

PRACTICE STATEMENT NO 5

RULE 13.5(a) – INVOCATION OF CONDITIONS

It is standard market practice in the UK for offers (other than mandatory offers, where the provisions of Rule 9 of the Takeover Code apply) to be stated as being conditional upon the satisfaction, or waiver, of a number of conditions. In a typical offer, the conditions can be broken down into four broad categories as follows:

- the acceptance condition – i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer;
- UK or European Commission competition clearances;
- other, effectively mandatory, conditions designed to give effect to some supervening regulatory requirement – for example, a listing condition on a securities exchange offer; and
- other conditions included for the benefit of the offeror in order to give it the right not to proceed with the offer in the circumstances stipulated. There is a wide range of conditions which fall within this category, although one of those frequently encountered is the “material adverse change” (or “MAC”) condition, whereby the offeror can lapse its offer in the event of a material adverse change in the business or prospects of the offeree company in the period after announcement of the offer.

The principal provision of the Code applicable to conditions is Rule 13. Rule 13.1 provides that offer conditions must not normally be in subjective terms. In addition, Rule 13.5(a) provides that, except for the acceptance condition:

“An offeror should not invoke any condition ... so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition ... are of material significance to the offeror in the context of the offer.”

Rule 13.2 provides further that neither a UK nor a European Commission competition condition will be subject to either Rule 13.1 or Rule 13.5(a).

The purpose of Rule 13.5(a) is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of then Note 2 on Rule 13 (which is now Rule 13.5(a)) was considered by the Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was

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a MAC condition. The Panel concluded that the necessary test of “material significance” was not met and in its decision stated that:

“... meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous ... to something that would justify frustration of a legal contract.”.

The Executive is aware that certain practitioners interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer (other than the acceptance condition or any UK or European Commission competition condition). The Executive does not consider this interpretation to be correct.

In applying Rule 13.5(a) in the light of the Panel’s decision set out in Panel Statement 2001/15, the Panel Executive’s practice is as follows:

- as set out in Rule 13.5(a), the appropriate test for the invocation of a condition is whether the relevant circumstances upon which the offeror is seeking to rely are of material significance to it in the context of the offer – which must be judged by reference to the facts of each case at the time the relevant circumstances arise;
- in the case of a MAC, or similar, condition, whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and
- whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.

In accordance with RS 2004/4, in considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive’s practice to take into account all relevant factors, including whether:

- the condition was the subject of negotiation with the offeree company;
- the condition was expressly drawn to offeree company shareholders’ attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; and
- the condition was included to take account of the particular circumstances of the offeree company.

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This Practice Statement applies in the same way to the invocation of pre-conditions permitted under Rule 13.4.

The Executive should be consulted in cases of doubt.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

28 April 2004

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