



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

8 May 2008

Our ref: ICAEW Rep 60/08

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

By email supportgroup@thetakeoverpanel.org.uk

Dear Sir

PUBLIC CONSULTATION PAPER 2008/1 COMPETITION REFERENCE PERIODS

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on PCP 2008/1 Competition Reference Periods.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours faithfully

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**THE INSTITUTE
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ICAEW Representation

ICAEW REP 60/08

PCP 2008/1 COMPETITION REFERENCE PERIODS

Memorandum of comment submitted in May 2008 by The Institute of Chartered Accountants in England and Wales, in response to The Code Committee of the Takeover Panel's public consultation paper 2008/1 Competition Reference Periods published in March 2008

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the ICAEW) welcomes the opportunity to comment on the public consultation paper (PCP) *Competition Reference Periods* published by the Code Committee of the Takeover Panel.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the ICAEW provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The ICAEW is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The ICAEW ensures these skills are constantly developed, recognised and valued.
4. The ICAEW's Corporate Finance Faculty (the Faculty) is a network of some 6,500 corporate finance professionals. This response draws on the experience of Faculty members and other associates with significant experience of working on transactions to which the Takeover Code applies.

MAJOR POINTS

Support for the initiative

5. We welcome the Code Committee's proposals to clarify the application of the Rules of the Takeover Code (the Code) which relate to competition reference periods. We agree that the broad effect of the proposals will be to codify existing practice in relation to the application of those Rules. At the same time, in our responses below, we have highlighted areas where additional clarification of the Code Committee's intentions would be useful as well as other issues which we believe could usefully be addressed.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1: Do you agree with the proposals for clarifying the application of Rules 35.1 and 12.2 and for amending them as described in paragraphs 2.1 to 2.14?

6. As a general point we believe that footnote 1 could be clearer on who is considered to be a 'potential offeror'. For example what about competing offerors which have not been referred at all? Presumably Rule 12.2 does not apply? This should be made clear in the Rule.

7. We agree with the principle to ensure that firm offerors and potential offerors which are referred to the competition authorities are placed on the same footing. However from the discussion in the PCP and from the drafting of the proposed new Rule 12.2 we are not clear how the Panel intends to apply the rule in certain complex situations:
 - a. Where the offers of more than one offerors are referred it is possible that the clearance decision of those offers may be publicised on different days. Where there are two referred offerors is it intended that the first cleared offeror should “put up or shut up” within 21 days of the date its offer is cleared or should the deadline be deferred until 21 days after the clearance of the second offeror?
 - b. Where in a competitive situation, one offer is referred and one bidder’s offer may have lapsed without reference due to shareholder uncertainty. Is it intended that the non-referred offeror will have the chance to re-bid in the 21 days after the referred offeror has been cleared?

As a general rule we believe that it would be in offeree shareholders’ interests to permit competing referred bidders scope to bid in the 21 days following the latest clearance decision. Finally we would be interested in hearing whether the Code Committee has considered the scenario of a non-referred, lapsed bidder re-entering the fray following clearance given that its bid may have lapsed due to shareholder uncertainty about other referred bidder(s).

8. In addition, we would like to have some guidance from the Panel as to how the requirement to “put up or shut up” normally within the 21 day window will be applied. Offerors and potential offerors may have different capabilities as to speed of response following clearance for some of the following reasons:
 - a. They may have different levels of information about an offeree company depending on the time the offer was in contemplation prior to the reference and information access prior to or during the reference period.
 - b. The terms on which clearance is given may be simple or may require complex review and analysis.
 - c. A referred offeror will generally have some private advance notice of the timing of clearance whereas other competing offerors will not have such advance notice.

It would be helpful if the Code Committee could consider these issues and comment in the response statement to this PCP on the circumstances where more than 21 days may be permitted for “put up or shut up” following clearance. This is particularly important if the Code Committee agrees with our position set out in paragraph 7 above.

Q2: Do you agree that Rule 12.2 should not normally apply when an offer that is announced subject to a competition pre-condition as described above is referred but that the Panel should be able to grant dispensations from individual Rules during the competition reference period?

9. We agree. We do consider however that it would be more useful to include examples within the amended text (see paragraph 17).

10. It may be helpful to clarify in the response statement that when the scenario was given in paragraph 3.9 whereby an offeror may make an offer pre-conditional on there being no reference, this cannot be 'on terms satisfactory to the offeror' as references of this nature cannot be conditional.

Q3: Do you agree that the Code should be amended in order to reflect more accurately both UK and EU competition law?

11. We agree that the Code should be amended to reflect more accurately both UK and European law. However, the Rules do not provide for the situation of an appeal to the competition authorities and it would be helpful to know what the Code Committee envisages for such circumstances and/or whether such issues were considered when producing the suggested amended wording.

Q4: Do you agree with the proposed amendments?

12. We broadly agree with the principles behind the proposed amendments but set out various concerns in the following paragraphs.

Rule 12.2 amendments

13. In line with our suggestion in paragraph 7 above in Rule 12.2(b) (ii) we suggest 'for the referred offeror whose decision is last to be announced' should be inserted after 'at the end of the competition reference period'.
14. In Rule 12.2(b) (ii) (A) the reference to 'any offeror' would appear to be drawn too broadly and, on the face of the Rule, catches offerors who have never been referred. Is that the Committee's intention? We think that it should not catch non-referred offerors nor, indeed, non-referred potential offerors.
15. If the offeror has been referred, and cleared, to what extent does Rule 12.2(b) (ii) (B) apply to another offeror when stating its intention? We are of the view that all referred and cleared offerors should be bound to "put up or shut up" at the same time to protect the target from coming under siege. However we do not think it is clear how the 21 days would work for each individual offeror awaiting clearance; in our view, it might be fairer for the 21 day period to start only once the last such referred offeror has been cleared. Moreover, consistent with our view in para 7, we consider it would be unfair to tie any offerors who are not subject to clearance to such 21 day clarification period.
16. We note that it is proposed in Note 1 of the *Notes on Rule 12.2* that the restrictions of Rule 12.2(b) (i) (D) and (E) will not normally apply in certain circumstances. It would be helpful if the Code Committee could explain what factors the Panel is likely to consider in applying this Note.
17. We believe that, in Note 3 of the *Notes on Rule 12.2*, as well as stating that 'the Panel may grant a dispensation from a particular Rule if it would be proportionate in the circumstances to do so', it would be helpful for the Code Committee in its response statement to provide more clarification on the dispensations the Panel is likely to give.
18. We are unclear as to why there is no longer a link to Rule 2.2(e) from the *Notes to Rule 35.1 and 2* and consider that this link should be reinstated.

Q5: Do you agree with the proposed amendment to Rule 2.4(b)?

19. We agree.

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