

## Practice Note 12 (PN12) – Gathering of irrevocable commitments

Note 4 to Rules 3.1, 3.2 and 3.3 provides that “[a]n offeror may approach a very restricted number of shareholders to obtain irrevocable commitments in an offer. An offeror does not have to consult the Executive in advance before approaching a shareholder with a material interest in an offeree company. In other cases the Executive must be consulted before any approach is made to a shareholder to obtain an irrevocable commitment in connection with an offer... For the purpose of this note, a shareholder has a material interest in an offeree company if he and his concert parties control(s) directly or indirectly 5% or more of the voting rights of an offeree company.”.

The rationale of Note 4 to Rules 3.1, 3.2 and 3.3 is twofold: first, to preserve secrecy before an announcement of an offer (see Rule 1.4); and secondly, to ensure equal dissemination of information to shareholders either during the course of an offer or when an offer is in contemplation (see General Principle 3 of the Codes). In administering this Note the Executive takes into account an offeror’s need for certainty as well as the risks of possible leakage of information and unequal dissemination of information.

As Note 4 suggests, consultation with the Executive is not required where an offeror wishes to approach a shareholder with a material interest (i.e. a shareholder who together with his concert parties holding 5% or more of the voting rights of a company). In other cases, the Executive must be consulted.

An offeror may approach a shareholder with a material interest any time prior to the publication of a possible offer announcement or a firm intention announcement (“**Rule 3.5 Announcement**”) and prior consultation with the Executive is not necessary. For all other shareholders (i.e. a shareholder (together with his concert parties) holding less than 5% of the voting rights of a company), the Executive’s consent is required prior to any approach and the following principles apply:

- (a) Shareholders may only be approached within a limited period to be agreed in advance with the Executive before the publication of the Rule 3.5 Announcement. This usually means the approach can only be made within the agreed number of business days before the issue of the Rule 3.5 announcement, the length of which will normally depend on the nature and identity of that shareholder.
- (b) The draft Rule 3.5 Announcement must be in a clearable form and the financial resources to satisfy the offeror’s obligation under the offer must be readily available prior to the approach. The Executive must have indicated verbally that it does not have any substantive comments on the draft Rule 3.5 Announcement and the draft financial resources confirmation.
- (c) Information that may be provided to shareholders should be confined to details that are either already public (i.e. in a possible offer announcement), and those that are contained in the draft Rule 3.5 Announcement where the Executive has indicated it has no substantive comments.

### ***Rule of six***

A “very restricted number of shareholders” under Note 4 means no more than six. This number includes both shareholders who have a material interest and those who do not. In circumstances where a material interest in an offeree company is held by a SPV, the SPV and its ultimate beneficial shareholders will count as one shareholder. In respect of concert party holdings in an offeree company, the Executive will treat each member of the concert group as one shareholder unless the interest of the group is held collectively through a SPV.

There is no limit on the number of shareholders who can be approached following the publication of the Rule 3.5 Announcement so long as only information that are already in the public domain are provided and Note 3 to Rule 8.1 is complied with.

### ***Importance of maintaining secrecy***

In all cases, the Executive expects an offeror and its advisers to preserve secrecy before any announcement of an offer. Whenever a shareholder is approached prior to a Rule 3.5 announcement, there will be a risk that details of the potential offer may be leaked. Therefore, the offeror and its advisers should make appropriate arrangements and take utmost care to minimise the possibility of a leak. What is appropriate may differ in each case and the obligation is on the offeror’s financial adviser to advise on when and how a shareholder should be approached. An offeror and its advisers must ensure that information shared when approaching a shareholder will also be contained in the eventual Rule 3.5 Announcement.

Shareholders approached before the publication of the Rule 3.5 Announcement will have to agree to be insiders, and therefore be subject to all the rules and regulations applicable to insiders. The potential offeror should make appropriate arrangements (e.g. obtaining signed confidentiality undertakings from the relevant shareholders) to prevent leakage of information.

### ***List of shareholders approached to be provided to Executive***

An offeror should provide to the Executive a list of all shareholders that it has approached. Where a draft possible offer announcement or Rule 3.5 announcement has been submitted for vetting, such list should be provided not later than 12.00 noon on the business day after the date of such approach. If shareholders with material interests are approached before the commencement of the vetting process, the list of shareholders approached should be submitted together with the first draft possible offer announcement or Rule 3.5 announcement.

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