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THE PANEL ON TAKEOVERS AND MERGERS

**CONSULTATION PAPER ISSUED BY
THE CODE COMMITTEE OF THE PANEL**

RESOLUTION OF COMPETITIVE SITUATIONS

**REVISION PROPOSALS RELATING TO
RULES 31.6, 32 AND 35 OF
THE TAKEOVER CODE**

Before it introduces or amends any Rules of the Takeover Code or the Rules Governing the Substantial Acquisitions of Shares, the Code Committee of the Takeover Panel is required under its consultation procedures to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

The Code Committee is therefore inviting comments on this Consultation Paper. Comments should reach the Code Committee by **27 November 2001**.

Comments may be sent by email to:

consultation@disclosure.org.uk

Alternatively, please send comments in writing to:

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It is the Code Committee's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.

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1. Introduction

1.1 One of the principal objectives of The City Code on Takeovers and Mergers (the "**Code**"), as set out in the Introduction to the Code, is to provide an orderly framework within which takeover bids are conducted. In recent years, the Panel has had to consider on a number of occasions how to provide such a framework when, in the later stages of an offer period, two or more competing offerors are bidding for the same target company. In order to resolve the competitive

situation in an orderly fashion, the Panel has employed sealed bid procedures governing the making of increased offers on Day 46 (normally the last day for revising an offer).¹ However, there is no specific provision for these procedures in the rules of the Code.

- 1.2 This consultation paper seeks views on the approach (which includes proposed amendments to the Code) that the Panel should adopt in relation to the resolution of competitive situations that continue to exist on Day 46.

1. Where there are two or more competing offerors, the Code timetable applying to the earlier bid is reset under Rule 31.6(a)(i) to conform with the timetable set by the posting of the later offer document

2. Background

(a) Eagle Star

- 2.1 The competing offers for Eagle Star in 1983 represented the first occasion on which the full Panel had to consider a situation in which competing offers remained open and capable of revision on Day 46. The Panel decided that the normal Code rules should apply subject to certain minor modifications. These comprised a requirement that a revised offer announcement be lodged by each offeror with the Panel shortly before release; a dispensation from posting on Day 46; and a prohibition on either offeror seeking to increase its offer further after Day 46, even with the consent of the offeree board.

(b) Energy Group

- 2.2.1 It was not until the competing offers for Energy Group in 1998 that the Panel had to consider again what rules should govern the conduct of competing offers on Day 46. In that case, one of the competing offerors appealed against a ruling of the Executive that formula offers should be permitted in the context of a sealed bid procedure. A formula offer is a bid which is made by reference to a bid made by a competing offeror (see paragraph 8.3.3 below). The possibility of formula offers had not been addressed in the Eagle Star ruling. The Panel upheld the ruling of the Executive allowing formula offers.
- 2.2.2 The Energy Group procedure would have involved the Executive opening sealed bids specifying the maximum price each offeror was willing to pay but without that maximum price ever necessarily being made public. The Executive would have reviewed the bids submitted to the Executive pursuant to the sealed bid procedure and would have informed each party of the amount of the bid it was obliged to announce taking account of any formula offers.
- 2.2.3 As it turned out, the appellant in Energy Group, who had the lower current bid, did not participate on Day 46 and the successful offeror was not obliged therefore to raise its existing offer. But for the formula offer mechanism, the higher offeror may have found that it had raised its existing bid unnecessarily (effectively bidding against itself).

(c) Hyder

2.3.1 In a number of cases following Energy Group, the Executive discussed the Energy Group procedure with the relevant parties to establish whether there were any objections to applying the same procedure. In the Hyder transaction in 2000, substantially the same dispute arose as that which had arisen in the Energy Group case. The procedure set by the Executive in Hyder after discussions with the advisers to each of the parties was substantially the same as that in Energy Group. One of the competing offerors objected to a sealed bid procedure which permitted formula offers. The Hyder board also favoured a procedure which permitted only fixed price bids. The ruling of the Executive permitting formula price bids was not, however, the subject of any appeal. An appeal to the full Panel in the Hyder case was made on a narrower point relating to the consequences of a late announcement of the only bid tendered under the sealed bid procedure.

2.3.2 It merits note that, in both Energy Group and Hyder, the competing offeror objecting to formula offers had acquired a substantial stake in the offeree company in the market and, accordingly, its assessment of the merits of the sealed bid procedure would reasonably have been influenced by the price which it would receive for its offeree shares in the event that its revised offer was the lower.

2.3.3 Panel Statements relating to the Panel's decision in each of the Eagle Star, Energy Group and Hyder cases are attached as Appendix A.

3. Key issues

This paper addresses the following key issues:

- (a) the importance of achieving finality and an orderly resolution of a competitive situation (see paragraph 4 below);
- (b) the removal of tactical opportunities in competitive situations which might otherwise be available to competing offerors under the Code (see paragraphs 5, 6 and 7 below);
- (c) an evaluation of the possible approaches which the Panel might adopt in order to resolve a competitive situation (see paragraph 8 below);
- (d) the extent to which the adoption of any particular approach should depend upon a consensus (see paragraph 9 below); and
- (e) the timing of the posting of any revised offer document (see paragraph 10 below).

4. The importance of achieving finality and an orderly resolution of a competitive situation

- 4.1 As noted in the Introduction, one of the principal objectives of the Code is to provide an orderly framework within which takeover bids are conducted. In the bids for Eagle Star, Energy and Hyder, consistently with that objective, the Panel established a procedure which was designed to bring about an orderly resolution of the competitive situation and to achieve finality. Finality meant ensuring both offerors made bids which were 'final' in the sense that they were not capable of further revision even with the consent of the offeree board (unless both offers lapsed). Shareholders in the target company then had 14 days from the posting of any revised offer document to make up their mind. In each of those bids, 'final' offers had to be published by Day 46.
- 4.2 The Code prescribes a 60 day timetable for the prosecution of a takeover offer. The timetable is principally established by the Final Day Rule (Rule 31.6) which stipulates that an offer must become or be declared unconditional as to acceptances by midnight on Day 60 (that is the 60th day after the posting of the initial offer document) and otherwise lapse.
- 4.3 The rationale behind the Final Day Rule derives from the siege principle. While the offeror should have sufficient time in which to prosecute its offer (and to seek to persuade shareholders of its merits), the offeree company should not be exposed to an excessive period of siege. The siege principle recognises that an offer creates uncertainty (not only for shareholders but also for the current and potential management, employees and business partners of the offeree company) which may lead to its business being damaged and the interests of shareholders being prejudiced through a corresponding fall in the value in the offeree company. It is generally irrelevant, however, where the offeree company is receptive to the bidder. For this reason, the Panel will normally be willing to extend Day 60 when the offeree board consents (and this is specifically

provided for in Rule 31.6(a)(ii)).

- 4.4 The siege principle also underlies Rule 35.1 (delay of 12 months) which prevents a bidder announcing a fresh offer within 12 months of the lapse of its original offer. Again, the Rule specifically provides for the 12 month restriction to be dispensed with where the offeree board consents (Note (a)).

- 4.5 The siege principle, as generally understood, would indicate that the normal Rules of the Code should obtain in a competitive situation and that a competing offeror should be free to approach an offeree board after Day 46 with a view to obtaining a recommendation of a revised offer.

- 4.6 The position of a target company faced with competing offers is, however, materially different from that of a target company which is in receipt of a bid from a single offeror. This is because the target company will have seen the offer timetable reset by the emergence of the second offeror. By Day 46 of this new timetable (and taking account of the usual delays between announcing and posting offers), the company might have been under offer for well over four months. Whether or not the target board has recommended one or other of the competing offers, in these circumstances the target company and its shareholders will have experienced an extended period of uncertainty.

- 4.7 The target company's predicament is particularly acute in cases where it has already recommended one or (at different times) both of the competing offers. In the absence of some attempt to achieve an orderly resolution, if the offeree board is approached after Day 46 by an offeror which is prepared to offer more, the board is placed in an invidious position. However strong its concerns may be about the impact of the extended offer period on the company, the board may decide that it cannot stand in the way of an improved offer to shareholders. If the offeree board in such circumstances recommends such an offer, the Executive is likely to take the view that the competing offeror should also have another opportunity to consider its options and to revise its own bid. The timetable would then roll on.
- 4.8 These considerations lead to the conclusion that the siege principle should be adapted to the circumstances of a competitive situation. Regardless, however, of the implications of siege, we consider that the Panel is justified in seeking to achieve finality within a reasonable timeframe having regard to the importance of an orderly resolution of the competitive situation. Shareholders should be given a period of certainty within which to make the investment decision with which the competing offers present them. Certainty requires that both offers are 'final' and not capable of further revision or renewal (unless both lapse).
- 4.9 We do not, however, believe that either considerations of siege or the need for finality within a reasonable timeframe dictate that the competitive situation should be resolved within a rigid timetable (which might, for example, stipulate that 'final' offers should be published by no later than Day 46). The overriding concern of the Panel should be to secure an orderly resolution of the competitive situation within a reasonable timeframe, which may involve a limited extension

of the normal timetable.

Q1 Do you agree that the objective of achieving finality and an orderly resolution of a competitive situation is of paramount importance?

Q2 Do you agree that achieving an orderly resolution should be more important than achieving finality by a fixed time such as Day 46?

5. Relevant Code Rules

5.1.1 On the basis that the orderly resolution of a competitive situation is the key objective, it is necessary to consider the normal rules of the Code governing the conduct of the later stages of a bid and to identify the tactical opportunities open to a competing bidder (whatever procedure is applied to resolve the competitive situation) which, if exploited, would frustrate this key objective.

5.1.2 The timing rules in the Code were drafted principally with a single hostile bid in mind and do not therefore provide in detail for competitive situations.

5.1.3 The three rules of principal relevance are:

(a) Rule 32.1 (offer open for 14 days after revision);

(b) Rule 31.6 (final day rule); and

(c) Rule 35.1 (delay of 12 months).

5.1.4 The full text of each of these Rules is attached as Appendix B. These three rules are described in more detail below.

(a) **Rule 32.1 (offer open for 14 days after revision)**

5.2.1 Rule 32.1 requires that a revised offer must be kept open for at least 14 days after the posting of the revised offer document. The rule goes on to prohibit the posting of a revised offer document in the period of 14 days ending on the last day on which the offer may become unconditional as to acceptances.

5.2.2 Rule 32.1 is not an absolute rule requiring posting on Day 46 at the latest but a rule which requires that shareholders have at least 14 days to consider a revised offer. This gives effect to General Principle 4 which requires that shareholders must be given sufficient time to reach a properly informed decision.

5.2.3 Note 3 on Rule 32.1 stipulates that an offeror must not place itself in a position where it would be required to revise its offer in the last 14 days of a 60 day offer timetable. Note 2 on that Rule refers to the circumstances in which a revised offer is normally required, namely where purchases are made at above the offer price (Rule 6), where a cash offer is required to be introduced (Rule 11) or an obligation to make a mandatory bid is incurred (Rule 9).

(b) Rule 31.6 (the "Final Day Rule")

5.3.1 In practice, Rule 32.1 must generally be applied by reference to the Final Day Rule which sets the last day on which an offer may become or be declared unconditional as to acceptances. The Final Day Rule states that, except with the consent of the Panel, the final day may not be later than midnight on Day 60.

5.3.2 Rule 31.6(a) sets out a number of circumstances in which the consent of the Panel to an extension of Day 60 will normally be granted including, most relevantly, the board of the offeree company consenting to the extension.

(c) Rule 35.1 (delay of 12 months)

5.4.1 In considering the operation of Rule 32.1, it is also necessary to consider the effect of Rule 35.1 (delay of 12 months) which stipulates that, except with the consent of the Panel, when an offer has lapsed, the offeror must not announce another offer or possible offer for the offeree within 12 months from the date on

which the first offer lapsed.

5.4.2 The Notes on Rule 35.1 set out circumstances in which the Panel will normally agree to dispense with the 12 month restriction. In particular, those circumstances include a situation in which the new offer is recommended by the board of the offeree company (see Note (a)(i) on Rule 35.1). The Note, however, goes on to say that the Panel will not normally permit a renewed offer within three months of the lapsing of the previous offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of making a no extension or a no increase statement.

6. Tactical opportunities open to a competing offeror

6.1 It is, in fact, rare for competing offerors still to be competing on Day 46. Nonetheless, within the framework of the three rules summarised in paragraph 5 above, it would arguably be open to a bidder in a competitive situation:

- (a) to seek to increase its offer after Day 46, but still satisfy the requirements of Rule 32.1, by securing the consent of the target company board to an extension of the final day under paragraph (ii) of Rule 31.6(a). The Panel's consent would "normally ... be granted" for such an extension (as long as the bidder had not made a no increase or no extension statement);

- (b) not to revise its offer on Day 46 but then to allow that offer to lapse on a closing date prior to Day 60 and, subject to Panel consent pursuant to Note (a)(i) on Rule 35.1, to come back immediately (assuming a no increase or no extension statement has not been made) with a recommended offer at a higher price; and
- (c) not to revise its existing offer on Day 46 but then to allow that offer to lapse on a closing date prior to Day 60 with the intent of buying offeree shares in the market at above the competing offeror's offer price and thereby frustrating that offer.

6.2 Each of these actions might be taken in the context of the other bidder having declared its revised offer as "final" and thereby apparently having restricted its opportunity to compete further either during the offer period or in the three months following the lapsing of its offer. Each of these actions not only compromises the desire for finality of the bids but also jeopardises the broader objective of an orderly resolution of the competitive situation.

6.3 In addition to the effects of the tactical opportunities described in this paragraph, an orderly resolution of competing offers might not be achieved for other reasons:

- (i) an apparently winning offer capable of being declared unconditional as to acceptances on Day 60 might lapse under a 90% acceptance condition (perhaps because a substantial shareholding in the offeree company held by the competing offeror had not been assented to the offer);

- (ii) an apparently winning offer, which had been declared unconditional as to acceptances on Day 60, might subsequently lapse under another offer condition; and

- (iii) both offers might lapse, deadlocked, with combined acceptances amounting to more than 50% of the offeree company's voting shares but with neither bidder individually achieving more than 50% (this may particularly be a risk in competing share offers or where cash offers are equal or, possibly, nearly equal).

6.4 Any arrangements made to achieve an orderly resolution of a competitive situation would need to be sufficiently flexible to address these possible outcomes.

Q3 Do you agree that each of the actions set out in paragraph 6.1 above would compromise the achievement of finality and the objective of an orderly resolution of the competitive situation?

7. Closing off tactical opportunities

7.1 In order to achieve an orderly resolution of a competitive situation, the Code Committee believes that it is necessary to close off the tactical opportunities referred to in paragraph 6 above.

Rule 31.6/Rule 35.1

- 7.2.1 Denying the tactical opportunities referred to in paragraphs 6.1(a) and 6.1(b), could be achieved by amendments to the Code along the following lines:
- (a) in a competitive situation, after Day 46, the Panel would not normally give its consent under Rule 31.6(a)(ii) to an extension of the last time and day for the acceptance condition to be satisfied;² and
 - (b) the Panel would not normally give a dispensation from the restriction imposed by Rule 35.1 (for example, it would not permit a new bid after the lapsing of an offer in a competitive situation within three months of the lapsing of all the competing offers), unless acceptances received by one offeror, or combined acceptances received by competing offerors, on Day 60 exceeded 50%.
- 7.2.2 The qualification to the second of these changes would provide a means of addressing the possibility (identified in paragraph 6.3 above) of either failure of the apparently winning offer (arising from the invocation of an offer condition) or deadlock between the two offers: in both these situations, acceptances or combined acceptances would be greater than 50%.

²The application of an open auction procedure (see paragraph 8.4 below) will, however, involve an extension to Day 60

Q4 Do you consider the above changes to Rule 31.6 and Rule 35.1 would achieve the purpose of closing off the tactical opportunities open to a competing bidder after Day 46 (or after the completion of any open auction procedure of the kind described in paragraph 8.4 below)?

Market purchases

- 7.3.1 In relation to paragraph 6.1(c), in general (except through Rules 4 and 38), the Code does not seek to impose outright restrictions on share dealings, concentrating instead on the consequences of share dealings. However, the objective of resolving a competitive situation in an orderly fashion does imply that there should be share purchasing restrictions on a lapsed offeror whilst the competing offeror continues to prosecute its offer.
- 7.3.2 Where a competing offeror posts a revised offer on Day 46, it will normally be barred by Rule 32.1 and Note 3 on that Rule from purchasing shares at above its offer price (or making cash purchases if it has made a share offer). There is, however, no restriction on an offeror making market purchases if its offer has lapsed. Accordingly, if an offeror does not participate on Day 46 but allows its existing offer to lapse, it will be in a position to purchase shares at above the value of its lapsed offer (and that of any revised offer made by a competing offeror). In the absence of any clear statement under Rule 2.8 (statements of intention not to make an offer) that it has no intention to renew its bid, the market might interpret this as an indication of an intention to come back with a higher offer and therefore enough to frustrate the competing offer.

7.3.3 There may be situations in which a prohibition on market purchases by a lapsed offeror would operate unfairly: for example, where a third party is making significant market purchases or the higher offer is subject to significant conditions but the higher offeror is nonetheless making market purchases.

7.3.4 A proportionate approach would be an additional Code amendment (following on from proposed amendments (a) and (b) described above) along the following lines:

- (c) where there have been competing offers, a lapsed offeror will normally be restricted from purchasing shares in the target company at a price above the value of its lapsed offer until such time as the competing offer has either lapsed or become wholly unconditional.

Q5 Do you consider that a restriction on market purchases by a competing offeror whose bid has lapsed would be justified?

7.4 Detailed rule changes reflecting the above approach are set out as Amendments (i), (ii) and (iii) in Appendix C.

8. Possible approaches to resolving a competitive situation

8.1 There are a number of possible approaches which the Code Committee might adopt in order to resolve a competitive situation:

- (i) provide a specific Code basis for the Eagle Star procedure;
- (ii) provide a specific Code basis for the kind of sealed bid procedure employed in Energy and Hyder; or
- (iii) provide for an open auction procedure.

Each of these approaches is predicated upon the tactical opportunities identified in paragraph 6.1 having been closed off.

(a) Eagle Star procedure

8.2.1 The Panel in Eagle Star decided that the normal rules of the Code should apply subject to certain minor modifications, specifically:

- (i) any revised offer had to be lodged with the Executive by 4.30pm on Day 46;
- (ii) any revised offer had to be announced before 5.00pm on Day 46;
- (iii) an extension of two business days for posting was granted (with a corresponding change to Day 60);

- (iv) the offer could be revised after Day 46 only in exceptional circumstances and not simply on the grounds of a recommendation of the offeree board; and
- (v) neither offeror could buy shares after Day 46 at above its offer price.

8.2.2 The principal attraction of the Eagle Star procedure is simplicity, in the sense that the procedure itself does not represent a significant departure from the normal application of the relevant Code Rules. By granting a dispensation to each offeror from the obligation to post a revised offer by Day 46, the Eagle Star procedure avoided the risk of information concerning an increased offer leaking before the deadline (which is a risk associated with bulk printing revised offer documents before announcement) and of that information being used to its advantage by the competing offeror. The obligation to lodge announcements with the Panel in advance eliminated the risk that either offeror might seek to respond to last minute announcements by the other and that an announcement might go out after the deadline.

8.2.3 The disadvantage of the Eagle Star procedure is that it does not provide an opportunity for either offeror to respond to any revised offer which the competing offeror has made on Day 46. This may result in the offeror with the higher bid on Day 45 raising its offer on Day 46 when the competing offeror does not improve its bid (that is the higher offeror effectively bidding against itself). Alternatively, one or both competing offerors may not put forward their best offer in a 'blind auction' on Day 46. This may result in a situation in which a competing offeror is willing to raise its offer further but barred from doing so. This would not only deprive shareholders of an improved offer but might also

jeopardise the objective of an orderly resolution (since the lower offeror might well wish to inform the market that it had been willing to pay more).

8.2.4 Advocates of the Eagle Star procedure may argue that the possibility of a bidder effectively bidding against itself is not inherently offensive, particularly if it produces a higher take-out price for offeree shareholders, and that the Eagle Star procedure is likely to produce just such a higher result. These advocates might draw an analogy between the Eagle Star procedure and a private company auction in which the party submitting the higher fixed price bid by the deadline is successful (subject to considerations such as conditionality and financial resources). There are, of course, many different auction structures. What procedure will produce the highest proceeds is, however, a matter of judgement and will depend upon the circumstances of the particular competitive situation and the strategies of the bidders.

8.2.5 The Eagle Star procedure does not address the possibility of formula offers. If a procedure along the lines of that in Eagle Star were to be built into the Code, guidance would need to be given as to whether or not formula offers are permitted (see (b) below).

(b) Sealed bid procedures (with formula bids)

8.3.1 In the competing offers for Energy Group, the Eagle Star procedure was refined by the Executive to allow for formula offers. The procedure adopted in Energy Group was as follows:

- (i) any sealed bid had to be lodged with the Executive by 4.00pm on Day 46;
- (ii) a sealed bid had to be in cash, or include a cash alternative, of not less than a stated amount;
- (iii) the sealed bid might be at either a fixed or a formula price;
- (iv) a formula offer had to be at least 5p in cash above the competing offeror's cash bid (subject to any stipulated maximum);
- (v) in the case of a formula offer, the offeror could specify a maximum price;
- (vi) the Executive would notify each bidder of the price it was obliged to offer (taking account of any formula offer);
- (vii) the Executive would consult the offeree board with regard to any request made by the lower offeror for a dispensation or suspension of its obligation to post;

- (viii) an extension of two business day was allowed for posting (with a corresponding change to Day 60); and
- (ix) no revision could be made otherwise than in accordance with the sealed bid procedure save in exceptional circumstances.

8.3.2 A similar procedure was adopted in the competing bids for Hyder.

8.3.3 Formula price bids are bids which are expressed as a formula by reference to the competitor's bid. For example, bidder A might bid 5p more than bidder B's bid, subject to a maximum of 100p. If bidder B bids at a fixed price, the outcome depends on whether B has bid more or less than 100p. If bidder B also bids on a formula price basis (i.e. 5p more than A's bid, subject to a maximum of Xp), then the outcome depends on whether B's maximum is more or less than A's 100p maximum offer. The winner's price would be 5p more than the other bidder's maximum, subject to the limit of the winner's maximum. The procedure may provide for the possibility of a re-run if there is a tie.

8.3.4 The principal attraction of a sealed bid procedure allowing formula price bids is that it operates very like an open auction. As in an open auction, the winner is the bidder prepared to offer the highest price, but he is not compelled to pay his maximum price, only a price which exceeds the next highest offer by a specified amount. Thus, formula offers can be expected to produce the same outcome as an open auction but without any extension of the bid timetable.

- 8.3.5 Formula price bids have proved to be controversial in large part because many consider that fixed price bids are generally more likely to lead to a higher price for shareholders. This is a matter of judgement, since the outcome in any particular case will depend on the circumstances and the objectives of the parties themselves.
- 8.3.6 If only fixed price bids were permitted, each competing offeror might bid its top price on the basis that neither would want to have any regrets about the outcome; this would in all likelihood produce a higher price for shareholders than the formula price bidding procedure. Alternatively, the bidders might make their fixed price bids on the basis of what they believed their competitor would be prepared to pay. The stronger bidder will of course be anxious not only not to overpay but also not to be seen to overpay. This could lead to miscalculation, in which case the formula price bidding procedure would in all likelihood lead to the higher price. It is the possibility that the lower bidder might be prepared to pay more than that leads to some of the tactical concerns set out in paragraph 6 concerning what the lower bidder might want to try next.
- 8.3.7 There is no explicit Code basis for ruling out formula offers made unilaterally and publicly as opposed to through a negotiated sealed bid procedure. However, there are obvious dangers in making formula offers on a basis which has not been agreed between the parties: the formula might not work given that it would refer to a competing offer the structure of which the formula offeror would be ignorant (for example, the type of consideration being offered).

- 8.3.8 If both offerors involved in the competitive situation restrict themselves to offering either cash or shares of a class already listed, formula offers can be made with relative certainty. If, however, either offeror reserves the discretion to introduce unlisted securities, there is a significant risk that the result of any formula offer, at least where the procedure does not have the agreement of all the parties, may produce a flawed result. Rule 24.10 requires an estimate of the value of unlisted securities by an appropriate adviser to be contained in the offer document and any subsequent circular. However, in a contested situation, a competing offeror may well not be willing to rely upon the value ascribed to unlisted securities by a competing offeror's financial adviser for the purposes of its formula offer. Even the valuation of loan notes is not free of dispute if no bank guarantee is provided or it is limited (for example, as to principal). In any case, if the economic rights attaching to a security are contingent, they may be incapable of meaningful valuation. An example would be contingent loan notes in which the noteholder's entitlement is linked to the quantum of the proceeds realised on a disposal of a division of the offeree company that is of no interest to the offeror.
- 8.3.9 Sealed bid procedures which involve the Panel opening sealed bids specifying the maximum price which the bidder is willing to pay but which may never be published have proved controversial due to the lack of transparency.
- 8.3.10 Having regard to these considerations, the Code Committee has concluded that sealed bid procedures represent an unattractive means by which to resolve a competitive situation in the absence of a consensus between all the parties. While the Code Committee does not rule out the possibility of the Panel operating a sealed bid procedure with which all the parties are in agreement, the Code Committee would not envisage the Panel imposing such a procedure on

the parties.

Q6 Do you agree that sealed bid procedures (whether or not formula offers are permitted) should only apply if there is consensus between all the parties?

(c) Open auction procedure

8.4.1 An 'open auction' procedure means a set of rules which will permit the competitive bid process which runs up to Day 46 to continue, but on an accelerated and controlled basis, after Day 46. An open auction procedure might work as follows (where a competitive situation involving two competing offerors, A and B, subsists on Day 46):

- (i) any revised offer which either offeror proposes to announce after 5.00pm on Day 45 would have to be lodged with the Panel by 4.30pm on Day 46 and announced by 5.00pm that day;
- (ii) if one of the offerors (say, A) chooses to announce a revised offer as contemplated in paragraph (i), the other offeror (B) would have until 5.00pm on Day 47 (or such other deadline as the Panel may specify) to announce a revised offer;

- (iii) if, however, offeror A does not announce a revised offer by 5.00pm on Day 46, offeror B would not be permitted to revise its own offer after 5.00pm on Day 46;
- (iv) if offeror B announces a revised offer by 5.00pm on Day 47 as contemplated in paragraph (ii), offeror A will likewise have until 5.00pm on Day 48 (or such other deadline as the Panel may specify) to respond;
- (v) this process will continue until one or other offeror fails to announce a revised offer within the time specified;
- (vi) a revised offer need not be recommended at the time of announcement;
- (vii) posting of any revised offer should be postponed until the end of the open auction procedure (with a corresponding change to Day 60); and
- (viii) the Panel would consult the offeree board with regard to any request made by the lower offeror for a dispensation from its obligation to post.

8.4.2 It is unlikely that both bidders will increase their existing offers on Day 46. The bidder with the higher existing offer can instead be expected to stand back and wait to see whether the lower offeror increases its bid (in which case the higher offeror will then be entitled to respond on Day 47). The higher offeror may though choose to increase its offer on Day 46 if the existing bids are close and he wishes to establish a clearer divide between the two offers. In the event that both bidders do bid on Day 46, both would then have the right to respond on Day 47 (and so on). However, a bidder will only be able to increase its offer on Day 47 or any subsequent day if the other bidder has revised its offer on the previous day.

8.4.3 The Code Committee considered whether it should be a requirement of the procedure that any revised offer represent a material improvement in the current value or at least the terms of that offeror's existing offer (for example, the introduction of a cash alternative). The purpose of that requirement would be to ensure that the process was not unduly prolonged. It would then fall to the Panel in each case to form a judgement as to whether a particular increase was material – a question likely to be the subject of significant contention. On balance, the Code Committee has concluded that such a requirement is unnecessary, but that the Panel should have the power to impose a final deadline for making increased offers in the event that the process is unduly protracted. The Panel would take account of any representations made by the board of the offeree company before 'guillotining' the procedure in this way. The Code Committee contemplates that such a guillotine would be employed only rarely where neither offeror was making material improvements to its existing offer and the timetable was therefore being unduly extended.

Q7 Do you agree that it is unnecessary to stipulate that a revised offer made under an open auction procedure represents a material improvement to the bidder's current offer?

8.5 The Code Committee has concluded, on balance, that an open auction process, based on the procedure outlined above, represents the most appropriate method of resolving competitive situations in an orderly fashion. First, the auction process (unlike the Eagle Star procedure) provides each offeror with an opportunity to respond to any revision made by a competing offeror. Secondly, the open auction procedure is transparent and, for this reason, not as susceptible to the controversy which sealed bids (in particular formula offers) have generated in previous transactions. Thirdly, an open auction procedure avoids the practical difficulties associated with the making of formula offers in competitive situations. The open auction procedure should work effectively regardless of the form of consideration being offered.

8.6 Amendment (iv) in Appendix C sets out a new Rule 32.5 providing for the use of an auction procedure established by the Panel to resolve competitive situations.

Q8 Do you agree that an open auction procedure represents the fairest method of resolving a competitive situation?

9. Need for a consensus

- 9.1 It is also necessary to determine whether a particular procedure should only apply where there is consensus among all the parties, or at least the offeree board consents to its application, and what procedure should apply where there is no consensus.
- 9.2 As stated in paragraph 8.3.10 above, the Code Committee has concluded that formula price offers should only be employed in a competitive situation where there is a consensus between the competing offerors and the offeree company. As a general rule, the Panel would always give consideration to any procedure to resolve a competitive situation where there is a consensus among each of the parties to follow that procedure. In the absence of any such consensus, the Panel would adopt the open auction procedure described in paragraph 8.4 above.
- 9.3 The offeree company may object to an open auction procedure on the grounds that it involves an extension of the bid timetable. However, any extension should not be unduly long and the Panel would, in any case, have the discretion to guillotine the procedure. It might also be said that, in the context of a bid timetable already extended by the emergence of a competitive situation, the effect of the further extension will normally be insignificant. The Code Committee does not consider that the application of an open auction procedure should depend on the agreement of both offerors or the offeree board.
- 9.4 Note 2 on the new Rule 32.5 set out in Amendment (iv) in Appendix C provides for a guillotine of the auction procedure in appropriate circumstances.

Q9 Do you agree that the Panel should impose an open auction procedure even if one of the bidders or the board of the offeree company disagrees? If not, what procedure do you believe should apply in the absence of a consensus?

10. Obligation to post

10.1 Note 2 on Rule 2.7 sets out circumstances where there is no need to post an offer. The note addresses the situation of an announced offeror if a competitor has already posted a higher offer. This deals with the situation at the start of an offer timetable (the subject matter of Rule 2) but not towards the end of the timetable as reset by a competing offer.

10.2 There will often be little purpose served by a competing offeror, whose final offer is clearly less attractive, posting that offer. The offeree board may well wish him not to do so because of the potential confusion. However, if the higher offer remains subject to significant conditions or if the competitive situation involves one or more share offers (which are subject to fluctuations in value), the offeree board may well not wish to lose the possibility of the lower offer.

10.3 Note 1 on the new Rule 32.5 set out in Amendment (vi) in Appendix C provides for a dispensation from the obligation to post at the end of the offer timetable, subject to the agreement of the offeree board.

11. Cost/Benefit Implications

- 11.1 The Code Committee believes that these proposals aimed at achieving an orderly resolution of competitive situations, will be of benefit to the parties and to offeree shareholders and should not involve any significant increase in costs.

12. Conclusions

The Code Committee has reached the following conclusions:

- (a) the approach adopted by the Panel in relation to competitive situations subsisting on Day 46 should be provided for in the Rules of the Code;
- (b) the proper objective of the Panel (and the Code) should be to achieve an orderly resolution of a competitive situation subsisting on Day 46;
- (c) given the tactical opportunities open to a competing offeror after Day 46 when the normal rules of the Code apply, the Code needs to be amended so as to close off those opportunities with a view to ensuring that an offeror either participates in the procedure provided in the Code

for the resolution of the competitive situation or stands aside after Day 46;

- (d) in the context of a competitive situation, the Panel is justified in barring a bidder from purchasing shares at above its offer price after Day 46 even though its own offer has lapsed, since that restriction is necessary to bring the competitive situation to an orderly resolution;
- (e) sealed bid procedures (whether or not formula bids are permitted) should only apply if there is consensus between all the parties;
- (f) the fairest method by which to resolve competitive situations (in the absence of consensus of all parties to follow a different procedure) is to impose an open auction procedure along the lines of that outlined in paragraph 8.4 above; and
- (g) the application of the open auction procedure should not be contingent upon the consent of the offeree board or the agreement of both bidders.

APPENDIX A

PANEL STATEMENTS ON:

EAGLE STAR HOLDINGS PLC

THE ENERGY GROUP PLC

HYDER PLC

1983/13

STATEMENT

OFFERS BY ALLIANZ VERSICHERUNGS-AG

AND

BAT INDUSTRIES PLC

FOR

EAGLE STAR HOLDINGS PLC

The full Panel under the Chairmanship of Martin Jacomb met today to consider the position which may arise in connection with the above competitive offers. There has not in the past been any comparable situation where two competing bidders have both remained in the field at the end of the normal Code time limits. These in effect require that no offer may be revised after the 46th day (in this case 30 December 1983) after the

posting of the later of the two competing offers. The Panel considers, however, that the existing Rules can effectively govern the present situation with very minor amendment.

In these circumstances the Panel has informed the parties that in accordance with Rule 22 of the Code neither offer may be increased after 30 December 1983. The only minor amendment to the normal procedure which the Panel has allowed is that whereas normally an offer must be posted by the end of the 46th day, in this case any offer by either offeror must be announced before 5.00pm on the 46th day. Any offer on the 46th day must be lodged with the Panel at least 30 minutes before it is announced. The final date for posting any offer is 4 January 1984 (2 business days after the 46th day) and 18 January 1984 will become "the 60th day".

Exceptions to the normal timetable have been permitted in the past where a single offeror has wished to increase an offer after the 46th day to secure the recommendation of the offeree board. The Panel considers that such an exception is not appropriate where there are competing offers. Therefore, no further revisions will be permitted unless other exceptional circumstances arise.

Since any offer on the 46th day will be a final offer neither offeror may thereafter purchase shares at a price which would, under the Code, require it to revise its offer.

21 December 1983

TEXAS UTILITIES COMPANY ("TEXAS")

PACIFICORP/

THE ENERGY GROUP PLC ("ENERGY")

The full Panel met on 29 April 1998 to consider an appeal by PacifiCorp against a ruling of the Panel Executive regarding the procedure which should apply in connection with Rule 32.1 in relation to possible revisions of the competing offers for Energy by wholly-owned subsidiaries of Texas and PacifiCorp. The Panel Executive had ruled that a procedure which permitted formula sealed bids would achieve the fairest and most orderly framework for possible revisions to the competing offers. The Panel upholds the ruling of the Panel Executive.

BACKGROUND

PacifiCorp and Texas have each announced and subsequently increased an offer for Energy which currently remains open for acceptance. Neither offer has yet been declared final and may therefore be increased or otherwise revised. Rule 32.1 of the Code provides that the last date for posting a revised offer document is Day 46 of the timetable which is established by the posting by the later competing offeror of its first offer document. There has only been a handful of cases since the introduction of the Code in which two competing offers have remained capable of revision as Day 46 approached. In only one of those cases has the appropriate procedure been considered by the full Panel. In 1983 competing offers by Allianz Versicherungs-AG and BAT Industries Plc for Eagle Star

Holdings Plc were considered, but, even in that case, the proposed procedure was not ultimately tested. The Panel decided, in the circumstances of that case, that only minor amendments to the normal procedure were necessary. It ruled that any offer had to be announced before 5.00pm on Day 46, having been lodged with the Panel Executive at least 30 minutes previously. The final date for posting any such increased offer would have been two business days after Day 46.

In the present case the Panel Executive discussed the Eagle Star decision with each of the parties in order to establish whether there were any objections to the same procedure applying in the present case. As a result of these discussions, it became apparent that it would not be possible to reach consensus. In view of the fact that persons might be dealing in the market in the expectation that Day 46 would ordinarily have been Sunday, 26 April, the Panel Executive issued Panel Statement 1998/7 on 23 April extending the offer timetable (including Day 46) to allow time to establish a fair and orderly procedure for possible revisions of the competing offer for Energy.

Following further discussions with the parties, the Panel Executive ultimately ruled in favour of a form of sealed bid procedure under which each offeror would be allowed, if it so wished, to state in its sealed bid that it would offer a certain amount more cash than the other offeror subject to a specified maximum amount (a "Formula Sealed Bid"). PacifiCorp appealed against the ruling of the Panel Executive, contending that either the procedure strictly envisaged by Rule 32.1 should apply (i.e. that any revised offer must be announced and posted by midnight on Day 46) or any sealed bid procedure should allow the competing offerors to specify only a fixed price.

THE PANEL'S DECISION

The Panel is concerned to ensure, as effectively as it can, that the Code should be operated in such a way as to provide an orderly framework under which takeovers are conducted. Whilst the circumstances of any future case may well be different, in this particular case the Panel considers that no revision to the competing offers for Energy may be announced after 3.30pm on 1 May except by means of the following sealed bid procedure.

1. Any sealed bid must be of at least 840p in cash, although, in addition to the cash offer, shares or other forms of consideration may be made available. A bid may be at a fixed price but, if it is a Formula Sealed Bid, the amount by which it is expressed to exceed the other offeror's cash bid, subject to any stated maximum price per Energy share, must also be in cash and must be at least 5p. The bid must incorporate the full terms and conditions of the offer and include a cash confirmation statement from the offeror's financial adviser.
2. Each competing offeror must lodge any sealed bid with the Panel Executive not later than 4.00pm on Friday, 1 May. No further revisions will be permitted thereafter except with the permission of the Panel, which will only be given in wholly exceptional circumstances.
3. The Panel Executive will, as soon as practicable on 1 May, notify both offerors of the outcome of the sealed bid procedure and, having taken account of the effect of any Formula Sealed Bids, will confirm to each the level at which it will be required to announce its final offer. Each offeror must then immediately announce its final offer.

4. If, following any such announcement on 1 May, an offeror seeks a dispensation from or suspension of its obligation to post its offer on the basis that its offer was clearly the lower of the two, the Panel Executive will consult Energy in considering whether to grant any such dispensation or suspension.

5. Subject to paragraph 4 above, the final day for posting any such final offer will be Tuesday, 5 May and the final day on which either offer will be capable of becoming unconditional as to acceptances will be 14 days thereafter – i.e. on Tuesday, 19 May.

29 April 1998

2000/13

OFFERS BY
ST DAVID CAPITAL PLC ("SDC")
AND
WPD LIMITED ("WPD")
FOR
HYDER PLC ("HYDER")

The Panel met on 15 August to hear an appeal by SDC against the Executive's ruling that WPD should be allowed to proceed to announce and post an increased offer of 365p per share. The 365p per share bid was the only sealed bid submitted by 1.00 p.m. on 11 August 2000 (Day 46 of the offer timetable) under the sealed bids procedure previously

announced in Panel Statement 2000/10. This appeal arose after WPD's revised offer had failed to be announced by 4.30 p.m., as specified in the sealed bids procedure.

SDC is advised by UBS Warburg ("Warburgs"). WPD is advised by Schroder Salomon Smith Barney ("SSSB"). JP Morgan and Dresdner Kleinwort Benson are joint Rule 3 advisers to the Hyder board.

Background to the competitive situation

On 28 March Hyder made an announcement that it was in discussions which might lead to an offer. On 18 April SDC (a company formed by Nomura International's Principal Finance Group) announced a recommended cash offer of 260p per Hyder share. SDC's offer document was posted on 28 April.

On 30 April WPD announced that it was considering making a competing offer for Hyder. On 31 May WPD announced a cash offer of 300p per share. WPD's offer document was posted on 26 June. This reset the Code timetable for the purposes of both offers.

The SDC offer was subject to clearance by the Secretary of State under the Fair Trading Act. Clearance was obtained on 7 June. The WPD offer was subject to regulatory clearance by the European Commission and in the UK. As part of its proposals, WPD had entered into arrangements with United Utilities Plc ("UU") under which UU would purchase certain businesses of Hyder and provide operation and maintenance services to Dwr Cymru, Hyder's water utility business. WPD's offer was conditional on the UU arrangements not constituting a water merger under the Water Industry Act.

Concerns that the WPD offer might not proceed due to regulatory uncertainties meant that the Hyder board did not initially feel able to recommend WPD's offer.

On 1 August (Day 36) SDC announced an increased cash offer of 320p. The Hyder board

recommended SDC's increased offer. On the same day WPD announced an increased cash offer of 340p. On the following day (2 August), the Secretary of State announced his decision that the UU arrangements did not constitute a water merger. This removed the last material regulatory uncertainty affecting WPD's offer. The Hyder board recommended WPD's 340p offer on 7 August.

On 9 August (Day 44) SDC announced an increased cash offer of 360p. By this time, the parties were in discussion with the Executive concerning the sealed bids procedure as described below. The sealed bids procedure was announced on 10 August (Day 45) at which time SDC's 360p offer was the highest bid.

Background to the sealed bids procedure

All parties agreed that the competitive bid procedure should, if possible, be brought to a conclusion on Day 46 (11 August).

Under the normal Code timetable, Day 46 is the last day on which an offeror is permitted to increase its offer. Normally, and in the absence of a sealed bids procedure, any revised offer document would need to be posted by midnight on Day 46 and, accordingly, would need to be prepared and printed ahead of this time, in readiness for posting.

Following the approach in previous cases involving competing cash offers, the Executive had discussed with all the parties the practical issues which could arise at Day 46. These discussions had commenced around Day 37 (2 August) and all parties had agreed in principle that there should be a sealed bid procedure and the desirability of achieving finality and certainty for Hyder and its shareholders on Day 46.

There were differing views concerning the respective merits of fixed and formula bids. Formula bids allow each bidder to bid a variable amount (up to its own stipulated maximum) over and above the other party's offer. A similar difference of view on the

question of fixed and formula bids had been the subject of a previous appeal to the full Panel in 1998 in connection with competing offers for The Energy Group Plc ("Energy Group"). In that case, the full Panel had ruled that bids, both formula and fixed, should be permitted as announced at the time in Panel Statement 1998/8.

By 9 August (Day 44) all parties had accepted the Executive's ruling that bids, both formula and fixed, should be permitted following the approach in the Energy Group case. The Executive was aware that neither SDC nor Hyder was in favour of formula bids. No appeal was made against the Executive's ruling.

Procedures for the sealed bids

As part of the process leading to implementation of the sealed bids procedure, formal rules and procedures (the "Sealed Bid Procedures") were settled between the parties and the Executive.

The following stipulations included in the Sealed Bids Procedures are of principal relevance to this appeal:

- "No new or revised offer for Hyder may be announced by either SDC or WPD after 4.30 p.m. on 10 August, except in accordance with the following sealed bids procedure or with the permission of the Panel, which will only be given in wholly exceptional circumstances."
- "Each competing offeror must lodge its sealed bid, if any, with the Panel Executive by hand not later than 1.00 p.m. on 11 August. No further revisions will be permitted thereafter...."
- "Any sealed bid will not be capable of withdrawal."
- "A sealed bid must be submitted on the prescribed form together with a Rule 2.5

announcement in terms (other than price) reviewed in advance by the Panel and the Rule 3 advisers....."

- "The bid may be at a fixed or at a formula price."
- "The Panel Executive will, as soon as practicable, having taken account of the effect of any formula bids, confirm to each offeror whether it is the higher or the lower offeror and the amount of its bid. The Panel Executive will also inform the Rule 3 advisers of the level at which the higher offeror will be required to announce the final offer. The higher offeror must announce its final offer by 4.30 p.m. on Friday 11 August or if later one hour after the Panel Executive notifies that bidder that it is the higher bidder...."
- "The final day for posting any increased offer will be Wednesday 16 August and Day 60 will be Wednesday 30 August."

Events prior to 4.30 p.m. on Day 46 (11 August)

On 11 August WPD (but not SDC) submitted a sealed bid before the 1.00 p.m. deadline set by the Sealed Bid Procedures. WPD was notified by the Executive at approximately 1.20 p.m. that it was the highest bidder at a price of 365p and accordingly should proceed to announce its offer.

Ahead of the deadline for the submission of sealed bids, the Executive had received and reviewed the form of announcement proposed to be issued by WPD in the event that WPD were to be the higher offeror. A form of announcement by SDC had similarly been reviewed by the Executive. The form of this announcement (the "Draft Announcement") accompanied WPD's sealed bid as required under the Sealed Bid Procedures.

Shortly after 3.00 p.m. on the afternoon of 11 August, the Executive was notified by SSSB that WPD required to make certain changes to the Draft Announcement. These

changes related to new arrangements agreed between WPD and UU, and did not affect the terms of the offer. However, WPD's Draft Announcement contained a statement to the effect that its arrangement with UU remained as previously announced. This statement had by then become incorrect. Moreover, the Draft Announcement had been prepared in the form of a recommended increased offer announcement, and the announcement, and all changes, therefore required formal approval from the Hyder board.

The new arrangements between WPD and UU were only documented between 2.30 p.m. and 3.30 p.m. on 11 August. The revised wording for the relevant section of the Draft Announcement was first transmitted by SSSB (for WPD) to DKB (for Hyder) at around 4.00 p.m. This revised announcement was ready for issue to the Stock Exchange shortly after 4.00 p.m. but, following discussion between SSSB and DKB, its release was embargoed pending formal confirmation by DKB that the changes were satisfactory to Hyder.

At approximately 4.15 p.m., the Executive communicated with SSSB to chase the announcement. At this point the Executive emphasised that an announcement should go out immediately. The omission of the section concerning the new arrangements with UU was discussed and, as a result, a further announcement was prepared by SSSB. However, the release of this announcement was also held up pending DKB's confirmation that it was satisfactory to Hyder. Accordingly no announcement was issued before 4.30 p.m.

Events after 4.30 p.m. on Day 46 (11 August)

DKB confirmed Hyder's approval to an announcement soon after 4.30 p.m. The approved announcement was received by the Company Announcements Office at 4.52 p.m. but, for the reasons following, was not released.

At 4.35 p.m. the Executive received a call from Warburgs asserting that, since WPD had

not announced its offer by 4.30 p.m., it had missed the deadline. Warburgs requested that no announcement on behalf of WPD be released. The Executive notified SSSB of Warburgs objection.

Pending resolution of Warburgs objection, it was not appropriate for WPD's announcement to be issued, notwithstanding that DKB had subsequently communicated the Hyder board's approval to the revised announcement.

During the late afternoon and evening of 11 August, the Executive invited and heard representations from all parties. During the course of this process, Warburgs (for SDC) reiterated their view that WPD should be prohibited from proceeding with its revised offer by reason of its failure to meet the 4.30 p.m. deadline for an announcement. As a result, Warburgs contended that the existing offer by SDC at 360p per share was the highest offer, and was the only offer which should be permitted to proceed.

In discussions with the Executive on the evening of 11 August, Warburgs proposed that SDC would be prepared to increase its own offer to 365p (notwithstanding that SDC had not made any increased offer under the sealed bids procedure) provided that the Executive ruled in SDC's favour.

Having heard representations from all parties, the Executive ruled that WPD should not be prevented from proceeding with its revised offer despite the delay in the announcement. Warburgs gave formal notice to the Executive of an appeal against the Executive's ruling. Following notification by Warburgs of this appeal, the Executive issued Panel Statement 2000/11 confirming the pending appeal.

Although, as set out above, SDC had been opposed to the inclusion of a formula price (as well as a fixed price) procedure, and had contended that a fixed price procedure alone was appropriate, nevertheless SDC had accepted the proposed sealed bid procedure (including both a formula and a fixed price procedure). Warburgs had confirmed that SDC would not appeal this point. SDC, however, having taken part in setting up the sealed bid procedure, took no further part in the bidding on Day 46 until several minutes

after 4.30 p.m.

SDC confirmed at the hearing that its decision not to submit a sealed bid at 1.00 p.m. was based on commercial considerations. As a result, SDC prima facie lost the auction.

Substance of the appeal: rulings sought by SDC

SDC sought a ruling that WPD should be prohibited from announcing any new or revised offer. In support of its case, SDC made the following proposals:

1. SDC confirmed its preparedness to increase its offer to 365p if the Panel were to prohibit WPD from announcing any new or revised offer.
2. Alternatively, SDC proposed that the Sealed Bid Procedure should be re-run, but on a basis under which only fixed price offers (but not formula offers) would be allowed. SDC proposed that any such offer should be equal to or greater than 365p per share and on this basis committed to submit a sealed bid of more than 365p.

Decision

The central issue which the Panel therefore had to resolve was the effect of WPD's failure to announce its revised bid by 4.30 p.m. as required by the Sealed Bid Procedures. It was contended, on behalf of SDC, that the failure resulted in the revised bid being invalidated. WPD, however, contended that it did not have this effect.

It was, in the view of the Panel, unfortunate that the revised offer was not announced, as apparently it could have been, before 4.30 p.m; and it appears to the Panel that the financial adviser to WPD was not blameless for this failure to meet the deadline. Nevertheless the Panel is of the view that, whereas the 1.00 p.m. deadline had to be

strictly applied, the 4.30 p.m. deadline was a deadline of considerably lesser significance, and that it did not call for the same degree of strict application. On the facts arising in this case, it was unlikely that any prejudice would have been caused to any party by the delay between 4.30 p.m. and 4.52 p.m. when the announcement by WPD was finally received by the Company Announcements Office.

One of the main principles of the Code is that primary regard should be had to the underlying purposes involved; and in the view of the Panel that principle applies to a sealed bid procedure as it applies to the Code. Part of that purpose is to ensure that parties to a takeover do not have their legitimate expectations frustrated by a technical application of the Code (or of the sealed bid procedure). In the circumstances of this case it appears to the Panel that it would be unfair, by reason of what happened, to interpret the procedure so as to invalidate WPD's improved offer.

Accordingly, the Panel is of the view that WPD should now proceed as soon as practicable to announce and post its revised bid and that, in accordance with the terms of the Sealed Bid Procedures, SDC is prohibited from revising its existing 360p offer. The dates on which the Code days will fall will need to be re-considered. For example, the final day for posting the revised offer will now have to be later than Wednesday 16 August (as provided for in the Sealed Bid Procedures); and other subsequent dates will also need to be re-considered. This should now be undertaken by the Executive in consultation with WPD and Hyder and their respective advisers.

Accordingly it is in these circumstances that this appeal is dismissed.

18 August 2000

APPENDIX B

RULE 32. REVISION

32.1 OFFER OPEN FOR 14 DAYS AFTER REVISION

If revised, an offer must be kept open for at least 14 days following the date on which the revised offer document is posted. Therefore, no revised offer document may be posted in the 14 days ending on the last day the offer is able to become unconditional as to acceptances.

NOTES ON RULE 32.1

1. Announcements which may increase the value of an offer

Where an offer involves an exchange of equity or potential equity, the announcement by an offeror of trading results, profit or dividend forecasts, asset valuations, merger benefits statements or proposals for dividend payments may have the effect of increasing the value of the offer. An offeror will not, therefore, normally be permitted to make such announcements after it is precluded from revising its offer. If an announcement of trading results and/or dividends would normally be made in accordance with the offeror's usual timetable during the offer period, the Panel must be consulted at the earliest opportunity and an offeror will not be permitted to make a no increase statement as defined in Rule 32.2 prior to the release of either of the above announcements.

2. *When revision is required*

An offeror will normally be required to revise its offer if it, or any person acting in concert with it, purchases shares at above the offer price (see Rule 6) or it becomes obliged to introduce a cash offer under Rule 11 or to make a cash offer, or to increase an existing cash offer, under Rule 9.

3. *When revision is not permissible*

Since an offer must remain open for acceptance for 14 days following the date on which the revised offer document is posted, an offeror will generally not be able to revise its offer, and must not place itself in a position where it would be required to revise its offer, in the 14 days ending on the last day its offer is able to become unconditional as to acceptances. Nor must an offeror place itself in a position where it would be required to revise its offer if it has made a no increase statement as defined in Rule 32.2.

4. *Triggering Rule 9*

When an offeror, which is making a voluntary offer either in cash or with a cash alternative, makes an acquisition which causes it to have to extend a mandatory offer under Rule 9 at no higher price than the existing cash offer, the change in the nature of the offer will not be viewed as a revision (and will thus not be precluded by an earlier no increase statement), even if the offeror is obliged to waive any outstanding condition, but such an acquisition can only be made if the offer can remain open for acceptance for a further 14 days following the date on which the amended offer document is posted.

**31.6 FINAL DAY RULE (FULFILMENT OF ACCEPTANCE
CONDITION, TIMING AND
ANNOUNCEMENT)**

- (a) Except with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day the initial offer document was posted. The Panel's consent will normally only be granted:-
- (i) if a competing offer has been announced (in which case both offerors will normally be bound by the timetable established by the posting of the competing offer document); or
 - (ii) if the board of the offeree company consents to an extension; or
 - (iii) as provided for in Rule 31.9; or
 - (iv) if the offeror's receiving agent requests an extension for the purpose of complying with Note 7 on Rule 10.
- (b) For the purpose of the acceptance condition, the offeror may only take into account acceptances or purchases of shares in respect of which all relevant documents (as required by Notes 4 and 5 on Rule 10) are received by its receiving agent before the last time for acceptance set out in the offeror's relevant document or announcement. This time must be no later than 1.00 pm on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended). In the event of an extension with the consent of the Panel in circumstances other than those set out in paragraphs (a) (i) to (iii) above, acceptances or purchases in respect of which relevant documents are received after 1.00 pm on the relevant date may only be taken into

account with the agreement of the Panel, which will only be given in exceptional circumstances.

- (c) Except with the consent of the Panel, on the 60th day (or any other date beyond which the offeror has stated that its offer will not be extended) an announcement should be made by 5.00 pm as to whether the offer is unconditional as to acceptances or has lapsed. Such announcement should include, if possible, the details required by Rule 17.1 but in any event must include a statement as to the current position in the count. (See Note 2.)

NOTES ON RULE 31.6

1. Extension of offer under Rule 31.6(a)

It should be noted that the effect of Rule 31.6(a) is that, unless the offer is unconditional as to acceptances by midnight on the final closing date (or the Panel gives permission for the offer to be extended), the offer will lapse. When, however, there is a Code matter outstanding on the final closing date, it may be inappropriate for the offer to become or be declared unconditional as to acceptances or to lapse at that time. In such a case, the Panel may, in addition to the circumstances set out in Rule 31.6(a), give permission for the offer to be extended, but with no extension of the time by which all relevant documents in respect of acceptances, withdrawals and purchases must be received for the purpose of the acceptance condition, as referred to in Rule

31.6(b) and Rule 34.

2. *Rule 31.6(c) announcement*

Under Rule 31.6(c), an announcement as to whether the offer is unconditional as to acceptances or has lapsed should normally be made by 5.00 pm on the final closing date. This requirement should not be reflected in the terms of the offer pursuant to Rule 24.6, but, if there is any question of a delay in the announcement required by Rule 31.6, the Panel should be consulted as soon as practicable. Only in exceptional circumstances will the Panel agree to an offeror's request that this announcement may be made after 5.00 pm.

3. *The Competition Commission and the European Commission*

If there is a significant delay in the decision on whether or not there is to be a reference or initiation of proceedings, the Panel will normally extend "Day 39" (see Rule 31.9) to the second day following the announcement of such decision with consequent changes to "Day 46" (see Rule 32.1) and "Day 60".

35.1 DELAY OF 12 MONTHS

- (a) Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-
- (i) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company); or
 - (ii) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer.
- (b) The restrictions in this Rule may also apply where a person, having made an announcement which, although not amounting to the announcement of an offer, raises or confirms the possibility that an offer might be made, does not announce a firm intention either to make, or not to make, an offer within a reasonable time thereafter.

This applies irrespective of the precise wording of the announcement and the reason it was made. For example, it is relevant in the case of an announcement that a person is "considering his options" if, in all the circumstances, those options may reasonably be understood to include the making of an offer. However, the Panel envisages that this provision will only be applied occasionally and usually only if the Panel is persuaded by the potential offeree company that the damage to its business from the uncertainty outweighs the disadvantage to its shareholders of losing the

prospect of an offer.

The question as to what is "a reasonable time" has to be determined by reference to all the circumstances of the case: the stage which the offeror's preparations had reached at the time the announcement was made is likely to be relevant.

NOTE ON RULES 35.1

When dispensations may be granted

- (a) *The Panel will normally grant consent under this Rule when:-*
- (i) *the new offer is recommended by the board of the offeree company. Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement; or*
 - (ii) *the new offer follows the announcement of an offer by a third party for the offeree company; or*

(iii) *the previous offer period ended in accordance with Rule 12.2 and the new offer follows the giving of clearance by the Competition Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation (EEC) 4064/89. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or*

(iv) *the new offer follows the announcement by the offeree company of a "whitewash" proposal (see Note 1 of the Notes on Dispensations from Rule 9) or of a reverse take-over (see Note 2 on Rule 3.2) which has not failed or lapsed or been withdrawn.*

(b) *The Panel may also grant consent in circumstances in which it is likely to prove, or has proved, impossible to obtain material regulatory clearances relating to an offer within the Code timetable. The Panel should be consulted by an offeror or potential offeror as soon as it has reason to believe that this may become the position.*

APPENDIX C

Possible Code amendments to achieve finality and to provide for an auction procedure

Amendment (i)

Amend Rule 31.6(a)(i) to read as follows:

"(i) in a competitive situation (see Note 4 below)"

Add a new Note 4 as follows:

"4. Competitive situations

If a competing offer has been announced, both offerors will normally be bound by the timetable established by the posting of the competing offer document. In addition, the Panel will extend 'Day 60' for the purposes of any procedure established by the Panel in accordance with Rule 32.5.

The Panel will not normally grant its consent under Rule 36.1.6(a)(ii) in a competitive situation unless its consent is sought before the 46th day following the posting of the competing offer document".

Amendment (ii)

Note (a) on Rule 35.1. Amend the second sentence of (i) as follows:

"Such consent will not normally be granted within 3 months of the lapsing of an earlier offer in circumstances where the offeror either was prevented from revising or extending its previous offer as a result of a no increase statement or a no extension statement or was one of two or more competing offerors whose offers lapsed with combined acceptances of less than 50% of the voting rights of the offeree company; or"

Amendment (iii)

Add a new Rule 35.4:

"35.4 RESTRICTIONS ON DEALINGS BY A COMPETING OFFEROR WHOSE OFFER HAS LAPSED

Except with the consent of the Panel, where an offer has been one of two or more competing offers and has lapsed, neither that offeror, nor any concert party of that offeror, may acquire shares in the offeree company on terms better than those made available under its lapsed offer until each of the competing offers has either been declared unconditional in all respects or has itself lapsed. For these purposes, the value of the lapsed offer shall be calculated as at the day the offer lapsed."

Amendment (iv)

Add a new Rule 32.5

"32.5. COMPETITIVE SITUATIONS

If a competitive situation continues to exist in the later stages of the offer period, the Panel will normally require revised offers to be published in accordance with an auction procedure, the terms of which will be determined by the Panel. That procedure will normally require final revisions to competing offers to be announced by the 46th day following the posting of the competing offer document but enable an offeror to revise its offer within a set period in response to any revision announced by a competing offeror on or after the 46th day. The procedure will not normally require any revised offer to be posted before the expiry of a set period after the last revision to either offer is announced. The Panel will consider applying any alternative procedure which is agreed between competing offerors and the board of the offeree company."

Add notes to new Rule 32.5

"1. Dispensation from obligation to post

The Panel will normally grant a dispensation from the obligation to post a revised offer, which is lower than the final revised offer announced by a competing offeror, when the board of the offeree company consents."

"2. Guillotine

The Panel may impose a final time limit for announcing revisions to competing offers for the purposes of any procedure established in accordance with this Rule taking into account representations by the offeree board of the offeree company, the revisions previously announced and the duration of the procedure."

APPENDIX D

Questions for Consultation

- 1. Do you agree that the objective of achieving finality and an orderly resolution of a competitive situation is of paramount importance?**

- 2. Do you agree that achieving an orderly resolution should be more important than achieving finality by a fixed time such as Day 46?**

- 3. Do you agree that each of the actions set out in paragraph 6.1 would compromise the achievement of finality and the objective of an orderly resolution of the competitive situation?**

- 4. Do you consider the changes to Rule 31.6 and Rule 35.1 proposed in paragraph 7.2.1 would achieve the purpose of closing off the tactical opportunities open to a competing bidder after Day 46 (or after the completion of any open auction procedure of the kind described in paragraph 8.4)?**

- 5. Do you consider that a restriction on market purchases by a competing offeror whose bid has lapsed would be justified?**

- 6. Do you agree that sealed bid procedures (whether or not formula offers are permitted) should only apply if there is consensus between all the parties?**

- 7. Do you agree that it is unnecessary to stipulate that a revised offer made under an open auction procedure represents a material improvement to the bidder's current offer?**

- 8. Do you agree that an open auction procedure represents the fairest method of resolving a competitive situation?**

- 9. Do you agree that the Panel should impose an open auction procedure even if one of the bidders or the board of the offeree company disagrees? If not, what procedure do you believe should apply in the absence of a consensus?**