



The Law Society

Takeover Panel consultation paper PCP 2018/1

Law Society and City of London Law
Society joint response

7 December 2018



Introduction

1. The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).
2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees, and membership of its Company law Committee can be found at http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=115&Itemid=469.
3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.
4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers.

Response

- Q1 Is a period of 12 months prior to the commencement of the offer period an appropriate “look back” period in order for Rule 29 to apply to a valuation under the proposed Rule 29.1(a)(ii)?**
5. We agree that this is an appropriate period, and understand that this reflects a codification of current Panel practice.
- Q2 Do you have any comments on the application of Rule 29 to a valuation published in the circumstances described in the proposed Rule 29.1(a)(i), (ii) or (iii)?**
6. We have no comments on this.
- Q3 Do you have any comments on the proposed wording “unless the Panel considers that the valuation is not material to offeree company shareholders in making a properly informed decision as to the merits or demerits of the offer”?**
7. We have no comments on this.

Q4 Do you have any other comments on the proposed new NB at the beginning of Rule 29, the proposed Rule 29.1(a) or the proposed new Note on Rule 29.1?

8. We note that the reporting exemptions that apply under the Code in respect of ordinary course forecasts have not been replicated for asset valuations. We are not wholly convinced by the reasons set out in paragraph 2.28 of the PCP for distinguishing the treatment of asset valuations from forecasts in this way – for example we would query whether asset valuations are necessarily of more fundamental importance to shareholders in assessing the offer, or more dependent on subjective judgements by directors, than profit forecasts. In this context, we note that in PCP 2010/1, when the introduction of the ordinary course exemption was first raised, the Panel aspired to bring in a consistent approach in relation to profit forecasts and asset valuations, with the aim of “improving the coherence and consistency of the approach in the Code towards the requirements for certain financial information, when published in the form of a profit forecast, an asset valuation, a merger benefits statement or any other quantified statement of effects” (para 1.1). Indeed, many of the arguments given in section 2.4 of that consultation seem to us to apply equally validly to profit forecasts and asset valuations. We would suggest that advantages of a consistent approach are considerable. See also our response to Q14 below in relation to no material change statements.
9. Where a valuation is included in the offer documentation but is not subject to Rule 29 (for example, where it is included in the company’s financial statements or is otherwise considered by the Panel not to be material), it would be helpful to have clarification from the Panel as to whether it would expect disclaimer language to be included clarifying that the valuation has not been produced in accordance with the requirements of Rule 29.
10. Where a party to an offer has any extant third party valuations on its website at the commencement of the offer period (for example, mineral valuations or broker estimates of value), again it would be helpful to have clarification as to whether the Panel would require these to be removed if they are not reported on in accordance with Rule 29.

Q5 Should the specific types of asset valuations to which Rule 29 applies be those referred to in the proposed Rule 29.1(b)?

11. We think it would be helpful to parties and their advisers for the Panel to issue a short practice statement in relation to those asset classes considered to be inside/outside the regime summarising the position set out in Section 3 of the PCP (including the examples given in paragraph 3.4 of the types of valuations where Rule 29 would not be applied and the approach to an “illustration of value” as referred to in paragraph 3.12). For example, although paragraph 3.4 of the PCP notes that pension fund surpluses or deficits would not usually be subject to Rule 29, the basis for this exception is not clear on the face of the revised Rule – although an estimate of any deficit would be included in the annual report, it is likely to be referred to by the parties during the course of the offer and therefore would not fall within the Note on Rule 29.1.

Q6 Should the Panel have the ability to apply Rule 29 to a valuation of other assets or liabilities, as referred to in the proposed Rule 29.1(c)?

12. We have no comments, other than as referred to in Q5 above.

Q7 Do you have any comments on the proposed Rules 29.1(b) and (c)?

13. We have no comments, other than as referred to in Q5 above.

Q8 Do you have any comments on the proposed Rule 29.1(d) in relation to the publication of a net asset value or adjusted net asset value?

14. We have no comments on this.

Q9 Should the Code require that a valuation published during the offer period must be in the form of, or accompanied by, a valuation report?

15. We have no comments on this.

Q10 Should the Code require that a valuation report in respect of a valuation falling within the proposed Rule 29.1(a)(ii) or (iii) should be included in the offer document or the offeree board circular (as appropriate) or, if earlier, in the first announcement or document published during the offer period by the offeree company or the securities exchange offeror (as the case may be) which refers to that valuation?

16. We have no comments on this.

Q11 Do you have any other comments on the proposed Rule 29.2, regarding the requirement for a valuation report, or on the proposed new Note on Rule 29.2, in relation to the circumstances where it is not possible to obtain a valuation report within the required timeframe?

17. We have no comments on this, but note that it is helpful that the Note recognises some of the practical issues that can arise.

Q12 Do you have any comments on the proposed Rule 29.3 in relation to the requirements applying to valuers?

18. It would be helpful for the Panel to provide additional clarity on the meaning of the reference (in Rule 29.3(a)(iii)) to the valuer satisfying “any relevant legal or regulatory requirements”.

Q13 Do you have any comments on the proposed Rule 29.4 in relation to a valuation report?

19. We do not have any comments on this.

Q14 Do you have any comments on the proposed Rule 29.5 in relation to “no material difference” statements?

20. The requirement for the directors of the offeror or offeree company to obtain confirmation from the valuer that an updated valuation would not be materially different is likely to be problematic in practical terms and we would query whether valuers would be able to give such a confirmation without, in practice, effectively repeating the valuation. It is not clear to us why the approach taken in the ESMA Recommendations (i.e. only requiring that confirmation be given by the issuer) is not sufficient for the purposes of Rule 29 or on what basis the distinction has been made – where a valuation report has been included in a prospectus, that is also a valuation given by the valuer but it is accepted that (for prospectus purposes) the no material change statement need only be given by the issuer. Alternatively, we would suggest that there is a specified period (for example three months from the date of the original report) during which the confirmation could be given by the issuer without the need for an additional confirmation from the valuer.

Q15 Do you have any comments on the proposed Rule 29.6 in relation to the requirement to give an estimate of the amount of the potential tax liability which would arise upon a sale of the assets?

21. We have no comments on this.

Q16 Do you have any comments on the proposed Rule 29.7 in relation to information in valuation reports which could constitute a profit forecast?

22. We have no comments on this.

Q17 Do you have any comments on the proposed Rule 29.8 in relation to the valuation by one party to an offer of another party’s assets?

23. We have no comments on this.

Q18 Do you have any comments on the consequential amendments to the Code proposed in Section 9(d) of the PCP?

24. We have no comments on this. However, as a general comment, it would be helpful to understand whether any transitional arrangements are proposed.

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