PRACTICE STATEMENT 34

RULE 21.1 – RESTRICTION ON ACTIONS BY THE BOARD OF THE OFFEREE COMPANY

1. Introduction

1.1 Rule 21.1(a) provides that during the relevant period the board of the offeree company must not, except with the approval of shareholders in general meeting or the consent of the Panel, take or agree to take:

(a) any restricted action; or

(b) any other action which may result in the frustration of any offer or bona fide possible offer.

1.2 Rule 21.1(b) defines the "relevant period" for the purposes of Rule 21.1.

1.3 Rule 21.1(c) sets out certain actions that are a "restricted action" to the extent that the relevant action is not in the ordinary course of the offeree company's business.

1.4 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to the taking of a proposed action that would otherwise be restricted by Rule 21.1(a).

1.5 This Practice Statement provides guidance on:

(a) matters that the Panel Executive will take into account when determining:

(i) whether an action listed in Rule 21.1(c)(i) to (v) is in the ordinary course of the offeree company's business; and

(ii) whether to give its consent to a proposed action that would be restricted under Rule 21.1(a) on the basis that a decision to take the proposed action had been taken and partly implemented before the beginning of the relevant period, as described in Rule 21.1(e)(v);

(b) how the Executive applies Note 7 on Rule 21.1, which describes how Rule 21.1 will apply where there is more than one offeror;

(c) how the Executive applies Note 9 on Rule 21.1, in relation to the relevant period where the offeree board is seeking a potential offeror or where a purchaser is being sought for a controlling interest in a company; and

(d) how the Executive normally interprets "exceptional circumstances" when determining under Note 10 on Rule 21.1 whether it will

consent to the restrictions in Rule 21.1(a) not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

1.6 Rule 21.1(d) provides that the Panel must be consulted in advance if any proposed action may be restricted by Rule 21.1(a). Offeree boards and advisers to offeree companies are encouraged to consult the Executive at an early stage, including to determine whether a proposed action is in the ordinary course of the offeree company's business.

2. Disposals and acquisitions of assets

(a) Disposals and acquisitions of assets for cash

2.1 Rule 21.1(c)(iv) provides that disposing of or acquiring (in one or more transactions) assets of a material amount, other than in the ordinary course of the offeree company's business, is a restricted action.

2.2 Note 3 on Rule 21.1 describes how the Panel will assess whether assets being disposed of or acquired are of a material amount.

2.3 The matters that the Executive will consider when determining whether a disposal or acquisition is in the ordinary course of the offeree company's business include whether:

(a) the proposed transaction falls within the established business model of the offeree company, taking into account:

(i) the frequency of similar transactions and the size of the proposed transaction in comparison to previous similar transactions; and

(ii) how the offeree company describes its business strategy to its shareholders;

(b) the terms of the proposed transaction and the basis of valuation are in line with normal practice by reference to either a broader market (for example, where the offeree company proposes to dispose of or acquire liquid securities) or previous transactions entered into by the offeree company or its peers; and

(c) the proposed transaction is part of an ongoing strategy, rather than a strategic change.

2.4 The Executive will also take into account the cumulative effect of disposals and acquisitions during the relevant period on the offeree company's assets and business as a whole. Where the offeree company has agreed to make a large number of disposals or acquisitions during

the relevant period, each of which is not restricted by Rule 21.1(a) because it is:

(a) not material individually; or

(b) in the ordinary course of the offeree company's business,

the Executive may nonetheless consider that the overall level of disposals and acquisitions is no longer in the ordinary course of the offeree company's business.

2.5 If so, any subsequent disposal or acquisition would not be regarded as being in the ordinary course of the offeree company's business. As a result, for the purpose of Note 3(e) on Rule 21.1, all subsequent disposals and/or acquisitions would be aggregated together with any disposals and/or acquisitions that the Executive had already agreed should be aggregated under Note 3(e) (i.e. any disposal and/or acquisition entered into earlier in the relevant period that was not in the ordinary course of the offeree company's business but was not individually material).

(b) Acquisitions of assets for the issue of shares or convertible securities

2.6 Rule 21.1(c)(i) provides that issuing shares or convertible securities, other than in the ordinary course of the offeree company's business, is a restricted action.

2.7 The Executive will consider the following matters when determining whether the issue of shares or convertible securities as consideration for an acquisition of assets is in the ordinary course of the offeree company's business:

(a) the frequency with which the offeree company has issued shares or convertible securities as consideration for an acquisition of assets;

(b) the size of the proposed issue of shares or convertible securities in comparison to historical issues of shares or convertible securities as consideration for an acquisition of assets;

(c) the terms of the proposed issue of shares or convertible securities, including whether they will be issued at market value; and

(d) whether the acquisition of assets itself would be in the ordinary course of the offeree company's business, taking into account the matters set out in paragraph 2.3.

3. Contracts - general

3.1 Rule 21.1(c)(v) provides that entering into, amending or terminating a material contract, other than in the ordinary course of the offeree company's business, is a restricted action.

3.2 The Executive will assess whether a contract is a material contract primarily by reference to its size in comparison to other contracts entered into by the offeree company. The Executive will apply a low threshold for determining when a contract is material.

3.3 If a contract is a material contract, the Executive will assess whether it is in the ordinary course of the offeree company's business by reference to all the relevant circumstances, including:

(a) the frequency with which the offeree company has entered into similar contracts;

(b) the size of the contract in comparison to similar contracts entered into by the offeree company;

(c) whether the contract is of particular importance to the offeree company's business;

(d) the terms of the contract and whether any non-market terms are onerous on the offeree company; and

(e) if relevant, the costs associated with terminating or amending the contract.

3.4 The application of the approaches described in paragraphs 3.2 and 3.3(b) means that the size of a contract will be relevant in assessing both whether it is a material contract and (if so) whether it is in the ordinary course of the offeree company's business. For example, if a contract represents a large proportion of the offeree company's revenue (and is therefore a material contract), its size may mean that it is not in the ordinary course of business even though the contract relates to the offeree company's normal products or services (such that the offeree company regularly enters into smaller similar contracts).

3.5 The Executive will normally consider a minor amendment to a material contract to be in the ordinary course of the offeree company's business (even if the contract itself is not in the ordinary course of the offeree company's business). As a result, a minor amendment to a material contract will not normally be a restricted action.

4. Contracts - specific examples

(a) Introduction

4.1 In addition to the matters relevant to all contracts set out in Section 3, the Executive will take into account additional matters, as set out below, when considering whether certain types of contract are in the ordinary course of the offeree company's business.

(b) Capital expenditure

4.2 Regular or maintenance capital expenditure will normally be regarded as being in the ordinary course of the offeree company's business. In considering material "growth" capital expenditure (for example, capital expenditure required to enter a new product area or geographical market), the Executive will take into account the offeree company's historical approach to capital expenditure and whether the proposed capital expenditure and/or the related strategic decision had been publicly disclosed before the start of the relevant period.

(c) Refinancing or raising new debt

4.3 Refinancing or raising new debt on normal market terms will normally be regarded as being in the ordinary course of the offeree company's business. The Executive may treat issuing new shares or securities that do not form part of the offeree company's equity share capital in the same way as raising new debt, depending on the nature of the rights attaching to the relevant shares or securities.

(d) Property leases

4.4 Normal property lease management will normally be regarded as being in the ordinary course of the offeree company's business.

(e) Settlement agreements

4.5 Rule 21.1(a) should not normally compromise the ability of the offeree board to achieve the best outcome for shareholders in relation to a commercial dispute and entering into a settlement agreement in relation to a commercial dispute or a compromise agreement with a departing director or employee will normally be regarded as being in the ordinary course of the offeree company's business.

4.6 When considering whether that is the case, the Executive will take into account:

(a) the financial impact of the settlement agreement or compromise agreement;

(b) whether the relevant costs have been provided for in the offeree company's accounts or are covered by insurance;

(c) any legal advice received by the offeree company; and

(d) any other likely impact on the offeree company.

5. Offer-related retention arrangements

5.1 Note 1(c) on Rule 21.1 provides that the Panel may regard as a restricted action entering into offer-related retention arrangements that:

(a) relate to a period that is (in whole or in part) prior to the end of the offer period (other than arrangements that are considered to be in the ordinary course of the offeree company's business under Note 1(a) or Note 1(b) on Rule 21.1); and

(b) are significant in value or relate to directors or management.

5.2 The Executive will not normally regard new offer-related retention arrangements as being significant in value where the aggregate value of the arrangements is no more than 1% of the value of the offeree company calculated by reference to the price of the offer.

5.3 Where the arrangements are for the benefit of directors or management or are significant in value, additional matters may be relevant in determining whether entering into the proposed arrangements should be regarded as a restricted action. These may include:

(a) the change to the offeree company's aggregate employment costs;

(b) the terms of each individual retention arrangement, including the absolute value of the award;

(c) the proportion of the individual's annual remuneration that the proposed award represents;

(d) the expected offer timetable and the time at which the offeree board proposes to grant the award;

(e) the normal practice in the relevant industry or sector;

(f) the importance of the individual to the offeree company's business;

(g) any change to the individual's role within the offeree company's business; and

(h) the views of the Rule 3 adviser.

6. Partial implementation of a decision to take a proposed action

6.1 Rule 21.1(e)(v) provides that the Panel will normally consent to a proposed action that would be restricted by Rule 21.1(a) where:

(a) a decision to take the proposed action had been taken; and

(b) that decision had been partly implemented,

in each case, before the beginning of the relevant period.

6.2 In considering whether a decision to take a proposed action had been taken by the offeree board, the Executive will normally seek to determine whether the board had made an "in principle" decision.

6.3 If it had then, in considering whether that "in principle" decision had been partly implemented, the Executive will normally seek to determine whether the substantial commercial terms, and in particular the financial terms, had been agreed between the parties. In some cases, the commercial terms may have been agreed at the time of the "in principle" decision and in other cases they may not have been agreed until a later stage.

6.4 By way of example, in the context of a proposed disposal of assets by the offeree company by means of a competitive auction, the Executive considers that:

(a) indicative, first round, non-binding bids based on only an assessment of an information memorandum will not normally be a sufficient basis for an "in principle" decision to undertake the proposed disposal to be partly implemented; and

(b) second round, binding bids which follow the completion of due diligence and have been accepted as a basis for entering into a sale and purchase contract will normally be a sufficient basis for an "in principle" decision to undertake the proposed disposal to be partly implemented.

6.5 Where the relevant action does not involve an agreement with a third party, the Executive will consider whether steps have been taken towards implementing the "in principle" decision. For example, in the context of a decision by the offeree board to grant options over shares, the Executive would consider whether the offeree board had taken steps towards implementing the grant, such as communicating the decision to the recipient of the options or preparing the required documentation.

7. Competing offerors

7.1 The restrictions in Rule 21.1(a) apply during the relevant period. Under Rule 21.1(b), the relevant period begins upon the earlier of:

(a) an approach by a potential offeror to the board of the offeree company; and

(b) the beginning of the offer period.

7.2 Note 7 on Rule 21.1 provides that, where there is more than one offeror, the Panel will normally treat the relevant period for any new offeror or potential offeror as beginning upon an approach by that offeror to the board of the offeree company or, if earlier, when that offeror is publicly identified in an announcement.

7.3 Rule 21.1(e) sets out the circumstances in which the Panel will normally give its consent to a proposed action that would be restricted by Rule 21.1(a). The effect of Note 7 on Rule 21.1 is that, where there is more than one offeror, the Executive may agree to give its consent to a proposed action based on a combination of the circumstances set out in Rule 21.1(e).

7.4 For example, the offeree board may continue to take steps towards implementing a proposed action after it has received an approach from a potential offeror and later receive an approach from a second potential offeror. In such circumstances, the Executive may determine that the decision to take that action had been taken and partly implemented at a point in time after the offeree board received the approach from the first offeror, such that the decision was not partly implemented before the beginning of the relevant period for the first offeror. However, the decision may have become partly implemented before the offeree board received the approach from the second offeror, such that it was partly implemented before the beginning of the relevant period for the second offeror.

7.5 If, on the facts of the relevant case, the Executive determined that the decision to take the proposed action had been taken and partly implemented at a point in time between the approach from the first offeror and the approach from the second offeror, it could permit the proposed action on the basis of a combination of, for example:

(a) the first offeror having consented to the proposed action under Rule 21.1(e)(ii); and

(b) the decision to take the proposed action having been taken and partly implemented under Rule 21.1(e)(v) before the approach from the second offeror.

7.6 Similarly, the disposals and/or acquisitions that are required to be aggregated for the purpose of Note 3(e) on Rule 21.1 are only those entered into during the relevant period. As the effect of Note 7 on Rule 21.1 is to give each competing offeror its own relevant period, the offeree board may therefore be required to aggregate different disposals and/or acquisitions for the purpose of Note 3(e) on Rule 21.1 for each offeror.

8. Relevant period where the offeree board is seeking a potential offeror or where a purchaser is being sought for a controlling interest

8.1 Note 9(a) on Rule 21.1 provides that where the offeree board is seeking one or more potential offerors (whether by way of a formal sale process or otherwise), the relevant period for a potential offeror will not normally begin until that potential offeror makes a proposal with indicative offer terms.

8.2 An offeror is not required to propose a specific offer price in order to be considered to have made a proposal with indicative offer terms. A proposal that included a price range or a quantified indicative premium to the prevailing share price could constitute a proposal with indicative offer terms. The offeree board or offeror should consult the Executive if there is any doubt as to whether a proposal contains indicative offer terms.

8.3 Note 9(b) on Rule 21.1 provides that the Panel should be consulted at an early stage to determine when the relevant period will begin where a purchaser is being sought for interests in shares carrying in aggregate 30% or more of the voting rights of a company.

8.4 By analogy with Note 9(a) on Rule 21.1, the Executive considers that, in such circumstances, the relevant period will normally begin for a potential offeror when it makes a proposal to the selling shareholder setting out indicative terms for the purchase (i.e. indicative offer terms).

8.5 However, if the offeree board is not aware that a buyer is being sought for a controlling stake, or is not aware of the current status of the discussions between the selling shareholder and potential purchasers, the Executive may agree that the restrictions in Rule 21.1(a) will apply only once the offeree board is made aware that the potential offeror has made an indicative proposal setting out terms.

8.6 The offeree board or the controlling shareholder should consult the Executive to discuss when the relevant period will begin where a purchaser is being sought for a controlling interest.

9. Sanction of a scheme of arrangement in a competitive situation

9.1 Note 10 on Rule 21.1 provides that, other than in exceptional circumstances, the Panel will consent to the restrictions in Rule 21.1(a) not being applied where the offeree board seeks to sanction a scheme of arrangement in a competitive situation.

9.2 The Executive will consider in the light of all the relevant facts whether there are exceptional circumstances, such that the restrictions in Rule 21.1(a) should apply to the offeree board seeking to sanction a scheme of arrangement in a competitive situation. Exceptional circumstances might exist if, for example, the Executive considered that the offeree board was acting in a clearly unreasonable manner in seeking to sanction the scheme.

9.3 The Executive considers that the fact that the offeree board is seeking to sanction the lower of two competing offers, or that the competing offeror has had a limited time in which to make or revise its offer, would not of itself be regarded as exceptional circumstances.

9.4 If a competing offeror does not approach the offeree board, or does not otherwise make its interest in making an offer known, until after the shareholder meetings to approve the scheme of arrangement, the Executive will normally consent to the restrictions in Rule 21.1(a) not being applied under Rule 21.1(e)(v) on the basis that the offeree board's decision to seek to sanction the scheme was partly implemented before the beginning of the relevant period for the competing offeror (as determined in accordance with Note 7 on Rule 21.1).

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.

11 December 2023