



Consultation Paper on Takeovers Code - 1999

Commentary

PART 1 : INTRODUCTION

1.1 Section 1 - Nature and purpose of the Code - In Section 1.7 new wording has been added to emphasise that other professional advisers must have the competence, professional expertise and adequate resources to fulfil their role and discharge their responsibilities under the Code.

1.2 Section 6 - The Takeovers and Mergers Panel - Section 6.3 has been amended to allow more flexibility in the membership of the Panel. It will now consist of 26 members of whom up to 4 are Executive Directors or staff of the SFC, with no fixed number of representatives from particular constituencies making up the balance.

1.3 Sections 16 and 18 - Publication of rulings - Section 16.5 has been amended to be consistent with Section 18. Sections 18.1 and 18.2 now deal with publication of rulings by the Panel and the Takeovers Appeal Committee. A new Section 18.3 explains the policy of the Executive to publish its important rulings and to issue statements of policy, which may take the form of Practice Notes.

PART 2 : CODE ON TAKEOVERS AND MERGERS

DEFINITIONS

2.1 Acting in concert - A new Note 6 has been introduced to make it clear that the giving of an irrevocable commitment to accept an offer or a warranty in relation to a company will not of itself lead to the presumption that the shareholder giving them is acting in concert with the offeror.

2.2 Associate - Wording has been added to the definition of associate to



emphasise that persons acting in concert with the offeror are associates.

2.3 Rights over shares - The definition has been expanded to include an option to acquire shares.

RULES

2.4 Rule 2.8 - Independent committees - The Rule applies to both offeror and offeree companies and to clarify this two amendments have been made. The first change makes it clear that a director of an offeror who has a shareholding in the offeree has, or may have, a conflict. This will be a matter of materiality. The second change covers affiliates of a controlling shareholder of an offeror as well as of an offeree company.

2.5 Rule 3.5 - Announcements - Interests in rights over shares must be included in the announcement of a firm intention to make an offer under this Rule and in the announcement of the results of an offer under Rule 19.1.

2.6 Rule 8 - Timing and content of documents - The Panel is concerned that offeree company shareholders may not have enough time to consider the advice of their board and its advisers when the offeree board circular is posted on day 14, given the logistical problems when many shareholdings are registered in the name of CCASS. It is not proposed to alter the time limits for posting of these documents. However, where an offeree company applies to extend the 14 day period for despatch of the offeree board circular, the Executive will only give its consent if the offeror agrees to extend the first closing date by the same number of days as the period is extended. A new Note to the Rule has been added to emphasise that directors and advisers of offeree companies must start work on their circular as soon as an offer is announced and that a circular must be sent on day 14 with whatever information is then available. All parties are encouraged in agreed transactions to produce composite documents so as to give offeree shareholders full information as soon as practicable and appropriate amendments have been made to Rule 15.

2.7 Rule 9 - Standard of care and responsibility - Two new Notes have been added to this Rule to explain more clearly the requirements for responsibility statements from directors who have a conflict of interest and from the ultimate controlling shareholders of an offeror company.



2.8 Rule 10 - Profit forecasts - The Rule and the associated Notes have been expanded to give more guidance and have been split to separate the requirements for profit forecasts and other financial information. Under new Rule 10.11 a statement of material changes to the financial or trading position of a company must be reported on in accordance with the Rule. In respect of the negative statement required to be made, the statement does not need to be reported on but the directors of the company must provide evidence to the Executive of the steps taken by them to support that statement.

2.9 Rule 15 - Offer timetable - Rule 15.1 has been amended to deal with the timing concerns addressed in Rule 8. Where the offeree board circular is not posted on the same date as the offer document, or they are not combined in a composite document, the first closing date has been extended by 7 days.

2.10 Rule 15.1 has also been amended to resolve the technical issue that an offer is revised or extended by the announcement of the revision or extension. It is therefore technically impossible for the offeror to inform the Executive and the Stock Exchange the day before the announcement that the offer has been revised or extended, and for the offer not to lapse on the closing date if it has not been revised or extended before that time. The only way to resolve the issue is for the offeror to announce the revision/extension before the expiry time of the offer. It is therefore proposed that the Code should require an offer to be kept open at least until day 22 or day 29, rather than day 21 or 28. All offers must be closed by 9.30 am on a closing date and it must also be a condition of an offer that acceptances must be received by 4pm on the day preceding the closing date. Any acceptances lodged after 4 pm on such closing date would only be valid if the offer is revised or extended, or the offer has become or been declared unconditional as to acceptances, by 4 pm on the day preceding the closing date.

2.11 A new Rule 15.6 has been added so that an offeror may not keep its offer open for more than 4 months where it has stated its intention to exercise its powers of compulsory acquisition.

2.12 Rule 16 - Revised offer - The wording has been changed to make it clear that a revised offer document may not be posted in the final 14 days in which an offer may be open.

2.13 Rule 19 - Announcement of results of offer - Rule 19.1 has been amended



to be consistent with Rule 3.5 and has also been amended to be consistent with the changes to Rule 15.1. The offeror would be required to inform the Executive and the Stock Exchange by 6 pm on the day preceding the closing date of its intentions as to the revision, extension, expiry or unconditionality of its offer so that preparations can be made to clear the announcement that evening.

2.14 Rule 21 - Restrictions on dealings before and during the offer - Rule 21.1 has been amended to prohibit persons acting in concert with an offeror from dealing in securities of the offeree company when they have price sensitive information relating to the offer unless the securities are excluded from the offer or there are no-profit arrangements in place. A new Note 2 has been added to describe such no-profit arrangements

2.15 A new Rule 21.5 has been added so that financial advisers and stockbrokers to the offeree company and their respective groups should be prohibited from purchasing offeree company securities for their own account, or for investment accounts they manage on a discretionary basis, or assisting or inducing others to deal in such securities during the offer period.

2.16 Rule 23 - When cash offer required - Rule 23(b) has been changed so that, when an offeror acquires shares for cash during the offer period at any price, it must provide a cash offer or cash alternative at the highest price paid during the offer period, rather than the present requirement to offer cash where the offeror buys shares at above the offer price. Notes have been added to describe when the obligation is satisfied and to deal with acquisitions for securities, including placings.

2.17 Note 7A to Rule 26.1 - Placing - A new Note has been added to explain how the Executive would deal with the situation where a purchaser wishes to acquire part of a holding up to 34.9% and the vendor wishes to dispose of the balance of its holding.

2.18 Note 8 to Rule 26.1 - The chain principle - The Note has been amended so that the test is now the significance of the assets or profits of the companies in a chain and relative values of 60% will normally be regarded as significant.

2.19 Rule 28 - Partial offers - The Rule has been amended to allow a holder of more than 50% of a company to make a partial offer for up to the maximum holding



allowed by the Listing Rules to maintain the minimum public float. A Note has also been added to encourage an offeror in a partial offer to minimise the number of existing and new odd lot holdings.

2.20 Rule 31 - Delay before subsequent offer - Rule 31.1(a) has been clarified so that a failed offeror may not make or announce another offer or partial offer for more than 35% for 12 months. In Rule 31.1(b) the restrictions would apply for 6 months and a new Rule 31.1(c) has also been added so that, where a person makes a statement of intention not to make an offer, he may not subsequently make an offer for 6 months.

2.21 Rule 31.2 has been amended so that the 12 months restriction applies following all unsuccessful partial offers and successful partial offers for between 35% and 50%, the 6 months restriction applies following successful partial offers for less than 35% and the restrictions in new Rule 31.1(c) apply to partial offers.

2.22 Rule 32 - Share repurchases - The wording has been changed to clarify that an application for a waiver under this Rule will be treated as a whitewash waiver application and the whitewash waiver fees apply.

2.23 Rule 33 - Disclosure of acquisitions of 10% and above - Following the changes in the SDIO to require disclosure of holdings of 5% within 3 business days the Panel has decided to delete this Rule.

PART 3 : SHARE REPURCHASE CODE

3.1 Rule 3 - The offer document - The time period within which an offer document must be sent to shareholders has been extended from 15 days to 21 days. A new Note has been added to require the offeror to apply for an exemption from the Companies Ordinance to allow the document to be posted in that time period.

3.2 Rule 4 - Shareholder approval - A new Note has been added to require an offeror to apply for an exemption from the Companies Ordinance to allow the offer document to be sent to shareholders with the notice of meeting.

3.3 Rule 8 - Takeovers Code implications of share repurchases - The wording has been changed to clarify that an application for a waiver under this Rule will be



treated as a whitewash waiver application and the whitewash waiver fees apply.

PART 4 : SCHEDULES

4.1 Schedule V - Guidelines for the exemption of listed companies from the share repurchase requirements of section 49BA of the Companies Ordinance - A new paragraph 5.4 has been added allowing companies to apply for exemption from the requirements of section 49BA(3)(a) so as to meet the requirements of Rules 3 and 4 of the Code, and for no fee to attach to such applications.