

PCP 2022/4 19 October 2022

# **THE TAKEOVER PANEL**

## **PUBLIC CONSULTATION BY THE CODE COMMITTEE**

### **MISCELLANEOUS CODE AMENDMENTS**



The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 13 January 2023.

Comments may be sent by email to:

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Alternatively, please send comments in writing to:

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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 amendments to various provisions of the [Takeover Code](#) (the “**Code**”), as summarised below.

### (b) Derogations and waivers from the requirements of the Code

1.2 **Section 2** proposes amendments to:

- (a) **section 2(c) of the Introduction** to the Code, in order to provide the Panel with greater flexibility to grant a derogation or waiver from the requirements of the Code in exceptional circumstances, for example, to facilitate a rescue of a company which is in serious financial difficulty; and
- (b) **Note 3 of the Notes on Dispensations from Rule 9**, in order to remove certain limitations on the Panel’s flexibility to waive the requirements of **Rule 9** in the case of a rescue operation to save a company which is in serious financial difficulty.

### (c) *Where rumour and speculation or an untoward share price movement is caused by a clear public statement*

1.3 **Section 3** proposes the deletion of **Note 2 on Rule 2.2**. The Note provides that a potential offeror which is actively considering an offer for an offeree company, but has not yet made an approach to the offeree company, will not normally be required to make an announcement under **Rule 2.2(d)** if the Panel is satisfied that rumour or speculation, or an untoward movement in the share price of the offeree company, results only from a clear and unequivocal public statement. Such public statement could be, for example, a disclosure of the acquisition of shares required by the FCA Handbook, an announcement of a dawn raid or an intention to purchase shares, or an announcement of a tender offer.

### (d) *Adjusted mandatory offer price under Note 3 on Rule 9.5*

1.4 **Section 4** proposes to amend **Note 3 on Rule 9.5** to provide that:

- (a) the price payable by an offeror when the mandatory offer price is adjusted under **Rule 9.5(c)** must be “appropriate” rather than “fair and reasonable”; and
- (b) a decision by the Panel to adjust the price of a mandatory offer must be “made public” rather than published by the Panel itself.

**(e) Offeree board recommendations and disclosure of directors' intentions in respect of their own shares**

1.5 **Section 5** proposes:

- (a) amendments to **Rule 25.2** and **Rule 15.2** to require the board of the offeree company to make a recommendation to shareholders and to holders of convertible securities, options and subscription rights as to the action that they should take in respect of, respectively, an offer (including any alternative offers) or an offer or proposal made under **Rule 15**;
- (b) amendments to **Rule 25.4(a)(v)** to:
  - (i) require that, where there are alternative offers, the offeree board circular must state which alternative (if any) the directors intend to elect for in respect of their own shares; and
  - (ii) specify that the Panel may require the offeree board circular to state the directors' reasons for electing for a particular alternative; and
- (c) certain minor and consequential amendments to the Code, including the deletion of three Notes which the Code Committee considers no longer to be necessary.

**(f) Irrevocable commitments and letters of intent**

1.6 **Section 6** proposes that, if a party to an offer or any person acting in concert with it procures an irrevocable commitment or letter of intent before the announcement of a firm intention to make an offer, that party should be required to publish the irrevocable commitment or letter of intent on a website by the current deadline for announcing details of the irrevocable commitment or letter of intent (rather than only following the announcement of a firm intention to make an offer).

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

1.7 **Section 7** provides an assessment of the impact of the proposals.

**(h) Invitation to comment**

1.8 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 13 January 2023 and should be sent in the manner set out at the beginning of this PCP.

1.9 The proposed amendments to the Code are set out in **Appendix A**. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted.

1.10 A list of the questions that are put for consultation is set out in **Appendix B**.

*(i) Implementation*

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

## 2. Derogations and waivers from the requirements of the Code

### (a) Introduction

2.1 **Section 2** proposes amendments to:

- (a) **section 2(c) of the Introduction** to the Code, in order to provide the Panel with greater flexibility to grant a derogation or waiver from the requirements of the Code in exceptional circumstances, for example, to facilitate a rescue of a company which is in serious financial difficulty; and
- (b) **Note 3 of the Notes on Dispensations from Rule 9**, in order to remove certain limitations on the Panel's flexibility to waive the requirements of **Rule 9** in the case of a rescue operation to save a company which is in serious financial difficulty.

### (b) Ability of the Panel to grant dispensations

2.2 **Section 1 of the Introduction** to the Code provides an overview of the functions of the Panel. It states that the rules of the Code are set out not only in the Rules but also in other provisions of the Code, as explained in the following extract:

#### "1 OVERVIEW

The Panel[']s ... main functions are ... to supervise and regulate takeovers and other matters to which the Code applies in accordance with the rules set out in the Code. ... The rules of the Code include rules set out in this Introduction, the General Principles, the Definitions, the Rules, and the related Notes and Appendices ...".

2.3 **Section 2(b) of the Introduction** notes that the Code is based upon six General Principles, which are as follows:

"1. (1) **All holders of the securities of an offeree company of the same class must be afforded equivalent treatment.**

(2) **If a person acquires control of a company, the other holders of securities must be protected.**

2. (1) **The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid.**

(2) **Where it advises the holders of securities, the board of directors of the offeree company must give its views on the effects of implementation of the takeover bid on:**

(a) **employment;**

(b) **conditions of employment; and**

(c) **the locations of the company's places of business.**

3. **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.**
4. **False markets must not be created in the securities of:**
  - (a) **the offeree company;**
  - (b) **if the offeror is a company, that company; or**
  - (c) **any other company concerned by the takeover bid**

**in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.**
5. **An offeror must announce a takeover bid only after:**
  - (a) **ensuring that the offeror can fulfil in full any cash consideration, if such is offered; and**
  - (b) **taking all reasonable measures to secure the implementation of any other type of consideration.**
6. **An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid for its securities.”.**

2.4 **Section 2(b) of the Introduction** states that the General Principles and the other rules of the Code are to be applied and interpreted in accordance with their spirit in order to achieve their underlying purpose.

2.5 As part of the principles-based and purposive application of the Code, **section 2(c) of the Introduction** gives the Panel the ability to a grant dispensation from the requirements of Code in specified circumstances, as follows:

**“(c) Derogations and Waivers**

The Panel may derogate or grant a waiver to a person from the application of a rule (provided that the General Principles are respected) either:

- (i) in the circumstances set out in the rule; or
- (ii) in other circumstances where the Panel considers that the particular rule would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).”.

2.6 This reflects [section 944\(1\)\(d\)](#) of the Companies Act 2006 (the “**Act**”), which provides that the Code may “*authorise the Panel to dispense with or modify the application of rules in particular cases and by reference to any circumstances*”.

2.7 The Panel’s ability to grant dispensations under **section 2(c) of the Introduction** is therefore wide but constrained by the requirement in **section 2(c)** that, when doing so, “*the General Principles are respected*”.

2.8 As noted in **section 5 of the Introduction** to the Code, the day-to-day work of takeover supervision and regulation is carried out by the Panel Executive (the “**Executive**”). In practice, therefore, any dispensation from a requirement of the Code will in the first instance be considered and, if deemed appropriate, granted by the Executive. This is reflected in **section 6(b) of the Introduction**, which states that:

“[W]henever a waiver or derogation from the application of the provisions of the Code is sought, [a] person or its advisers must consult the Executive in advance.”.

**(c) *Dispensations where the relevant circumstances are set out in the rule***

**(i) *Introduction***

2.9 Two examples of rules which, in accordance with **section 2(c)(i) of the Introduction**, set out specific circumstances in which the Panel may grant a dispensation from the requirements of the rule are **Rule 9** and **Rule 21.1**.

**(ii) *Rule 9 – the mandatory offer and its terms***

2.10 In summary, **Rule 9.1** requires a person to make a mandatory offer for a company if the person, or any person acting in concert with it, acquires an interest in shares which (when taken together with shares in which they are already interested) either:

- (a) carry 30% or more of the voting rights of the company; or
- (b) increases their aggregate interests in shares in the company carrying voting rights within the 30% to 50% band.

2.11 **Rule 9.1** reflects the requirement in **General Principle 1(2)** that:

“**If a person acquires control of a company, the other holders of securities must be protected.**”.

2.12 The **Notes on Dispensations from Rule 9**, which are set out at the end of **Rule 9**, specify various circumstances in which the Panel may grant a dispensation from the requirement for a person to make a mandatory offer for a company.

2.13 Under **Note 1 of the Notes on Dispensations from Rule 9** (“**Dispensation Note 1**”), the Panel will normally grant a waiver from the mandatory offer obligation, i.e. a “**Rule 9 waiver**”, in relation to the issue of new securities for cash or as consideration for an acquisition, provided that the transaction is approved in advance by an independent vote at a meeting of the company’s shareholders.

2.14 Under **Note 3 of the Notes on Dispensations from Rule 9** (“**Dispensation Note 3**”), the Panel may waive the requirements of **Rule 9** where a company in a serious financial

position can only be saved by an urgent “rescue operation” which involves the “rescuer” taking control of the company by virtue of:

- (a) the issue of new shares without the prior approval of independent shareholders in accordance with **Dispensation Note 1**; or
- (b) the acquisition of existing shares without a mandatory offer being made.

2.15 However, given the requirement in **General Principle 1(2)** that shareholders must be protected if a person acquires control of a company, **Dispensation Note 3** provides that any such waiver must be subject to either:

- (a) the approval of the rescue operation by independent shareholders as soon as possible after it is carried out; or
- (b) the provision of some other protection for independent shareholders which the Panel considers satisfactory in the circumstances.

2.16 Where neither the approval of independent shareholders nor any other form of protection can be provided, **Dispensation Note 3** states that the rescuer will be required to make a mandatory offer for the company in accordance with **Rule 9**. **Dispensation Note 3** draws specific attention to the fact that, pursuant to **Note 3 on Rule 9.5**, the Panel may adjust the price of a mandatory offer in certain circumstances, including, under **Note 3(e) on Rule 9.5**:

*“if an offer is required in order to enable a company in serious financial difficulty to be rescued”.*

2.17 As a consequence of the operation of **Dispensation Note 3** (and the requirement for the Panel to respect **General Principle 1(2)** when granting a dispensation from the requirements of **Rule 9.1**), if:

- (a) a proposed rescuer of a company in a serious financial position as described in **Dispensation Note 3** does not wish to subject the rescue operation to a subsequent shareholder vote (given the risk that the rescuer might need to make a mandatory offer if the rescue operation is not approved by shareholders); and
- (b) the Panel is unable to satisfy itself that shareholders will be afforded some other form of protection,

the current wording of the Code does not give the Panel sufficient flexibility to grant a dispensation from the requirements of **Rule 9**, notwithstanding that, if the Panel did not grant a dispensation, the company could face imminent insolvency. This could be highly undesirable for the company’s shareholders and other stakeholders. In such

circumstances, it could be preferable to permit the rescue operation to proceed even though it was not possible for it to be approved by the company's shareholders (or for any other protection to be provided to shareholders) since this could secure the company's survival (albeit under the control of the rescuer) and enable shareholders to retain at least some economic value.

2.18 Accordingly, the Code Committee believes that **Dispensation Note 3** should be amended as proposed below.

(iii) *Rule 21.1 – restrictions on “frustrating action”*

2.19 In summary, **Rule 21.1(a)** restricts the board of the offeree company from taking any action which may result in an offer being frustrated, unless that action is approved by a general meeting of the company's shareholders.

2.20 **Rule 21.1(c)** sets out certain circumstances in which the Panel will normally agree to disapply the restriction set out in **Rule 21.1(a)**, i.e. if:

**(i) the taking of the proposed action is conditional on the offer being withdrawn or lapsing ... ;**

**(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.”.**

2.21 In a recent case, the offeree company proposed that, in order to avoid imminent insolvency, it would immediately sell all of its assets to one of the two competing offerors without obtaining either:

(a) the approval of the company's shareholders in accordance with **Rule 21.1(a)**; or

(b) the consent of the other competing offeror in accordance with **Rule 21.1(c)(ii)**,

and without any of the other provisions of **Rule 21.1(c)** being applicable.

2.22 The Executive agreed to grant a dispensation from **Rule 21.1(a)** in order to allow the sale to proceed, given that it was satisfied that the only alternative was the imminent insolvency of the offeree company.

**(d) Proposed amendments to the Code**

*(i) Introduction*

2.23 The Code Committee believes that, in general, it is important for the Panel (in practice, the Executive) to be satisfied that, in granting a dispensation from the requirements of the Code, the General Principles are respected.

2.24 On occasion, however, there may be exceptional circumstances, most obviously to facilitate the rescue of a company which is in serious financial difficulty, in which the Panel might consider it necessary and proportionate to grant a derogation or waiver, notwithstanding that doing so might be said not to respect one or more of the General Principles.

2.25 The Code Committee believes that the Panel should be able to grant a derogation or waiver in such circumstances and that this should be made clear in the Code.

*(ii) Section 2(c) of the Introduction to the Code*

2.26 In the light of the above, the Code Committee proposes to amend **section 2(c) of the Introduction** to the Code by introducing a new final paragraph, as follows:

**“(c) Derogations and Waivers**

The Panel may derogate or grant a waiver to a person from the application of a rule (provided that the General Principles are respected) either:

- (i) in the circumstances set out in the rule; or
- (ii) in other circumstances where the Panel considers that the particular rule would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).

In exceptional circumstances, for example, in order to facilitate the rescue of a company to which the Code applies which is in serious financial difficulty, the Panel may derogate or grant a waiver to a person from the application of a rule notwithstanding that, in doing so, one or more of the General Principles might not be respected.”

*(iii) Dispensation Note 3 - first paragraph*

2.27 The Code Committee considers that the requirement in the first paragraph of **Dispensation Note 3** for either:

- (a) the rescue operation to be approved by independent shareholders; or
- (b) shareholders to be provided with some other protection,

should be deleted and replaced with an ability for the Panel to make any waiver of the mandatory offer obligation subject to such conditions (if any) as the Panel considers appropriate. This would, in effect, result in **Dispensation Note 3** reverting to a similar form to that in which it existed prior to the implementation of the EU Takeovers Directive in 2006.

2.28 The Code Committee therefore proposes to amend the first paragraph of **Dispensation Note 3**, as follows:

**“3. Rescue operations**

*There are occasions when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new shares without approval by a vote of independent shareholders or the acquisition of existing shares by the rescuer which would otherwise require an offer under Rule 9. The Panel may, however, waive the requirements of the Rule in such circumstances, subject to such conditions (if any) as the Panel considers appropriate. ~~provided that either:~~*

~~(a) approval for the rescue operation by a vote of independent shareholders is obtained as soon as possible after the rescue operation is carried out; or~~

~~(b) some other protection for independent shareholders is provided which the Panel considers satisfactory in the circumstances.”~~

(iv) *Dispensation Note 3 - second paragraph*

2.29 As indicated above, the second paragraph of **Dispensation Note 3** provides as follows:

*“Where neither the approval of independent shareholders nor any other form of protection can be provided, an offer under Rule 9 will be required. In such circumstances, however, the Panel may consider an adjustment of the highest price, pursuant to Note 3 on Rule 9.5.”*

2.30 The Code Committee considers that it is unnecessary for this paragraph to be included in **Dispensation Note 3**, given that **Note 3(e) on Rule 9.5** itself specifies that the price of a mandatory offer might be adjusted if the offer is required to enable a company in serious financial difficulty to be rescued.

2.31 The Code Committee therefore proposes to delete the second paragraph of **Dispensation Note 3**, as set out in **Appendix A**.

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

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

**3. Where rumour and speculation or an untoward share price movement is caused by a clear public statement**

**(a) Introduction**

3.1 **Section 3** proposes to delete **Note 2 on Rule 2.2**. The Note provides that a potential offeror which is actively considering an offer for an offeree company, but has not yet made an approach to the offeree company, will not normally be required to make an announcement under **Rule 2.2(d)** if the Panel is satisfied that rumour or speculation, or an untoward movement in the share price of the offeree company, results only from a clear and unequivocal public statement. Such public statement could be, for example, a disclosure of the acquisition of shares required by the FCA Handbook, an announcement of a dawn raid or an intention to purchase, or an announcement of a tender offer.

**(b) Background**

3.2 **Rule 2.2(d)** provides as follows:

**“2.2 WHEN AN ANNOUNCEMENT IS REQUIRED**

**An announcement is required:**

...

**(d) when, after a potential offeror first actively considers an offer but before an approach has been made to the board of the offeree company, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror’s actions (whether through inadequate security or otherwise) which have led to the situation;”.**

3.3 **Note 2 on Rule 2.2** provides as follows:

**“2. Clear statements**

*The Panel will not normally require an announcement under Rule 2.2(d) if it is satisfied that the price movement, rumour or speculation results only from a clear and unequivocal public statement, eg (a) a disclosure under the FCA Handbook; (b) an announcement of a dawn raid or an intention to purchase; or (c) an announcement of a tender offer.”.*

3.4 **Note 2 on Rule 2.2** was introduced in 1998. The rationale for the Note is that, even though an offer may be one of the options being considered by a purchaser of shares in a company, an announcement under **Rule 2.2(d)** should not normally be required where a share price movement, rumour or speculation results only from inferences drawn from a clear and unequivocal statement of the nature set out in the Note.

3.5 Depending on the facts, however, the Panel may nevertheless require an announcement in such a situation, for example, if it is not satisfied that the fact that a share purchaser is also actively considering an offer remains confidential.

**(c) Proposed deletion of Note 2 on Rule 2.2**

3.6 An announcement may be made of a purchase of shares in a company (or of a dawn raid, tender offer or intention to purchase shares) by a person who is actively considering an offer for that company but has not yet made an approach to its board. Such announcement may be followed by rumour and speculation relating to a possible offer for that company or an untoward share price movement. In such circumstances, there is a strong argument that, since the offeror's actions led to the announcement, which in turn gave rise to the speculation, there are reasonable grounds for concluding that it is the potential offeror's actions which have led to the rumour and speculation or untoward share price movement. It would therefore be appropriate to require the potential offeror to make an announcement under **Rule 2.2(d)** in these circumstances.

3.7 The Code Committee notes that there is no requirement for an announcement to be made under **Rule 2.2** if there is no truth to rumour and speculation. It follows that, if a disclosure relating to a share purchase is made by a person who is actively considering an offer and:

(a) rumour and speculation follows; but

(b) an immediate announcement of a possible offer is not made,

then market participants may conclude, wrongly, that there is no truth to the rumour and speculation.

3.8 The Code Committee also notes that, under **Rule 2.6(a)**, a potential offeror has 28 days from the time that it is first identified to announce either a firm intention to make an offer or that it does not intend to make an offer. A consequence of the application of **Note 2 on Rule 2.2** is that a potential offeror which has not yet approached the offeree company may, through purchasing shares and despite speculation as to its intentions, be able to defer the imposition of such a deadline. The Code Committee considers that a potential offeror should not be able to gain such a tactical advantage.

3.9 In the light of the above, the Code Committee considers that the operation of **Note 2 on Rule 2.2** has potentially adverse consequences and that it should be deleted.

3.10 The Code Committee notes that the deletion of the Note would reverse the presumption as to whether, in the relevant circumstances, an announcement under **Rule 2.2(d)** will normally be required. This would place a potential offeror who has purchased shares in

the offeree company in an equivalent position, in terms of the requirement to make an announcement following rumour and speculation, to a potential offeror who has not purchased shares. The Panel will, however, retain its discretion as to whether or not to require such an announcement, depending on the specific circumstances of a particular case.

**(d) Proposed amendments to the Code**

3.11 The Code Committee therefore proposes to:

- (a) delete **Note 2 on Rule 2.2**; and
  - (b) re-number **Notes 3 and 4 on Rule 2.2** as **Notes 2 and 3 on Rule 2.2**,
- as set out in **Appendix A**.

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

#### 4. Adjusted mandatory offer price under Note 3 on Rule 9.5

##### (a) Introduction

4.1 Section 4 proposes to amend Note 3 on Rule 9.5 to provide that:

- (a) the price payable by an offeror when the mandatory offer price is adjusted under Rule 9.5(c) must be “appropriate” rather than “fair and reasonable”; and
- (b) a decision by the Panel to adjust the price of a mandatory offer must be “made public” rather than published by the Panel itself.

##### (b) Rule 9.5 – Consideration to be offered under a mandatory offer

4.2 Rule 9.5 sets out the requirements for the consideration to be offered under a mandatory offer required by Rule 9. In summary:

- (a) under Rule 9.5(a), a mandatory offer must be in cash at not less than the highest price paid by the offeror, or any person acting in concert with it, for any interest in shares in the offeree company during the 12 months prior to the announcement of the offer;
- (b) under Rule 9.5(b), if, after the announcement of a mandatory offer, the offeror, or any person acting in concert with it, acquires any interest in shares at above the offer price, it must increase its offer to not less than the highest price paid;
- (c) under Rule 9.5(c), in certain circumstances, the Panel may determine that the highest price calculated under Rule 9.5(a) and Rule 9.5(b) should be adjusted; and
- (d) Note 3 on Rule 9.5 sets out an inclusive list of circumstances which the Panel might take into account when considering an adjustment of the highest price under Rule 9.5(c).

4.3 In addition, Note 3 on Rule 9.5 states as follows:

*“The price payable in the circumstances set out above will be the price that is fair and reasonable taking into account all the factors that are relevant to the circumstances.*

*In any case where the highest price is adjusted under Rule 9.5(c), the Panel will publish its decision.”.*

##### (c) Schedule 1C to the Companies Act 2006

4.4 Rules 9.5(a) to (c) and Note 3 on Rule 9.5 implement certain requirements of Schedule 1C to the Act, which provide as follows:

(a) **paragraph 7(2)** of Schedule 1C provides that:

“Rules must ensure that the mandatory takeover bid must be ... at the equitable price”; and

(b) **paragraph 8** of Schedule 1C provides that:

- “(1) For the purposes of paragraph 7, “the equitable price” is the highest price paid for the same securities by the offeror, or by persons acting in concert with the offeror, over a period, determined by rules, of not less than 6 and not more than 12 months before the mandatory takeover bid is announced.
- (2) Rules must ensure that if, after the mandatory takeover bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with the offeror purchases securities at a price higher than the offer price, the offeror must increase the offer consideration so that it is not less than the highest price paid for the securities so acquired.
- (3) Rules may confer power on the Panel to adjust the equitable price in circumstances and in accordance with criteria that are clearly determined.
- (4) Rules must ensure that any decision by the Panel to adjust the equitable price must be substantiated and made public.”.

**(d) Proposed amendments to the Code**

(i) *Requirement for an adjusted price to be “appropriate” rather than “fair and reasonable”*

4.5 As explained above, where the “highest price” calculated under **Rule 9.5(a)** or **(b)** is adjusted in accordance with **Rule 9.5(c)**, **Note 3 on Rule 9.5** requires the price payable to be “the price that is fair and reasonable”. The Code Committee considers that this requirement is potentially confusing. This is because the term “fair and reasonable” is generally used in the context of the financial terms of an offer. For example, under **Rule 3.1**, the board of the offeree company must obtain competent independent advice as to whether the financial terms of an offer are “fair and reasonable”.

4.6 The Code Committee therefore proposes to amend **Note 3 on Rule 9.5** to require that, where the “highest price” calculated under **Rule 9.5(a)** or **(b)** is adjusted in accordance with **Rule 9.5(c)**, the price payable must be the price that is “appropriate”, rather than the price that is “fair and reasonable”.

4.7 The Code Committee notes that the requirement for an adjusted “highest price” to be a “fair and reasonable” price is not a requirement under Schedule 1C to the Act. As indicated above, paragraph 7(2) of Schedule 1C requires a mandatory offer to be made at the “equitable price”, which is defined in paragraph 8(1) of Schedule 1C as being “the highest price paid ... over a period ... of not less than 6 and not more than 12 months before the mandatory takeover bid is announced”, and paragraph 8(3) of Schedule 1C allows the Code to provide the Panel with power to adjust that equitable price. There is

no requirement in the Act for the “equitable price” to be a price that is “fair and reasonable”.

4.8 The Code Committee considers that the requirement for an adjusted “highest price” to be a “fair and reasonable” price is also potentially confusing because **Rule 9.5** addresses the question of the price that an offeror is required to offer under a mandatory offer, and not the question of whether that price is “fair and reasonable” for shareholders to accept (for example, in the sense in which that term is used in **Rule 3.1**).

(ii) *Proposed deletion of the requirement for the Panel to publish a decision to adjust the price*

4.9 Separately, the Code Committee proposes to amend the final paragraph of **Note 3 on Rule 9.5** so as to require that, where the highest price is adjusted by the Panel under **Rule 9.5(c)**, the decision must be “made public”. This would both:

(a) reflect current practice, whereby any decision to adjust the highest price is typically explained in the firm offer announcement and the offer document, rather than being published by the Panel; and

(b) conform the wording of that paragraph with paragraph 8(4) of Schedule 1C to the Act.

(iii) *Proposed amendments*

4.10 In the light of the above, the Code Committee proposes to amend **Note 3 on Rule 9.5** as follows:

**“3. Adjustment of highest price**

*Circumstances which the Panel might take into account when considering an adjustment of the highest price include:*

...

*The price payable in the circumstances set out above will be the price that is appropriate ~~fair and reasonable~~ taking into account all the factors that are relevant to the circumstances.*

*Any decision by the Panel to adjust in any case where the highest price is adjusted under Rule 9.5(c) must be made public, the Panel will publish its decision.*”.

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

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

**5. Offeree board recommendations and disclosure of directors' intentions in respect of their own shares**

**(a) Introduction**

**5.1 Section 5** proposes:

- (a) amendments to **Rule 25.2** and **Rule 15.2** to require the board of the offeree company to make a recommendation to shareholders and to holders of convertible securities, options and subscription rights as to the action that they should take in respect of, respectively, an offer (including any alternative offers) or an offer or proposal made under **Rule 15**;
- (b) amendments to **Rule 25.4(a)(v)** to:
  - (i) require that, where there are alternative offers, the offeree board circular must state which alternative (if any) the directors intend to elect for in respect of their own shares; and
  - (ii) specify that the Panel may require the offeree board circular to state the directors' reasons for electing for a particular alternative; and
- (c) certain minor and consequential amendments to the Code, including the deletion of three Notes which the Code Committee considers no longer to be necessary.

**(b) Background**

*(i) Offeree board circulars*

5.2 Under **Rule 24.1**, an offeror must, within 28 days of announcing a firm intention to make an offer, publish an offer document, which must include the information required by **Rules 24.2** to **24.16**.

5.3 Under **Rule 25.1**, the board of the offeree company must, by no later than the 14th day following the date on which the offer document is published, send a circular to offeree company shareholders (an "**offeree board circular**"), which must include the information required by **Rules 25.2** to **25.9**.

5.4 If a "contractual offer" is recommended by the board of the offeree company, the offer document and the offeree board circular will, in practice, be combined with each other in a single document (see the **Note on Rule 25.1**). If the offer is being effected by means of a scheme of arrangement, the offer document and the offeree board circular will be replaced by a scheme circular, to which **Rule 24** and **Rule 25** will apply (see the **Definitions and Interpretation** section at the beginning of **Appendix 7** of the Code).

- 5.5 Under **Rule 25.2(a)**, the offeree board circular must:
- (a) set out the opinion of the board of the offeree company on the offer (including any alternative offers) and the board's reasons for forming that opinion; and
  - (b) include the board's views on:
    - (i) the effects of implementation of the offer on all the company's interests, including, specifically, employment; and
    - (ii) the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the offeree company's places of business.
- 5.6 **Rule 3.1** requires the board of the offeree company to obtain independent advice from a "**Rule 3 adviser**" as to whether the financial terms of the offer (including any alternative offers) are fair and reasonable. Under **Rule 25.2(b)**, the substance of that advice must be included in the offeree board circular.
- 5.7 Under **Note 2 on Rule 25.2**, if the board of the offeree company does not reach a clear opinion on an offer, or if there is a divergence of views among its members, or between the board and the Rule 3 adviser, this must be stated and an explanation given, which should include the arguments for acceptance or rejection of the offer, emphasising the important factors.
- 5.8 Separately, under **Rule 25.4(a)(v)**, the offeree board circular must state:
- (a) whether or not the directors of the offeree company themselves intend to accept the offer; and
  - (b) where there are alternative offers, and if so required by the Panel, which alternative (if any) the directors intend to elect for.
- (ii) *Offers and proposals to holders of Rule 15 securities*
- 5.9 Under **Rule 15.1**, if an offeror makes an offer for voting equity share capital and the offeree company has also issued convertible securities, options or subscription rights ("**Rule 15 securities**"), the offeror must make an appropriate offer or proposal (a "**Rule 15 offer or proposal**") to the holders of those Rule 15 securities.
- 5.10 Under **Rule 15.2**, the board of the offeree company must obtain independent advice on any Rule 15 offer or proposal and the substance of that advice must be made known to the holders of the Rule 15 securities, together with the board's views on the offer or

proposal. In practice, the advice on the Rule 15 offer or proposal will normally also be given by the financial adviser appointed for the purposes of **Rule 3.1**.

**(c) Proposed requirement for the offeree board to make a recommendation, including in respect of an alternative offer**

5.11 Whilst **Rule 25.2** requires the board of the offeree company to set out its opinion on an offer, and **Rule 15.2** requires the board to set out its views on a Rule 15 offer or proposal, there is no express requirement for the board of the offeree company to make a recommendation as to the action that shareholders or holders of Rule 15 securities should take in respect of, respectively, the “main” offer or the Rule 15 offer or proposal.

5.12 In practice, the board of the offeree company will almost always provide a recommendation to shareholders as to whether they should accept or reject the main offer as part of its “opinion” on the offer. This was previously explained in paragraph 11.7 of [PCP 2014/1](#) (*Miscellaneous amendments to the Code*), as follows:

“By contrast [with the Rule 3 adviser], the offeree company board is required to give its opinion on the offer, its reasons for forming that opinion and its views on the matters referred to in paragraphs (i) and (ii) of Rule 25.2(a). In forming its opinion on the offer in accordance with Rule 25.2(a), the board of the offeree company will take into account the offer price, the independent adviser’s advice and any other factors which it considers relevant. Note 1 on Rule 25.2 makes it clear that the Code does not limit the factors that the board of the offeree company may take into account in forming its opinion on the offer and that, in particular, the board is not required by the Code to consider the offer price as the determining factor. The board’s opinion will normally include a recommendation to offeree company shareholders as to whether, in the board’s view, shareholders should accept or reject the offer.” *[emphasis added]*

5.13 The Code Committee understands, however, that there have been a number of cases in which the board of the offeree company has sought to argue that it should not be required to provide a recommendation as to the course of action that:

- (a) shareholders should take in respect of an alternative offer; and/or
- (b) holders of Rule 15 securities should take in respect of a Rule 15 offer or proposal.

5.14 The Code Committee considers that it is important that shareholders and holders of Rule 15 securities should be provided with a recommendation from the board of the offeree company as to what action they should take in respect of an offer or a Rule 15 offer or proposal, including in respect of any alternative offer or Rule 15 offer or proposal. This is on the basis that the directors of a company are the persons best placed to evaluate the merits or demerits of an offer and therefore the board’s recommendation will be important information for shareholders in making their acceptance decision. Accordingly, the Code Committee considers that appropriate requirements to this effect should be included in the Code.

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

(a) introduce a new **Rule 25.2(c)**, as follows:

**“25.2 ~~VIEWS-OPINION~~ OF THE OFFEREE BOARD ON THE OFFER, INCLUDING VIEWS ON THE OFFEROR’S PLANS FOR THE COMPANY AND ITS EMPLOYEES**

...

**(c) The circular must also include a recommendation from the board of the offeree company as to the action that shareholders should take in respect of the offer (including any alternative offers).”; and**

(b) amend **Rule 15.2**, as follows:

**“15.2 INDEPENDENT ADVICE AND ~~VIEWS-OPINION~~ OF THE OFFEREE BOARD**

**(a) The board of the offeree company must obtain competent independent advice on the any offer or proposal and the substance of such advice must be made known to the holders of the Rule 15 securities, together with**

**(b) In addition, the board’s views-opinion on the any offer or proposal should be made known to the holders of the Rule 15 securities, together with a recommendation as to the action that they should take in respect of it.”.**

***(d) Where there is no clear opinion and/or recommendation***

5.16 As noted above, **Note 2 on Rule 25.2** provides that if the board of the offeree company is unable to reach a clear opinion on an offer, or if there is a divergence of views among its members, this must be stated in the offeree board circular and an explanation given.

5.17 The Code Committee considers that, in the large majority of cases, it should be possible for the board of the offeree company to form a clear opinion on an offer and to provide a corresponding recommendation to shareholders. The Code Committee recognises, however, that there may be a small number of cases in which the board of the offeree company is unable to form a clear opinion on, or recommendation in respect of, an offer (or an alternative offer) and considers that **Note 2 on Rule 25.2** should continue to apply in such circumstances.

5.18 The Code Committee proposes to make certain minor amendments to **Note 2 on Rule 25.2** in order to clarify its application in such circumstances, as follows:

**“2. Where there is no clear opinion and/or recommendation or where there is a divergence of views**

*If the board of the offeree company ~~does not reach~~ is unable to form a clear opinion on, or recommendation in respect of, the ~~an~~ offer (including any alternative offer), or if there is a divergence of views among its members, or between the board and the independent adviser appointed under Rule 3.1, this must be stated and an*

explanation given, including the arguments for acceptance or rejection of the offer (or any alternative offer), and emphasising the important factors.

An explanation must also be given if there is a divergence of views among the members of the board (in which case, the opinion and recommendation of the minority should be included in the circular) or if the board's opinion is not consistent with the advice of the independent adviser appointed under Rule 3.1."

**(e) Directors' elections**

5.19 As mentioned, under **Rule 25.4(a)(v)** the offeree board circular is required to state:

- (a) whether the directors of the offeree company intend to accept the offer in respect of their own beneficial shareholdings; and
- (b) where there are alternative offers, and if so required by the Panel, which alternative (if any) they intend to elect for.

5.20 The Code Committee understands that, where there are alternative offers, the Executive's practice is almost invariably to require the offeree board circular to state which alternative (if any) the directors of the offeree company intend to elect for, both in the interests of transparency and on the basis that it is useful for offeree company shareholders to understand what action the directors intend to take in respect of their own shares. The Code Committee agrees with this practice and considers that it should be codified, i.e. that the directors' intentions in relation to alternative offers should normally be stated in the offeree board circular, rather than only where this is specifically required by the Panel.

5.21 In addition, the Code Committee understands that, in certain cases, the Executive may also request that the offeree board circular include the reasons why a director intends to elect for a particular alternative offer. This may be the case where, for example, a director intends to elect for an alternative which has a lower value than the "main" offer or which the board of the offeree company is not recommending shareholders to accept. The Code Committee agrees with the Executive's practice and considers that, in such circumstances, it may be material for offeree company shareholders, in making their investment decisions, to understand the reasons behind the director's decision. The Code Committee therefore considers that the ability for the Panel to require the directors' reasons for electing for a particular alternative to be included in the offeree board circular should be codified.

5.22 The Code Committee therefore proposes to amend **Rule 25.4(a)(v)**, as follows:

**"25.4 INTERESTS AND DEALINGS**

- (a) The offeree board circular must state:**

...

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or not accept the offer (and, if there are alternative offers, ~~and if so required by the Panel, which alternative, if any, they intend to elect for~~ and, if so required by the Panel, the reasons for making that election) ~~or to reject the offer.~~".

(f) **Minor and consequential amendments**

5.23 In the light of the above, the Code Committee proposes to make certain minor and consequential amendments to:

- (a) **Note 1 on Rule 25.2** (*Factors which may be taken into account*);
- (b) **Note 4 on Rule 25.2** (*Conflicts of interest*); and
- (c) the cross-reference to **Rule 25.2** in **Section 4(j) of Appendix 1** of the Code,

as set out in **Appendix A**.

5.24 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:

- (a) **Note 2 on Rule 3.1** (*When there is uncertainty about financial information*): whilst the Code Committee considers that any uncertainty as to the offeree company's financial position should be drawn to shareholders' attention, it considers that such information falls within the general disclosure requirements of **Rule 23.1** and that it is unnecessary for this to be expressly specified in the Code;
- (b) **Note 2 on Rule 3.3** (*Investment trusts*): whilst the Code Committee considers that, where the offeree company is an investment trust, its investment manager (or a person in the same group as the investment manager) would not qualify as an independent adviser to the offeree company, it considers that this is sufficiently obvious that it is unnecessary for it to be expressly specified in the Code; and
- (c) **Note 3 on Rule 25.2** (*When a board has effective control*): whilst the Code Committee agrees that there is a particular onus on the board of the offeree company to explain its opinion where the directors between themselves have a controlling shareholding in the company, given that their actions are likely to determine the outcome of the offer, it considers that it is unnecessary for this to be expressly specified in the Code.

5.25 The proposed deletions are set out in **Appendix A** and the remaining **Notes on Rules 3.1, 3.3** and **25.2** would be renumbered accordingly.

- Q6** Should there be a requirement for the board of the offeree company to make a recommendation to shareholders and to holders of Rule 15 securities as to the action that they should take in respect of an offer (including any alternative offers) or a Rule 15 offer or proposal? Do you have any comments on the proposed amendments to Rule 25.2 and Rule 15.2 and the related provisions of the Code?
- Q7** Should the offeree board circular be required to state details of the directors' intentions in relation to any alternative offers and, where required by the Panel, the reasons for a director's decision to elect for a particular alternative? Do you have any comments on the proposed amendments to Rule 25.4(a)?
- Q8** Should Note 2 on Rule 3.1, Note 2 on Rule 3.3 and Note 3 on Rule 25.2 be deleted as proposed?

## 6. Irrevocable commitments and letters of intent

### (a) Introduction

6.1 **Section 6** proposes that, if a party to an offer or any person acting in concert with it procures an irrevocable commitment or letter of intent before the announcement of a firm intention to make an offer, that party should be required to publish the irrevocable commitment or letter of intent on a website by the current deadline for announcing details of the irrevocable commitment or letter of intent (rather than only following the announcement of a firm intention to make an offer).

### (b) Relevant rules

#### (i) *Rule 2.10 (Irrevocable commitments and letters of intent)*

6.2 **Rule 2.10(a)** provides that during an offer period, if any party to an offer, or any person acting in concert with it, procures an irrevocable commitment or letter of intent, the relevant party to the offer must announce the details in accordance with the **Notes on Rule 2.10** by no later than 12 noon on the following business day.

6.3 **Rule 2.10(b)** provides that if any party to an offer, or any person acting in concert with it, has procured an irrevocable commitment or a letter of intent prior to the commencement of the offer period, the relevant party to the offer must announce the details in accordance with the **Notes on Rule 2.10** by no later than 12 noon on the business day following either the commencement of the offer period or (in the case of an offeror) the date of the announcement that first identifies the offeror as such.

6.4 **Note 2 on Rule 2.10** provides that disclosure under **Rule 2.10** should be made in accordance with the requirements of **Rule 30.1**, i.e. it must be published via a RIS.

6.5 **Note 3 on Rule 2.10** provides that the details to be disclosed under **Rule 2.10(a)** or **(b)** are, in summary:

- (a) the number of securities to which the irrevocable commitment or letter of intent relates;
- (b) the person who has given the irrevocable commitment or letter of intent;
- (c) in the case of an irrevocable commitment, the conditions to which it is subject; and
- (d) in the case of an irrevocable commitment or letter of intent procured before the announcement of a firm intention to make an offer, the price of the possible offer.

- 6.6 **Rule 2.10** does not require the irrevocable commitment or letter of intent to be published on a website. However, **Note 2 on Rule 2.10** states:

*“See also Rule 26 (documents to be published on a website).”*

- (ii) *Rule 26 (Documents to be published on a website)*

- 6.7 **Rule 26.1** relates to the publication of documents, announcements and information on a website following the commencement of an offer period. **Rule 26.1(a)** provides as follows:

**“(a) The following documents, announcements and information must be published on a website by the offeror or offeree company, as relevant, promptly following the publication of the relevant document, announcement or information and in any event by no later than 12 noon on the following business day:**

**(i) any document or information in relation to an offer sent to offeree company shareholders, persons with information rights or other relevant persons in accordance with Rule 30.2;**

**(ii) any announcement (other than an announcement referred to in Note 7 below) published via a RIS (whether related to the offer or not); and**

**(iii) any document or information required to be published on a website under Rule 20.1 or any other provision of the Code (other than Rules 26.2 or 26.3).”**

- 6.8 **Rule 26.2** relates to the publication of documents on a website following the announcement of a firm offer. It provides that copies of certain documents, including irrevocable commitments and letters of intent, must be published on a website following the announcement of a firm intention to make an offer.

- 6.9 As noted in paragraph 6.4, any announcement of the details of an irrevocable commitment or letter of intent required by **Rule 2.10(a)** or **Rule 2.10(b)** must be published via a RIS, and the announcement is therefore required to be published on a website in accordance with **Rule 26.1(a)(ii)**. However, the requirement under **Rule 26.2** to publish the irrevocable commitment or letter of intent itself on a website does not apply unless and until a firm intention to make an offer has been announced.

- (c) ***Proposed requirement to publish an irrevocable commitment or a letter of intent on a website following the commencement of the offer period***

- 6.10 As explained above, if a party to an offer or any person acting in concert with it procures an irrevocable commitment or a letter of intent during the offer period but prior to the announcement of a firm intention to make an offer, only summary details of the

irrevocable commitment or letter of intent are required to be announced under **Rule 2.10(a)** and **(b)**.

6.11 However, the Code Committee considers that it may be important for market participants to understand the precise terms of the irrevocable commitment or letter of intent rather than having to rely on summary details. Accordingly, it is proposed that any irrevocable commitment or letter of intent procured during an offer period, or before the commencement of an offer period, should be required to be published on a website by the deadline for announcing details of the irrevocable commitment or letter of intent under **Rule 2.10(a)** and **(b)**.

**(d) Proposed amendments to the Code**

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

(a) amend **Rule 2.10(a)**, as follows:

**“(a) During an offer period, if any party to the offer or any person acting in concert with it procures an irrevocable commitment or a letter of intent, the relevant party to the offer must:**

**(i) announce the details in accordance with the Notes on this Rule 2.10; and**

**(ii) publish the irrevocable commitment or letter of intent on a website,**

**by no later than 12 noon on the following business day.”;**

(b) amend **Rule 2.10(b)**, as follows:

**“(b) If any party to an offer or any person acting in concert with it has procured an irrevocable commitment or a letter of intent prior to the commencement of the offer period, it must:**

**(i) announce the details in accordance with the Notes on this Rule 2.10; and**

**(ii) publish the irrevocable commitment or letter of intent on a website,**

**by no later than 12 noon on the business day following either the commencement of the offer period or (in the case of an offeror) the date of the announcement that first identifies the offeror as such (as appropriate).”;**

(c) introduce a new **Rule 26.1(c)**, as follows:

**“(c) If any party to an offer is required to announce details of an irrevocable commitment or a letter of intent in accordance with Rule 2.10(a) or Rule 2.10(b), the relevant party to the offer must publish that**

**irrevocable commitment or letter of intent on a website in accordance with Rule 2.10(a) or Rule 2.10(b).**; and

- (d) delete **Rule 26.2(a)** and re-number **Rules 26.2(b) to (e)** as **Rules 26.2(a) to (d)**, as set out in **Appendix A**.

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

## 7. **Assessment of the impact of the proposals**

7.1 The amendments proposed in this PCP relate to various different provisions of the Code and there is no overarching theme to the proposals.

### **(a) *Derogations and waivers from the requirements of the Code***

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

- (a) provide the Panel with greater flexibility to grant a derogation or waiver from the requirements of the Code in exceptional circumstances, for example, to facilitate the rescue of a company which is in serious financial difficulty; and
- (b) remove certain limitations on the Panel's flexibility to waive the requirements of **Rule 9** in the case of a rescue operation.

7.3 The Code Committee considers that the proposed amendments could benefit shareholders, offeree companies that are in a serious financial position and potential rescuers of such companies. The proposed amendments should remove possible deterrents to rescuers of such companies, and facilitate the rescue of such companies to the benefit of shareholders and other stakeholders. The Code Committee does not consider that the proposed amendments will place any new burdens on parties to offers or result in any additional cost implications.

### **(b) *Where rumour and speculation or an untoward share price movement is caused by a clear public statement***

7.4 The amendments proposed in **Section 3** would reverse the presumption as to whether, in the relevant circumstances, an announcement under **Rule 2.2(d)** will normally be required.

7.5 The Code Committee considers that it would normally be proportionate and fair to require a potential offeror to make an announcement under **Rule 2.2(d)** in circumstances where the rumour or speculation or untoward movement in the share price of the offeree company has resulted from a clear and unequivocal public statement such as a disclosure of the acquisition of shares required by the FCA Handbook, an announcement of a dawn raid or an intention to purchase shares, or an announcement of a tender offer.

7.6 The Code Committee considers that any additional burden or cost implications for a potential offeror will be outweighed by the benefit to shareholders and other market participants.

**(c) Adjusted mandatory offer price under Note 3 on Rule 9.5**

7.7 The amendments proposed in **Section 4** would require that:

- (a) the price payable by an offeror when the mandatory offer price is adjusted under **Rule 9.5(c)** must be “appropriate” (rather than “fair and reasonable”, which the Code Committee considers to be potentially confusing); and
- (b) a decision by the Panel to adjust the price of a mandatory offer must be “made public” rather than published by the Panel itself, which would better reflect current practice and conform the wording of the Code with the requirements of Schedule 1C to the Act.

7.8 The Code Committee considers that the proposed amendments will align the Code more closely with the Act and better reflect current practice and understanding, and will not place any new burdens on parties to offers or result in any additional cost implications.

**(d) Requirement for the offeree board to make a recommendation to shareholders and holders of Rule 15 securities**

*(i) Offeree board to make a recommendation*

7.9 The amendments proposed in **Section 5(c)** include the introduction of an express requirement for the board of the offeree company to make a recommendation to, respectively, shareholders and holders of convertible securities, options and subscription rights as to the action that they should take in respect of an offer (including any alternative offers) or proposal.

7.10 In practice, the board of the offeree company will almost always provide a recommendation to shareholders as to whether they should accept or reject the main offer as part of its “opinion” on the offer, but there have been cases where the board has sought to argue that it should not be required to provide a recommendation as to the course of action that:

- (a) shareholders should take in respect of an alternative offer; and/or
- (b) holders of Rule 15 securities should take in respect of a Rule 15 offer or proposal.

7.11 The Code Committee considers that any additional burden or cost implications resulting from the amendments proposed will be outweighed by the benefit to shareholders and holders of Rule 15 securities of being provided with a recommendation from the board as to what action they should take in respect of an offer or a Rule 15 offer or proposal.

(ii) *Where there is no clear opinion or recommendation*

7.12 The amendments proposed in **Section 5(d)** would clarify the application of the requirement to give a recommendation in circumstances where there is no clear opinion and/or recommendation or where there is a divergence of views. As these amendments are clarificatory in nature, the Code Committee considers that the amendments will not place any new burdens on parties to offers or result in any additional cost implications.

(iii) *Directors' elections*

7.13 The amendments proposed in **Section 5(e)** would require that, where there are alternative offers, the offeree board circular must state which alternative (if any) the directors intend to elect for in respect of their own shares and enable the Panel to require the offeree board circular to state the directors' reasons for electing for a particular alternative.

7.14 The amendments reflect a codification of current practice and the Code Committee believes that they will not place any significant new burdens on parties to offers or result in any additional cost implications.

(iv) *Minor and consequential amendments*

7.15 The Code Committee believes that the minor and consequential amendments proposed in **Section 5(f)** will improve the Code and will not place any new burdens on parties to offers or result in any additional cost implications.

(e) *Irrevocable commitments and letters of intent*

7.16 The amendments proposed in **Section 6** would require that, if a party to an offer or any person acting in concert with it procures an irrevocable commitment or letter of intent before the announcement of a firm intention to make an offer, that party should publish the irrevocable commitment or letter of intent on a website by the current deadline for announcing details of the irrevocable commitment or letter of intent (rather than only following the announcement of a firm intention to make an offer).

7.17 The Code Committee believes that the proposed amendments will benefit market transparency and will not place any significant new burdens on parties to offers or result in any significant additional cost implications.

## APPENDIX A

### Proposed amendments to the Code

#### INTRODUCTION

#### 2 THE CODE

...

##### (c) Derogations and Waivers

The Panel may derogate or grant a waiver to a person from the application of a rule (provided that the General Principles are respected) either:

- (i) in the circumstances set out in the rule; or
- (ii) in other circumstances where the Panel considers that the particular rule would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).

In exceptional circumstances, for example, in order to facilitate the rescue of a company to which the Code applies which is in serious financial difficulty, the Panel may derogate or grant a waiver to a person from the application of a rule notwithstanding that, in doing so, one or more of the General Principles might not be respected.

#### Rule 2.2

#### 2.2 WHEN AN ANNOUNCEMENT IS REQUIRED

...

##### **NOTES ON RULE 2.2**

...

##### **2. — Clear statements**

*The Panel will not normally require an announcement under Rule 2.2(d) if it is satisfied that the price movement, rumour or speculation results only from a clear and unequivocal public statement, eg (a) a disclosure under the FCA Handbook; (b) an announcement of a dawn raid or an intention to purchase; or (c) an announcement of a tender offer.*

##### **32. Rumour and speculation during an offer period**

...

##### **43. When a dispensation may be granted**

...

## Rule 2.10

### 2.10 IRREVOCABLE COMMITMENTS AND LETTERS OF INTENT

(a) During an offer period, if any party to the offer or any person acting in concert with it procures an irrevocable commitment or a letter of intent, the relevant party to the offer must:

(i) announce the details in accordance with the Notes on this Rule 2.10;  
and

(ii) publish the irrevocable commitment or letter of intent on a website,

by no later than 12 noon on the following business day.

(b) If any party to an offer or any person acting in concert with it has procured an irrevocable commitment or a letter of intent prior to the commencement of the offer period, it must:

(i) announce the details in accordance with the Notes on this Rule 2.10;  
and

(ii) publish the irrevocable commitment or letter of intent on a website,

by no later than 12 noon on the business day following either the commencement of the offer period or (in the case of an offeror) the date of the announcement that first identifies the offeror as such (as appropriate).

## Rule 3

### 3.1 BOARD OF THE OFFEREE COMPANY

...

#### NOTES ON RULE 3.1

...

#### ~~2. When there is uncertainty about financial information~~

~~When there is a significant area of uncertainty in the most recently published accounts or interim figures of the offeree company (eg a qualified audit report, a material provision or contingent liability or doubt over the real value of a substantial asset, including a subsidiary company), the board and the independent adviser should highlight the factors which they consider important.~~

#### ~~3.2. Where the independent adviser is unable to advise whether the financial terms of the offer are fair and reasonable~~

...

### 3.3 DISQUALIFIED ADVISERS

...

#### NOTES ON RULE 3.3

...

## **~~2. Investment trusts~~**

~~A person who manages or is part of the same group as the investment manager of an investment trust company will not normally be regarded as an appropriate person to give independent advice in relation to that company.~~

## **~~3. Success fees~~**

...

## **Rule 9**

### **9.5 CONSIDERATION TO BE OFFERED**

...

#### **NOTES ON RULE 9.5**

...

### **3. Adjustment of highest price**

*Circumstances which the Panel might take into account when considering an adjustment of the highest price include:*

...

*The price payable in the circumstances set out above will be the price that is appropriate fair and reasonable taking into account all the factors that are relevant to the circumstances.*

*~~Any decision by the Panel to adjust in any case where the highest price is adjusted under Rule 9.5(c) must be made public, the Panel will publish its decision.~~*

...

#### **NOTES ON DISPENSATIONS FROM RULE 9**

...

### **3. Rescue operations**

*There are occasions when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new shares without approval by a vote of independent shareholders or the acquisition of existing shares by the rescuer which would otherwise require an offer under Rule 9. The Panel may, however, waive the requirements of the Rule in such circumstances, subject to such conditions (if any) as the Panel considers appropriate. ~~provided that either:~~*

*~~(a) approval for the rescue operation by a vote of independent shareholders is obtained as soon as possible after the rescue operation is carried out; or~~*

*~~(b) some other protection for independent shareholders is provided which the Panel considers satisfactory in the circumstances.~~*

~~Where neither the approval of independent shareholders nor any other form of protection can be provided, an offer under Rule 9 will be required. In such circumstances, however, the Panel may consider an adjustment of the highest price, pursuant to Note 3 on Rule 9.5.~~

The requirements of Rule 9 will not normally be waived in a case where a major shareholder in a company rather than that company itself is in need of rescue. The situation of that shareholder may have little relevance to the position of other shareholders and, therefore, the purchaser from such major shareholder must expect to be obliged to extend an offer under Rule 9 to all other shareholders.

## Rule 15.2

### 15.2 INDEPENDENT ADVICE AND ~~VIEWS~~ OPINION OF THE OFFEREE BOARD

(a) The board of the offeree company must obtain competent independent advice on the ~~any~~ offer or proposal and the substance of such advice must be made known to the holders of the Rule 15 securities, ~~together with~~

(b) In addition, the board's ~~views~~ opinion on the ~~any~~ offer or proposal should be made known to the holders of the Rule 15 securities, together with a recommendation as to the action that they should take in respect of it.

## Rule 25.2

### 25.2 ~~VIEWS~~ OPINION OF THE OFFEREE BOARD ON THE OFFER, INCLUDING VIEWS ON THE OFFEROR'S PLANS FOR THE COMPANY AND ITS EMPLOYEES

...

(c) The circular must also include a recommendation from the board of the offeree company as to the action that shareholders should take in respect of the offer (including any alternative offers).

#### NOTES ON RULE 25.2

##### 1. Factors which may be taken into account

The provisions of the Code do not limit the factors that the board of the offeree company may take into account in giving its opinion on the offer in accordance with Rule 25.2(a) and its recommendation under Rule 25.2(c). In particular, ~~when giving its opinion, the board of the offeree company is not required by the Code to consider the offer price as the determining factor and is not precluded by the Code from taking into account any other factors which it considers relevant.~~

##### 2. Where there is no clear opinion and/or recommendation or where there is a divergence of views

~~If the board of the offeree company does not reach~~ is unable to form a clear opinion on, or recommendation in respect of, the ~~an~~ offer (including any alternative offer), or if there is a divergence of views among its members, or between the board and the independent adviser appointed under Rule 3.1, this must be stated and an explanation given, including the arguments for acceptance or rejection of the offer (or any alternative offer), and emphasising the important factors.

An explanation must also be given if there is a divergence of views among the members of the board (in which case, the opinion and recommendation of the minority should be included in the circular) or if the board's opinion is not consistent with the advice of the independent adviser appointed under Rule 3.1.

The Panel should be consulted in advance about the explanation which is to be given.

~~The views of any directors who are in a minority should also be included in the circular.~~

### **3. — When a board has effective control**

~~A board whose shareholdings confer control over an offeree company must carefully examine the reasons behind its opinion on the offer and must be prepared to explain its decisions publicly. Shareholders in companies which are effectively controlled by the directors must accept that in respect of any offer the attitude of their board will be decisive.~~

### **43. Conflicts of interest**

~~A director who has a conflict of interest should not normally be joined with the remainder of the in the expression of its views excluded from the opinion and recommendation of the board. on the offer and †The nature of the conflict should be clearly explained.~~

Depending on the circumstances, such a director may have to make the responsibility statement required by Rule 19.2, appropriately amended to make it clear that the director does not accept responsibility for the views opinion and recommendation of the board on the offer.

## **Rule 25.4**

### **25.4 INTERESTS AND DEALINGS**

(a) The offeree board circular must state:

...

(v) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or not accept the offer (and, if there are alternative offers, and if so required by the Panel, which alternative, if any, they intend to elect for and, if so required by the Panel, the reasons for making that election) or to reject the offer.

## **Rule 26**

### **26.1 DOCUMENTS, ANNOUNCEMENTS AND INFORMATION TO BE PUBLISHED ON A WEBSITE DURING AN OFFER**

...

(c) If any party to an offer is required to announce details of an irrevocable commitment or a letter of intent in accordance with Rule 2.10(a) or Rule 2.10(b), the relevant party to the offer must publish that irrevocable commitment or letter of intent on a website in accordance with Rule 2.10(a) or Rule 2.10(b).

## 26.2 DOCUMENTS TO BE PUBLISHED ON A WEBSITE FOLLOWING THE ANNOUNCEMENT OF A FIRM OFFER

The following documents must be published on a website promptly following the publication of the announcement of a firm intention to make an offer (or, if later, the date of the relevant document) and in any event by no later than 12 noon on the following business day:

~~(a) any irrevocable commitment or letter of intent procured by the offeror or offeree company (as appropriate) or any person acting in concert with it;~~

(ba) any documents relating to the financing of the offer (Rule 24.3(f));

(eb) any agreements or arrangements, or, if not reduced to writing, a memorandum of the terms of such agreements or arrangements, of the kind referred to in Note 11 on the definition of acting in concert;

(ec) any offer-related arrangement or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2; and

(ed) any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer (Rule 2.7(c)(vii)).

### Appendix 1

#### APPENDIX 1

#### RULE 9 WAIVERS

...

#### 4 RULE 9 WAIVER CIRCULAR

The circular must contain the following information and statements and comply appropriately with the Rules of the Code as set out below:

...

(j) Rules 23, 24.2, 24.3, 25.2 and 25.3 (offeror intentions, financial and other information, and ~~views~~ opinion of the offeree board). Full details of the assets, if any, being injected must be included;

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

- Q1** Should section 2(c) of the Introduction to the Code be amended to provide greater flexibility for the Panel to grant a dispensation from a requirement of the Code in order to facilitate the rescue of a company which is in serious financial difficulty and in other exceptional circumstances?
- Q2** Should Note 3 of the Notes on Dispensations from Rule 9 be amended as proposed to remove the limitations on the Panel's flexibility to waive the requirement for a mandatory offer where an urgent rescue operation is the only way to save a company in serious financial difficulty?
- Q3** Should Note 2 on Rule 2.2 be deleted as proposed?
- Q4** Should Note 3 on Rule 9.5 be amended as proposed so as to require an adjusted mandatory offer price to be "appropriate"?
- Q5** Should Note 3 on Rule 9.5 be amended as proposed in relation to the publication of a decision to adjust the mandatory offer price?
- Q6** Should there be a requirement for the board of the offeree company to make a recommendation to shareholders and to holders of Rule 15 securities as to the action that they should take in respect of an offer (including any alternative offers) or a Rule 15 offer or proposal? Do you have any comments on the proposed amendments to Rule 25.2 and Rule 15.2 and the related provisions of the Code?
- Q7** Should the offeree board circular be required to state details of the directors' intentions in relation to any alternative offers and, where required by the Panel, the reasons for a director's decision to elect for a particular alternative? Do you have any comments on the proposed amendments to Rule 25.4(a)?
- Q8** Should Note 2 on Rule 3.1, Note 2 on Rule 3.3 and Note 3 on Rule 25.2 be deleted as proposed?
- Q9** Should the Code be amended so that, if details of an irrevocable commitment or letter of intent are announced under Rule 2.10, the underlying irrevocable commitment or letter of intent must be published on a website by the same deadline?