

Chapter 16

Worker involvement and the EU Takeover Bids Directive: the case of the United Kingdom

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1. Introduction

The takeover of Cadbury by Kraft in 2010 prompted a reform of the UK takeover rules, arguably towards a more detailed, target company and stakeholder-friendly model. The Code Committee responsible for the reform concluded that a number of changes to the UK City Code on Takeovers and Mergers should be proposed to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders. The Kraft/Cadbury case study merits special attention insofar as it questioned the United Kingdom's 'open market' for corporate control with regard to a range of aspects concerning the duties of the parties involved in the takeover bid, as well as issues of disclosure and stakeholder protection related to the takeover process itself.

The reform process began in June 2010 with the issuance of a preliminary consultation paper on key aspects of UK takeover regulation by the Code Committee of the Panel.¹ One of the proposals to amend the takeover rules on which the consultation sought views included requiring bidders to provide more information in relation to the implications and effects of the bid in the offer document and greater rights for employees (Takeover Panel 2010a). The Code Committee responded to the Consultation Paper and set out the Committee's conclusions in relation to the principal issues

1. On 1 June 2010, the Code Committee published a public consultation paper (Takeover Panel 2010a), in which it sought views on various suggestions for possible amendments to the Code without setting out any specific proposals or drafting amendments to the Code. The topics addressed were: acceptance condition thresholds; the 'disenfranchisement' of shares acquired during an offer period; disclosures in relation to shares and other securities; the contents of offer documents and offeree board circulars; advice, advisers and advisory fees; protection for offeror company shareholders; the 'put up or shut up' regime; 'virtual bids' and the offer timetable; inducement fees and other deal protection measures; and substantial acquisitions of shares.

consulted upon (Takeover Panel 2010b).² According to the review of the Takeover Panel Code Committee, a variety of factors had in recent times enabled offerors to obtain a tactical advantage over the offeree company (Takeover Panel 2010b: 4–5). The Code Committee of the Panel accepted that (i) it had become too easy for ‘hostile’ offerors to succeed and that (ii) the outcome of offers, and particularly hostile offers, may be unduly influenced by the actions of so-called ‘short-term’ investors (Takeover Panel 2010b: 3). The Committee therefore intended to ‘bring forward proposals to amend the Code with a view to reducing this tactical advantage and redressing the balance in favour of the offeree company’ (Takeover Panel 2010b: 3) and concluded that ‘a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders’ (Takeover Panel 2010b: 3).

This chapter will provide an analysis and critique of employee information and consultation rights under the UK Takeover Framework prior to and after the takeover of Cadbury Plc. Section 2 will refer to the shareholder primacy norm endorsed by the UK City Code on Takeovers and Mergers. The deviation from the norm prompted by the 2011 reforms will also be referred to. Section 3 will address employees’ rights under the Code and refer to the 2011 regulatory reforms. Section 4 will refer to the conclusions of the review of the amendments to the Code which were implemented by the Code Committee in 2012. Section 5 provides some conclusive remarks on the reforms. The conclusions drawn will reflect on whether the reforms are in fact an improvement regarding employees’ rights or whether they qualify as mere window dressing in relation to what is otherwise the accepted norm of shareholder primacy in the United Kingdom.

2. Key elements of UK takeover legislation

The United Kingdom, by comparison with other jurisdictions, has the most liberal laws on takeovers in the world (Kay 2012: 13). Public takeovers in the United Kingdom are regulated by the City Code on Takeovers and Mergers (henceforth, the Code). The Code’s main objective is to regulate the way in which takeovers are conducted and ensure that

2. This statement constitutes the Code Committee’s response to the Consultation Paper and sets out its conclusions in relation to the principal issues consulted upon.

shareholders are treated fairly and not denied an opportunity to decide on the merits of a potential bid (General Principle 3). The Code is not about the economic usefulness of takeovers generally, nor does it allow the Panel to assess the specific financial or commercial merits of an individual takeover.³ The characteristic aspect of the Code is the norm of shareholder primacy it endorses, which is reflected in the strict non-frustration principle encompassed in Rule 21 of the Code. The rule prohibits target directors from taking any defensive measures against a bid without obtaining prior shareholder approval once a bid has become imminent.

Prior to the Cadbury reforms, the Code provided for a light regulatory touch in terms of regulating employee information and consultation rights. Elaborate provisions on disclosure and information rights of employees were introduced in the Code largely due to the implementation of the EU Takeover Directive in the United Kingdom. A discussion of employees' rights within a takeover context in 2010 was prompted by a controversy over Kraft's statements regarding the future of Cadbury's Somerdale factory and employment therein. In the aftermath of the deal Kraft revised its initial plans and did not follow up on the undertaking to keep the factory open, cutting 400 jobs. Kraft's failure to meet that commitment resulted in distrust towards Kraft, but also towards takeovers and their social implications in general. In response to Kraft's decision to ignore its undertaking, the Takeover Panel issued a statement of public criticism against Kraft, which found the latter in breach of Rule 19.1 of the Code (Takeover Panel 2010a).⁴ Kraft's decision not to keep the Somerdale factory open was also condemned in the House of Commons, which found that Kraft's actions had undoubtedly damaged its reputation in the United Kingdom and its relationship with Cadbury's employees (House of Commons 2010: 10–11). In general, other problems identified by the Takeover Panel following the Kraft/Cadbury takeover were that, during recommended bids, employee representatives had no time to express their views and also, because the target board had no obligation to disclose to the public any opinion it may have received from employee representatives, it was difficult for the latter to collate information on the likely effects of the bid on all divisions within the bid timetable. In response to such concerns the Takeover Panel put forward recommenda-

3. See Introduction of the Code.

4. Note that the breach of Rule 19.1 of the Code refers to Kraft's failure to prepare its documents on its intentions with the highest standards of care and accuracy.

tions on, among other things, improving employees' right to be informed, improving the timing of information and requiring the target board to inform employee representatives at the earliest opportunity of their right to circulate an opinion on the effects of the bid on employment.

A series of reforms of the UK regulatory framework were introduced in 2011 on the basis of the Code Committee's conclusion that 'a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders' (Takeover Panel 2010b: 22). The reform process concerning employees' rights focused on, among other things, improving the provisions that regulate the disclosure requirements set out in the offer document, the process via which employees' become involved in the takeover process and the a priori enforcement of a bidder's intentions for the target company. The rationale underlying these reforms was that the disclosure of accurate information may be the means by which more sound takeovers can succeed, in the sense that the interests of shareholders, as well as other stakeholders affected by the takeover bid, will be well thought-out by shareholders interested in the value of such information. The exchange of accurate information was considered important for the protection not only of target shareholders' interests, but also those of other constituencies involved in the takeover process.

The Kraft/Cadbury deal is evidence that the shareholder primacy norm in a takeover context does not come without costs. The facilitation of takeovers by restricting managers' ability to block a bid can disrupt the business of well-functioning companies (Lipton 1987: 18–20) and encourage short-termism over long-term shareholder value (Wachter 2003: 823). The problem with the way in which the UK legal framework on takeover bids had been constructed was arguably that it prompted target directors to set the company's independent future and long-term continuity aside and support bids that benefit only certain shareholders with short-term speculative horizons. The takeover highlighted, among other things, the importance of considering the long-term implications of a takeover bid, especially in relation to firm-specific investment and stakeholders' rights. The following section will take a closer look at the reforms introduced to the Code regarding disclosures by offeror and offeree companies concerning the offeror's intentions as they affect the offeree company and its employees, as well as the rights of employee representatives during the takeover process.

3. Workers' involvement: the 2011 regulatory reforms

As mentioned at the outset of the chapter, following the Kraft/Cadbury case study, a series of concerns were brought forward regarding the protection that the Code affords employees during the takeover process. One concern was that, during recommended bids, employee representatives had no time to express their views. According to the provisions of the UK Code, the offer timeline commences with the announcement of a bid. From the announcement of the bid the bidder has, according to Rule 24.1 of the Code, a 28 day maximum time period, the end of which may be labelled 'Day 0', to send the offer document to the target shareholders and persons with information rights and to make it available to target pension scheme trustees and target and bidder employees. According to Rule 25.1(a), which is normally relevant only in the context of a hostile acquisition, the target has 14 days from Day 0 – 'Day 14' – to publish a response circular. According to Rule 31.1 of the Code, 'Day 21' constitutes the earliest first closing date.⁵ In recommended bids, however, the firm offer announcement and the offer document are usually published on the same day. The target board's circular is then effectively combined with the offer document, which subsequently allows no time for the employee representatives to produce a circular expressing their views. The target board also has no obligation to make public any circular that it may have received from employee representatives, which makes it difficult for the latter to collate information on the likely effects of the bid on employment within the bid timetable.

One of the aims of the takeover law reform process was to provide greater recognition of the interests of the offeree company employees by (i)

5. An indicative offer timeline for an acquisition of a company is as follows: According to Rule 31.4 of the Code, *Day 35* is the first date on which the offer may close assuming that the offer has been declared unconditional as to acceptance on *Day 21* and, according to Rule 31.8 of the Code, the last date for settlement of consideration if the offer made was wholly unconditional on *Day 21*. In the context of a hostile bid, Rule 31.9 of the Code provides that *Day 39* is the last date for the target board to release new information and Rule 32.1 of the Code provides that *Day 46* is the last date for a revision of the offer and for the bidder to release new information if the offer includes shares in the bidding company. Finally, *Day 60*, according to Rule 31.6 of the Code, is the last date for the offer to become or to be declared wholly unconditional as to acceptances. Note that following *Day 60*, Rule 31.4 provides for *Day 74* upon which the offer may be closed. Assuming that the offer became unconditional as to acceptances on *Day 60*, Rule 31.7 provides for *Day 81*, which is the last date for the offer to go wholly unconditional; assuming that the offer became unconditional as to acceptances on *Day 60* and Rule 31.8 of the Code provides for *Day 95*, which is the last date for settlement of consideration if the offer is wholly unconditional on *Day 81*.

improving the quality of *disclosure* by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and (ii) improving *the ability of employee representatives to make their views known* (Takeover Panel 2011: 2). Overall, improvements to the rules were considered necessary insofar as they: facilitate the passing of information on the bid to employees at the earliest opportunity, better facilitate the process and time arrangements through which employees make their views known and financially assist employee representatives and employees in obtaining advice for the verification of the information contained in the employee representatives opinion and in publishing their opinion. The quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees was arguably improved through the reform of the disclosure requirements encompassed in the offer document (Rules 24.2 and 24.3). The accuracy and adequacy of information published by the bidder was considered important in this respect, insofar as it assists the target board and other interested parties in complying with their own obligations and, most importantly, in providing meaningful information to shareholders and employees (Takeover Panel 2010: 20). Proposals on enhancing the ability of employee representatives to make their own views known focused on improving communications between the board of the offeree company and the offeree company's employees, and enabling representatives to be more effective in providing their opinion on the effects of an offer on employment (Takeover Panel 2011a: Section 8). Respondents to the Public Consultation Paper 2010/2 believed that improving communication would enable the employee representatives to be more effective in providing their opinion on the effects of the offer on employment and, in doing so, facilitate a better understanding of the implications that the offer may have for the interests of the offeree company employees (Takeover Panel 2010: 21).

The reforms concerning the protection of employees' rights can be categorised in terms of the following three thematic areas: 1. *Disclosure* by offeror and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; 2. *process* undertaken in relation to informing employee representatives, namely the passing on of information, the employees' opinion on the offer and the costs incurred; and 3. *factors* that the target board may take into account when observing its advisory role.

3.1 Disclosure

3.1.1 Additional disclosure requirements and a negative statement requirement (Rule 24.2)

One of the general principles of the Code is that target shareholders must be given sufficient information and advice to enable them to reach a properly informed decision on the offer (General Principle 2). Rule 23.1 of the Code provides that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits of an offer; that such information must be available to shareholders early enough to enable them to make a decision in good time; and that no relevant information should be withheld from them. The primary sources for the required information are the formal announcement of the offer and the bidder's offer document sent to all the shareholders. Constituencies other than the shareholders of the target company may also have an interest in the information contained in the offer document. The content of the offer document is regulated by Rule 24 of the Code.

Amendments were introduced to the Code in order to improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees (Takeover Panel 2011: 79). The amendments were made on the basis that any statement of intention by an offeror should be as detailed as possible in view of the fact that the offeror must have a fundamental business rationale for seeking to acquire the offeree company; this should be disclosed as fully as possible (Takeover Panel 2011: 80–81). The Code Committee also clarified that statements of a general nature were unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence (Takeover Panel 2011: 80–81). The new Rule 24.2 of the Code regulates in detail the content of the offer document in terms of the intentions regarding the offeree company, the offeror company and their employees.⁶ The new elements of the rule are that more importance is attached to the disclosure

6. (a) In the offer document, the offeror must state its intentions with regard to the future business of the offeree company and explain the long-term commercial justification for the offer. In addition, it must state:

- (i) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment;
- (ii) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company's places of business;

of the bidder's intentions with regard to the future business of the offeree company and to an explanation of the long-term commercial justification for the offer. The rule also introduces the requirement that the bidder disclose his intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company. Another new and interesting element of the rule is the concept of the bidder's negative statement, in the sense that the bidder is now required to make a statement if he has no intention to make any changes in relation to the matters described under (a) (i) to (iii) of Rule 24.2 or if he considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business. The Code Committee has introduced these changes on the basis that the ability of the offeree company board and other interested constituencies to comply with their own obligations, and to provide meaningful information to the offeree company shareholders and employees, depends on the accuracy and adequacy of the information published by the offeror in accordance with its own obligations (Takeover Panel 2010b: 20).

With particular reference to the revised Rule 24.2, the Code Committee observed that:

The Code Committee believes that any statement of intention by an offeror should be as detailed as is possible on the basis of the information that is known to the offeror at the time it is made. The Code Committee acknowledges that it might be legitimate for a hostile offeror which has not had an opportunity to undertake full due diligence on the offeree company to state that it will undertake a review of the offeree company's business once it has obtained control of the company. However, the Code Committee believes that the offeror must have a fundamental business rationale for seeking to acquire the offeree company, which it should disclose as fully as

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- (iii) its intentions with regard to any redeployment of the fixed assets of the offeree company; and
 - (iv) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.
 - (b) If the offeror has no intention to make any changes in relation to the matters described under (a)(i) to (iii) above, or if it considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business, it must make a statement to that effect.
 - (c) Where the offeror is a company, and insofar as it is affected by the offer, the offeror must also state its intentions with regard to its future business and comply with (a) (i) and (ii) with regard to itself.

possible. The Code Committee also considers that statements of a general nature are unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence. (Takeover Panel 2011b: par 7–8)

3.1.2 Adherence to undertakings for at least a year (Rule 19.1, Note 3)

Rule 19.1 of the Code requires that each document or advertisement published, or statement made (undertaking entered into) during the course of an offer is to be prepared with the highest standards of care and accuracy and the information given to be adequately and fairly presented. According to the Panel, Kraft backed out of its prior commitment because it did not observe sufficiently high standards of care and accuracy in the information communicated to the target shareholders in its offer regarding its prospective business plans for Cadbury.⁷ The standard of care for published documents to be observed in the takeover process remains unaltered in the latest version of the Code. The Kraft/Cadbury deal highlighted that there is a legal gap with regard to the enforcement of the bidder's intentions concerning the target's assets and employees after the successful bid is complete in the event that the bidder fails to comply with his initial statement. The Code Committee therefore introduced a new rule, Note 3 to Rule 19.1,⁸ which imposes adherence to statements (undertakings) for at least a year or other specified period which is provided for by the bidder.

The Code Committee considered that if a statement of intention is specified to apply for only a very short period, readers of the statement will be able to draw their own conclusions regarding the offeror's intentions in the longer term (Takeover Panel 2011b: 83). The Code Committee, however, made it permissible for the offeror or offeree company to be released from this requirement if there has been a material change of circumstances (Takeover Panel 2011b: 83). Therefore, as an exception to the rule, the Code provides that the Panel may allow for dispensation from the obligation to follow up on the statements outlined in the offer document where there is a material change of circumstance (Note 3 to Rule 19.1).

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7. Takeover Panel (2010), whereby the Panel applied an objective and a subjective test to Kraft's statement, thus holding the company accountable for breach of Rule 19.1 of the Code.
 8. Note 3. Statements of intention: 'If a party to an offer makes a statement in any document, announcement or other information published in relation to an offer relating to any particular course of action it intends to take, or not take, after the end of the offer period, that party will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, unless there has been a material change of circumstances.'

3.1.3 Disclosure obligations in relation to the publication, content and display of documents (Rules 24.1 and 25.1)

Rule 24.1 of the Code now makes clear that the offer document should, at the same time that it is sent to the shareholders of the offeree company, also be made readily available to employee representatives and that on the day of publication the offeror must also publish the offer document on a website. Rule 25.1 of the Code provides that, at the same time that the board of the offeree company sends a circular to the offeree company's shareholders, it must make it readily available to employee representatives and that on the day of publication it must publish the circular on a website.

3.2 Process

3.2.1 Passing of information to employee representatives at an earlier stage (Note 6 to Rule 20.1)

Concerning improving the passing of information to employee representatives, a new Note 6 to Rule 20.1 was added, which makes clear that the Code does not prevent information from being passed on in confidence by an offeror or offeree company to their respective employee representatives or employees, provided that the requirement for secrecy under Rule 2.1 is respected.

3.2.2 Offeree companies should inform employee representatives of the right to give an opinion on the offer (Rule 2.12(a) and (d) – announcement of the offer) (Rule 32.1(b) – revised offer document)

Concerning the obligation of the offeree companies to inform employee representatives of the right to give an opinion on the offer, the rules were revised so as to require that: (i) an announcement of a possible offer must be made readily available by the offeree company to its employee representatives (Rule 2.12(a)); (ii) the offeree company must, at the same time, inform the employee representatives of their right to have an opinion on the effects of the offer on employment appended to the offeree board's circular (Rule 2.12(d)); and (iii) the offeree company must similarly inform the employee representatives of their right to have an opinion appended to any offeree board circular published in relation to a revised offer (Rule 32.1(b)).

Regarding Rule 2.12(a) of the Code, improvements were made on the basis that the previous version of the Code provided employee representa-

tives and employees of both the offeror and the offeree company were notified under former Rule 2.6 when an announcement of a firm intention to make an offer had been made under former Rule 2.5 of the Code. However, if an offer period began before an announcement had been made under Rule 2.5, there were no provisions to guarantee that employees were informed at this earlier stage. Also, regarding Rule 2.12(d) it is important to note that following the implementation of the Takeover Directive provisions were added to the Code requiring the target company to append to any circular sent to shareholders any opinion it receives from its employee representatives on the effects of the offer on employment.

3.2.3 Publication of the employee representatives' opinion and responsibility of the offeree company for costs (Rule 25.9, Note 1 to Rule 25.9, Rule 32.6(b), Rule 30.4(b))

The previous regime already provided for employee representatives' participation in the process of a takeover. The new provisions however arguably facilitate a more timely and costless process, as the Code now provides that: (i) targets are responsible for costs incurred by representatives in verifying and publishing their opinion, and (ii) targets must publish the opinion on the internet whenever it is received during the offer process.

Concerning the process of publication of the employee representatives' opinion and the responsibility of the offeree company for costs incurred, Rule 25.9 now better regulates the obligation of the board of the offeree company to append the employee representatives' opinion to its circular (also see Rule 32.6(b)). Rule 25.9 specifically provides that:

The board of the offeree company must append to its circular a separate opinion from its employee representatives on the effects of the offer on employment, provided such opinion is received in good time before publication of that circular. Where the opinion of the employee representatives is not received in good time before publication of the offeree board circular, the offeree company must promptly publish the employee representatives' opinion on a website and announce via an RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional.

Employee representatives should now be informed at an earlier stage of their right to have their opinion annexed to the target board's circular (Rule 25.9). The target will also be responsible for costs incurred by employee representatives in verifying and publishing their opinion and for any costs reasonably incurred by employee representatives in obtaining advice in order to verify the information contained in their opinion (Note 1 on Rule 25.9).

3.3 Factors

The directors of the target company must provide their advice on the merits of the bid and ensure that there is equality of information both for the target company shareholders and for competing bidders (Rule 20). The target company is under the obligation to produce a document containing relevant information on the offer and disclose the board's view on the effects of implementation of the offer on the company's interests, in particular with regard to employment, and the board's views on the offeror's strategic plans for the target and their likely repercussions on employment and the locations of its place of business (Rule 25.2). The information provided to target shareholders must be sufficient to enable them to take a view on the offer (Rule 23). Target directors are also under the positive duty to request independent financial advice on the merits of the bid, the substance of which should be communicated to its shareholders (Rule 3.1). The target board's circular will include, among other things, the substance of the advice given to the board of the offeree company by the independent advisor (Rule 25.2(b)).

Prior to the 2011 revision of the Code, target boards were not precluded from advising against a hostile bid on the grounds that the bid would be 'contrary to a long-term strategy of building up the company's business in a particular way'. However, as Deakin and Singh explain, the board had to nevertheless be cautious in stating such views because it was still under a legal duty to objectively and clearly report on the financial merits of the bid in question (Deakin and Singh 2008: 11). As Deakin and Singh point out, even though directors were in fact in a position to advocate that a hostile bid was contrary to the company's long-term planned strategy, they were nevertheless bound to provide an objective financial assessment of the bid in their opinion (Deakin and Singh 2008: 11). The aim of the Panel was to revise the rules, in order to strengthen the position of the target company compared to that of the bidder, and specifically to address

the concern that there was a perception under the Code that the board of the target was bound to consider only the offer price when giving its opinion on an offer.

The Code was amended to provide for an additional interpretive text to Rule 25. Note 1 on Rule 25.2 of the Code now clarifies that the Code does not limit the factors that the target may take into account in giving its opinion on the offer. The note makes clear that the target board is not required by the Code to consider the offer price as the determining factor, nor is it precluded by the Code from taking into account any other factors which it considers relevant. The Code Committee of the Takeover Panel specified that the amendment constituted a statement of fact and did not impose any obligations on the boards of offeree companies, as the duties of directors remain a matter for company law and not the Code (Takeover Panel 2011b: 58–59).

3.4 2012 Takeover Panel Review

In 2012 the Code Committee undertook a review of the operation of the amendments to the Code following their implementation (subject to the level of bid activity during that period). In relation to disclosure by offerors and offeree companies on the offeror's intentions regarding the offeree company and its employees, Panel Statement 2012/8 provides that there has been an improvement in the quality and detail of disclosures of intention made by offerors under Rule 24.2 and by the boards of offeree companies under Rule 25.2. It notes, however, that the Code Committee was disappointed that, in many cases, disclosures had been general, and not specific, and that, for example, a number of offerors – including offerors that have secured a recommendation from the offeree company board – had sought to satisfy the requirements of Rule 24.2 by stating that their intention is to undertake a review of the offeree company's business following completion of the takeover (Takeover Panel 2012: 17). The Code Committee pointed out that, if an offeror that had made general, non-specific disclosures under Rule 24.2 of its intentions regarding the offeree company and its employees subsequently takes an action, such as making a significant number of employees redundant, to which it had not referred in the offer document, the Executive would then investigate whether:

at the time that the offer document was published, the offeror had in fact formulated an intention to take that action. If the offeror had

formulated such an intention but had not disclosed this, and had instead restricted itself to a general statement, the Code Committee understands that the Executive would be likely to consider this to be a serious breach of the Code. (Takeover Panel 2012: 18)

In relation to the changes introduced to improve communication between the board of the offeree company and the offeree company's employees, and to enable employees to be more effective in providing their opinion of the effects of an offer on employment through the adoption of Rule 2.12 and Rule 25.9, the Review raises the following points. In the year that ended 18 September 2012, a total of 18 employee representatives' opinions were published in respect of 10 separate offers. Out of these opinions nine employee representatives' opinions were appended to offeree board circulars in respect of five offers in accordance with the first sentence of Rule 25.9. This, according to the Review, represented a significant increase over the period which followed the introduction of the right for employee representatives to have their opinions appended to offeree board circulars (Takeover Panel 2012: 19). Furthermore, out of all the opinions, nine employee representatives' opinions (in respect of a further five offers made) were published on a website in accordance with the second sentence of Rule 25.9 after they were received by offeree companies following the publication of the offeree board circular (Takeover Panel 2012: 20). According to the Review, the figures are evidence that the 2011 reforms have gone a considerable way towards achieving their objectives of improving communications between offeree companies and their employee representatives and of enabling employee representatives to be more effective in providing their opinion on the effects of an offer on employment (Takeover Panel 2012: 20).

4. Conclusion

The Kraft/Cadbury case study has shown that certain important aspects of the takeover process were not effectively or sufficiently dealt with by the UK framework regulating takeover bids. Improving the provisions on the disclosure and facilitation of information between parties involved in and affected by the takeover may well guarantee that takeovers that undermine stakeholders' interests and corporations' long-term growth will be subject to a higher level of scrutiny. The new rules on employee consideration arguably improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the

offeree company and its employees. The disclosure of the bidder's intentions regarding the future business of the offeree company and regarding the long-term commercial justification for the offer, may help shareholders, as well as other stakeholders, to obtain a better understanding of the characteristics and subsequent value of the bid. Shareholders interested in information concerning the bidder's motives for the launch of the bid, as well as his future plans with regard to the business of the target and employees, may well help interested shareholders potentially reflect on the impact that the bid will have on other constituencies and make a more informed decision about the merits of the bid. The importance attached to the *accuracy of the statements* made with regard to the bidder's business intentions is reflected in the revised rules. The new rule imposes a condition on the bidder to include a negative statement in the offer document, i.e. indicating that he has no plans in relation to the matters outlined in the relevant rule. The enhanced disclosure requirements of the offer document may result in greater caution being exercised when making significant concrete plans for the target company. In the case of Kraft/Cadbury, however, one could argue that Kraft was unaware of the developments concerning the Somerdale factory, as it had limited information concerning the business of the target when undertaking the due diligence for the takeover. The target board is not required by law to disclose privately held information on the target company's business, so that Kraft only became privy to information on the factory after the takeover was successfully completed. It is also important to note that the closure of the Somerdale facility was already on Cadbury's own agenda, so it would have been realised even in the event that Cadbury had remained independent. The efficacy of the newly introduced rule should therefore be reflected on with caution.

The revision of the UK takeover rules aimed to provide greater recognition of the interests of the offeree company employees, not only by improving the disclosure requirements, but also by improving the ability of employee representatives to make their views known. The new rules allow for employee representatives and employees to receive information about the offer *at an earlier stage*. The improvement regarding the timeline and process observed for employees' involvement in the takeover process may help facilitate an objective and accurate exchange of information. These improvements may well enable a better assessment of the bid's impact on employment overall.

References

- Deakin S. and Singh A. (2008) The stock market, the market for corporate control and the theory of the firm: legal and economic perspectives and implications for public policy, Working Paper 365, Cambridge, Centre for Business Research, University of Cambridge.
- House of Commons (2010) Mergers, acquisitions and takeovers: the takeover of Cadbury by Kraft - Business, Innovation and Skills Committee, HC 234, Ninth Report of Session 2009-10, London, The Stationery Office. <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/234/234.pdf>
- Kay J. (2012) The Kay review of UK equity markets and long-term decision-making: interim report, URN 12/631. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31544/12-631-kay-review-of-equity-markets-interim-report.pdf
- Lipton M. (1987) Corporate governance in the age of finance corporatism, *University of Pennsylvania Law Review*, 136 (1), 1-72.
- The Takeover Panel Code Committee (2010a) Review of certain aspects of the regulation of takeover bids, Consultation paper, PCP 2010/2, 1 June 2010. <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201002.pdf>
- The Takeover Panel Code Committee (2010b) Kraft Foods Inc. ('Kraft') offer for Cadbury Plc ('Cadbury'), Panel Statement 2010/14, 26 May 2010. <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-14.pdf>
- The Takeover Panel Code Committee (2010c) Review of certain aspects of the regulation of takeover bids, Panel Statement 2010/22, 21 October 2010. <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/2010-22.pdf>
- The Takeover Panel Code Committee (2011a) Review of certain aspects of the regulation of takeover bids, proposed amendments to the takeover code, Consultation paper, PCP 2011/1, 21 March 2011. <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf>
- The Takeover Panel Code Committee (2011b) Review of certain aspects of the regulation of takeover bids, Response statement by the code committee of the panel following the consultation on PCP 2011/1, RS 2011/1, 21 July 2011. <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf>

The Takeover Panel Code Committee (2012) Review of the 2011 amendments to the takeover code, Panel Statement 2012/8, 26 November 2012.

<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2012/01/2012-8.pdf>

Wachter M.L. (2003) Takeover defense when financial markets are (only) relatively efficient, *University of Pennsylvania Law Review*, 151 (3), 787-824.

All the links were checked on 20.05.2016.