John Dovey
Secretary to the Code Committee
The Takeover Panel, One Angel Court
London, EC2R 7HJ

Sent via email (21 July): supportgroup@thetakeoverpanel.org.uk

Dear John,

UK Finance response to the public consultation - PCP2023/1

UK Finance is grateful for the opportunity to respond to this public consultation paper PCP2023/1 on 'Review of Rule 21 (restrictions on frustrating action) and other matters'.

UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers, and facilitate innovation.

The role of the Takeover Panel (the 'Panel') and the Takeover Code (the 'Code') are vital for our members as they participate and advise clients active in mergers and acquisitions, and other activities covered by the Code. Our Corporate Finance Committee brings together these members, and we appreciate the time you have spent engaging with the Committee regarding various Code amendments including this Consultation.

Generally, we welcome the proposals set out in PCP2023/1 and believe they strike an appropriate balance between protecting the legitimate interests of an offeror and allowing an offeree to continue to operate its business in the ordinary course.

We look forward to continued engagement with the Panel on Code related matters.

Yours sincerely,

Avanthi Weerasinghe
Principal, Capital Markets & Wholesale Policy
UK Finance

UK Finance response to the public consultation - PCP2023/1

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

Yes, we are supportive of the proposal.

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

We are supportive of the proposal. However, we would query whether the definition of shares in the new Rule 21.1(c)(i) to (iii) should be limited to shares/securities forming part of the offeree's equity share capital.

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

We are supportive of this proposal. It would be useful for the Executive to confirm that where shares are issued, and the new Note 1(b) on Rule 21.1 is in place it would not expect to be consulted.

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

We are supportive of this proposal.

Q5 Should the Panel be able to have regard to additional or alternative indicators of materiality that it considers appropriate either in the context of the relevant industry or in order to take into account the particular circumstances of the offeree company when determining whether a disposal or acquisition of assets is of a material amount, as set out in the proposed new Note 3(c) on Rule 21.1?

Yes, we agree the Panel should be able to have regard to additional or alternative indicators of materiality.

Q6 Should only disposals and acquisitions that are outside the ordinary course of the offeree company's business be included in the calculation when determining if the relevant assets are, in aggregate, of a material amount, as set out in the proposed new Note 3(e) on Rule 21.1?

We are supportive of this proposal.

Q7 Do you have any comments on the matters that the Executive will consider when determining whether a disposal or acquisition of assets is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?

No comments.

Q8 Should the Panel normally consider an inducement fee arrangement proposed to be entered into by the offeree company to be a material contract outside the ordinary course of the offeree company's business if: (a) before a firm offer is announced, the fee is more than 1% of the market value of the equity share capital of the offeree company (as determined in accordance with the new Note 3 on Rule 21.1); or (b) following the announcement of a firm offer, the fee is more than 1% of the value of the offeree company by reference to the offer price (as is currently the case)?

We are supportive of this proposal.

Q9 Do you have any comments on the matters that the Executive will consider when determining whether: (a) an individual contract; or (b) a particular type of contract, is in the ordinary course of the offeree company's business, as set out in the draft new Practice Statement No 34?

The factors included in draft PS34 seem particularly relevant to the assessment of 'ordinary course' as set out in para 2.9 (a):

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

as opposed to 2.9 (b):

"the offeree company may undertake in the ordinary course of being a company but which may not be considered to be in the ordinary course of its day-to-day business (for example, refinancing debt or entering into a new office lease")

It may be helpful for the Executive to confirm that the examples given of the specific contracts e.g. refinancings are not exhaustive and that in considering ordinary course actions that arise in the course of being a company the factors such as the 'frequency with which the offeree company has entered into similar contracts" in PS24 will be applied flexibly.

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

It would be helpful to confirm if the provisions set out in the new Note 1(c) on Rule 21.1 would be engaged in a situation where an offeree is seeking potential offerors at the point set out in the new Note 9(a) on Rule 21.1.

Questions 11 - 23

Yes, we are supportive of the proposals.

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

We think it would be helpful to confirm that the intention behind the obligation to provide 'all information' is not to change market practice in respect of information provided orally in management meetings. Where Rule 21.3 is engaged, we consider the obligation extends to an obligation to provide the same information in the same format i.e. if it was provided orally to bidder 1 then bidder 2 will have the opportunity to have an equivalent meeting where it will receive equivalent disclosure orally if it asks for information already disclosed to bidder 1.

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

In the context of MBO or similar transactions, the management are often not classified as the 'offeror' and would often be unable to satisfy the 'joint offeror' tests and, as such, management is often a concert party of the provider of equity finance who would typically be the 'offeror'. In this context should the Rule 21.4 obligation therefore also relates to information passed by the management team to the offeror and/or potential sources of debt / equity finance?

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

We are supportive of this proposal.

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

We are supportive of this proposal.

Other comments

- Paragraph 6.3 of the new draft PS34 notes the Executive's interpretation of an 'in principle' decision, noting "….in particular the financial terms, have been agreed between the parties". We would query whether in order for an offeree to take an 'in principle' decision it needs agreement between the parties. The offeree board could have concluded with itself the financial terms on which it would be willing to transact and doesn't necessarily need a counter party to have accepted its position in order to have reached an 'in principle' decision.

- For consistency we propose the New Rule 21.1(b)(ii) to be read as "the commencement of the offer period" rather than "the beginning of the offer period".