

THE TAKEOVER PANEL

CODE COMMITTEE

Instrument 2023/3

Restrictions on frustrating action and other matters

Pursuant to sections 942, 943 and 944 of the Companies Act 2006, Articles 2, 3 and 4 of the Companies (Takeovers and Mergers Panel) (Jersey) Law 2009, and sections 340A, 340B and 340C of the Companies (Guernsey) Law, 2008, and in exercise of the functions conferred on it by the Panel in paragraph 2 of its Terms of Reference, the Code Committee hereby makes this instrument containing rules.

The Takeover Code is amended, with effect from 11 December 2023, in accordance with the Appendix to this instrument.

In the Appendix, underlining indicates new text and striking-through indicates deleted text.

Chris Saul

Chair of the Code Committee

for and on behalf of the Code Committee

27 October 2023

APPENDIX

INTRODUCTION

6 INTERPRETING THE CODE

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(a) Interpreting the Code — guidance

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In addition, the Executive may from time to time publish Practice Statements which provide informal guidance as to how the Executive usually interprets and applies particular provisions of the Code in certain circumstances. Practice Statements do not form part of the Code and, accordingly, are not binding and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. ~~Practice Statements are available on the Panel's website.~~

DEFINITIONS

Acting in concert

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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

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NOTES ON RULE 9.1

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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

51. Established share option schemes~~**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 incentive scheme, provided that the proposed practice was publicly disclosed before the relevant period.~~

~~the Panel will normally give its consent or if the grant of options over, or awards in respect of, shares is in connection with a genuine promotion or new appointment or hire.~~

~~(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 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 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 (in whole or in part) 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 management, the Panel may regard 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:

- (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 or the nature of the relevant assets.

~~(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 to the offeree company.~~

~~(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 or manager as entering into or amending a material contract ~~“otherwise than in outside~~ the ordinary course 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 or manager’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 or hire 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.~~

16. Details to be included in circular or announcement

Any circular sent to shareholders ~~in accordance with~~ under Rule 21.1(df)(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.

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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, equally and 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 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 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.~~

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, equally and 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

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(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

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3 EXPECTED SCHEME TIMETABLE

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

(i) a long-stop date by which the scheme must become effective (unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel);

(ii) a specific date by which the shareholder meetings must be held (unless extended by the offeror with the agreement of the parties to the offer offeree company 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 by the offeror with the agreement of the parties to the offer offeree company 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.

(c) Any condition referred to in paragraph (b) above:

...

(ii) must not be capable of being invoked or waived after the date specified unless extended by the offeror with the agreement of the parties to the offer offeree company or, in a competitive situation, with the consent of the Panel; and

...

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.