

TAKEOVER APPEAL BOARD

XCHANGING PLC

RULING OF THE TAKEOVER APPEAL BOARD

Introduction

1. The principal issue on this appeal from the ruling of the Hearings Committee made on 18 December 2015, with written reasons on 23 December 2015, is the interpretation of Rule 2.6(d) of the Takeover Code, which deals with the time by which a publicly identified potential offeror, which is in competition with an announced firm offeror, must clarify its intentions in relation to the offeree company:

“When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement of the first offer), the potential offeror must, by 5.00 pm on the 53rd day following the publication of the first offeror’s initial offer document, either:

- (i) announce a firm intention to make an offer in accordance with Rule 2.7; or
- (ii) announce that it does not intend to make an offer, in which case the announcement will be treated as a statement to which Rule 2.8 applies.

...”.

2. The appeal to the Board was heard on 6 January 2016, when the Board informed the parties that the appeal would be dismissed, with reasons to be given later.

Background

3. On 4 October 2015, Xchanging plc (“Xchanging”) announced that it had received separate approaches from Capita plc (“Capita”) and Apollo Global Management, LLC (“Apollo”), which might or might not lead to an offer being made for Xchanging.

4. In accordance with Rule 2.6(a) each of Capita and Apollo was required by not later than 5.00pm on 2 November either to announce a firm intention to make an offer for Xchanging in accordance with the requirements of Rule 2.7 or to announce that it did not intend to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 (restrictions on further offers or acquisitions) applied.
5. On 14 October, Capita announced a firm intention to make an offer for Xchanging at 160p per share in cash, which was recommended by the board of Xchanging, to be implemented by means of a contractual takeover offer.
6. In a separate announcement on 14 October, Xchanging announced that it was holding discussions with Apollo with regard to a potential offer for Xchanging at 170p per share in cash.
7. By virtue of Rules 2.6(b) and 2.6(d), the time by which Apollo was required either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or to announce that it did not intend to make an offer was not later than 5.00pm on the 53rd day following the publication of Capita's offer document.
8. On 17 October Capita's offer document was published and sent to Xchanging's shareholders. The time by which Apollo was therefore required pursuant to Rule 2.6(d) to announce its intentions was 5.00pm on 9 December.
9. On 4 November Xchanging announced that Apollo had notified Xchanging that it was no longer interested in making an offer. This announcement was made with the consent of Apollo and, accordingly, Apollo then became subject to the restrictions in Rule 2.8.
10. On 12 November, Xchanging announced that it had received an approach from Computer Sciences Corporation ("CSC") regarding a possible offer at 170p per share in cash.
11. On 16 November Xchanging announced that it had received an approach from Ebix, Inc. ("Ebix") regarding a possible offer at 175p per share in cash.
12. In accordance with Rule 2.6(d), and as set out in Xchanging's announcements of

12 November and 16 November, each of CSC and Ebix was required by not later than 5.00pm on 9 December (the 53rd day following the publication of Capita's offer document) either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or to announce that it did not intend to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 applied.

13. During the course of 7/8 December, the Executive sought the views of Lazard & Co Ltd ("Lazard"), advisers to Xchanging, regarding the announcements which might be made by CSC and Ebix on 9 December. Lazard considered that, in the event that CSC made a firm offer announcement (as Lazard expected CSC to do), Ebix should be required pursuant to Rule 2.6(d) to clarify its intentions by the 53rd day following the publication of CSC's offer document.
14. At 7.57am on 9 December, CSC announced a firm intention to make an offer for Xchanging at 190p per share in cash, which was recommended by the board of Xchanging. This announcement stated:

“As a result of this announcement, the previous deadline of 5.00 p.m. on 9 December for other bidders either to announce a firm intention to make an offer or to announce they do not intend to make an offer will be replaced by a new deadline of 5.00 pm on the 53rd day following the posting of the Offer Document.”.
15. Later in the morning of 9 December, the Executive circulated a draft Panel Statement to the advisers to Xchanging, Capita, CSC and Ebix, which stated that, in accordance with Rule 2.6(d), the deadline for the clarification by Ebix of its intentions would be re-set.
16. Following the circulation of the draft Panel Statement, the Executive discussed with Xchanging, CSC, Ebix and Capita the time and date by which Ebix should be required to clarify its intentions. Xchanging withdrew its request that Ebix should be required to clarify its position by 5.00pm on the 53rd day following the publication of CSC's offer document, and proposed that Ebix should be required to clarify its intentions by 5.00 pm on 9 December.
17. During the afternoon of 9 December, the Executive ruled that, pursuant to Rule 2.6(d), Ebix must, by 5.00pm on the 53rd day following the publication of CSC's

offer document, either announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or announce that it did not intend to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 applied.

18. Xchanging, Capita and Ebix accepted this ruling. CSC requested that the ruling should be reviewed by the Hearings Committee.
19. At 6.12pm on 9 December, Capita published an announcement in which it stated that it did not intend to revise its offer and that, if the acceptance condition was not satisfied by the next closing date of 16 December, its offer would lapse.
20. On 15 December, CSC published its offer document and sent it to Xchanging shareholders.
21. At 4.30pm on 16 December, Capita announced that its offer had lapsed.
22. On 18 December, the Hearings Committee rejected the request of CSC and upheld the ruling of the Executive, and gave written reasons on 23 December.

The Hearings Committee

The Executive's Position

23. The Executive's position before the Hearings Committee was that Ebix as a potential competing offeror should be required to clarify its intentions by reference to the offer timetable established by the publication of CSC's offer document. The rationale underlying Rule 2.6(d) was to remove uncertainty as to whether Ebix would announce a firm offer for Xchanging in the later stages of the offer timetable when Xchanging shareholders were required to make their investment decisions. As a consequence of CSC's firm offer announcement on 9 December, the offer timetable was re-set pursuant to Note 2 on Rule 31.6 (which provides that, if a competing firm offer has been announced, both offerors will normally be bound by the timetable established by the publication of the competing offer document) by reference to CSC's offer document, which was subsequently published on 15 December. Xchanging shareholders would not therefore be required to make their investment decisions regarding CSC's offer until later in the

process.

24. The phrases “first offer” and “the first offeror’s initial offer document” should be interpreted as referring back to the words “an offeror” in the first line of the Rule, which should be construed as applying to the offeror whose offer document has established the offer timetable, and not the offeror which first published an offer document. This construction corresponds with the rationale behind the rule, namely to avoid uncertainty in the later stages of the offer timetable.
25. It would be wrong to require Ebix to clarify its position by an earlier date, in circumstances where the rationale for requiring each of Ebix and any further competing offeror to clarify its position would be the same (namely to avoid uncertainty in the later stages of CSC’s offer timetable as to whether any publicly identified competing offeror would announce a firm offer).
26. In CSC’s firm offer announcement, it was accepted that other identified potential competing offerors would have until 5.00pm on the 53rd day following publication of CSC’s offer document before being required to clarify their intentions in the form of an announcement under either Rule 2.7 or Rule 2.8. This confirmed to the market that the relevant deadline was 5.00 pm on the 53rd day after the publication of its offer document. CSC should be held to this statement.

CSC's Position

27. CSC’s position was that the plain meaning of Rule 2.6(d) required Ebix to confirm its position by 5.00pm on the 53rd day following the publication of the offer document by Capita. The decision of the Executive unfairly prejudiced CSC and created uncertainty.
28. The decision could encourage a race to be last to make an announcement where there are two or more potential offerors.
29. The Rule 2.7 announcement by CSC was not intended to refer to Ebix but to other bidders who had not yet been publicly disclosed.

Xchanging's Position

30. Xchanging said that it was supportive of Ebix being given some limited additional time to make a higher offer. That time should expire no later than 7 days prior to the first closing date of the offer by CSC, namely on 8 January 2016, the first closing date being 15 January 2016. The process had caused disruption to the business of Xchanging and uncertainty for its customers and employees.

Ebix's Position

31. Ebix supported the ruling of the Executive, confirmed the seriousness of their interest in making an offer for Xchanging, and acknowledged an obligation to inform the market should the company irrevocably conclude before the expiry of the 53rd day that they would not properly be able to announce a firm intention to make an offer for Xchanging. Ebix had relied upon the statement in the firm offer made by CSC as applicable to Ebix as an “other” bidder.

The Hearings Committee's Decision

32. The Hearings Committee acknowledged the attractions of the submission by Xchanging that Ebix should be granted a shorter period to announce either a firm intention to make an offer or a withdrawal but, in the absence of any ruling by the Executive on the power to make or merits of such a proposal (which was only put forward in the written submissions of Xchanging), doubts about the jurisdiction of the Committee to address the submission, the expressed need of the Executive to consider it, and objections from both CSC and Ebix to it doing so, the Committee declined to address it.
33. The statement made in the announcement on 9 December that “other bidders” would be subject to “a new deadline” of the 53rd day following the posting of the offer document by CSC applied to Ebix as an “other” bidder and would be read as such not only by Ebix itself but also by the market. There was also some evidence in the price of Xchanging shares that the market anticipated the possibility of another offer.
34. The language of Rule 2.6(d) could readily and accurately be read as describing CSC as “an offeror” which “has announced a firm intention to make an offer” as it

had done just that on the morning of 9 December, and Ebix as a “publicly identified potential offeror” which “might make a competing offer”, which it was.

35. The key principle was that the shareholders in Xchanging should not be deprived of the opportunity to receive an improved offer by Ebix if that remained, as on the evidence it did, a serious possibility. Against that was the possible prospect of Xchanging having to endure an extended “siege”, but that prospect was to a real extent already there and, as CSC acknowledged, siege was of less concern following the recommendation of an offer. Xchanging would be able, if so advised, to recommend to shareholders that they accept the offer from CSC before the final closing date of the CSC offer.
36. The Committee therefore rejected the request of CSC and upheld the ruling of the Executive.

CSC’s appeal to the Takeover Appeal Board

CSC’s Position

37. The Hearings Committee focussed disproportionately on the sentence concerning the deadline for other bidders in CSC’s firm intention to make an offer announcement. CSC and their advisers all interpreted, in good faith and in light of their understanding of the Rules, the sentence as referring to other bidders who had not yet been publicly disclosed rather than all other bidders. CSC was not suggesting that there could be any extension of the deadline for Ebix. The “Background to and reasons for the recommendation” section indicated that “Xchanging also received an indicative proposal from Ebix...but Ebix has not reached the stage at which it is prepared to announce a firm intention to make an offer...(and there can be no certainty Ebix will do so).” The next sentence goes on to clarify that “...*other* bidders” i.e. bidders other than Ebix, would have a “new deadline of 5.00 p.m. on the 53rd day following the posting of the Offer Document.”
38. The Executive’s submission to the Hearings Committee was that CSC should be held to the Executive’s interpretation of this statement. But the Executive ignored the idea that Ebix should be held to Xchanging’s 16 November announcement

which was made with the prior agreement of Ebix and the Executive's approval:

“As required by Rule 2.6(d) of the City Code on Takeovers and Mergers (the “Code”), Ebix is required by not later than 5.00 pm on 9 December, either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 of the Code or to announce that they do not intend to make an offer, in which case the announcement will be treated as a statement to which Rule 2.8 of the Code applies.”

39. This announcement reflected a proper implementation of Rule 2.6(d) and did not refer to the possibility of the deadline being extended.
40. The plain meaning of Rule 2.6(d) required Ebix to confirm its position by 5.00pm on the 53rd day following the publication of Capita's offer document, namely by 5.00pm on 9 December.
41. Rule 2.6(d) applies when an offeror, in this case Capita, announces a firm intention to make an offer and there is another publicly identified offeror, in this case CSC and Ebix. The deadline set for the publicly identified potential offerors is 5.00pm on the 53rd day following publication of the first offeror's initial offer document. The “first offeror” in this context was Capita, having been the first offeror to announce a firm intention to make an offer and publish an offer document, and this remained the case after CSC announced its firm intention to make an offer. On any natural reading of the Rule, the “first offeror” cannot be any other party. Rule 2.6(d) contains no mechanism for the deadline applicable to Ebix to be extended or re-set automatically upon the announcement by CSC of a firm intention to make an offer nor does it provide the Panel (by contrast with Rule 2.6(a)) with the discretion to do this.
42. Had the Panel wished to allow potential offerors which were subject to an earlier deadline established under Rule 2.6(d) to be given additional time until Day 53 after the posting of a subsequent offeror's offer document in order to confirm their position, the Code Committee could and should have added a provision like that in Rule 2.6(a) (28 day period for making firm intention of offer “unless the Panel has consented to an extension of the deadline”) or included a statement that the deadline could be extended with Panel consent.

43. The fundamental principle is that, if the words used are clear and unambiguous, effect will be given to those words.
44. The purpose behind Rule 2.6(d) supports CSC's interpretation. The aim of establishing a fixed deadline of the 53rd day following publication of the first offeror's offer document (compared with the previous more flexible regime) was to give parties to an offer and market participants the certainty of a fixed date which balanced: (i) giving the potential competing offeror a fixed period of seven days after the last day on which the first offeror is permitted to revise its offer (Day 46) in order to prepare to announce a firm intention to make an offer and, if appropriate, engage with the offeree company in order to seek a recommendation; and (ii) giving shareholders a period of seven days to decide whether to accept the first offeror's offer in the event the competing offeror decides not to announce a firm offer.
45. Both of these aims are upheld in a natural reading of Rule 2.6(d). Like CSC, Ebix had the benefit of a fixed seven day period from the 46th day following publication of Capita's offer document in order to finalise its offer and engage with Xchanging.

The Executive's Position

46. Rule 2.6(d) was drafted in anticipation of there being only one potential competing offeror.
47. Ebix as a potential competing offeror should be required to clarify its intentions by reference to the current offer timetable established by the publication of CSC's offer document; and not by the previous offer timetable established by the publication of Capita's offer document. The rationale underlying Rule 2.6(d) is to remove uncertainty as to whether Ebix will announce a firm offer for Xchanging in the later stages of the offer timetable when Xchanging shareholders need to make their investment decisions.
48. If CSC had not released a firm offer announcement on 9 December and had instead made a statement to which Rule 2.8 applies, the deadline of 5.00pm on 9 December would have continued to have applied to Ebix. The application of the

deadline in this scenario would have avoided uncertainty in the later stages of the timetable for Capita's offer as to whether Ebix would announce a competing firm offer, when Xchanging shareholders would be making their investment decisions regarding the Capita offer.

49. Due to the publication of CSC's firm offer announcement and offer document, and the fact that CSC's cash offer is at a significant premium to Capita's cash offer, at 5.00pm on 9 December, shareholders in Xchanging were not yet at the point of making their investment decisions in the later stages of the offer timetable. The rationale behind Rule 2.6(d) was therefore no longer applicable at 5.00pm on 9 December to the competitive offer situation which had developed as a result of CSC's firm offer announcement that morning.
50. This analysis is supported by the fact that, if a further potential competing offeror became publicly identified after 5.00pm on 9 December, the deadline for that party to clarify its intentions would be 5.00pm on the 53rd day after publication of CSC's offer document (being 6 February 2016).
51. It would be incorrect to require Ebix to clarify its position by an earlier date, in circumstances where the rationale for requiring each of Ebix and any further competing offeror to clarify its position would be the same (namely to avoid uncertainty in the later stages of CSC's offer timetable as to whether any publicly identified competing offeror would announce a firm offer).
52. CSC's firm offer announcement stated that "other bidders" would have until 5.00pm on the 53rd day following publication of CSC's offer document before being required to clarify their intentions in the form of an announcement under either Rule 2.7 or Rule 2.8. This statement must refer to Ebix and indeed can only be interpreted to refer to publicly identified potential competing offerors given there is no requirement in the Code for a potential competing offeror whose existence has not been publicly identified to clarify its position by a particular deadline. The statement clearly and unequivocally informed the market of the applicable clarification deadline for Ebix.
53. The Executive's position on whether Xchanging's request for consideration of its alternative proposal can be considered by the Takeover Appeal Board is a legal

question on which it takes no position. It has sympathy with Xchanging's submission that, pursuant to section 2(c) of the Introduction to the Code, the Hearings Committee had jurisdiction to consider Xchanging's proposal regarding a shorter deadline and that, pursuant to Rule 2.19 of the Rules of the Takeover Appeal Board as referred to in section 8(c) of the Introduction to the Code, the Takeover Appeal Board may confirm, vary, set aside, annul or replace the contested ruling of the Hearings Committee. The Executive however notes that it has not had the opportunity of hearing the reasoned views of the other interested parties on this point.

Xchanging's Position

54. The Hearings Committee misdirected itself in declining to consider Xchanging's proposal that Ebix be required to clarify its intentions at least seven days before the first closing date of the CSC offer.
55. Rule 2.6(d) was drafted in anticipation of there being only one potential competing offeror. Consequently, the Panel should look to the principles of the Code to determine the right outcome.
56. General Principle 3 provides that the board of the offeree company must not deny shareholders the opportunity to decide on the merits of the bid.
57. In recognition of this principle, Xchanging has afforded Ebix all reasonable accommodation to enable it to make an offer. The proposal enables the Xchanging shareholders to consider an offer from Ebix should it be able to make one and strikes the right balance between this principle and General Principle 6 that the offeree should not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.
58. Xchanging had been subject to takeover speculation since 4 October 2015 and there had already been a 60 day offer timetable pursuant to the offer from Capita. A new Day 53 set by reference to the CSC 60 day offer timetable has the potential to drag out unnecessarily the uncertainty for shareholders and perpetuate the disruption to Xchanging's business.

59. The system must promote the integrity of the financial markets (see also General Principle 4). The proposal helps maintain the integrity of financial markets which continue to operate on the basis that Ebix may make an offer but what is in doubt is how soon it will be forced to make up its mind. Day 53 arguably creates a false market by encouraging what is likely to be ill informed market speculation about a higher takeover offer being in prospect all the way until Day 53 when in reality this was unlikely.
60. However, in circumstances where the Executive and the Hearings Committee consider the Code should be interpreted to provide Ebix with another opportunity to make an offer, it would not be consistent with its fiduciary duties or General Principle 3 for Xchanging to be passive or seek to deny shareholders the potential opportunity to consider a firm fully financed offer from Ebix unless that would potentially imperil the firm offer from CSC.
61. The deadline should in fact be at least seven days in advance of the first closing date of the CSC offer since this is the time when Xchanging shareholders will be required to make an important investment decision, namely whether to accept the CSC offer before the offer might lapse.
62. Despite repeated requests to Ebix for further clarity, the state of its preparation to make an offer remains unclear to Xchanging. The proposed deadline for Ebix would result in a relatively short period following the TAB hearing for it to announce a firm intention to make an offer for Xchanging. But Ebix had already had ample opportunity to prepare a firm fully financed offer for Xchanging. Given the level of support for CSC's current offer, if Ebix was serious it would have been providing evidence to Xchanging that it was working as hard as possible to be in a position to announce a firm intention to make an offer for Xchanging by 8 January 2016 to have any chance of success.
63. To rule in favour of CSC would potentially deny Xchanging's shareholders the opportunity to decide on the merits of a bid by Ebix contrary to General Principle 3 if Ebix is a serious bidder.
64. To allow Ebix until Day 53 of the CSC offer would be contrary to General Principle 6, because it would extend the offer period seemingly without any

corresponding benefit to Xchanging or its shareholders. It could even precipitate CSC's offer lapsing on its first closing date and Ebix may never make an offer. This would be highly prejudicial for Xchanging shareholders and would disrupt the integrity of the financial markets and the UK system of takeover regulation.

Ebix's Position

65. Ebix continues to support the ruling of the Executive, and acknowledges that it is required to inform the market of its intentions before the expiry of the 53rd day following the publication of CSC's offer document.

Discussion

66. There are two points on this appeal. The first is whether it was open to the Hearings Committee and/or is open to the Board to consider Xchanging's alternative proposal that the firm intention critical date be set as January 8, 2016. The second is the interpretation of Rule 2.6(d) of the Code.

Xchanging's proposal

67. The issue before the Executive and subsequently before the Hearing Committee was a narrow one. It concerned the application of Rule 2.6(d) of the Code: did it require Ebix to put up or shut up by 5.00pm on 9 December 2015 or by 5.00pm on the 53rd day following the publication of the CSC offer document? The different issue raised by Xchanging's proposal was never at large: i.e., neither of the possible Rule 2.6(d) answers being appropriate what, in the particular circumstances of this offeree company and of the firm and potential offers that had emerged for it and having regard to the General Principles of the Code, was an appropriate end date? The Executive decided the narrow issue by ruling that the end date should be the 53rd day after the issue of CSC's document, and the Hearings Committee upheld that ruling. The Executive never addressed, formally, the very different issue raised by Xchanging's proposal to select January 8, 2016 (7 days before the first closing date of CSC's offer) as an alternative date between 9 December 2015 and 8 March 2016.
68. By virtue of Section 2(c) of the Introduction to the Code: "The Panel may derogate or grant a waiver to a person from the application of a rule (provided, in the case

of a transaction and rule subject to the requirements of the Directive, that the General Principles are respected) either: (i) in the circumstances set out in the rule; or (ii) in other circumstances where the Panel considers that the particular rule would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).”

69. Xchanging’s proposal was first raised in its submission to the Hearings Committee dated 16 December 2015 and therefore had not been put to the Executive prior to the Executive’s ruling on 9 December 2015, or subsequently in accordance with the normal process of consultation with the Executive.
70. Section 4(c) of the Introduction to the Code states that “the principal function of the Hearings Committee is to review rulings of the Executive.” Recital (3) to the Rules of Procedure of the Hearings Committee similarly states that the Hearings Committee (inter alia) “reviews rulings of the Executive” and that that is one of its principal functions. Proceedings before the Hearings Committee are to be by way of a complete hearing at first instance of all matters contested: Rule 2.6. On determining the matter, the Hearings Committee may, in its ruling and in accordance with the Introduction to the Code, grant such remedies ... and/or make such directions as appear to the Hearings Committee to be necessary and appropriate in the circumstances of the case: Rule 2.16.
71. Section 8(a) of the Introduction to the Code states that “the Board is an independent body which hears appeals against rulings of the Hearings Committee”. Recital (5) to the Rules of the Board similarly states that its functions are (inter alia) “to hear and determine appeals against rulings of the Hearings Committee.” Appeals are by way of a complete rehearing: Rule 2.8. The Board may confirm, vary, set aside, annul or replace the contested ruling of the Hearings Committee: Rule 21.9.
72. The Executive had power under paragraph 2(c) of the Introduction to the Code to derogate, but it had not been invited by Xchanging to rule on the proposal, and therefore had not addressed it formally at all, and hence there was no ruling for consideration by the Hearings Committee. The Hearings Committee rightly declined to consider the proposal, and the Board is satisfied that it has no power to

endorse the proposal. Although appeals are by way of a rehearing the starting point will normally be a ruling of the Executive. The Hearings Committee and the Board were not intended to be treated as a substitute for the Executive.

Interpretation of Rule 2.6(d) of the Code

73. The Executive helpfully gave the Board an outline of the history behind Rule 2.6(d). Until 2011, the Code required that a potential competing offeror should not allow a statement that it was considering making an offer to remain unclarified for more than a limited period of time in the later stages of the offer period.
74. In Response Statement RS 2011/1 (July 2011), the Code Committee accepted that the meaning of the words “a date in the later stages of the offer period” should be clarified in a new Note on Rule 2.6. The Note stated that the date for clarification of a potential competing offeror’s intentions would “normally be a date which is on or around 10 days prior to the final day on which the first offeror’s offer is capable of becoming or being declared unconditional as to acceptances”. The amendment to the Code was introduced with effect from 19 September 2011.
75. In PCP 2014/1, “Miscellaneous Amendments to the Takeover Code”, the Code Committee proposed that, in a situation where an offeror has announced a firm intention to make an offer, the deadline for a publicly identified potential competing offeror to clarify its intentions should be a firm date rather than a flexible date which was set by the Panel on a case-by-case basis. It was also proposed that the deadline should be extended slightly and should be calculated as the 53rd day following publication of the initial offer document by the firm offeror, thereby ensuring that shareholders in the offeree company would have a period of at least seven days within which to decide whether to accept the firm offer without the uncertainty regarding whether the potential competing offeror would announce a firm offer.
76. Following the publication of RS 2014/1, Rule 2.6(d) was amended and on 1 January 2015 took effect in its present form.
77. There is no reason to doubt the Executive’s contention that Rule 2.6(d) was drafted in anticipation of there being only one potential competing offeror. Paragraph 2.1

of PCP 2014/1 defined the firm offeror as “Offeror 1” and the potential competing offeror as “Offeror 2”.

78. The question for the Hearings Committee was, and for the Board is, a question of interpretation of a provision in circumstances which were not addressed by those who formulated and issued the provision. There was some discussion in the submissions before the Board of the relevance of drafts etc in the interpretation of legislation and of contracts. The Rules are plainly not contractual in nature, but although the Rules have statutory underpinnings, neither are they a form of legislation. In the view of the Board, they are to be interpreted in a common sense way in the light of their purposes and objectives and in the light of the Introduction to the Code and the General Principles.
79. There was considerable discussion of the differing positions taken on the issue at various times by the Board of Xchanging and of the significance and interpretation of the statement by Xchanging and CSC in the announcement of 9 December that “other bidders” would be subject to a new deadline of the 53rd day following CSC’s offer document. Although they tend to support the Executive’s argument, they do not ultimately affect the question of interpretation.
80. Section 2(a) of the Introduction to the Code provides that the Code should provide an orderly framework within which takeovers are conducted. The General Principles include (1) “The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid ... ” (General Principle 2); (2) “False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid ...” (General Principle 4); and (3) “An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.”
81. The Board accepts that the rationale for requiring a clarification of intentions by a potential competing offeror is to remove uncertainty in the later stages of the offer timetable as to whether a potential competing offeror would announce a firm offer, at a time when shareholders in the offeree company were making their investment decisions.

82. Consequently the Hearings Committee was right to say that the point of the Rule is that shareholders in an offeree company should not be deprived of the opportunity to receive an improved offer and should be able to reach a properly informed decision on an offer.
83. The Board accepts the Executive's submission that where there are two or more offerors, the phrases "first offer" and "the first offeror's initial offer document" in Rule 2.6(d) should be interpreted as referring back to the words "an offeror" in the first line of the rule, which should be construed as applying to the offeror whose offer document has established the offer timetable, and not the offeror which first as a matter of history published an offer document. This construction corresponds with the rationale behind the Rule, namely to avoid uncertainty in the later stages of the offer timetable.
84. It follows that Ebix as a potential competing offeror should be required to clarify its intentions by reference to the current offer timetable established by the publication of CSC's offer document; and not by reference to the previous offer timetable established by the publication of Capita's offer document.
85. Accordingly, the Hearings Committee was right to dismiss the appeal against the Executive's ruling that Ebix must clarify its intentions by no later than 5.00pm on the 53rd day after the publication of CSC's offer document.

Ruling

86. The Board declines to rule on Xchanging's proposal for an earlier deadline, and dismisses CSC's appeal against the ruling of the Hearings Committee.

15 January 2016

APPENDIX**TAKEOVER APPEAL BOARD MEMBERS**

The members of the Takeover Appeal Board who constituted the Board for the purpose of the Hearing were:

Present:	Lord Collins of Mapesbury	Chairman
	Sir John Mummery	
	Edward Walker-Arnott	
Secretary to the Board	Mark Bardell	Herbert Smith Freehills LLP

DECISION OF THE HEARINGS COMMITTEE

THE TAKEOVER PANEL

HEARINGS COMMITTEE

XCHANGING PLC ("XCHANGING")

RULING OF THE HEARINGS COMMITTEE (THE "COMMITTEE")

1. INTRODUCTION

1.1 On 4 October 2015, in response to press speculation, Xchanging plc ("Xchanging") announced that it had received separate approaches from Capita plc ("Capita") and Apollo Global Management, LLC ("Apollo") which might or might not lead to an offer being made for Xchanging. In accordance with Rule 2.6(a) of the Takeover Code (the "Code"), each of Capita and Apollo was required by not later than 5.00 pm on 2 November either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or to announce that it did not intend to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 applied. Under Rule 2.8, a person who has announced that it has no intention of making an offer for a company is restricted for a period of six months for, among other things, announcing an offer for that company.

1.2 On 14 October, Capita announced a firm intention to make an offer for Xchanging at 160 pence per share in cash, which was recommended by the board of Xchanging, to be implemented by means of a contractual takeover offer. In a separate announcement on the same date, Xchanging announced that it was holding discussions with Apollo with regard to a potential offer for Xchanging at 170 pence per share in cash. In accordance with Rules 2.6(b) and 2.6(d) of the Code, and as set out in Xchanging's second announcement of 14 October following the announcement of Capita's firm offer, the time by which Apollo was required either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or to announce that it did not

intend to make an offer was not later than 5.00 pm on the 53rd day following the publication of Capita's offer document.

- 1.3 Capita's offer document was published and sent to Xchanging's shareholders on 17 October. Apollo was therefore required pursuant to Rule 2.6(d) to clarify its intentions by 5.00 pm on 9 December.
- 1.4 On 4 November, Xchanging announced that Apollo had notified Xchanging that it was no longer interested in making an offer. This announcement was made with the consent of Apollo and, accordingly, Apollo then became subject to the provisions of Rule 2.8.
- 1.5 On 12 November, Xchanging announced that it had received an approach from Computer Sciences Corporation ("CSC") regarding a possible offer at 170 pence per share in cash.
- 1.6 On 16 November, Xchanging announced that it had received an approach from Ebix, Inc. ("Ebix") regarding a possible offer at 175 pence per share in cash.
- 1.7 In accordance with Rule 2.6(d), and as set out in Xchanging's announcements of 12 November and 16 November, each of CSC and Ebix was required by not later than 5.00 pm on 9 December (being the 53rd day following the publication of Capita's offer document) either to announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or to announce that it did not intend to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 applied.
- 1.8 During the course of 8 December, the Executive sought the views of Lazard, the independent adviser to Xchanging, regarding the announcements that might be made by CSC and Ebix on 9 December. Lazard considered that, in the event that CSC made a firm offer announcement (as Lazard expected CSC to do), Ebix should be required pursuant to Rule 2.6(d) to clarify its intentions

by the 53rd day following the publication of CSC's offer document.

- 1.9 At 7.57 am on 9 December, CSC announced a firm intention to make an offer for Xchanging at 190 pence per share in cash, which was recommended by the board of Xchanging, to be implemented by means of a contractual takeover offer. This announcement stated that the previous deadline of 5.00 pm on 9 December 2015 for "other bidders" either to announce a firm intention to make an offer or to announce they did not intend to make an offer would be replaced by a new deadline of 5.00 pm on the 53rd day following the publication of CSC's offer document. The particular passage is in Section 6 on page 9 of the announcement.
- 1.10 Later on 9 December, the Executive circulated a draft Panel Statement to the advisers to Xchanging, Capita, CSC and Ebix, which stated that, in accordance with Rule 2.6(d), the deadline for the clarification by Ebix of its intentions would be re-set.
- 1.11 Following the circulation of this draft Panel Statement, the Executive discussed with Xchanging, CSC, Ebix and Capita the time and date by which Ebix should be required to clarify its intentions. At that point, Xchanging withdrew its request that Ebix should be required to clarify its position by 5.00 pm on the 53rd day following the publication of CSC's offer document, and instead proposed that Ebix should be required to clarify its intentions by 5.00 pm on 9 December.
- 1.12 There is some uncertainty about the precise facts of the fast-moving events of 8 and 9 December, but nothing of consequence to this Ruling save where expressly mentioned.
- 1.13 During the afternoon of 9 December, the Executive ruled that, pursuant to Rule 2.6(d), Ebix must, by 5.00 pm on the 53rd day following the publication of CSC's offer document, either announce a firm intention to make an offer for Xchanging in accordance with Rule 2.7 or announce that it did not intend

to make an offer, in which case the announcement would be treated as a statement to which Rule 2.8 applied.

- 1.14 Each of Xchanging, Capita and Ebix accepted this ruling. CSC requested that the ruling should be reviewed by the Hearings Committee.
- 1.15 At 5.56 pm on 9 December, the Executive published Panel Statement 2015/19 setting out details of the above ruling and confirming that a hearing of the Hearings Committee would be convened.
- 1.16 At 6.12 pm on 9 December, Capita published an announcement in which it stated that it did not intend to revise its offer and that, if the acceptance condition was not satisfied by the next closing date of 16 December, its offer would lapse. It did in the event lapse on that date.
- 1.17 On 15 December, CSC published its offer document, which it sent to Xchanging shareholders on the same day.

2. THE PARTIES

(a) *Xchanging*

- 2.1 Xchanging provides business processing, technology and procurement services internationally to customers across multiple industries. Xchanging is registered in England and Wales and its shares are admitted to trading on the Main Market of the London Stock Exchange. Accordingly, Xchanging is a company which is subject to the Code in accordance with section 3(a)(i) of the Introduction to the Code. As at the close of business on 15 December 2015, Xchanging had a market capitalisation of approximately £474 million.
- 2.2 Xchanging is advised by Lazard and Ashurst.

(b) Capita

2.3 Capita is an international business process outsourcing and professional services company with staff across the UK, Europe, South Africa and India.

2.4 Capita is registered in England and Wales and its shares are admitted to trading on the Main Market of the London Stock Exchange. As at the close of business on 15 December 2015, Capita had a market capitalisation of approximately £7.6 billion.

2.5 Capita is advised by Citi and Eversheds.

(c) CSC

2.6 CSC is a global provider of information technology and professional services solutions headquartered in Virginia, USA.

2.7 CSC is registered in the USA and is listed on the New York Stock Exchange. As at the close of business on 15 December 2015, CSC had a market capitalisation of approximately \$4.2 billion.

2.8 CSC is advised by Goldman Sachs and Allen & Overy.

(d) Ebix

2.9 Ebix provides software and e-commerce solutions to the insurance industry with more than 40 offices worldwide.

2.10 Ebix is registered in the USA and is listed on NASDAQ. As at the close of business on 15 December 2015, Ebix had a market capitalisation of approximately \$1.1 billion.

2.11 Ebix is advised by Kinmont Advisory and Skadden Arps.

3. THE HEARING

3.1 The Committee heard the matter on the morning of Friday 18 December 2015. The Committee was constituted by those Hearings Committee members who are identified in the Appendix to this Ruling.

3.2 The spokesman for the Executive at the Hearing was its Director General, Mr Crispin Wright. Mr Richard Browne and Mr Nick Harper spoke for CSC. Xchanging (represented by Mr Robert Ogilvy Watson and Mr Cyrus Kapadia) and Ebix (represented by Mr Gavin Kelly and Mr Scott Hopkins) also attended the Hearing as interested parties. Each party, except Ebix (which supported the ruling of the Executive), made written submissions to the Committee by 4pm on Wednesday 16 December as directed by the Chairman of the Committee. The Hearing was transcribed and held in private in accordance with Rule 2.9 of the Committee's Rules of Procedure. No witnesses gave evidence.

3.3 In late afternoon on 18 December, the parties were informed that the Committee had decided to uphold the ruling of the Executive with its reasons to be supplied later. Panel Statement 2015/20 was issued by the Committee to that effect later on 18 December.

4. RELEVANT CODE PROVISIONS

Rule 2.6(d)

4.1 Rule 2.6(d) sets out the time by which a publicly identified potential offeror, which is in competition with an announced firm offeror, must clarify its intentions in relation to the offeree company, and states as follows:

“When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement

of the first offer), the potential offeror must, by 5.00 pm on the 53rd day following the publication of the first offeror's initial offer document, either:

- (i) announce a firm intention to make an offer in accordance with Rule 2.7; or**
- (ii) announce that it does not intend to make an offer, in which case the announcement will be treated as a statement to which Rule 2.8 applies.**

...”.

4.2 Note 2 on Rule 31.6 deals with the offer timetable which applies to competing firm offers and states as follows:

“If a competing firm offer has been announced, both offerors will normally be bound by the timetable established by the publication of the competing offer document. ...”.

Accordingly, in the event that a publicly identified potential offeror, which is in competition with an announced firm offeror, announces a firm intention to make an offer, the 60 day offer timetable for both offerors is re-set pursuant to this Note by reference to the date on which the second offeror publishes its offer document.

4.3 Rule 2.6(d) has a somewhat tortuous history which is described in the written submission of the Executive, but the underlying principles are readily discernible. Shareholders in an offeree company should not be deprived of the opportunity to receive an improved offer and should be able to reach a properly informed decision on an offer. The principle which underlies Rule 2.7 is that companies should not be under siege, uncertain whether or not any offer will be made. But, once a firm offer has been made, that offer itself sets the future timetable. Rule 2.6(d) then sets the time by which any potential competing offeror must announce a firm offer which precedes the expiry of that timetable so as to remove any uncertainty at the time when shareholders are addressing their decisions.

4.4 Rule 2.6(d) was drafted in anticipation of there being only one potential competing offeror. The Executive acknowledges that the present, unusual,

competitive offer situation which involves three potential and/or actual offerors was not specifically provided for when the rule was drafted.

5. THE SUBMISSIONS OF THE EXECUTIVE

5.1 The key issue to be determined is whether Ebix as a potential competing offeror should be required to clarify its intentions by reference to:

- (a) the current offer timetable established by the publication of CSC's offer document; or
- (b) the previous offer timetable established by the publication of Capita's offer document.

5.2 The Executive's submission is that it should be the former. This is on the basis that the rationale underlying Rule 2.6(d) is to remove uncertainty as to whether Ebix will announce a firm offer for Xchanging in the later stages of the offer timetable when Xchanging shareholders are required to make their investment decisions. As a consequence of CSC's firm offer announcement on 9 December, which was a material new development in the competitive offer situation, the offer timetable was re-set pursuant to Note 2 on Rule 31.6 by reference to CSC's offer document, which was subsequently published on 15 December. Xchanging shareholders will not therefore be required to make their investment decisions regarding CSC's offer until later in the process.

5.3 The Executive submits that the correct interpretation of Rule 2.6(d) is that for competitive offer situations where there are two or more offerors, the phrases "*first offer*" and "*the first offeror's initial offer document*" should be interpreted as referring back to the words "*an offeror*" in the first line of the rule, which should be construed as applying to the offeror whose offer document has established the offer timetable, and not the offeror which first published an offer document. This construction corresponds with the rationale behind the rule itself, namely to avoid uncertainty in the later stages of the offer timetable.

- 5.4 The Executive further submits that this analysis is supported by the fact that, if a further potential competing offeror became publicly identified after 5.00 pm on 9 December, the deadline for that party to clarify its intentions would be 5.00 pm on the 53rd day after publication of CSC's offer document (being 6 February 2016). In the opinion of the Executive, it would be incorrect to require Ebix to clarify its position by an earlier date, in circumstances where the rationale for requiring each of Ebix and any further competing offeror to clarify its position would be the same (namely to avoid uncertainty in the later stages of CSC's offer timetable as to whether any publicly identified competing offeror would announce a firm offer).
- 5.5 In addition, in CSC's firm offer announcement, it was recognised and accepted that other identified potential competing offerors would have until 5.00 pm on the 53rd day following publication of CSC's offer document before being required to clarify their intentions in the form of an announcement under either Rule 2.7 or Rule 2.8, as follows:
- “As a result of this announcement, the previous deadline of 5.00 p.m. on 9 December 2015 for other bidders either to announce a firm intention to make an offer or to announce they do not intend to make an offer will be replaced by a new deadline of 5.00 pm on the 53rd day following the posting of the Offer Document.”*
- 5.6 The above statement stated CSC's expectation that “other bidders” would be required to clarify their intentions by the 53rd day following the publication of CSC's offer document. The Executive considers that this statement must refer to Ebix and indeed can only be interpreted to refer to publicly identified potential competing offerors given there is no requirement in the Code for a potential competing offeror, whose existence has not been publicly identified, to clarify its position by a particular deadline.
- 5.7 CSC's own firm offer announcement also confirmed to the market that the relevant deadline was 5.00 pm on the 53rd day after the publication of its offer document. The Executive believes that CSC should be held to this statement.

- 5.8 The Executive therefore considers that the Hearings Committee should uphold the Executive's ruling.

6. THE SUBMISSIONS OF CSC

- 6.1 The Committee should overturn the decision of the Executive and Ebix should be treated as having withdrawn from making any offer pursuant to Rule 2.7.

- 6.2 "The plain meaning" of Rule 2.6(d) required Ebix to confirm its position by 5.00 pm on the 53rd day following the publication of the offer document by Capita. There is no discretion to extend that date. Ebix did not do so.

- 6.3 The decision of the Executive unfairly prejudices CSC and creates uncertainty.

- 6.4 The decision could encourage a race to be last to make an announcement where there are two or more potential offerors.

- 6.5 Whilst "It could be argued that the disclosure [in the Rule 2.7 announcement by CSC] should have been clearer", it was not intended to refer to Ebix but to other bidders who had not yet been publicly disclosed.

7. THE SUBMISSIONS OF XCHANGING

- 7.1 The Board of Xchanging had unanimously recommended the offer made by CSC which had received commitments to accept the offer from approximately 47% of the existing ordinary share capital of Xchanging in issue on 8 December. Those commitments were binding unless a competing offer exceeded the value of CSC's offer by either 10 or 12% depending on the particular terms of the relevant commitment.

- 7.2 "Mindful of its fiduciary duties, its obligation under General Principle 3 of the Code and its view that Ebix is a bona fide potential offeror", the Board of

Xchanging was supportive of Ebix being given “some limited additional time” to make a higher offer. That time should expire no later than 7 days prior to the first closing date of the offer by CSC (the first closing date being 15 January 2016).

7.3 Xchanging must do nothing to prejudice the offer from CSC, in particular the risk that, if 75% acceptances were not received by 15 January, CSC might lapse the offer. The Committee, however, thinks it right to note that no such suggestion has been made by CSC.

7.4 The process had already caused disruption to the business of Xchanging and uncertainty for its customers and employees.

8. THE SUBMISSIONS OF EBIX

8.1 Whilst Ebix made no written submissions, they were permitted to ask and to answer questions to and from the other parties and to make short oral final submissions.

8.2 Ebix supported the ruling of the Executive, confirmed the seriousness of their interest in making an offer for Xchanging, and acknowledged an obligation to inform the market should the company irrevocably conclude before the expiry of the 53rd day that they would not properly be able to announce a firm intention to make an offer for Xchanging.

8.3 Ebix also said, and there is no reason to doubt, that Ebix had relied upon the statement in the firm offer made by CSC (see paragraph 1.9) as applicable to Ebix as an “other” bidder.

9. REASONS

9.1 Whilst the Committee acknowledges the possible attractions of the submission by Xchanging that Ebix should be granted a shorter period to announce either

a firm intention to make an offer or withdrawal, in the absence of any ruling by the Executive on the power to make or merits of such a proposal (which was only put forward in the written submissions of Xchanging), doubts about the jurisdiction of the Committee to address the submission, the expressed need of the Executive to consider it, and objections from both CSC and Ebix to it doing so, the Committee declined to address it.

- 9.2 The Committee considers that the statement made in the announcement made by the Boards of Xchanging and CSC on 9 December (see paragraph 1.9 above) that “other bidders” would be subject to “a new deadline” of the 53rd day following the posting of the offer document by CSC both as a matter of language (particularly read with the preceding paragraph referring to Ebix) and for the reason given by the Executive (paragraph 5.4 above) did apply to Ebix as an “other” bidder and would be read as such not only by Ebix itself but also by the market. There was also some evidence in the price of Xchanging shares that the market anticipated the possibility of another offer.
- 9.3 The language of Rule 2.6(d) of the Code raises in the present context a short issue. Is the “offeror” in the first line Capita and only Capita or CSC; or, which is essentially the same point, has Capita effectively been replaced by CSC once CSC “announced a firm intention to make an offer” for Xchanging and so set a new timetable for resolution of any competing offers?
- 9.4 The Committee considers that the language can readily and accurately be read as describing CSC as “an offeror” which “has announced a firm intention to make an offer” as it had done just that on the morning of 9 December, and Ebix as a “publicly identified potential offeror” which “might make a competing offer”, which it was.
- 9.5 The Committee has also considered the principles which underlie the relevant Rules. It considers that the key principle in the present circumstances to be that the shareholders in Xchanging should not be deprived of the opportunity to receive an improved offer by Ebix if that remains, as on the evidence it

does, a serious possibility. Against that is the possible prospect of Xchanging having to endure an extended “siege”, but that prospect is to a real extent already there and, as CSC acknowledges, siege is of less concern following the recommendation of an offer. It is also to be noted that Xchanging would be able, if so advised, to recommend to shareholders that they accept the offer from CSC before the final closing date of the CSC offer.

10. RULING

10.1 For the above reasons, and as announced on 18 December, the Committee rejects the request of CSC and upholds the ruling of the Executive.

11. APPEAL

11.1 11.1 If any party wants to appeal this Ruling to the Takeover Appeal Board ("TAB"), it should notify its intention to do so in accordance with the Rules of TAB as set out on its website (www.thetakeoverappealboard.org.uk) by 5.00 pm on Wednesday 30 December 2015.

23 December 2015

APPENDIX

HEARINGS COMMITTEE MEMBERS

The members of the Hearings Committee who constituted the Committee for the purpose of the Hearing were:

Present:	Sir Gordon Langley	Chairman
	Sir David Lees	
	Lord Morris of Handsworth	
	Sir Ian Robinson	
Association for Financial Markets in Europe	Mark Warham	Rothschild
Association of British Insurers	John Reizenstein	Direct Line Insurance Group
British Bankers' Association	Simon Croxford	Barclays Bank PLC
Institute of Chartered Accountants	Simon Boadle	PricewaterhouseCoopers
National Association of Pension Funds	Martin Mannion	John Lewis Partnership
Quoted Companies Alliance	Michael Higgins	Ebiquity
Secretary to the Committee	Charles Penney	Addleshaw Goddard LLP