27 July 2010

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

Dear Sirs

Re: PCP 2010/2 : Review of Certain Aspects of the Regulation of Takeover Bids

Please find attached a copy of our responses to the questions asked in the referenced PCP. We wish to note that the responses represent what we believe is the majority view of our members. We are aware that many of our members are responding directly to your consultation and may express views which are different in some respect from our attached responses.

We appreciate the opportunity to respond to the issues raised in the PCP. We would be happy to discuss our responses with you, if you would find that useful.

Thank you for your consideration of these comments.

Yours faithfully

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List of questions

Q1 What are your views on raising the minimum acceptance condition threshold for voluntary offers above the current level of "50% plus one" of the voting rights of the offeree company? ***(Page 19)***

We agree with the Panel that it is entirely appropriate that the acceptance condition should mirror the threshold for the passing of statutory control under the Companies Act which allows a 50%+1 holder to pass ordinary resolutions and to remove the entire board of directors. Although minority shareholders in the UK do have protection from simple majority control in some cases (e.g. key decisions including decision to de-list require 75% approval), if a bidder is happy to accept a 50% acceptance condition and the majority of shareholders want to accept that offer, they should not have that opportunity denied by a minority of shareholders who may decide to maintain their interest despite a takeover.

In our view, if there is a perceived or postulated need to make it more difficult for overseas companies to acquire UK businesses (which seems to be the driver for this debate), it would be preferable to deal with this issue through competition policy and specifically a public interest test both of which would be enacted as a matter of primary legislation.

Q2 What are your views on raising the acceptance condition threshold for mandatory offers above the current level of "50% plus one" of the voting rights of the offeree company? ***(Page 19)***

The mandatory offer rule is intended to protect investors in the case where de facto control of a company has been acquired by a party, in that it provides shareholders with the opportunity of disposing of their shares, usually at a premium, following the passing of control to a new controller. Statutory control under UK company law rests with the party who controls 50%+ 1 of the voting rights of the company, and it is appropriate that the bidder in the context of a mandatory offer should be required to cash out those shareholders who do not wish to remain in the company under a new controller at that level. To raise the required acceptance level beyond the level which at which statutory control passes would increase the risk of a lapsed bid, thereby denying shareholders an exit in a company which has a new controller

Q3 If you believe that an increase in the acceptance condition thresholds for voluntary and/or mandatory offers would be desirable, at what level do you believe they should be set and why? ***(Page 19)***

Q4 What are your views on the consequences of raising the acceptance condition thresholds? ***(Page 19)***

We agree with the Panel that the minimum required acceptance levels in the Code should be considered in the context of company law which sets the legal basis for control of companies. It would seem perverse to deny a majority of shareholders their choice to accept an offer based on a minority's view in the absence of any strong national policy to restrain takeovers in general or from non-UK offerors. Any such policy would need to be established by primary legislation. As the Panel notes, it is not its role to take a view on the commercial or financial aspects of a given offer or as to its advantages and disadvantages.

It is also possible that the flow of investment into the UK will be impacted by important changes to the Code such as changes to minimum acceptance levels for offers in general or for mandatory offers in particular. That concern could arise in the event of primary legislation on these control issues too.

Q5 What are your views on the suggestion that shares acquired during the course of an offer period should be "disenfranchised"? ***(Page 30)***

We do not consider that disenfranchisement of shares purchased in an offer period would be appropriate. The ability of a shareholder to vote its shares is a fundamental shareholder right.

Such a change could potentially result in offers succeeding at a lower price as if new shareholders were to have no influence on the outcome of an offer, demand for the company's shares and hence liquidity would be reduced resulting in lower trading prices and less pressure on an offeror to increase its offer price.

As the Panel maintains, it is not the role of the Code to seek to prefer one type of shareholder over another. Rather the Code seeks to ensure that all offeree shareholders are treated equally.

Assuming that one purpose of such a change is to limit the ability of hedge funds or other parties to buy into a target company and agitate for a deal to occur, it should be noted that many 'bear hug' approaches are not ultimately successful (recently, Anglo American and National Express).

There is also a concern that a further impact of any change could be to create an uneven playing field in a competitive situation. For example, a potential bidder (with or without an existing holding) who sought to limit any advantage a potential competitor could seek through market purchases could announce his interest putting the target into an offer period. This would reduce the advantage any competitor could seek through share purchases which may deny offeree shareholders the fruits of a fully competitive bid situation.

It could also impact current defence tactics used by target boards in the event of a hostile bid e.g. trying to find a White Squire would be impossible as the investor would not be able to vote the acquired shares.

Also it is probably unworkable and would distort market behaviour e.g. the longer the offer period goes on, the more the decision on whether the offer succeeds would be placed in the hands of a smaller and smaller group of shareholders, giving them undue influence which would be perverse.

Finally, there are other practicalities to be addressed as noted in the PCP e.g. what happens where an offeror wants to buy target shares in the market? Would it be prohibited? Would the voting rights remain with the seller until the offer period ends or would they be temporarily disabled during the offer period?

Q6 If you are in favour of "disenfranchisement", what are your views on how such a proposal should be implemented? In particular, what are your views on the various consequential issues identified in section 3 of the PCP? ***(Page 30)***

Q7 What are your views on the suggestion that shares in a company should not qualify for voting rights until they have been held by a shareholder for a defined period of time and regardless of whether the company is in an offer period? ***(Page 30)***

We consider that such a rule would effectively create two classes of shareholders which would breach the fundamental principle that all shareholders should be treated equally and require separate and complex administration.

Q8 What are your views on the suggestion that the threshold trigger at which independent market participants become subject to the Code's disclosure regime, currently 1%, might be lowered to 0.5%? ***(Page 39)***

We have no objection to this proposal. However, we do not believe there would be a significant benefit to stakeholders if this suggestion were to be adopted. In view of the fact that the amended disclosure regime only came

into effect in April this year perhaps it is rather premature to change the disclosure threshold again.

Q9 What are your views on the suggestion that there should be additional transparency in relation offer acceptance decisions and of voting decisions in relation to schemes of arrangement? If you are in favour of this suggestion, please explain your reasons and how you think such additional transparency should be achieved? ***(Page 39)***

We are in favour of this suggestion generally on the basis suggested by the PCP--that it would increase accountability of the institutional holders/voters to the beneficial owners on whose behalf they act. We would suggest that the disclosures be triggered with respect to holders of voting rights at the Rule 8 trigger level for disclosures (1% at present). Disclosures should be made within one day of final acceptances.

Q10 What are your views on the suggestion that the application of the Code's disclosure regime to situations where the rights attaching to shares have been "split up" might be clarified? ***(Page 39)***

We have no objection to a proportionate change of disclosure responsibilities where there has been a splitting-up of voting and acceptance rights. We have no proposal to make at this time as to how a proportionate regime might be established. It seems to be a very complicated area and we are unaware of any material issue in practice.

Q11 What are your views on the suggestion that the same requirements as to the disclosure of financial information on an offeror, the financing of the offer, and information on quantified effects statements should apply regardless of whether**:** ***(Page 49)***

(a) the consideration being offered is cash or securities;

(b) the offer could result in minority shareholders remaining in the offeree company; or

(c) the offer is hostile or recommended, or whether a competitive situation has arisen?

We consider that the main focus of offeree shareholders during a cash offer will be the fairness of the offer price and that other matters will be significantly less important to them. To the extent that some will be interested in exploring the advisability of remaining a shareholder in the merged entity, it is true that additional information could be helpful. But where the acceptance level has been set at 90% (heavy majority of offers)

there will be a limited opportunity to remain a shareholder in the event of a successful bid.

Q12 What are your views on**:** ***(Page 49)***

(a) disclosures made by offerors of their intentions in relation to the offeree companies under Rule 24.1; and

(b) the views of the boards of offeree companies on offerors' intentions given under Rule 25.1?

If you consider that greater detail is required, how do you consider that this would be best achieved?

For target shareholders, in a cash offer their concern only needs to be that there is sufficient cash to satisfy the offer, which is adequately covered by the cash confirmation. It would seem more appropriate for the acquirer's shareholders to focus on the financing of takeover. Usually the question is addressed as the bidder will communicate with its shareholders (and where appropriate analysts and rating agencies) on this topic.

Existing disclosure requirements on plans for the target company and including intentions towards management and employees are adequate. It is difficult to envisage how it would work to hold acquirers to a higher standard of disclosure when it is unlikely that detailed planning is possible based on the level of due diligence typically conducted prior to an offer and in particular a hostile offer. However, since the introduction of the new requirements in 2006 companies have been struggling to understand how much detail is required and therefore perhaps guidance from the Panel in the form of a Practice Statement or consultation with the Panel on the disclosure to be put in the offer document would be appropriate.

Q13 What are your views on the matters to which the board of the offeree company should have regard in deciding whether or not to recommend acceptance of an offer? ***(Page 50)***

It is up to a board to consider and explain the basis for its recommendation (and potentially go into more detail when rejecting an offer). This should not be a box-ticking exercise, and the rationale offered should not be formulaic. It is clear that more information will be required where there is a share offer or where other securities are offered. However, the duties of the directors to the company and shareholders are set in the Companies Act 2006, and companies have recently revised governance principles in the UK Corporate Governance Code. It is not necessary for the Code to be enhanced in this respect.

Q14 What are your views on the suggestion that there should be a requirement for independent advice on an offer to be given to offeree company shareholders separately from the advice required to be given to the board of the offeree company? ***(Page 59)***

It is the board's duty to take decisions and make recommendations to their shareholders. The requirement to obtain independent advice under Rule 3 goes a long way to ensure that a less experienced board in takeover situations will have an appropriate framework for considering their recommendation. The board will have detailed information on the business and its prospects to which the shareholders will not have access. Thus, the burden for making the value judgement as to whether an offer represents enhanced value to shareholders should remain the primary responsibility of the directors. We consider that neither the offeree board nor any advisor to the board can be in a position to offer tailored advice to each shareholder since they are unaware of each party's investment objectives and risk tolerance. On the other hand, the advice given to the board in respect of an offer is the equivalent of advising shareholders as a group, especially since the advice to the board will be disclosed to shareholders. We also believe that the boards of offeree companies which advise their shareholders are constrained to do so in a fiduciary capacity. We believe it would be unnecessary and expensive to engage separate advisors for the board and for the shareholders as a whole. We note that typically shareholders are advised to seek the advice of their own financial and legal advisors by the offeree board.

Q15 What are your views on the suggestion that the board of any offeree company should be restricted from entering into fee arrangements with advisers which are dependent on the successful completion of the offer**?** ***(Page 59)***

In our view a blanket prohibition of success fee arrangements between an offeree board and its advisors would not be in the best interests of the offeree shareholders or the process in general. Such arrangements have worked well and are favoured by many companies as valid commercial means to raise the value of the bid. A key part of the target advisor's job is to negotiate a higher price and they should not be disqualified if their remuneration structure reflects this. Rule 3.3 is sufficient to ensure truly independent advice.

Q16 What are your views on the suggestion that the fees incurred in relation to an offer should be required to be publicly disclosed? ***(Page 59)***

Although we consider that the fees paid by the offeror or offeree to their respective advisors are not the primary concern of shareholders, we recognize that current perceptions are that increased public disclosure is to be desired. Recognising this fact, we are not opposed to increased

disclosure of fees in the context of takeovers. Disclosure should extend to all fees and costs in the context of the offer, however it should be noted that in some cases negotiation of the fee may continue over the term of the offer. We believe this is a matter that could be dealt with by the Panel through amendments to the Code.

Q17 If you are in favour of the disclosure of fees, how do you think that any provision should operate? For example: ***(Page 59)***

(a) to which fees (and other costs) should any provision apply and on what basis?

(b) at what point(s) of the transaction should any disclosure be made?

We would propose that there be a preliminary disclosure of the estimated aggregate amount of all fees and costs to be charged in connection with the offer in the first offeror and offeree documents. This should include advisory fees, legal fees, financing costs, accounting fees, registrar fees, etc. and should comprise [base] costs but not include contingent (ratchet) fees. Therefore in the case of the financial advisers the base costs will be calculated by reference to the bid price on table. The preliminary disclosure would also state the types of costs included in the estimated aggregate amount but not the incremental amounts. To the extent there is a revised offer then the disclosure on aggregate fees will be updated accordingly in subsequent documentation. Secondly we would suggest a final disclosure of the aggregate fees paid by the offeror and offeree as defined above (but not the incremental amounts) be disclosed after the completion of the offer. This disclosure method is similar to that required in a prospectus and is such as to give stakeholders an understanding of the level of costs associated with the deal.

Q18 What are your views on the suggestion that shareholders in offeror companies should be afforded similar protections to those afforded by the Code to offeree company shareholders? ***(Page 65)***

Offeror shareholders in UK listed companies are adequately protected via the class tests in the UK Listing Rules. Foreign acquirers have similar protections via the relevant home listing regimes. In the UK, the class tests ensure that shareholder approval is sought and detailed information provided where appropriate. Introducing similar provisions in the Code would be unnecessary and also lead to an anomalous situation where the requirements for an offeror to seek shareholder approvals and provide information were different in the case of an acquisition of a public company vs. a private acquisition. It is also inappropriate and unfeasible for UK law to seek to afford protections extraterritorially to bidder shareholders who would not otherwise be protected by UK law.

Q19 If you consider that offeror company shareholders should be afforded protections: ***(Page 65)***

(a) to which offeror companies should such protections apply and in what circumstances?

(b) what form should such protections take?

(c) by whom should such protections be afforded (for example, the Panel, the FSA, the Government or another regulatory body)?

Shareholders of UK offerors are adequately protected by the class tests in the UK Listing Rules. Companies are also under a duty to implement good governance processes at board level which would include an independent risk identification and management process in the context of significant corporate transactions including takeovers. UK public companies are governed by the UK Code of Corporate Governance against which they must publicly report on a comply or explain basis annually.

Q20 What are your views on the suggested amendments to the "put up or shut up" regime? In particular: ***(Page 79)***

(a) what are your views on the suggestions that "put up or shut up" deadlines might be standardised, applied automatically and/or shortened?

(b) what are your views on the suggestion that a "private" "put up or shut up" regime might be introduced?

The majority view is that a PUSU deadline should not be standardised. There may well be particular reasons why it is helpful for the Panel to have the flexibility to impose a longer or shorter deadline e.g. interaction of bidder reporting, for large transactions such as Cadbury, there can be difficulty arranging financing due to the rule of six under the secrecy obligations. Disadvantaging bidders in this situation by not giving them sufficient time is not in the interest of target shareholders.

We support the proposal for a private PUSU in appropriate circumstances which will obviate the need to have a public announcement where that may not be desired by the offeree. This is a matter for the Panel to deal with through amendments to the Code.

One member felt that the suggested changes could be helpful.

Q21 What are your views on possible offer announcements that include the possible terms on which an offer might be made and/or that include pre-conditions to the making of an offer? ***(Page 79)***

Current rules are well understood and their repeal might only serve to deny shareholders a possible offer. Pre-conditional offers are important in the event that there are serious anti-trust issues to be worked through. PUSU can deal with any siege issue.

Q22 What are your views on the deadline for the publication of the offer document and the suggestion that the current 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document might be reduced? ***(Page 79)***

We support the idea that in appropriate circumstances the 28 day period should be reduced in order to trim the potential siege period faced by the offeree and in recognition of the fact that the offeror has had time to prepare. We would propose that the 28 day period be reduced day for day by reference to any PUSU period down to a minimum of 7 days, subject to the offeror's right to request additional time from the Panel where that is reasonable and where to do otherwise would potentially harm the interests of offeree shareholders. This is a matter for the Panel to deal with through amendments to the Code.

Q23 What are your views on the suggestion that the Panel should have the ability unilaterally to foreshorten the timetable for subsequent competing offers? ***(Page 79)***

We consider that such a power would be inimical to the interests of offeree shareholders as suggested in para 8.29.

Q24 What are your views on the Panel's approach to inducement fees? In particular: ***(Page 94)***

(a) do you consider that inducement fees should be prohibited?

(b) if you consider that inducement fees should continue to be permitted:

(i) do you regard the *de minimis* nature of inducement fees (and the Panel's approach to what is *de minimis*) as a sufficient safeguard?

(ii) do you consider that any further restrictions should be imposed on inducement fees by the Panel (for example, in relation to the timing of payment or the triggers for payment)?

(iii) what are your views on the suggestion that the Panel should cease to require confirmations from the offeree company board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders?

We do not consider that inducement fees should be subject to a blanket ban. They are already subject to a de minimis limitation and do not in practice deter other bidders. There is no continuing need, given the limitation of their substance and current requirements around disclosure, for the Panel to seek a confirmation from the board or its financial adviser that a relevant inducement fee is in the best interests of shareholders. The board is in any event accountable to its shareholders.

Q25 What approach should the Panel take to deal protection measures? In particular, do you consider that any specific deal protection measures should be either prohibited or otherwise restricted? Please explain the reasons for your views. ***(Page 94)***

The existing restrictions on deal protection are stringent e.g. the 1% cap on break fees and are more restrictive than other key jurisdictions (such as the US). We do not see the need to add to these restrictions.

Q26 What are your views on the suggestion that implementation agreements and other agreements containing deal protection measures should be required to be put on display earlier than at present? ***(Page 95)***

We propose that disclosure of such documents be made at the same time as the Rule 2.5 announcement of the offer.

Q27 What are your views on "fiduciary outs" in the context of inducement fee arrangements? ***(Page 95)***

We consider that such provisions are not advisable in the context of inducement fees since they obfuscate the value of the purported inducement fee arrangement. Reliance upon them will be subject to interpretation and legal challenge. A board's determination of its fiduciary duty is a function of its own judgement and as such may be viewed as self-serving.

Q28 What are your views on the ability of deal protection measures to frustrate a possible competing offer and on whether linking deal protection measures to the payment of an inducement fee may cure any such potential frustration? ***(Page 95)***

Q29 What are your views on the suggestion that provisions similar to those previously set out in the Rules Governing Substantial Acquisitions of Shares should be re-introduced? ***(Page 98)***

There is no current tendency to dawn raids or to equivalent surprise events, and shareholders are much less likely to sell to raiders. There is no reason to reintroduce such provisions.