buy-out management buy-out or similar transaction.”**

**Q25 Should Rule 21.4 in relation to management buy-outs be amended so as to require the offeror or potential offeror on request to provide to the independent directors of the offeree company or its advisers any information that it has provided, or subsequently provides, to external providers of finance?**

(e) ***Conditions attached to the passing of information under Rule 21.3***

(i) *Background*

7.21 The **current Note 2 on Rule 21.3** (which would be renumbered as the **new Note 1 on Rule 21.3** following the amendments proposed in **Section 7(c)**) provides as follows:

**“2. Conditions attached to the passing of information**

*The passing of information pursuant to this Rule should not be made subject to any conditions other than those relating to: the confidentiality of the information passed; reasonable restrictions forbidding the use of the information passed to solicit customers or employees; and, the use of the information solely in connection with an offer or potential offer. Any such conditions imposed should be no more onerous than those imposed upon any other offeror or potential offeror.*

*A requirement that a party sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any other offeror or potential offeror has been required to sign a letter in similar form.”*

- 7.22 The offeree board is permitted to require a firm or potential offeror to enter into a confidentiality agreement as a condition to the passing of information under **Rule 21.3(a)**, but any such agreement is only permitted to include the provisions set out in **Note 2 on Rule 21.3**.
- 7.23 The Code Committee understands that the Executive has previously been asked by an offeree board whether it is permissible to include a provision in a confidentiality agreement to which **Note 2 on Rule 21.3** applies that requires a potential offeror to obtain the offeree company's consent before sharing the information provided by the offeree board with a potential debt or equity finance provider (including any potential joint offeror).
- 7.24 The rationale for such a consent provision is that a potential debt or equity finance provider (including a sovereign wealth fund or other private equity provider) may often be permitted, under applicable regulation or its internal compliance policy, to discuss financing in relation to a particular offeree company with only a limited number of potential offerors. If the confidentiality agreement requires a potential offeror to seek the offeree company's consent before sharing the offeree company's information with a potential finance provider, it provides an offeree company with some protection against a potential offeror entering into discussions with a large number of finance providers, which could mean that those finance providers are then unable to enter into discussions with a competing potential offeror. This could mean that the competing potential offeror is unable to secure the financing that it would require to make a competing offer.
- 7.25 The offeree board may also include such a consent provision in order to ensure that it is aware that information that it has provided to a potential offeror may be shared with a potential finance provider. This would allow the offeree board to require in appropriate circumstances that a potential finance provider enters into a confidentiality agreement directly with the offeree company in order for the offeree company to have direct recourse against the finance provider in relation to the other provisions that are permitted under the **current Note 2 on Rule 21.3** (including, in particular, the non-solicitation provisions).
- (ii) *Proposal*
- 7.26 A provision in a confidentiality agreement that requires a potential offeror to obtain the offeree company's consent before sharing the relevant information with a potential finance provider is arguably permitted under the **current Note 2 on Rule 21.3** as a condition "*relating to the confidentiality of the information passed*". However, the Code Committee proposes to amend the **current Note 2 on Rule 21.3** to state expressly that such a provision will normally be acceptable, provided that the offeree company's consent cannot be unreasonably withheld.

7.27 The Code Committee recognises that if the offeree board were to withhold its consent to a less favoured potential offeror sharing information with potential finance providers, it could frustrate an offer by that potential offeror. However, the Code Committee considers that, provided that the offeree board is required under the terms of the confidentiality agreement to act reasonably in giving its consent to information being shared with potential finance providers, the risk of such a provision frustrating an offer is low.

7.28 As this proviso is intended to ensure that **General Principle 3** is respected, it would be for the Panel to determine whether the offeree board is withholding its consent unreasonably to the sharing of information with an external provider or potential provider of finance.

(iii) *Proposed amendments to the Code*

7.29 In the light of the above, the Code Committee proposes to amend the **current Note 2 on Rule 21.3** (which would be renumbered as the **new Note 1 on Rule 21.3**) as follows:

**21. Conditions attached to the passing of information**

(a) ~~The passing of information pursuant to this under Rule 21.3(a) should not be made subject to any conditions other than those relating to:~~

(i) ~~the confidentiality of the information passed. This may include a condition that the offeror or potential offeror will not share the information with external providers or potential providers of finance (whether equity or debt) without the consent of the offeree company, provided that such consent may not be unreasonably withheld;~~

(ii) ~~reasonable restrictions forbidding prohibiting the use of the information passed to solicit customers or employees; and, or~~

(iii) ~~the use of the information solely in connection with an offer or potential possible offer.~~

~~Any such conditions imposed should be no more onerous than those imposed upon on any other offeror or potential offeror.~~

(b) ~~A requirement that a party the offeror or potential offeror sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any each other offeror or potential offeror has been required to sign a letter in similar form."~~

**Q26** Should the passing of information under Rule 21.3(a) be permitted to be subject to a condition that the potential offeror must seek the offeree company's consent before sharing its information with a potential finance provider, provided that such consent cannot be unreasonably withheld?



(f) **Information provided to a purchaser of assets**

(i) *Background*

7.30 The **current Note 5 on Rule 21.3** provides:

**“5. Information given to a purchaser of assets**

(a) *If the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its assets (excluding cash and cash equivalents) during an offer or following the date on which the board of the offeree company has reason to believe that a bona fide offer might be imminent, information given by the offeree company to the potential asset purchaser(s) must, on request, be given to an offeror or bona fide potential offeror.*

*This requirement will usually only apply when there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s) or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the offeree company and the potential asset purchaser(s) are having such discussions.*

(b) *If a company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s) (including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror.”.*

7.31 **Note 5 on Rule 21.3** was introduced following [PCP 2017/1](#) (*Asset sales in competition with an offer and other matters*) in response to two cases in which an offeree board in receipt of an unrecommended offer decided that better value could be delivered to offeree company shareholders through the company selling all of its assets to a third party, returning the proceeds to shareholders and winding up the company. The Code Committee determined that the rationale that underpins **Rule 21.3** could apply equally where, in competition with a firm or possible offer, the offeree board decides to sell all or substantially all of the assets of the company.

(ii) *Information provided to a purchaser of assets after the offeree board receives an approach in relation to an offer*

7.32 The **current Note 5(b) on Rule 21.3** provides that, where discussions with a potential purchaser of all or substantially all of the offeree company’s assets began before the offeree board became aware that a firm or possible offer might be imminent, the board is not required to provide to an offeror or bona fide potential offeror information shared with the potential asset purchaser before the board became aware of the firm or possible offer. This is because the offeree board shared the information with the asset purchaser

at a time when the offeree board was not contemplating a transaction that would be subject to the Code and so may have shared more information than it would have done had **Rule 21.3** applied from the outset. If this were not the case, any Code company would have to consider the potential impact of **Rule 21.3** in relation to a sale of all or substantially all of its assets regardless of whether any third party thereafter considered making a competing offer, which would be disproportionate where the transaction is one to which the Code would not apply.

- 7.33 However, the **current Note 5(b) on Rule 21.3** also provides that, if the discussions with the potential asset purchaser began before the offeree board became aware that a firm or possible might be imminent, the board will not be required to provide to the potential offeror information which is provided to the potential asset purchaser after the offeree board becomes aware that the potential offeror is considering an offer. This means that, even if the offeree board receives an approach when discussions with the potential asset purchaser are at an early stage, it will not be required to share with the potential offeror any information given to the potential asset purchaser.

*(iii) Proposal*

- 7.34 On reflection, the Code Committee does not consider that there is a strong rationale for the approach taken in the **current Note 5(b) on Rule 21.3** as described in paragraph 7.33. Once the offeree board is in receipt of an approach in relation to a possible offer, it will be aware that it may potentially become involved in a transaction that would be subject to the Code and can manage information flows in the same way as any other offeree company.

- 7.35 The Code Committee therefore proposes to:

- (a) amend the **current Note 5(b) on Rule 21.3** to require an offeree board which commenced discussions in relation to a sale of all of the offeree company's assets before the beginning of the relevant period (as defined in the proposed **new Rule 21.1(b)**) to provide an offeror or bona fide potential offeror on request with the information it passes to the potential asset purchaser after the beginning of the relevant period; and
- (b) make minor drafting amendments to the **current Notes 5(a) and 5(b) on Rule 21.3**.

*(iv) Proposed amendments to the Code*

- 7.36 In the light of the above, the Code Committee proposes to amend the **current Note 5 on Rule 21.3** (which would be renumbered as the **new Note 4 on Rule 21.3**) as follows:

**“54. Information given provided to a purchaser of assets**

(a) ~~If, during the relevant period (as defined in Rule 21.1(b)), the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of its-the offeree company’s assets (excluding cash and cash equivalents)-during an offer or following the date on which the board of the offeree company has reason to believe that a bona fide offer might be imminent, information given provided by the board of the offeree company to the potential asset purchaser(s) must, on request, be given-provided on the basis set out in Rule 21.3 to an offeror or bona fide potential offeror.~~

(b) ~~This requirement will usually-normally only apply when:~~

(i) ~~there has been a-public-an announcement of the discussions between the offeree company and the potential asset purchaser(s); or,~~

(ii) ~~if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the board of the offeree company and the potential asset purchaser(s) are having such discussions.~~

(bc) ~~If a-the board of the offeree company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of its-the offeree company’s assets (excluding cash and cash equivalents) prior to-an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s) (including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror the relevant period, Rule 21.3(a) will apply only in relation to information provided to the potential asset purchaser(s) after the beginning of the relevant period.”~~

**Q27** Should the current Note 5 on Rule 21.3 be amended to require an offeree board which commenced discussions in relation to a sale of all or substantially all of the offeree company’s assets before the beginning of the “relevant period” (as defined in the proposed new Rule 21.1(b)), on request, to provide an offeror or bona fide potential offeror with the information it passes to the potential asset purchaser after the beginning of the relevant period?

**(g) Minor and consequential amendments**

7.37 The Code Committee proposes to make certain minor and consequential amendments to:

- (a) the **current Notes 3 and 4 on Rule 21.3**, which would be renumbered as the **new Notes 2 and 3 on Rule 21.3**, respectively; and
- (b) **Section 1(c) of Appendix 1**,

as set out in **Appendix A**.

## 8. Assessment of the impact of the proposals

### (a) *Restriction on actions by the board of the offeree company*

8.1 The amendments proposed in **Section 2** would:

- (a) mean that the restrictions in **Rule 21.1(a)** are less likely to prevent an offeree company from carrying on its normal activities. Preventing an offeree company from carrying on its normal activities is not the purpose of **Rule 21.1** and would not be in the best interests of the offeree company, its shareholders and other stakeholders, or a successful offeror;
- (b) provide further clarity on the circumstances in which the Panel will normally consider that a proposed action by the offeree board either is not material or is in the ordinary course of the offeree company's business (and would therefore not be restricted by **Rule 21.1(a)**); and
- (c) reduce the likelihood that the offeror's views are required before the Executive can either conclude that **Rule 21.1(a)** does not restrict a proposed action or grant a dispensation from the restrictions in **Rule 21.1(a)**.

8.2 The proposed amendments will have particular benefits for an offeree company whose business involves the buying and selling of assets, which would otherwise be subject to significant restrictions on its ordinary course business during the relevant period (which has become extended as a result of lengthier and more detail regulatory reviews), but will also be of assistance to offeree companies wishing to continue with other actions which are in the ordinary course of corporate activity.

8.3 Whilst the amendments could mean that a proposed action that either is not material or is in the ordinary course of the offeree company's business would not be restricted under **Rule 21.1(a)**, even where a firm or potential offeror is not supportive of that proposed action, the Code Committee considers that such an action is not likely to frustrate an offer or possible offer, and so it would be disproportionate for **Rule 21.1(a)** to restrict that action.

8.4 The amendments proposed in **Section 2(g)** mean that offer-related employee retention arrangements that will relate to a period that is prior to the end of the offer period could fall within the scope of the restrictions in **Rule 21.1(a)** regardless of the means by which they are implemented, which is largely a codification of the Executive's existing practice.

8.5 Entering into such offer-related employee retention arrangements may be a restricted action if they are significant in value or relate to directors or senior management. The Code Committee considers that this will benefit both:

- (a) shareholders in the offeree company, by reducing the risk that such arrangements:
  - (i) influence the actions of a relevant director or senior manager; or
  - (ii) lead to a firm or possible offer being frustrated or a potential offeror making a firm offer on lower terms than would otherwise be the case; and
- (b) an offeror who has announced a firm intention to make an offer, who could otherwise be required to proceed with its offer at a price that does not reflect the impact of such arrangements on the value of the offeree company.

8.6 The Code Committee believes that the proposed amendments will not place any significant new burdens on parties to offers or have any additional cost implications.

**(b) *Period for which Rule 21.1(a) applies***

8.7 The amendments proposed in **Section 3** would provide greater clarity for parties to offers as to the period for which the restrictions in **Rule 21.1(a)** apply.

8.8 The Code Committee considers that the proposal that, where no offer period has begun, the relevant period will end at 5.00 pm on the seventh calendar day following the date on which the latest approach is unequivocally rejected would strike a fair balance between the requirements of **General Principle 6** and avoiding a possible offer being frustrated in the window of time between approaches. If a rejected potential offeror wishes to re-approach the offeree board only once it has a revised proposal, which is common, it provides reasonable time for the potential offeror to complete any work required to support that increased proposal. Whilst extending the period for which **Rule 21.1(a)** applies following an unequivocal rejection from two business days to seven calendar days may place an additional burden on an offeree board, the restriction on the offeree board would be less extensive as **Rule 21.1(a)** would no longer restrict a proposed action that is in the ordinary course of the offeree company's business.

8.9 The amendments proposed in **Section 3(d)**, which would, in effect, give each competing offeror its own relevant period, would provide additional clarity for an offeree board as to when the Panel will normally consent to a proposed action under **Rule 21.1(a)** based on a combination of the circumstances set out in the **current Rule 21.1(c)** (which would become the **new Rule 21.1(e)**).

8.10 The Code Committee believes that the proposed amendments will not have any additional cost implications.

**(c) Application of Rule 21.1 to a reverse takeover**

- 8.11 The amendments proposed in **Section 4** would benefit the offeree company (and its shareholders) where the relevant offer is a reverse takeover, as the board of the offeror would be subject to the restrictions in **Rule 21.1(a)** on a similar basis to the offeree board.
- 8.12 The proposed amendments would place additional restrictions on the board of the offeror in such circumstances but, as the parties to such an offer frequently seek a dispensation from the restrictions in **Rule 21.2** in order to agree contractual obligations on the offeror which mirror the restrictions in **Rule 21.1(a)**, the Code Committee considers that this is not, in practice, an additional burden on the offeror.
- 8.13 The Code Committee believes that the proposed amendments may have modest cost implications for the offeror in an offer that is a reverse takeover as it would be required to engage with the Executive in relation to any proposed actions that would be restricted by **Rule 21.1(a)**.

**(d) Application of Rule 21.1 where an offeree board seeks to sanction a scheme of arrangement in a competitive situation**

- 8.14 The proposal in **Section 5** would make clear that, other than in exceptional circumstances, the Panel will consent to the restrictions in **Rule 21.1(a)** not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation. This would:
- (a) provide greater clarity regarding the circumstances in which the restrictions in **Rule 21.1(a)** may apply to this action; and
  - (b) minimise the scope for overlapping jurisdiction in this area between the roles of the Panel (in deciding whether to apply the restrictions in **Rule 21.1(a)**) and the court (in deciding whether to sanction a scheme of arrangement) in a competitive situation.

**(e) Ability for an offeror proceeding by way of a scheme of arrangement to extend a “mini-long-stop date” with the consent of the Panel**

- 8.15 The proposal in **Section 6** would enable an offeror proceeding by way of a scheme of arrangement which has specified within the conditions to the scheme dates by which the shareholder meetings or the court sanction hearing must be held to extend those dates not only with the consent of the offeree company (as is currently the case) but also, in a competitive situation, with the consent of the Panel. This would ensure that, in a competitive situation, an offeror proceeding by way of a scheme is able, with the consent of the Panel, to extend each of its mini-long-stop dates to a date which reflects the new

offer timetable. This proposal will increase the optionality available to the offeror proceeding by way of a scheme to compete and will not lead to it being required to incur additional costs.

**(f) Equality of information to competing offerors**

- 8.16 The proposals in **Section 7(c)** would reduce the administrative burden on the parties to offers where an offeror or bona fide potential offeror submits a request for information under **Rule 21.3(a)**, as the current practice of submitting a daily request would no longer be required, whilst ensuring that the offeree board's obligation to share information would cease after an appropriate period of time (i.e. seven days) in the absence of a further request.
- 8.17 The proposal in **Section 7(d)** would reduce the administrative burden on independent directors of the offeree company who request information from an offeror or potential offeror in respect of a management buy-out or similar transaction, as the independent directors would only be required to make a single request for information under **Rule 21.4**. The proposed amendment could arguably place an additional burden on an offeror or potential offeror who receives a request for information under **Rule 21.4**, as it would remain subject to the obligation to provide information to the independent directors for the duration of the offer period. However, the Code Committee considers that this is outweighed by the benefit to offeree company shareholders of the independent directors having access to all such information when providing their opinion on the offer and their recommendation as to the action that offeree company shareholders should take in respect of the offer.
- 8.18 The proposal in **Section 7(e)** would provide clarity to parties to an offer that the passing of information under **Rule 21.3(a)** can be subject to a condition that the firm or potential offeror receiving the information must obtain the offeree company's consent before sharing the information with potential finance providers. The proposal that the offeree company may not unreasonably withhold such consent would benefit offeree company shareholders and a potential offeror, as it would ensure that the possible offer cannot be frustrated as a result of the offeree board withholding its consent to a less favoured potential offeror sharing the relevant information with potential finance providers.
- 8.19 The proposal in **Section 7(f)** would benefit offeree company shareholders and a firm or potential offeror because it would:
- (a) ensure that an offeror competing with a proposal that the offeree company would sell all or substantially all of its assets would have equal access to information from the beginning of the relevant period; and

- (b) reduce the likelihood that the offer would be frustrated as a result of the offeree board withholding information from a firm or potential offeror.

8.20 The Code Committee believes that the proposed amendments will not have any additional cost implications.



## APPENDIX A

### Proposed amendments to the Code

#### DEFINITIONS

##### Acting in concert

...

Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(7) ~~the directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent~~ a possible offer (together with their close relatives and the related trusts of any of them) from the beginning of the relevant period as defined in Rule 21.1(b) or, where Note 9 on Rule 21.1 applies, from the beginning of the offer period. (See also Note 5);

#### Rule 3

##### 3.1 BOARD OF THE OFFEREE COMPANY

**The board of the offeree company must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offer) are fair and reasonable and the substance of such advice must be made known to its shareholders. (See also Rule 15.2 and Rule 21.1(df)(i).)**

#### Rule 9

##### 9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

...

##### **NOTES ON RULE 9.1**

...

##### **3. Directors of a company**

*Directors of a company which is subject to an offer or a possible offer will be presumed to be acting in concert ~~during an offer period or when they have reason to believe that a bona fide offer might be imminent~~ from the beginning of the relevant period as defined in Rule 21.1(b) or, where Note 9 on Rule 21.1 applies, from the beginning of the offer period. The normal provisions of this Rule will apply in these circumstances. At other times, directors of a company are not presumed to be acting in concert in relation to control of the company of which they are directors. Subject to the constraints imposed by the Rules, directors are, so far as the Code is concerned, free to deal in the shares of their company. The Panel reserves the right, however, to examine situations closely should the actions of the directors suggest that they may be acting in concert.*

## Rule 21

**21.1 WHEN SHAREHOLDERS' CONSENT IS REQUIRED RESTRICTION ON ACTIONS BY THE BOARD OF THE OFFEREE COMPANY**

(a) ~~During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, Except with the approval of shareholders in general meeting or the consent of the Panel, during the relevant period the board of the offeree company must not, without the approval of the shareholders in general meeting, take or agree to take:~~

~~(i) any restricted action; or~~

~~(ii) any other action which may result in the frustration of any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits, or;~~

(b) The relevant period is the period from the earlier of:

(i) an approach by a potential offeror to the board of the offeree company; and

(ii) the beginning of the offer period,

until the end of the offer period or, where no offer period has begun, 5.00 pm on the seventh day following the date on which the latest approach is unequivocally rejected. See also Note 7 and Note 9.

(c) A restricted action means any of the following, to the extent that it is not in the ordinary course of the offeree company's business:

~~(i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;~~

~~(ii) issue or grant options in respect of any unissued shares;~~

~~(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;~~

(i) issuing, or transferring out of treasury, shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;

(ii) redeeming or purchasing shares, or securities carrying rights of conversion into or subscription for shares, in the offeree company;

(iii) granting options over or awards in respect of shares in the offeree company;

(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, disposing of or acquiring (in one or more transactions) assets of a material amount; or

(v) enter entering into, amending or terminating a material contract contracts otherwise than in the ordinary course of business.

~~(bd)~~ The Panel must be consulted in advance if ~~there is any doubt as to whether any proposed action may fall within~~ be restricted by Rule 21.1(a).

~~(ee)~~ The Panel will normally agree to ~~disapply~~ give its consent under Rule 21.1(a) if:

(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing (see also Rule 21.1(eg));

(ii) the offeror consents to the taking of the proposed ~~action proposed to be taken by the board of the offeree company;~~

(iii) holders of shares carrying more than 50% of the voting rights of the offeree company state in writing that they approve the taking of the proposed action and would vote in favour of any resolution to that effect proposed at a general meeting;

(iv) the proposed action is in pursuance of a contract entered into before the beginning of the relevant ~~period referred to in Rule 21.1(a)~~ or another pre-existing obligation; or

(v) a decision to take the proposed action had been taken and ~~before the beginning of the period referred to in Rule 21.1(a)~~ which:

~~(A) has been partly or fully implemented before the beginning of that the relevant period; or~~

~~(B) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business.~~

~~(ef)~~ Where shareholder approval is to be sought in general meeting for the taking of a proposed action in accordance with Rule 21.1(a) ~~the board of the offeree company must:~~

(i) ~~the board of the offeree company must~~ obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable;

(ii) ~~the Panel must be consulted~~ consult the Panel regarding the date of the general meeting; and

(iii) ~~the board of the offeree company must~~ send a circular to shareholders containing the details set out in Note 4.6 as soon as practicable after the announcement of the proposed action.

~~(eg)~~ Where the Panel has ~~agreed to disapply~~ Rule 21.1(a) given its consent to a proposed action because the taking of the proposed action is conditional on the offer being withdrawn or lapsing, the board of the offeree company must publish an announcement containing the details set out in Note 4.6. (See also Rule 30.1(c), ~~pursuant to which the Panel may require a copy of the announcement (or a document which includes the contents of the announcement) to be sent to the persons referred to in that Rule.~~)

## NOTES ON RULE 21.1<sup>3</sup>

### **51. Established share option schemes****Employee incentive and retention arrangements**

~~(a) Where the offeree company proposes to~~ The Panel will normally consider the proposed grant of options over, or awards in respect of, shares, to be in the ordinary course of the offeree company's business if the timing and level of which are in accordance with:

~~(i) its the offeree company's normal practice under an established share option incentive scheme;~~ or

~~(ii) the offeree company's proposed practice under a new share incentive scheme, provided that the proposed practice was publicly disclosed before the relevant period.~~

~~the Panel will normally give its consent.~~

~~(b) Likewise, the~~ The Panel will normally give its consent to consider the issue of new shares or to the transfer of shares from treasury to satisfy the exercise of options or the vesting of awards under an established a share option incentive scheme to be in the ordinary course of the offeree company's business.

~~(c) The Panel must be consulted where the board of the offeree company proposes to put in place offer-related employee retention arrangements (other than arrangements that are considered to be in the ordinary course of the offeree company's business under Note 1(a) or Note 1(b)) that will relate to a period that is prior to the end of the offer period, whether in cash or in the form of options over, or awards in respect of, shares in the offeree company. Where those arrangements are significant in value or relate to directors or senior management, the Panel may treat entering into those arrangements as a restricted action.~~

### **2. Redemption or purchase of own shares**

A redemption or purchase of its own shares in line with defined limits announced or established before the relevant period will normally be in the ordinary course of the offeree company's business.

### **3. Interim dividends**

~~The declaration and payment of an interim dividend by the offeree company, otherwise than in the normal course, during an offer period may in certain circumstances be contrary to General Principle 3 and this Rule in that it could effectively frustrate an offer. Offeree companies and their advisers must, therefore, consult the Panel in advance.~~

### **23. Material Assets of a material amount**

(a) In assessing whether a disposal or acquisition is of assets of a material amount, the Panel will normally have regard to:

---

<sup>3</sup> The Code Committee proposes to renumber the **Notes on Rule 21.1** to reflect the structure of the amended **Rule 21.1**. In this **Appendix A**, the **Notes on Rule 21.1** are shown in the order in which they would appear following the proposed renumbering.

(i) ~~the aggregate value of the consideration to be received or given compared with the aggregate market value of all the equity shares share capital of the offeree company; and, where appropriate,~~

(ii) ~~the value of the assets to be disposed of or acquired compared with the value of the assets of the offeree company; and~~

(iii) ~~the operating profit (i.e. profit before tax and interest and excluding exceptional items) attributable to the assets to be disposed of or acquired compared with that the operating profit of the offeree company.~~

For these purposes:

“assets” will normally mean total assets less current liabilities (other than short-term indebtedness); and

“equity share capital” will be interpreted by reference to Note 3 on Rule 14.1.

(b) The figures to be used for these calculations must be:

(i) for ~~the market value of the shares equity share capital of the offeree company, the aggregate market value of all the equity shares of the company at the close of business either:~~

(A) on the business day immediately preceding the start of the offer period; or

(B) if there is no offer period, on the business day immediately preceding the announcement of the transaction; and

(ii) for assets and profits, the figures stated in the latest published audited consolidated accounts ~~of the offeree company~~ or, where appropriate, a subsequent preliminary statement of annual results or half-yearly financial report.

(c) The Panel may have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company.

~~(cd) Relative values—A relative value of 10% or more will normally be regarded as being of a material amount, although . A relative values lower value of less than 10% may also be considered of a material amount if the asset is assets are of particular significance.~~

~~(d) If several transactions relevant to this Rule, but not individually material, occur or are intended, the Panel will aggregate such transactions to determine whether the requirements of this Rule are applicable to any of them.~~

(e) If a number of disposals and/or acquisitions (other than disposals or acquisitions in the ordinary course of the offeree company’s business) are or, following the last proposed action, will be, in aggregate, of a material amount, the last relevant disposal or acquisition and any subsequent relevant disposal or acquisition will be treated as a restricted action. Disposals and acquisitions will be aggregated together disregarding any negative values.

~~(e) The Panel should be consulted in advance where there may be any doubt as to the application of the above.~~

#### **4. Service contracts**

The Panel will regard ~~amending or entering into or amending~~ a service contract with, or creating or varying the terms of employment or appointment of, a director as entering into or amending a material contract ~~“otherwise than in outside~~ the ordinary course of ~~business”~~ of the offeree company’s business for the purpose of ~~this Rule 21.1~~ if the new or amended contract or terms constitute an abnormal increase in the director’s emoluments or a significant improvement in the terms of service.

~~This will not prevent any such, unless the increase or improvement which results from a genuine promotion or new appointment but the Panel must be consulted in advance in such cases.~~

#### **~~75.~~ Inducement fees**

The Panel will normally ~~consent to the offeree company entering into~~ consider an inducement fee arrangement ~~with a counterparty to a transaction to which Rule 21.1 applies, provided that:~~ proposed to be entered into by the offeree company (other than an inducement fee arrangement in relation to an offer permitted under Note 1 or Note 2 on Rule 21.2) to be a material contract outside the ordinary course of the offeree company’s business if the aggregate value of the inducement fee or fees that may be payable is:

~~(a) the aggregate value of the inducement fee or fees that may be payable by the offeree company in relation to the same asset(s) is no more than 1% of the value of the transaction (or, if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and~~

~~(b) the aggregate value of the inducement fee or fees that may be payable by the offeree company in respect of all transactions to which Rule 21.1 applies is no~~

(a) where the inducement fee arrangement is entered into prior to the announcement by an offeror of a firm intention to make an offer, more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with Note 3); or

(b) where the inducement fee arrangement is entered into after the announcement by an offeror of a firm intention to make an offer, more than 1% of the value of the offeree company calculated by reference to the price of the offeror’s offer (or, if there are two or more offerors, the first offer) at the time of the announcement made under Rule 2.7.

#### **~~6.~~ Pension schemes**

~~This Rule may apply to proposals affecting the offeree company’s pension scheme(s), such as proposals involving the application of a pension scheme surplus, a material increase in the financial commitment of the offeree company in respect of its pension scheme(s) or a change to the constitution of the pension scheme(s). The Panel must be consulted in advance in relation to such proposals.~~

#### **~~46.~~ Details to be included in circular or announcement**

Any circular sent to shareholders ~~in accordance with~~ under Rule 21.1(ef)(iii) or announcement published ~~in accordance with~~ under Rule 21.1(eg) must contain the following:

(a) full details of the proposed action;

(b) the opinion of the board of the offeree company on the proposed action and the board’s reasons for forming its opinion;

(c) ~~if Rule 21.1(df)(i) applies, the substance of the advice given to the board of the offeree company as to whether the financial terms of the proposed action are fair and reasonable;~~

(d) ~~information about the current status of the offer or possible offer; and~~

(e) ~~any other information necessary to enable shareholders to make an informed decision.~~

~~The offeree company must also publish the circular or announcement, and any contracts entered into in connection with the proposed action, on a website. (See also Rule 26.1(a).)~~

### **7. Competing offerors**

Where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.

### **8. Reverse takeovers**

Where an offer is, or a possible offer would be, a reverse takeover, Rule 21.1 will also apply during the relevant period to the board of the offeror as if the offeror were an offeree company and vice versa.

### **9. Relevant period where the offeree board is seeking a potential offeror or where a purchaser is sought for a controlling interest**

(a) Where the board of an offeree company is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms.

(b) The Panel should be consulted at an early stage to determine when the relevant period will begin for a potential offeror where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

### **10. Sanction of a scheme of arrangement in a competitive situation**

Other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the board of the offeree company seeks to sanction a scheme of arrangement in a competitive situation.

...

## **21.3 EQUALITY OF INFORMATION TO COMPETING OFFERORS**

**(a) Any information given to one offeror or potential offeror, whether publicly identified or not, must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. The board of the offeree company must, on request, promptly provide an offeror or bona fide potential offeror with all information that it has provided, and that it provides in the seven days following the request, to another offeror or potential offeror.**

**(b) The requirement in Rule 21.3(a) will usually normally only apply when:**

(i) ~~there has been a public~~ an announcement of the existence of the offeror or potential offeror to which information has been given provided;  
or;

(ii) ~~if there has been no public announcement, when the offeror or bona fide potential offeror requesting information under this Rule has been informed authoritatively of the existence of another potential offeror.~~

### NOTES ON RULE 21.3

#### ~~1.~~ **General enquiries**

~~The less welcome offeror or potential offeror should specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor.~~

#### ~~21.~~ **Conditions attached to the passing of information**

(a) ~~The passing of information pursuant to this under Rule 21.3(a) should not be made subject to any conditions other than those relating to:~~

(i) ~~the confidentiality of the information passed. This may include a condition that the offeror or potential offeror will not share the information with external providers or potential providers of finance (whether equity or debt) without the consent of the offeree company, provided that such consent may not be unreasonably withheld;~~

(ii) ~~reasonable restrictions forbidding prohibiting the use of the information passed to solicit customers or employees; and, or~~

(iii) ~~the use of the information solely in connection with an offer or potential possible offer.~~

~~Any such conditions imposed should be no more onerous than those imposed upon on any other offeror or potential offeror.~~

(b) ~~A requirement that a party the offeror or potential offeror sign a hold harmless letter in favour of a firm of accountants or other third party will normally be acceptable provided that any each other offeror or potential offeror has been required to sign a letter in similar form.~~

#### ~~32.~~ **Management buy-outs**

~~If the offer or possible offer is a management buy-out or similar transaction, the information which this Rule 21.3 requires to be given to competing offerors another offeror or potential offerors offeror is that information generated by the offeree company (including the management of the offeree company acting in their capacity as such) which is passed to external providers or potential providers of finance (whether equity or debt) to the offeror or potential offeror. The Panel expects the directors of the offeree company who are involved in making the offer to must co-operate with the independent directors of the offeree company and its advisers in the assembly of this information.~~

#### ~~43.~~ **Mergers and reverse Reverse takeovers**

~~Where an offer or possible offer is a reverse takeover, an offeror or potential offeror for either party to such an offer or possible offer the reverse takeover will be entitled to receive information which has been given by such that party to the other party to the reverse takeover.~~



#### **54. Information given provided to a purchaser of assets**

(a) ~~If, during the relevant period (as defined in Rule 21.1(b)), the board of the offeree company commences discussions with one or more persons in relation to the sale of all or substantially all of ~~the offeree company's~~ assets (excluding cash and cash equivalents) during an offer or following the date on which the board of the offeree company has reason to believe that a bona fide offer might be imminent, information given provided by the board of the offeree company to the potential asset purchaser(s) must, on request, be given provided on the basis set out in Rule 21.3 to an offeror or bona fide potential offeror.~~

(b) ~~This requirement will usually normally only apply when:~~

~~(i) there has been a public announcement of the discussions between the offeree company and the potential asset purchaser(s); or~~

~~(ii) if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively that the board of the offeree company and the potential asset purchaser(s) are having such discussions.~~

~~(bc) If ~~a~~ the board of the offeree company was in discussions with one or more potential purchaser(s) regarding the sale of all or substantially all of ~~the offeree company's~~ assets (excluding cash and cash equivalents) prior to an offer being made or the date on which the board had reason to believe that a bona fide offer might be imminent, Rule 21.3 will not apply in relation to any information given to the potential asset purchaser(s) (including information given after the offer was made or the date that the board had reason to believe that a bona fide offer might be imminent) and accordingly there is no requirement for such information to be given to an offeror or bona fide potential offeror the relevant period. Rule 21.3(a) will apply only in relation to information provided to the potential asset purchaser(s) after the beginning of the relevant period.~~

#### **21.4 INFORMATION TO INDEPENDENT DIRECTORS IN MANAGEMENT BUY-OUTS**

If the offer or possible offer is a management buy-out or similar transaction, the offeror or potential offeror must, on request, promptly provide the independent directors of the offeree company or its advisers with all information which has been, or is subsequently, provided by the offeror or potential offeror to external providers or potential providers of finance (whether equity or debt) for the buy-out management buy-out or similar transaction.

### Appendix 1

#### APPENDIX 1

#### RULE 9 WAIVERS

...

#### 1 INTRODUCTION

...

(c) Rule 19, Rule 20, Rule 21.3, Rule 24.15, Rule 26, and Rule 30, where relevant, apply equally to documents, and announcements and information published, and information provided, in connection with a transaction which is the subject of the Rule 9 waiver.

## Appendix 7

## APPENDIX 7

## SCHEMES OF ARRANGEMENT

...

**3 EXPECTED SCHEME TIMETABLE**

...

- (b) The parties to the offer are permitted to include within the conditions to the scheme:

...

(ii) a specific date by which the shareholder meetings must be held (unless extended with the agreement of the parties to the offer or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the shareholder meetings to be set out in the scheme circular; and

(iii) a specific date by which the court sanction hearing must be held (unless extended with the agreement of the parties to the offer or, in a competitive situation, with the consent of the Panel), provided that the date specified must be more than 21 days after the expected date of the court sanction hearing to be set out in the scheme circular.

...

**5 ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A SCHEME**

- (a) If the parties to the offer include any condition to the scheme in accordance with Section 3(b) above and any such condition is not capable of being satisfied by the date specified in that condition, the offeror must make an announcement as soon as practicable and, in any event, by no later than 8.00 am on the business day following the date so specified, stating whether the offeror has invoked that condition, waived that condition or, with the agreement of the offeree company or with the consent of the Panel, specified a new date by which that condition may be satisfied.

**APPENDIX B****List of questions**

- Q1** Should the new definition of “restricted action” be introduced in the new Rule 21.1(c) as proposed?
- Q2** Should issuing shares or convertible securities, granting options or awards over shares, or redeeming or buying back shares or convertible securities by the offeree company, other than in the ordinary course of business, in any amount be a restricted action, as proposed in the new Rules 21.1(c)(i) to (iii)?
- Q3** Should the current Note 5 on Rule 21.1 be amended as proposed with regard to employee incentivisation arrangements?
- Q4** Should a redemption or purchase of its own shares by the offeree company in line with defined limits announced or established before the relevant period normally be in the ordinary course of the offeree company’s business, as proposed in the new Note 2 on Rule 21.1?
- Q5** Should the Panel be able to have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company when determining whether a disposal or acquisition of assets is of a material amount, as set out in the proposed new Note 3(c) on Rule 21.1?
- Q6** Should only disposals and acquisitions that are outside the ordinary course of the offeree company’s business be included in the calculation when determining if the relevant assets are, in aggregate, of a material amount, as set out in the proposed new Note 3(e) on Rule 21.1?
- Q7** Do you have any comments on the matters that the Executive will consider when determining whether a disposal or acquisition of assets is in the ordinary course of the offeree company’s business, as set out in the draft new Practice Statement No 34?
- Q8** Should the Panel normally consider an inducement fee arrangement proposed to be entered into by the offeree company to be a material contract outside the ordinary course of the offeree company’s business if:
- (a) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the new Note 3 on Rule 21.1); or
  - (b) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case)?
- Q9** Do you have any comments on the matters that the Executive will consider when determining whether:
- (a) an individual contract; or
  - (b) a particular type of contract,
- is in the ordinary course of the offeree company’s business, as set out in the draft new Practice Statement No 34?

- Q10** Should the Panel be consulted to determine whether entering into offer-related employee retention arrangements that relate to a period that is prior to the end of the offer period would be a restricted action, as proposed in the new Note 1(c) on Rule 21.1?
- Q11** Do you have any comments on the circumstances in which the Executive may consider entering into offer-related employee retention arrangements to be a restricted action, as set out in the draft new Practice Statement No 34?
- Q12** Should:
- (a) the current Note 3 on Rule 21.1 (*Interim dividends*); and
  - (b) the current Note 6 on Rule 21.1 (*Pension schemes*),
- be deleted?
- Q13** Should the restrictions in Rule 21.1(a) apply during the “relevant period”, as specified in the proposed new Rule 21.1(b)?
- Q14** Where no offer period has begun, should the relevant period end at 5.00 pm on the seventh calendar day following the date on which the latest approach is unequivocally rejected?
- Q15** Should the new Note 7 on Rule 21.1 be introduced as proposed to clarify the application of the relevant period where there is more than one offeror?
- Q16** Should the new Note 9(a) on Rule 21.1 be introduced to provide that, where the offeree board is seeking a potential offeror for the company, the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms?
- Q17** Should the new Note 9(b) on Rule 21.1 be introduced to provide that, where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company, the Panel should be consulted to determine when the relevant period will begin?
- Q18** Should presumption (7) of the definition of “acting in concert” be amended to provide that the directors of a company that is subject to an offer or a possible offer (together with their close relatives and the related trusts of any of them) are presumed to be acting in concert with each other from the beginning of the relevant period or, where the proposed new Note 9 on Rule 21.1 applies, the beginning of the offer period?
- Q19** Should the new Note 8 on Rule 21.1 be introduced as proposed to provide that where an offer or possible offer is a reverse takeover, Rule 21.1 will also apply to the board of the offeror as if the offeror were an offeree company and vice versa?
- Q20** Should:
- (a) the Panel consent to the restrictions in Rule 21.1(a) not being applied where an offeree board seeks to sanction a scheme of arrangement in a competitive situation, other than in exceptional circumstances; and
  - (b) Note 10 on Rule 21.1 be introduced as proposed?
- Q21** Do you have any comments on the Executive’s guidance as to how it would normally interpret “exceptional circumstances” for the purpose of the new Note 10 on Rule 21.1, as set out in the draft new Practice Statement No 34?

- Q22 Should:**
- (a) an offeror be permitted to extend a mini-long-stop date with the consent of the Panel in a competitive situation; and**
  - (b) Sections 3(b) and 5 of Appendix 7 be amended as proposed?**
- Q23 Should the restriction on general enquiries in Note 1 on Rule 21.3 be deleted?**
- Q24 Should Rule 21.3 be amended to require the offeree board to provide promptly to the requesting offeror or bona fide potential offeror both: (a) the information that has been provided to another firm or potential offeror at the time of the request; and (b) any further information that it provides to the other firm or potential offeror in the seven days following the request?**
- Q25 Should Rule 21.4 in relation to management buy-outs be amended so as to require the offeror or potential offeror on request to provide to the independent directors of the offeree company or its advisers any information that it has provided, or subsequently provides, to external providers of finance?**
- Q26 Should the passing of information under Rule 21.3(a) be permitted to be subject to a condition that the potential offeror must seek the offeree company's consent before sharing its information with a potential finance provider, provided that such consent cannot be unreasonably withheld?**
- Q27 Should the current Note 5 on Rule 21.3 be amended to require an offeree board which commenced discussions in relation to a sale of all or substantially all of the offeree company's assets before the beginning of the "relevant period" (as defined in the proposed new Rule 21.1(b)), on request, to provide an offeror or bona fide potential offeror with the information it passes to the potential asset purchaser after the beginning of the relevant period?**

**APPENDIX C****Draft Practice Statement No 34****PRACTICE STATEMENT NO 34****RULE 21.1 – RESTRICTION ON ACTIONS BY THE BOARD OF THE OFFEREE COMPANY****1. Introduction**

- 1.1 Rule 21.1(a) of the Takeover Code provides that, during the relevant period, the board of the offeree company must not, without the approval of shareholders in general meeting or the consent of the Panel, take or agree to take:
  - (a) any restricted action; or
  - (b) any other action which may result in the frustration of any offer or bona fide possible offer.
- 1.2 Rule 21.1(b) defines the “relevant period” for the purposes of Rule 21.1.
- 1.3 Rule 21.1(c) sets out certain actions that are restricted actions unless the relevant action is in the ordinary course of the offeree company’s business.
- 1.4 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to the taking of a proposed action that would otherwise be restricted by Rule 21.1(a).
- 1.5 This Practice Statement provides guidance on:
  - (a) matters that the Panel Executive will take into account when determining:
    - (i) whether an action listed in paragraphs (i) to (v) of Rule 21.1(c) is in the ordinary course of the offeree company’s business; and
    - (ii) whether to give its consent to a proposed action that would be restricted under Rule 21.1(a) on the basis that a decision to take the proposed action had been taken and partly implemented before the beginning of the relevant period, as described in Rule 21.1(e)(v);
  - (b) how the Executive applies Note 7 on Rule 21.1, which describes how Rule 21.1 will apply where there is more than one offeror;
  - (c) how the Executive applies Note 9(b) on Rule 21.1, which provides that the Panel must be consulted to determine when the relevant period will begin where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company; and
  - (d) how the Executive normally interprets “exceptional circumstances” when determining whether it will consent to the restrictions in Rule 21.1(a) not being applied under Note 10 on Rule 21.1 where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.
- 1.6 Rule 21.1(d) provides that the Panel must be consulted if any proposed action may be restricted by Rule 21.1(a). Offeree boards and advisers to offeree companies are encouraged to consult the Executive at an early stage, including to determine whether a proposed action is in the ordinary course of the offeree company’s business.

## 2. Disposals and acquisitions of assets

- 2.1 Rule 21.1(c)(iv) provides that disposing of or acquiring (in one or more transactions) assets of a material amount, other than in the ordinary course of the offeree company's business, is a restricted action.
- 2.2 Note 3 on Rule 21.1 describes how the Panel assesses whether assets being disposed of or acquired are of a material amount.
- 2.3 The matters that the Executive will consider when determining whether a disposal or acquisition is in the ordinary course of the offeree company's business include whether:
- (a) the proposed transaction falls within the established business model of the offeree company, taking into account:
    - (i) the frequency of similar transactions and the size of the proposed transaction in comparison to previous similar transactions; and
    - (ii) how the offeree company describes its business strategy to its shareholders;
  - (b) the terms of the proposed transaction are in line with normal practice by reference to either a broader market (for example, where the offeree company proposes to dispose of or acquire liquid securities) or previous transactions entered into by the offeree company or its peers; and
  - (c) the proposed transaction is part of an ongoing strategy, rather than a strategic change such as entering or exiting a geographic region or a particular business area.
- 2.4 The Executive will also take into account the cumulative effect of disposals and acquisitions during the relevant period on the offeree company's assets and business as a whole. Where the offeree company has agreed to make a large number of disposals or acquisitions during the relevant period, each of which is:
- (a) not material individually; and
  - (b) in the ordinary course of the offeree company's business,
- the Executive may nonetheless consider that the offeree company's overall level of disposals and acquisitions is no longer in the ordinary course of its business.
- 2.5 If so, any subsequent disposal or acquisition would no longer be regarded as being in the ordinary course of the offeree company's business and, if also of a material amount (either individually or when aggregated with other disposals and acquisitions entered into outside the ordinary course of the offeree company's business during the relevant period), would be a restricted action.
- 2.6 This means that, for example, an investment trust company:
- (a) would generally be able to carry out its normal disposals and acquisitions of investments; but
  - (b) would not be able to sell an abnormal proportion of its investment portfolio without seeking the Executive's consent under Rule 21.1(e).

### **3. Contracts - general**

- 3.1 Rule 21.1(c)(v) provides that entering into, amending or terminating a material contract, other than in the ordinary course of the offeree company's business, is a restricted action.
- 3.2 The Executive assesses whether a contract is a material contract primarily by reference to its financial size in comparison to other contracts entered into by the offeree company. The Executive applies a low threshold for determining when a contract is material.
- 3.3 If a contract is a material contract, the Executive will assess whether it is in the ordinary course of the offeree company's business by reference to all the relevant circumstances, including:
- (a) the frequency with which the offeree company has entered into similar contracts;
  - (b) the size of the contract in comparison to similar contracts entered into by the offeree company;
  - (c) whether the contract is of particular importance to the offeree company's business;
  - (d) the terms of the contract and whether any non-market terms are onerous on the offeree company; and
  - (e) if relevant, the costs associated with terminating or amending the contract.
- 3.4 The application of the approaches described in paragraphs 3.2 and 3.3(b) means that the size of a contract will be relevant in assessing both whether it is a material contract and (if so) whether it is in the ordinary course of the offeree company's business. For example, if a contract represents a large proportion of the offeree company's revenue (and is therefore a material contract), its size may mean that it is not in the ordinary course of business even though the contract relates to the offeree company's normal products or services (such that the offeree company regularly enters into smaller similar contracts).

### **4. Contracts - specific examples**

- 4.1 In addition to the matters relevant to all contracts set out in Section 3, the Executive will take into account additional matters, as set out below, when considering whether certain types of contract are in the ordinary course of the offeree company's business.

#### **(a) Capital expenditure**

- 4.2 Regular or maintenance capital expenditure will normally be regarded as being in the ordinary course of the offeree company's business. In considering material "growth" capital expenditure (for example, capital expenditure required to enter a new product area or geographical market), the Executive will take into account the offeree company's historical approach to capital expenditure and whether the proposed capital expenditure and/or the related strategic decision had been publicly disclosed before the start of the relevant period.

#### **(b) Refinancing or raising new debt**

- 4.3 Refinancing or raising new debt on normal market terms will generally be regarded as being in the ordinary course of the offeree company's business.

#### **(c) Property leases**

- 4.4 Normal property lease management will generally be regarded as being in the ordinary course of the offeree company's business.



**(d) Settlement agreements**

- 4.5 The Executive considers that Rule 21.1(a) should not normally compromise the ability of the offeree board to achieve the best outcome for shareholders in relation to a commercial dispute and it is likely that entering into a settlement agreement in relation to a commercial dispute will be regarded as being in the ordinary course of the offeree company's business.
- 4.6 When considering whether that is the case, the Executive will take into account:
- (a) the financial impact of the settlement agreement;
  - (b) whether the relevant costs have been provided for in the offeree company's accounts or are covered by insurance; and
  - (c) any other likely impact on the offeree company.

**5. Offer-related employee retention arrangements**

- 5.1 Note 1(c) on Rule 21.1 provides that the Panel may treat as a restricted action entering into offer-related employee retention arrangements that:
- (a) relate to a period that is prior to the end of the offer period (and are not ordinary course employee incentivisation arrangements under Note 1(a) or Note 1(b) on Rule 21.1); and
  - (b) are significant in value or relate to directors or senior management.
- 5.2 The Executive considers that new offer-related employee retention arrangements will not normally be regarded as being significant in value where the aggregate value of the arrangements is no more than 1% of the value of the offeree company calculated by reference to the price of the offer.
- 5.3 Where the arrangements are for the benefit of directors or senior management or are significant in value, additional matters may be relevant in determining whether entering into the proposed arrangements is a restricted action. These may include:
- (a) the change to the offeree company's aggregate employment costs;
  - (b) the terms of each individual retention arrangement, including the absolute value of the award;
  - (c) the proportion of the individual's annual remuneration that the proposed award represents;
  - (d) the expected offer timetable and the time at which the offeree board proposes to grant the award;
  - (e) the normal practice in the relevant industry or sector;
  - (f) the importance of the individual to the offeree company's business; and
  - (g) the views of the Rule 3 adviser.

**6. Partial implementation of a proposed action**

- 6.1 Rule 21.1(e)(v) provides that the Panel will normally consent to a proposed action that would be restricted by Rule 21.1(a) where:

- (a) a decision to take the proposed action had been taken; and
- (b) that decision has been partly implemented,

in each case, before the beginning of the relevant period.

- 6.2 In considering whether a decision to take a proposed action had been taken by the offeree board, the Executive will normally seek to determine whether the board had made an “in principle” decision.
- 6.3 In considering whether that “in principle” decision has been partly implemented, the Executive will normally seek to determine whether the substantial commercial terms, and in particular the financial terms, have been agreed between the parties. In some cases, the commercial terms may have been agreed at the time of the “in principle” decision and in other cases they may have been agreed at a later stage.
- 6.4 By way of example, in the context of a proposed disposal of assets by the offeree company by means of a competitive auction, the Executive considers that:
- (a) indicative, first round, non-binding bids based on only an assessment of an information memorandum will not normally be a sufficient basis for an “in principle” decision to undertake the proposed disposal to be partly implemented; and
  - (b) second round, binding bids which follow the completion of due diligence and have been accepted as a basis for entering into a sale and purchase contract will normally be a sufficient basis for an “in principle” decision to undertake the proposed disposal to be partly implemented.

## **7. Application of Rule 21.1 where there is more than one offeror**

- 7.1 The restrictions in Rule 21.1(a) apply during the relevant period. Under Rule 21.1(b), the relevant period begins upon the earlier of:
- (a) an approach by a potential offeror to the board of the offeree company; and
  - (b) the beginning of the offer period.
- 7.2 Note 7 on Rule 21.1 provides that, where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.
- 7.3 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to a proposed action that would be restricted by Rule 21.1(a). The effect of Note 7 is that, where there is more than one offeror, the Executive may agree to give its consent to a proposed action based on a combination of the circumstances set out in Rule 21.1(e).
- 7.4 For example, the offeree board may continue to take steps towards implementing a proposed action after it has received an approach from a potential offeror and later receive an approach from a second potential offeror. In such circumstances, the Executive may determine that the decision to take that action had been taken and partly implemented at a point in time after the offeree board received the approach from the first offeror, such that the decision was not partly implemented before the beginning of the relevant period for the first offeror. However, the decision may have become partly implemented before the offeree board received the approach from the second offeror, such that it was partly implemented before the beginning of the relevant period for the second offeror.
- 7.5 If, on the facts of the relevant case, the Executive determined that the decision to take the proposed action had been taken and partly implemented at a point in time between

the approach from the first offeror and the approach from the second offeror, it could permit the proposed action on the basis of a combination of, for example:

- (a) the first offeror having consented to the proposed action under Rule 21.1(e)(ii); and
- (b) the decision to take the proposed action having been taken and partly implemented under Rule 21.1(e)(v) before the approach from the second offeror.

7.6 Similarly, the disposals and/or acquisitions that are required to be aggregated for the purpose of Note 3(e) on Rule 21.1 are only those entered into during the relevant period. As the effect of Note 7 on Rule 21.1 is to give each competing offeror its own relevant period, the offeree board may therefore be required to aggregate different disposals and/or acquisitions for the purpose of Note 3(e) on Rule 21.1 for each offeror.

## **8. Relevant period where a buyer is being sought for a controlling stake**

8.1 Note 9(b) on Rule 21.1 provides that the Panel should be consulted at an early stage to determine when the relevant period will begin where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

8.2 By analogy with Note 9(a) on Rule 21.1, which provides when the relevant period will begin where an offeree board is seeking one or more potential offerors, the Executive considers that, in such circumstances, the relevant period will normally begin for a potential offeror when it makes a proposal to the selling shareholder setting out indicative terms for the purchase (i.e. indicative offer terms).

8.3 If the offeree board is not aware that a buyer is being sought for a controlling stake, or is not aware of the current status of the discussions between the selling shareholder and potential purchasers, the Executive may agree that the restrictions in Rule 21.1(a) will apply only once the offeree board is made aware that the potential offeror has made an indicative proposal setting out terms.

8.4 The offeree board or the controlling shareholder should consult the Executive to discuss when the relevant period will begin where a buyer is being sought for a controlling stake.

## **9. Application of Rule 21.1(a) where an offeree board seeks to sanction a scheme of arrangement in a competitive situation**

9.1 Note 10 on Rule 21.1 provides that, other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

9.2 The Executive will consider in the light of all the relevant facts whether there are exceptional circumstances, such that the restrictions in Rule 21.1(a) should apply to the offeree board seeking to sanction a scheme of arrangement in a competitive situation. Exceptional circumstances might exist if, for example, the Executive considered that the offeree board was acting in a clearly unreasonable manner in seeking to sanction the scheme.

9.3 The Executive considers that the fact that the offeree board is seeking to sanction the lower of two competing offers, or that the competing offeror has had a limited time in which to make or revise its offer, would not of itself be regarded as exceptional circumstances.

9.4 If a competing offeror does not approach the offeree board, or does not otherwise make its interest in making an offer known, until after the shareholder meetings to approve the scheme of arrangement, the Executive will normally consent to the restrictions in Rule 21.1(a) not being applied under Rule 21.1(e)(v) on the basis that the offeree board's decision to seek to sanction the scheme was partly implemented before the beginning of

the relevant period for the competing offeror (as determined in accordance with Note 7 on Rule 21.1).