

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 sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment. In all 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. In appropriate circumstances, the Executive may permit particular shareholders to be called and informed of details of a proposed offer which has not been publicly announced. ...”*

The Executive has been consulted on a number of occasions on the practicalities of this Note 4. In particular market practitioners have asked for clarification on the earliest time shareholders may be approached by an offeror and the number of shareholders who may be approached.

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, the Executive’s consent is not required where an offeror wishes to approach a very restricted number of sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment. For this purpose, “a very restricted number” means no more than **six**.

In cases which require consent under Note 4, the Executive would normally impose the following conditions:

- (a) Shareholders may only be approached within a limited period to be agreed in advance with the Executive, before the announcement of a firm intention to make an offer under Rule 3.5 of the Takeovers Code (“Rule 3.5 Announcement”) is published.

- (b) If shareholders are approached before an announcement of a possible offer is published, or in the event of a hostile bid, the total number of shareholders who may be approached is restricted to **six**. If an offer period has already commenced (e.g. following the issuance of an announcement of an offer or possible offer), there is normally no restriction on the number of shareholders who may be approached subject to them not being provided with any non-public information. Where the offer is recommended by the board of the offeree company the Executive may adopt a more relaxed approach to the number of shareholders who may be approached.
- (c) The Executive should be consulted at the earliest opportunity. As part of the consultation the Executive would expect to be provided with a list of the shareholders to be approached.

In each case where shareholders are approached:

- (i) Information that may be provided to those shareholders should be confined to details that are either already public or, if shareholders are approached before publication of the Rule 3.5 Announcement, would eventually be contained in the Rule 3.5 Announcement.
- (ii) Shareholders approached before 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 relating to the offer.

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