Quoted Companies Alliance

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The Secretary to the Code Committee
The Takeover Panel
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Friday 18 February 2022

Dear Secretary to the Code Committee,

Miscellaneous Code Amendments

We welcome the opportunity to respond to your public consultation by the Code Committee on Miscellaneous Code Amendments.

The Quoted Companies Alliance *Legal Expert Group* has examined the proposals and advised on this response from the viewpoint of small and mid-size quoted companies. A list of Expert Group members can be found in Appendix A.

Overall, we consider the changes to be reasonable and well considered and the comments we have to make are very much in the nature of a sense-check rather than objections to the proposals.

If you would like to discuss our response in more detail, we would be happy to attend a meeting.

Yours sincerely,

Mark Taylor
Partner
Dorsey & Whitney (Europe) LLP

Q1 Should the Code be amended as proposed so as to require a publicly identified potential offeror to announce any minimum level, or particular form, of consideration it is obliged to offer to offeree company shareholders?

Yes – this is a logical and helpful addition to the Code. We agree that this is information which is relevant for the market to know, and which would not be readily available to investors. We further note its particular importance in light of the fact that DTR disclosures do not typically include a trade's purchase price.

In practice we suggest that some flexibility may be required in how the requirement is met.

In particular, if the announcement is triggered prior to the offeror having established contact with all of its presumed concert parties the offeror will not necessarily know whether it is subject to a Rule 6 and/or Rule 11 requirement. In those circumstances a possible solution would be for the Panel to agree that the offeror should release the "standard announcement" and include mention that additional information will be announced within a short period thereafter. Following the issue of the initial announcement, the offeror would be better placed to extend its enquiries across all potential and presumed concert party members to obtain the necessary information.

By the same token, we assume that where discussions are ongoing with the Panel as to whether a Rule 6 and/or Rule 11 requirement exists there will be flexibility on the contents and timing of the release of the relevant information.

Q2 Should a mandatory offeror, and any person acting in concert with it, be restricted from acquiring additional interests in shares in the offeree company in the 14 days up to and including: (a) the unconditional date; and (b) the expiry of an acceptance condition invocation notice?

We understand the intention behind this proposal and note the existing requirement that a voluntary offeror may not trigger a Rule 9 offer after Day 46 because to do so would leave the offeror with a controlling position were the offer to lapse. We also understand the overall logic in the proposed change in terms of (a) protecting the 14-day "quiet period" and (b) "levelling-up" the position as between a "voluntary" offeror and "mandatory" offeror in these circumstances.

While the amendment appears to be a logical extension to this principle, recognising as it does that Rule 9 is also triggered by incremental acquisitions between 30 and 50 per cent, we wonder whether the distinction between an already triggered Rule 9 offer and a voluntary offer is a fair one to make given that continuous disclosure is required in any event. Triggering a Rule 9 obligation prior to day 46 is an established bidder tactic and investors are generally well aware of the fact that where the threshold is breached a key milestone has been passed in the offer process. We would not necessarily advocate a change to the proposal but would ask the Panel to consider, for example, making the bar on further acquisitions apply only where those acquisitions are not at a premium to the offer price and they cause the offeror's holding to exceed certain intermediate thresholds (say 35, 40 and 45 per cent.), noting that smaller incremental changes are less likely to be regarded as significant by the market.

Q3 Should the new Note 5 on Rule 9.5 be introduced as proposed in order to clarify the application of the "look-back period" for determining the minimum price of a mandatory offer?

Yes – we agree that this is a logical and fair amendment to the Code.

Q4 Should the test in limb (b) of Note 8 on Rule 9.1 be deleted such that the test in limb (a) would become the sole test for determining whether a chain principle offer is required, other than in exceptional circumstances?

Yes – we welcome the clarification to the circumstances in which the chain principle applies and recognise that the 30 per cent. test for company B's holding in company C is consistent with the Code. Please see our further comments on this element below.

Q5 Should the threshold at which relative values would be considered to be "significant" for the purposes of the test currently set out in limb (a) of Note 8 on Rule 9.1 be reduced from 50% to 30%?

Whilst we understand the logic for the proposed 30 per cent threshold we believe that it represents a tightening of Rules as much as it represents a clarification. If it is to be adopted we would welcome a note to make it clear that the Panel is prepared to exercise a broad discretion to adopt a higher threshold in appropriate cases. Examples might include: (i) where, for example, company A holds only marginally more than 50 per cent. of voting control of company B or (ii) where arrangements are in place which otherwise dilute the level of control that may be exercised over company C through the agency of company B.

Q6 Should Note 1 on Rules 35.1 and 35.2, Note 2 on Rule 2.5 and Note 2 on Rule 2.8 be amended as proposed in relation to the restrictions following the lapsing of an offer or a statement of no intention to bid?

Yes – we agree with the proposed amendments to the Notes on Rules 35.1, 35.2, 2.5 and 2.8 in relation to the restrictions following the lapsing of an offer or a statement of no intention to bid. The proposed amendments appear to sensible and provide additional clarity.

Q7 Should the minor amendments to the Code set out in Section 7 of the PCP be adopted as proposed?

Yes – we agree that the minor amendments to the Code as set out in Section 7 of the consultation should be adopted as proposed.

Appendix A

The Quoted Companies Alliance *Legal Expert Group*

Mark Taylor (Chair)	Dorsey & Whitney (Europe) LLP
Maegen Morrison (Deputy Chair)	Hogan Lovells International LLP
Stephen Hamilton (Deputy Chair)	Mills & Reeve LLP
Danette Antao	Hogan Lovells International LLP
Paul Arathoon	Charles Russell Speechlys LLP
Naomi Bellingham	Practical Law Company Limited
Ross Bryson	Mishcon De Reya
Andrew Chadwick	Clyde & Co LLP
Philippa Chatterton	CMS
Paul Cliff	Gateley
Sarah Dick	Stifel
Tunji Emanuel	LexisNexis
Kate Francis	Dorsey & Whitney (Europe) LLP
Claudia Gizejewski	LexisNexis
Francine Godrich	Focusrite Plc
Sarah Hassan	Practical Law Company Limited
David Hicks	Charles Russell Speechlys LLP
Kate Higgins	Mishcon De Reya
Alex Iapichino	Majestic Wine Plc
Nichols Jennings	Locke Lord LLP
Martin Kay	Blake Morgan
Jonathan King	Osborne Clarke
Nicola Mallet	Lewis Silkin
Nicholas McVeigh	Mishcon De Reya
Catherine Moss	Shakespeare Martineau LLP
Hilary Owens Gray	Practical Law Company Limited
Kieran Rayani	Stifel
Jaspal Sekhon	Hill Dickinson LLP
Donald Stewart	Kepstorn
Gary Thorpe	QCA Director
Robert Wieder	Faegre Drinker LLP