

## 26. Mandatory offer

### 26.1 When mandatory offer required

Subject to the granting of a waiver by the Executive, when

- (a) any person acquires, whether by a series of transactions over a period of time or not, ~~35%~~30% or more of the voting rights of a company;
- (b) two or more persons are acting in concert, and they collectively hold less than ~~35%~~30% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to ~~35%~~30% or more of the voting rights of the company;
- (c) any person holds not less than ~~35%~~30%, but not more than 50%, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than ~~5%~~2% from the lowest percentage holding of that person in the 12 month period ending on and inclusive of the date of the relevant acquisition; or
- (d) two or more persons are acting in concert, and they collectively hold not less than ~~35%~~30%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than ~~5%~~2% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date of the relevant acquisition;

that person, ~~or the principal members of the concert group, as the case may be,~~ shall extend offers, on the basis set out in this Rule 26, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares (see also Rule 36).

Offers for different classes of equity share capital must be comparable and the Executive should be consulted in advance in such cases. (See Rule 14.)

*Notes to Rule 26.1:*

#### 1. *Persons acting in concert*

*The majority of questions which arise relate to persons acting in concert. The definition of "acting in concert" contains a list of persons who are presumed to be acting in concert unless the contrary is established. The following Notes illustrate how this Rule 26 and definition are interpreted by the Executive.*

There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more.

2. *Shareholders coming together to act in concert*

*Acting in concert requires the co-operation of two or more parties. Where a party has acquired shares independently of other shareholders, or potential shareholders, but subsequently ~~joins~~comes together with other shareholders to co-operate to obtain or consolidate control of a company and their existing shareholdings amount to ~~35%~~30% or more of the voting rights of that company, the Executive would not normally require a general offer to be made under Rule 26.1. Such parties having once joined together however, the provisions of Rule 26.1 would apply so that:-*

- (a) if the combined shareholdings amounted to less than ~~35%~~30% of the voting rights of that company, an obligation to make an offer would arise if any member of that group acquired further shares such that total holdings of voting rights reached ~~35%~~30% or more; or*
- (b) if the combined shareholdings amounted to between ~~35%~~30% and 50% of the voting rights of that company, no member of that group could acquire shares which would result in acquisitions by the group amounting to more than ~~5%~~2% of the voting rights of the company in any 12 month period without incurring a similar obligation.*

3. *Banks*

*An arm's length agreement between a shareholder and a bank under which the shareholder borrows money for the acquisition of shares which gives rise to an obligation under this Rule 26 will not normally result in the bank becoming a concert party. However, see class (9) of the definition of acting in concert.*

4. *Shareholders voting together*

*The Executive will not normally regard the action of shareholders voting together on particular resolutions as action which of itself should lead to an offer obligation, but that circumstance may be taken into account as one indication that the shareholders are acting in concert.*

5. *Directors of a company*

*The directors of companies opposing an offer, their advisers, and others acting in concert with them, should consult the Executive before the acquisition of any voting rights which might lead to the incurring of an obligation under this Rule 26.*

*(See also class (6) of the definition of acting in concert.)*

6. *Acquisition of voting rights by members of a group acting in concert*

*While the Executive accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the holdings of members and the membership of such groups may change at any time. This being the case, there will be circumstances when the acquisition of voting rights by one member of a group acting in concert from another member of the concert group or from a non-member, will result in the acquirer of the voting rights having an obligation to make an offer. ~~In addition to the circumstances set out in Note 7, the Executive will apply the following criteria:~~*

*(a) Acquisitions from another member*

*~~(a)~~—Whenever the holdings of a group acting in concert total ~~35%~~30% or more of the voting rights of a company and as a result of an acquisition of voting rights from another member of the group a single member comes to hold ~~35%~~30% or more or, if already holding between ~~35%~~30% and 50%, has acquired more than ~~5%~~2% of the voting rights in any 12 month period, an obligation to make an offer will normally arise.*

*In addition to the factors set out in Note 7 to this Rule 26.1, ~~the~~ factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:-*

- (i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;*
- (ii) the price paid for the shares acquired; and*
- (iii) the relationship between the persons acting in concert and how long they have been acting in concert.*

~~(b)~~—The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:—

- (i) the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies; or
- (ii) the acquirer is a member of a group of persons comprising an individual, his close relatives and related trusts, and companies controlled by him, his close relatives or related trusts, and the acquirer has acquired the voting rights from another member of such group of persons.

~~(b)~~ Acquisitions from non-members

~~(e)~~—When the group holds between ~~35%30%~~ and 50% of the voting rights, an offer obligation will arise if there are acquisitions from non-members of more than ~~5%2%~~ in aggregate in any 12 month period. When the group holds over 50%, subject to Note 17 to this Rule 26.1 no obligations normally arise from acquisitions by any member of the group. However, subject to considerations similar to those set out in paragraph (a) of this Note, the Executive may regard as giving rise to an obligation to make an offer the acquisition by a single member of the group of voting rights sufficient to increase his holding to ~~35%30%~~ or more or, if he already holds between ~~35%30%~~ and 50%, by more than ~~5%2%~~ in any 12 month period.

~~(d)~~ Calculation of highest price

~~(d)~~—For the purpose of calculating the highest price paid in the event of an offer under this Rule 26, the prices paid for voting rights transferred between members of a group acting in concert may be relevant where, for example, all voting rights held within a group are transferred to that member making the offer or where prices paid between members are materially above the market price.

Other general interpretations

7. Vendor of part only of a shareholding

Shareholders sometimes wish to sell part only of their holdings or a purchaser may be prepared to acquire part only of a holding. This arises particularly where an acquirer wishes to acquire under ~~35%30%~~, thereby avoiding an obligation under this Rule 26 to make a general offer. The Executive will be concerned to see whether in such circumstances the arrangements between the purchaser and vendor effectively allow the purchaser to exercise a significant degree of control

*over the retained voting rights, in which case a general offer would normally be required. These concerns will also apply when the purchaser is already a member of a group acting in concert with the vendor, or when the purchaser joins such a group.*

*The Executive will also take into account any other transactions between the purchaser and the vendor, and between the purchaser and other members of the group acting in concert with the vendor. This could include, for example, the aggregation of transfers of voting rights to the purchaser over a period of time, or arrangements which have an effect similar to transfer, such as the underwriting by a purchaser of a rights issue which the vendor has agreed not to take up, or a placing of shares with the purchaser.*

*A judgement on whether such a significant degree of control exists will obviously depend on the circumstances of each individual case, but, by way of guidance, the Executive would regard the following points as having some significance: -*

- (a) there would be less likelihood of a significant degree of control over the retained voting rights if the vendor was not an “insider”;*
- (b) the payment of a very high price for the voting rights would tend to suggest that control over the entire holding was being secured;*
- (c) if the parties negotiate options over the retained voting rights it may be more difficult for them to satisfy the Executive that a significant degree of control is absent. On the other hand, where the retained voting rights are in themselves a significant part of the company’s capital (or even in certain circumstances represent a significant sum of money in absolute terms) a correspondingly greater element of independence may be presumed; **and***
- (d) it would be natural for a vendor of part of a controlling holding to select a purchaser whose ideas as regards the way the company is to be directed are reasonably compatible with his own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor’s support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained voting rights, would not lead the Executive to conclude that a general offer should be made.*

#### 7A. Placing

The Executive would not give its consent to the acquisition of a holding of ~~35%~~30% or more by a person in conjunction with arrangements by the purchaser to place sufficient voting rights to reduce the holding below ~~35%~~30%.

A purchaser may be prepared to acquire part only of a holding, particularly where he wishes to acquire under ~~35%~~30%, thereby avoiding an obligation under this Rule 26 to make a general offer. The Executive will be concerned to see that the arrangements made by the vendor to dispose of his remaining voting rights do not effectively allow the purchaser to exercise a significant degree of control over such voting rights not acquired by the purchaser. Where the remaining voting rights are placed by the vendor, the Executive will require confirmation from any financial adviser or placement agent involved in the placing or disposal of the identity of the placee or placees and whether they are independent. A procedure similar to that set out in Note 7 ~~of the Notes~~ on dispensations from Rule 26 will be followed. A placing with a number of persons having a common link, such as the discretionary clients of a fund manager who would be connected with the purchaser if he were an offeror, would not normally be acceptable. If in such circumstances the fund manager would have exempt status, it may apply to the Executive for consent to such placing.

#### Other general interpretations

#### 8. The chain principle

Occasionally, a person or group of persons acting in concert acquiring statutory control of a company (which need not be a company to which the Takeovers Code applies) will thereby acquire or consolidate control, as defined in the Codes, of a second company because the first company itself holds, either directly or indirectly through intermediate companies, a controlling interest in the second company, or holds voting rights which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Executive will not normally require an offer to be made under this Rule 26 in these circumstances unless either:—

- (a) the holding in the second company is significant in relation to the first company. In assessing this, the Executive will take into account a number of factors including, as appropriate, the assets and profits of the respective companies. Relative values of 60% or more will normally be regarded as significant; or
- (b) one of the main purposes of acquiring control of the first company was to secure control of the second company.



*The Executive should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule 26.*

*“Statutory control” in this Note means the degree of control which a company has over a subsidiary.*

9. *Triggering a mandatory offer during a voluntary offer*

*If it is proposed to incur an obligation ~~is incurred~~ under this Rule 26 during the course of a voluntary offer by the acquisition of voting rights ~~otherwise than through acceptances of the voluntary offer~~, the Executive must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule 26 must be announced immediately.*

*If no change in the consideration is involved it will be sufficient, following the announcement, simply to notify offeree company shareholders in writing of the new total holding of the offeror, of the fact that the acceptance condition in the form required by Rule 26.2 is the only condition remaining, and of the period for which the offer will remain open following posting of the document.*

*An offer made in compliance with this Rule 26 must remain open for not less than 14 days following the date on which the document is posted to offeree company shareholders.*

*Notes 3 and 4 to Rule 16.1 set out certain restrictions on the incurring of an obligation under this Rule 26 during the offer period.*

10. *Convertible securities, warrants and options*

*In general, the acquisition of convertible securities, warrants or options does not give rise to an obligation under this Rule 26 to make an offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of voting rights for the purpose of this Rule 26.*

*The Executive will, however, give special consideration to the granting and taking of options, and will have regard to the time when the option is exercisable, whether the grantor of the option has also sold part of his holding (see Note 7 to this Rule 26.1), the consideration paid for the option, and any other circumstances in which the relationship and arrangements between the two parties concerned are such that effective control over underlying voting rights has or may have passed to the taker of the option. Where the Executive takes the view that effective control over the voting rights has passed, it will treat the grant of the option as constituting an acquisition of the voting rights.*

*The Executive will not normally require an offer to be made following the exercise of convertible securities, warrants, options or other*

subscription rights in respect of new securities provided that the issue of convertible securities, warrants or options to the person exercising the rights is approved by a vote of independent shareholders in general meeting in the manner described in Note 1 ~~of the Notes~~ on dispensations from Rule 26. ~~This dispensation may be invalidated if there are any purchases of voting rights prior to such exercise.~~

Any holder of conversion or subscription rights who intends to exercise such rights and so to hold ~~35%30%~~ or more of the voting rights of a company (or to have acquired more than ~~5%2%~~ of such voting rights in any 12 month period) should consult the Executive before doing so to determine whether an offer obligation would arise under this Rule 26 and if so at what price. (See also Note 2(c) to Rule 26.3.)

Where there are conversion or subscription rights currently capable of being exercised, this Rule 26 is invoked at a level of ~~35%30%~~ of the existing voting rights. Where they are capable of being exercised during an offer period, Note 2 to Rule 6 and Note 3 to Rule 30.2 will be relevant. (See also Note ~~189~~ to this Rule 26.1.)

11. The ~~5%2%~~ creeper - acquisitions and dispositions of voting rights during 12 month period

A person, or group of persons acting in concert, holding ~~35%30%~~ or more of the voting rights of a company is free to acquire and dispose of further voting rights within a band of ~~5%2%~~ above the greater of ~~35%30%~~ or its lowest percentage holding of voting rights in the previous 12 month period without incurring an obligation to make a general offer. Within this band dispositions of voting rights may be netted off against acquisitions thereof.

12. The ~~5%2%~~ creeper - effect of dispositions

If a person, or group of persons acting in concert, holding ~~35%30%~~ or more of the voting rights of a company disposes of voting rights in circumstances other than those mentioned in ~~the preceding~~ Note 11 to this Rule 26.1, the reduced holding establishes a new lowest percentage holding for purposes of the ~~5%2%~~ creeper. As a result, an obligation to make a general offer will arise if:-

- (i) the reduced holding is ~~35%30%~~ or more and is increased by net acquisitions of voting rights by more than ~~5%2%~~ in any 12 month period, or
- (ii) following a reduction of the holding below ~~35%30%~~ it is increased to ~~35%30%~~ or more.

Except as mentioned in Note 11 ~~to this Rule 26.1~~ above, dispositions of voting rights may not be netted off against acquisitions thereof.



13. The ~~5%~~2% creeper - effect of dilution

Subject to Note 14 to this Rule 26.1, the dilution of a holding of voting rights by the issue of new shares or otherwise will normally be regarded by the Executive as equivalent to a reduction by way of a disposition of voting rights.

14. The ~~5%~~2% creeper - placing and top-up transactions

For purposes of the “creeper” a placing shareholder who conducts a placing and top-up transaction pursuant to Note 6 ~~of the Notes~~ on dispensations from Rule 26 shall be deemed to have a lowest percentage holding equal to the lower of the lowest percentage holding which the placing shareholder had in the 12 month period prior to or immediately after the placing and top-up transaction. A placing shareholder will be treated similarly if the top-up transaction does not give rise to an offer under this Rule 26 but the transaction complies with the requirements of Notes 6 or 7 ~~of the Notes~~ on dispensations from Rule 26.

Where a placing shareholder has completed a whitewashed transaction within the 12 months immediately before the placing and top-up transaction, Note 15 to this Rule 26.1 should be read together with this Note for the purpose of determining the lowest percentage holding which the placing shareholder had in that 12 month period.

15. The ~~5%~~2% creeper - effect of whitewash

When a person, or group of persons acting in concert, ~~becomes required~~ would otherwise be obliged to make a mandatory offer pursuant to this Rule 26 but the ~~related~~ obligation ~~to make a general offer~~ is waived pursuant to a vote of independent shareholders in accordance with the terms of Note 1 ~~of the Notes~~ on dispensations from Rule 26, such person, or group of persons, shall be ~~precluded from acquiring additional voting rights pursuant to Rule 26 for the 12 month period immediately following the acquisition, unless such further acquisition is authorised by way of a separate vote of independent shareholders. If such authorisation is not obtained, such person, or group of persons, shall be deemed to have a lowest percentage holding equal to the greater of (i) 35% and (ii) the percentage holding that is 5% less than the percentage holding of such person, or group of persons, immediately following the whitewashed transaction.~~ deemed to have a lowest percentage holding equal to the percentage holding of such person, or group of persons, immediately after the whitewashed transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the whitewashed transaction shall be subject to the 2% creeper under Rule 26.1 by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition. (See also Notes 11 and 12 to this Rule 26.1.)

By way of example, if a person, or group of persons acting in concert, originally holding 31% comes to hold 38% of the voting rights of a company as a result of a whitewashed transaction, such person or group of persons would be deemed to have a lowest percentage holding of 38% and thereby be free to acquire voting rights within the 2% band above 38% in the following 12 month period, unless any disposal of voting rights causes the lowest percentage holding of such person or group of persons to fall below 38%.

~~By way of example, if following a whitewashed transaction a person, or group of persons acting in concert, holds 38% of the voting rights of a company and does not obtain the shareholder authorisation to acquire additional shares contemplated by this Note, such person or group of persons would be deemed to have a lowest percentage holding of 35% and would thereby be free to acquire and dispose of voting rights within the 5% band above 35%.~~

16. The ~~5%~~2% creeper - voting rights acquired during mandatory offer

For purposes of the ~~5%~~2% creeper, following a mandatory offer which does not become unconditional an offeror shall be deemed to have a lowest percentage holding equal to his aggregate holding of voting rights of the offeree company at the close of the offer period, including any voting rights which he acquired during the offer.

17. The ~~5%~~2% creeper - holdings between ~~48.45%~~ and 50%

It should be noted also that the restriction in Rule 26.1(c) and (d) applies to any immediately preceding 12 month period if at any time during such period a person, or group of persons acting in concert, holds 50% or less of the voting rights. Thus, a person or group of persons with 49% of the voting rights of a company will be restricted from acquiring more than a further ~~5%~~2% of the offeree company's voting rights (resulting in a total of ~~51.54%~~) for a period of 12 months thereafter.

~~18. Shareholders, shares and holdings of voting rights~~

~~A reference to shareholder includes persons who hold or acquire voting rights. Similarly, a reference to shares includes voting rights. [Moved to Note 4 to Definitions.]~~

~~18.~~ Allotted but unissued shares

When shares of a company carrying voting rights have been allotted (even if only provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Executive should be consulted.

~~2019~~. *Discretionary clients*

*Dealings for discretionary clients by fund managers connected with an offeror or the offeree company, unless they are exempt fund managers, may be relevant (see Rule 21.6).*

## 26.2 Conditions

Except with the consent of the Executive:—

- (a) offers made under this Rule 26 must be conditional ~~upon, and~~ only upon; the offeror having received acceptances in respect of voting rights which, together with voting rights acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding more than 50% of the voting rights; and
- (b) no acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.

*Notes to Rule 26.2:*

1. *When more than 50% is held*

*An offer made under this Rule 26 should normally be unconditional when the offeror and persons acting in concert with it hold more than 50% of the voting rights before the offer is made.*

2. *When dispensations may be granted*

*The Executive will not normally consider a request for a dispensation under this Rule 26 other than in exceptional circumstances, such as when the necessary cash is to be provided, wholly or in part, by a cash underwritten alternative which is conditional on the obtaining of a listing for new shares. The Executive will normally require that both the announcement of the offer and the offer document include statements that if the acceptance condition is satisfied but the listing condition is not, within the time required, and as a result the offer lapses:—*

- (i) *the offeror will immediately make a new cash offer in compliance with this Rule 26 at the price required by this Rule 26; and*
- (ii) *until posting of the offer document in respect of that new offer, the offeror and persons acting in concert with it ~~will not~~ can only exercise ~~more-less~~ than 34.930% of the voting rights of the offeree company.*

*When a dispensation is given, the offeror must endeavour to obtain a listing for the new shares with all due diligence.*

3. Acceptance condition

Notes to Rule 30.2 apply to offers under this Rule 26.

In the event that an offer under Rule 26 lapses because a purchase may not be counted as a result of Note 7 to Rule 30.2 and subsequently the purchase is completed, the Executive should be consulted. It will require appropriate action to be taken such as the making of a new offer or the reduction of the offeror's holding.

**26.3** Consideration

- (a) Offers made under this Rule 26 must, in respect of each class of equity share capital involved, be in cash or be accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for ~~voting rights~~ shares of that class of the offeree company during the offer period and within 6 months prior to its commencement. The cash offer or the cash alternative must remain open after the offer has become or is declared unconditional for not less than 14 days thereafter. The Executive should be consulted where there is more than one class of equity share capital involved.
- (b) The Executive's consent is required if the offeror considers that the highest price should not apply in a particular case.

*Notes to Rule 26.3:*

*1. Nature of consideration*

*When voting rights have been acquired for a consideration other than cash, the offer must nevertheless be in cash or be accompanied by a cash alternative of at least equal value, which must be determined by an independent valuation.*

*When there have been significant acquisitions in exchange for securities, General Principle 1 may be relevant and such securities may be required to be offered to all shareholders: a cash offer will also be required. The Executive should be consulted in such cases.*

## 2. Calculation of the price

- (a) *In calculating the price paid, stamp duty and broker's commission should be excluded.*
- (b) *If voting rights have been acquired in exchange for listed securities, the price will normally be established by reference to the weighted average traded price of board lots (excluding special bargains and odd lots) of the listed securities on the date of the acquisition.*
- (c) *If voting rights have been acquired by the conversion or exercise of convertible securities, warrants, options or other subscription rights, the price will normally be established by reference to the purchase price of the convertible securities, warrants or options and the relevant conversion or exercise terms. If however the convertible securities or warrants were issued or sold privately to the purchaser, the Executive may also take into account the weighted average traded price of board lots (excluding special bargains and odd lots) of the relevant shares on the day on which notice of conversion or subscription was submitted.*

*The Executive should be consulted in advance in the circumstances described in (b) and (c) above.*

## 3. Dividends

*When accepting shareholders are entitled under the offer to retain a dividend declared by the offeree company but not yet paid, the offeror, in establishing the level of the cash offer, may deduct from the highest price paid the net dividend to which offeree company shareholders are entitled.*

## 4. Dispensations from highest price

*Factors which the Executive might take into account when considering an application for an adjusted price include:-*

- (a) the size and timing of the relevant purchases;*
- (b) the attitude of the board of the offeree company;*
- (c) whether shares had been purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and*
- (d) the number of shares purchased in the preceding 12 months.*

## 26.4 Restrictions on control by offeror

Except with the consent of the Executive, no nominee of an offeror or persons acting in concert with it may be appointed to the board of the offeree company or any of its subsidiaries, nor may an offeror and persons acting in concert with it exercise offeree company voting rights, until the offer document has been posted.

*Note to Rule 26.4:*

*Cross reference to Rule 7-1*

*Reference is made to Rule 7-1 which restricts the ability of the directors of an offeree company to resign prior to the first closing date of the offer, or the date when the offer becomes or is declared unconditional, whichever is the later.*

## 26.5 Obligations of directors selling shares

When directors (and their close relatives, related trusts and companies controlled by them, their close relatives or related trusts) sell shares to a purchaser as a result of which the purchaser is required to make an offer under this Rule 26, such directors must ensure that as a condition of the sale the purchaser undertakes to fulfil his obligations under this Rule 26.

## 26.6 Holdings of between 30% and 35%

Where a person, or two or more persons acting in concert, holds 30% or more of the voting rights of a company but less than 35% of such voting rights immediately prior to implementation of this Rule on 19 October 2001 then, for so long as such holding remains in this range and until 10 years after that date:-

- (a) the Takeovers Code (other than this Rule 26.6) shall be interpreted and applied as if the 30% trigger in Rule 26.1(a) and (b) was 35% for such person or persons; and
- (b) such person or persons are not subject to the 2% creeper under Rule 26.1(c) and (d).

Where a person, or two or more persons acting in concert, holds less than 30% of the voting rights of a company but holds convertible securities, warrants, options or subscription rights immediately prior to implementation of this Rule on 19 October 2001, that together with any voting rights held immediately prior to that date, on conversion, exercise or subscription in whole or in part on or after that date could result in such person or persons holding 30% or more of the voting rights of a company but less than 35% of such voting rights, the above provisions will apply following conversion, exercise or subscription in whole or in part in respect of such convertible



securities, warrants, options or subscription rights. If, following any one or more conversion, exercise or subscription in part, the holding of such person or persons becomes 30% or more but less than 35% and subsequently falls below 30%, these provisions cease to apply in respect of any remaining convertible securities, warrants, options or subscription rights that have not been converted or exercised.

For the avoidance of doubt, where such person or persons continue to hold 30% or more but less than 35% of the voting rights of the company at the end of the 10 year period, it will not be necessary for them to sell voting rights to take such holding below 30% in order to avoid a mandatory offer obligation.

Note to Rule 26.6:

Where the holding of such person or persons is diluted below 30% and the strict application of this Rule 26.6 to such person or persons would operate harshly, the Executive should be consulted.

## 26.7 Transitional provisions for the creeper

For the 12 months following implementation of this Rule on 19 October 2001, the creeper under Rules 26.1(c) and (d) shall be applied, in all respects other than under Rule 26.6, in the following manner:-

- (a) the 2% limit shall apply so as to cover the period from the date of the relevant acquisition back to 19 October 2001; and
- (b) the 5% limit previously applicable under the Takeovers Code shall apply so as to cover the period from the date of the relevant acquisition back to the date 12 months prior to the relevant acquisition.

Note to Rule 26.7:

Effect of transitional provisions for the creeper

The effect of the transitional provisions for the creeper can be illustrated by the following examples. Assuming there is no other acquisition or disposal of voting rights, if a person or group of persons acquires 4% of the voting rights of a company 3 months before 19 October 2001, such person or group of persons will be restricted from acquiring more than 1% of the company's voting rights within 9 months following 19 October 2001. Thereafter, the person or persons will be subject to the 2% limit. If a person or group of persons has acquired 1% of the voting rights of a company 3 months before 19 October 2001, such person or group of persons will be restricted from acquiring more than 2% in the 12 month period after 19 October 2001.

Notes on dispensations from Rule 26:

1. Vote of independent shareholders on the issue of new securities (“Whitewash”)

(See Schedule VI - Whitewash Guidance Note for the detailed requirements of the Takeovers Code under this ~~dispensation~~ Note.)

When the issue of new securities as consideration for an acquisition, or a cash subscription, or the taking of a scrip dividend, would otherwise result in an obligation to make a general mandatory offer under this Rule 26, the Executive will normally waive the obligation if there is an independent vote at a shareholders’ meeting. For this purpose “independent vote” means a vote by shareholders who are not involved in, or interested in, the transaction in question. The requirement for a general mandatory offer will also be waived, provided there has been an independent vote of shareholders, in cases involving the underwriting of an issue of shares. If an underwriter incurs an obligation under this Rule 26 unexpectedly, for example as a result of ~~an inability to failure by a sub-underwriter in respect of~~ all or part of his liability, the Executive should be consulted.

The appropriate provisions of the Code apply to whitewash proposals. Full details of the potential holding of voting rights must be disclosed in the document sent to shareholders relating to the issue of the new securities, which must also include competent independent advice on the proposals the shareholders are being asked to approve, together with a statement that the Executive has agreed to waive any consequent obligation under this Rule 26 to make a general mandatory offer. ~~The resolution must be made the subject of a poll.~~

~~The Executive must be consulted and a proof document submitted at an early stage. The document must not be despatched until the Executive has confirmed that it has no further comments thereon.~~

Reference should be made to Note 15 to Rule 26.1 which provides that when a person, or group of persons acting in concert, ~~becomes required would otherwise be obliged~~ to make a mandatory offer pursuant to this Rule 26, but the obligation ~~to make a general offer~~ is waived pursuant to a vote of independent shareholders in accordance with the terms of this Note, such person, or group of persons, shall be ~~precluded from acquiring additional shares pursuant to Rule 26 for the 12 month period immediately following the acquisition, unless such further acquisition is authorised by way of a separate vote of independent shareholders. If such authorisation is not obtained, such person or group of persons shall be~~ deemed to have a lowest percentage holding equal to ~~the greater of (i) 35% and (ii) the percentage holding that is 5% less than the percentage holding of such person, or group of persons, immediately following the “whitewashed” transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the~~

whitewashed transaction shall be subject to the 2% creper under Rule 26.1 by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition.

Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval by independent vote of a majority of the shareholders at a general meeting of the company:-

- (i) the Executive will not normally waive an obligation under this Rule 26 if the person to whom the new securities are to be issued or any persons acting in concert with him have acquired voting rights in the company in the 6 months prior to the ~~posting to shareholders of the circular relating to announcement of~~ the proposals but subsequent to negotiations, discussions or the reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities; and
- (ii) a waiver will not be granted or if granted will be invalidated if any acquisitions are made in the period between the ~~posting of the circular to shareholders~~ announcement of the proposals and the shareholders' meeting.

Following the meeting at which the proposals are considered by shareholders, an announcement must be made by the offeree company giving the result of the meeting and the number and percentage of voting rights attaching to the shares to which the potential controlling shareholders have become entitled as a result.

Where the final controlling shareholding is dependent on the results of underwriting, the offeree company must make an announcement following the issue of new securities stating the number of shares and percentage of voting rights held by the controlling shareholders at that time.

## 2. Enforcement of security for a loan, receivers, etc.

Where a shareholding in a company is charged to a bank or lending institution on an arm's length basis and in the ordinary course of its business as security for a loan, and, as a result of enforcement, the lender would otherwise incur an obligation to make a general offer under this Rule 26, the Executive will normally waive the requirement, provided that the security was not given at a time when the lender had reason to believe that enforcement was likely. In any case where arrangements are to be made involving a transfer of voting rights to the lender, but which do not amount to enforcement of the security, the Executive will wish to be convinced that such arrangements are necessary to preserve the lender's security and will also take into account the proviso above. When following enforcement a lender wishes to sell all or part of his shareholding, the provisions of this Rule 26 apply to the purchaser.

Although a receiver, ~~or liquidator or administrator~~ of a company is not required to make an offer when he takes control of a holding of ~~35%~~30% or more of the voting rights of another company, the provisions of this Rule 26 apply to a purchaser from such a person.

3. *Rescue operations*

There are occasions when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new securities without approval by a vote of independent shareholders or the acquisition of existing securities by the rescuer which would otherwise fall within the provisions of this Rule 26 and normally require a general offer. The Executive will consider waiving the requirements of this Rule 26 in such circumstances; particular attention will be paid to the views of the directors and advisers of the potential offeree company.

The requirements of this Rule 26 will not normally be waived in a case where a major shareholder in a company rather than that company itself is in need of rescue. The situation of that shareholder may have little relevance to the position of other shareholders and, therefore, the purchaser from such major shareholder must expect to be obliged to extend an offer under this Rule 26 to all other shareholders.

In considering whether to grant a waiver, the Executive must be satisfied about the urgency of the rescue and that it would be impracticable for the rescue proposal to be submitted for approval by shareholders not involved in or interested in the transaction under Note 1 on dispensations from Rule 26. If the urgency of the rescue is not established, the Executive may require an independent vote as a condition for a waiver. The Executive will also have regard to whether the rescue proposal is equitable to the existing shareholders and whether existing shareholders will have the right to participate in the rescue proposal on the same terms as the rescuing party, so far as practicable. Any application for a waiver under this Note must be submitted as early as possible.

4. *Inadvertent mistake*

If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule 26, the Executive will not normally require an offer if sufficient voting rights are disposed of within a limited period to persons unconnected with him.

5. *Balancing block: where 50% will not accept*

Situations may arise where a person, or group of persons acting in concert, acquires ~~35%~~30% or more of the voting rights of a company at a time when another person, or group of persons acting in concert, already holds ~~35%~~30% or more of the voting rights of that company. In such a situation the Executive will not normally waive the requirement for that person or group of persons to make a general offer under this Rule 26 unless:--

- (a) there is a single person holding 50% or more of the voting rights of the company who states that he will not accept the offer which the purchaser would otherwise be obliged to make; or
- (b) the Executive is provided with written confirmation from the holders of 50% or more of the voting rights of that company that they would not accept the offer which the purchaser would be obliged to make.

#### 6. *Placing and top-up transactions*

A waiver from the obligation to make a general offer under this Rule 26 will normally be granted where a shareholder, who together with persons acting in concert with him holds 50% or less of the voting rights of a company, places part of his holding with one or more independent persons (see Note 7 ~~below~~on dispensations from Rule 26) and then, as soon as is practicable, subscribes for new shares up to ~~such additional the number of shares placed as he requires to maintain the percentage interest in the offeree company which he held prior to the placement,~~ at a price substantially equivalent to the placing price after taking account of expenses incurred in the transaction. Such a waiver is required even if the placing and top-up are to be effected simultaneously whether by way of placing and subscription agreements that are inter-conditional or otherwise. For purposes of the ~~5%~~2% creeper the placing shareholder shall be deemed to have a lowest percentage holding equal to the lower of the lowest percentage holding which he had in the 12 month period prior to or immediately after the placing and top-up transaction. Reference is made in this regard to Note 14 to Rule 26.1. A waiver from the obligation to make a general offer under this Rule 26 will not be required where a shareholder, who together with persons acting in concert with him holds more than 50% of the voting rights of a company, carries out a placing and top-up transaction as described above. However, the Executive will require confirmation from the financial adviser or placement agent of the controlling shareholder ~~of the identity of that~~ the placee or placees ~~and whether they~~ are independent and may require information as to the identity of the placee or placees.

#### 7. *Verification of independence of placees*

*When compliance with a Rule or a waiver is dependent upon a disposition or placement of voting rights to independent persons the Executive will normally require the financial adviser, placement agent or acquirer of the voting rights to verify and/or confirm that the purchaser is independent of, and does not act in concert with, the vendor of the voting rights, and such verification or confirmation shall be provided in such manner as the Executive may reasonably require to satisfy itself of the acquirer's independence. In the case of a single placee the Executive will be particularly concerned with verifying the independence of the placee.*

~~8. On-market offers~~

~~*Where the price at which a mandatory offer is to be made is substantially lower than the prevailing market price and the Executive is satisfied that it is highly unlikely that any shareholder would accept the offer at such price, the Executive may allow the offeror to stand in the market to offer to buy shares at such price during trading hours for a period of 3 weeks or such other period as may be agreed by the Executive. In such cases, the offeror and offeree companies should issue advertisements to shareholders adopting the standard of care and responsibility required by Rule 9. The offeror and offeree documents may however contain information less detailed than that required under Schedules I and II but its contents must have the prior approval of the Executive.*~~