

PRACTICE STATEMENT 33

PURCHASES OF SHARES IN THE OFFEREE COMPANY BY AN OFFEROR DURING AN OFFER PERIOD

1. Introduction

- 1.1 This Practice Statement describes the way in which the Panel Executive interprets and applies certain provisions of the Takeover Code in relation to the purchasing of shares in the offeree company by an offeror during an offer period and explains certain practical steps that should be taken in order to comply with those provisions.
- 1.2 If an offeror intends to purchase shares in the offeree company, the application of a number of Rules, including Rule 4, Rule 5, Rule 6, Rule 7, Rule 8, Rule 9 and Rule 11, will also need to be considered in addition to the matters outlined in this Practice Statement.
- 1.3 In this Practice Statement, references to shares should be read to include any relevant securities of the offeree company and references to an offeror should (where appropriate) be read to include persons acting in concert with an offeror.
- 1.4 If an offeror intends to purchase shares in the offeree company during an offer period, the Executive should be consulted in advance.

2. Attribution of purchased shares to an offeror

- 2.1 The Executive considers that, to ensure compliance with General Principles 1(1) and 4, when an offeror uses a financial services firm to purchase shares in the offeree company on its behalf (referred to in this Practice Statement as a “broker”), all of the shares purchased by the broker on behalf of the offeror must be attributed to a specific trade with a shareholder in the offeree company or market counterparty.
- 2.2 In determining how many shares an offeror has purchased, the Executive expects a broker immediately to attribute to the offeror any shares it has purchased on the offeror’s behalf. Therefore, if the broker holds shares purchased for an offeror on its own book on the basis that they will be booked out to the offeror on a later date (sometimes referred to as “warehousing”), the offeror is obliged to disclose the purchases in accordance with the requirements of Rules 7 and 8 as if it had purchased the shares at the time that they were purchased by the broker.
- 2.3 In addition, to ensure compliance with General Principle 1(1), the price paid by an offeror for shares it has purchased will be regarded as the price received by the holder of the shares – i.e., whilst the broker might contractually give an offeror an “average price” in respect of the shares it purchases on its behalf, for the purposes of Rules 6, 8, 9 and 11 the

offeror will be treated as having purchased the shares at the underlying prices paid by the broker.

3. Prohibition on purchasing shares from an exempt principal trader connected with the offeror

- 3.1 Under presumption (6) of the definition of “acting in concert”, a connected adviser is presumed to be acting in concert with its client in respect of the interests in shares of that connected adviser and persons controlling, controlled by or under the same control as that connected adviser. As a result, a principal trader in the same group as a connected adviser to an offeror will normally be presumed to be acting in concert with that offeror. However, where a connected principal trader has satisfied the Executive that it is independent of the corporate finance and/or corporate broking operations of its group, and has been granted exempt status, the presumption of concertedness between the offeror and the connected principal trader will not apply. Connected exempt principal traders are, however, required to comply with, among other things, Rule 38.
- 3.2 Rule 38.2 provides that, during the offer period, an offeror must not deal, as principal, with an exempt principal trader connected with the offeror in the shares of the offeree company. Dealings through an anonymous order book system are, however, permitted provided that neither party to the transaction is aware of the identity of the other party. This prohibition eliminates the risk of the principle of equivalent treatment of shareholders being breached by an exempt principal trader connected with the offeror purchasing shares in the offeree company above the offer price and knowingly selling those shares to the offeror at the offer price, or at a lower price, with losses being compensated elsewhere.
- 3.3 Where more than one exempt principal trader is connected with an offeror, Rule 38.2 will apply to all such exempt principal traders and not only to the exempt principal trader which is a member of the same group as the broker appointed to undertake the purchase of shares. Rule 38.2 does not, however, restrict an offeror from purchasing shares in the offeree company from an exempt principal trader connected with the offeree company or with a competing offeror.

4. Considerations when purchasing shares in the offeree company

(a) Methods for identifying potential sellers

- 4.1 Provided it is not aware that the seller is an exempt principal trader connected with the offeror, an offeror or its broker may use a range of market practices to identify potential sellers and/or purchase shares. For example:

- (a) the offeror may contact individual shareholders in the offeree company directly (see section 5(d) in relation to retail shareholders);
- (b) the offeror may announce publicly that it is seeking to purchase shares and that any person interested in selling shares to the offeror should contact its broker (“standing in the market”);
- (c) a broker may post an “indication of interest” in purchasing shares in the offeree company in a trading system;
- (d) a broker may purchase shares from a shareholder that contacts the broker by way of a “reverse enquiry”; and
- (e) if the broker has a retail service provider (“RSP”), it may purchase shares for the offeror through its RSP provided it is satisfied that it can identify the retail stockbroker that is selling the shares.

(b) *Purchasing shares in the offeree company through matched principal transactions*

- 4.2 The Executive may be prepared to grant a limited derogation from the provisions of Rule 38.2 where it is proposed that an exempt principal trader connected with an offeror will purchase shares in the offeree company on a “matched principal” basis, as described below.
- 4.3 A connected exempt principal trader will be considered by the Executive to be acting on a matched principal basis if:
- (a) the sale of shares to the offeror is undertaken at the same price as the price at which the shares were purchased by the connected exempt principal trader (and without netting off any sales commission); and
 - (b) the purchases of shares in the offeree company by the connected exempt principal trader and their subsequent sale to the offeror are undertaken and booked simultaneously.
- 4.4 An application by a broker to purchase shares in the offeree company on behalf of an offeror through a connected exempt principal trader trading on a matched principal basis must be made to the Executive in good time before the proposed purchase is to take place.

(c) *Agreeing to purchase shares in the offeree company from the holder of a derivative contract*

- 4.5 An offeror may enter into discussions with a person who holds an interest in the shares of the offeree company through one or more derivatives – such as a contract for differences (a “CFD”) or a total return swap (a

“TRS”) – in order to seek to purchase shares that are held as a hedge to the derivative(s). Care should be taken to ensure that any shares in the offeree company that may be purchased as a result of such discussions are not held on the desk of an exempt principal trader connected with the offeror.

5. Other issues

(a) “All or none” orders

5.1 The Executive has previously been consulted about the possibility of an offeror placing an order that is only capable of being executed if the full order is filled (sometimes called an “all or none” or “fill or kill” order). Such an order cannot be executed by means of an offeror, or a broker on its behalf, publicly acknowledging that it is seeking to purchase shares at above the offer price, or at a price that would give rise to an obligation to make an announcement under Rule 7.1, because that would entail the offeror indicating to the market that it might improve its offer without committing itself to do so, contrary to Rule 19.3. If it is proposed to approach a number of shareholders confidentially with the intention of reaching an agreement with them at the same time so that a minimum number of shares is purchased, the Executive should be consulted.

(b) Using an intermediary that is not also a financial adviser to the offeror

5.2 If a broker is appointed by an offeror solely for the purpose of purchasing shares in the offeree company on behalf of the offeror, the broker will normally be regarded as a connected adviser to, or otherwise acting in concert with, the offeror.

(c) Using derivative contracts to finance an acquisition

5.3 If it is intended that an offeror will use CFDs, TRSs or other derivatives to acquire an interest in the shares of the offeree company during the offer period, the Executive should be consulted in good time before the proposed transaction.

(d) Protection of retail shareholders

5.4 Rule 20.6 provides that, except with the consent of the Panel, campaigns in which shareholders are contacted by telephone may be conducted only by staff of the financial adviser to an offeror who have a thorough understanding of the requirements of, and their responsibilities under, the Code. Shareholders must not be put under pressure to take action, or not to take action, in connection with an offer and must be encouraged to consult their professional advisers.

- 5.5 The Executive would not normally seek to apply Rule 20.6 to a broker acting for an offeror contacting any person that is:
- (a) authorised by the Financial Conduct Authority (or an equivalent regulator in another jurisdiction) and:
 - (i) is a fund manager or asset manager; or
 - (ii) provides advisory or asset management services to a shareholder in the offeree company; or
 - (b) otherwise classified by the broker as an eligible counterparty or a professional client.
- 5.6 If sales of shares are to be solicited directly from private individuals or small companies, the Executive expects the (financial adviser or) broker to be able to explain to it the systems put in place to ensure that any contact will comply with Rule 20.6.

(e) Consortium offers

- 5.7 Under Note 2 on Rule 4.1, if an offer is to be made by a consortium, or by a company formed by members of a consortium, the Panel must be consulted before any purchases of shares in the offeree company are made by members of the consortium. It will not normally be acceptable for consortium members to purchase shares unless, for example, appropriate arrangements are made to ensure the purchases are proportionate to members' interests in the consortium or there is an arrangement which gives no profit to the party making the purchase.
- 5.8 If the offeror is a consortium, and the shares are not being purchased by a company that has been formed for the purpose of making the offer and funded proportionately by the consortium members, the Executive expects to be consulted in good time so that it is able to review the arrangements put in place to comply with Note 2 on Rule 4.1.

(f) Purchasing shares to satisfy the acceptance condition

- 5.9 Under Note 5(a) on Rule 10.1, an offeror may only count a purchase of shares towards satisfaction of the acceptance condition where it (or its nominee) is the registered holder of the shares. Therefore, if uncertificated shares are purchased by an offeror on standard T+2 settlement terms, the shares will only be capable of being counted towards satisfaction of the acceptance condition two business days after the date of the dealing.

- 5.10 All purchases of shares by an offeror during an offer period must be disclosed under Rule 8.1 by no later than 12 noon on the business day following the date of the dealing. A person making a disclosure under Rule 8 is not required to include details of the settlement terms of the dealing. It is therefore possible that an offeror may have an obligation to make a disclosure under Rule 8 that shows that it is interested in shares carrying more than 50% of the voting rights in the offeree company before the offer becomes unconditional.
- 5.11 In order to ensure compliance with General Principle 4, the Executive expects an offeror to make a separate announcement when, before an offer is unconditional, it purchases sufficient shares that the acceptance condition will be satisfied upon settlement of all purchases made on its behalf, provided that such settlement will take place prior to the unconditional date. This announcement should contain details of all such purchases that have not settled at the time of the announcement, including their contractual settlement date. The Executive should be consulted before the announcement is published.

(g) Disclosure to the Executive

- 5.12 If an offeror purchases shares in the offeree company, the Market Surveillance Unit at the Executive should be provided with a spreadsheet at the end of each trading day containing details of:
- (a) the seller of the shares;
 - (b) the number of shares purchased; and
 - (c) the price paid to the seller.
- 5.13 The Executive expects to be able to reconcile the trading undertaken by the broker for the offeror to:
- (a) the information provided to the Executive by the selling shareholders; and
 - (b) the broker's trade and transaction reports.

Therefore, the information provided regarding any shares purchased through an anonymous order book must include details of each individual trade, including the time stamp, so that, in particular, the highest price paid for the relevant shares can be verified.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case.

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