

THE TAKEOVER PANEL

PRACTICE STATEMENT NO. 22

IRREVOCABLE COMMITMENTS, CONCERT PARTIES AND RELATED MATTERS

1. Introduction

- 1.1 This Practice Statement describes the way in which the Executive normally interprets and applies certain provisions of the Takeover Code (the “Code”) to irrevocable commitments to accept an offer which include an undertaking to vote the shares to which the irrevocable commitment relates in a particular way.
- 1.2 The principal issues under the Code that are considered in this Practice Statement are whether, as a result of entering into an irrevocable commitment which includes a voting undertaking:
- (a) the shareholder should be considered to be “acting in concert” with the offeror for the purposes of Note 9 on the definition of “acting in concert”;
 - (b) the offeror should be considered to be “interested” in the interests in shares to which the irrevocable commitment relates; and
 - (c) the offeror or shareholder should be required to make a disclosure.
- 1.3 While this Practice Statement refers only to irrevocable commitments to accept an offer, similar reasoning will apply to irrevocable commitments:
- (a) not to accept an offer;

- (b) to procure that any other person accepts or does not accept an offer; and
- (c) to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree company (or of its shareholders) in the context of an offer, including a resolution to approve or to give effect to a scheme of arrangement.

Where a shareholder enters into an irrevocable undertaking with the offeree company, for example, not to accept an offer or to procure that another person does not accept an offer, references in this Practice Statement to Note 9 on the definition of “acting in concert” would be relevant in determining whether the shareholder is “acting in concert” with the offeree company.

2. Concert parties and irrevocable commitments

2.1 Note 9 on the definition of “acting in concert” provides as follows:

“9. *Irrevocable commitments*

A person will not normally be treated as acting in concert with an offeror or the offeree company by reason only of giving an irrevocable commitment. However, the Panel will consider the position of such a person in relation to the offeror or the offeree company (as the case may be) in order to determine whether he is acting in concert if ... :

(a) the terms of the irrevocable commitment give the offeror or the offeree company (as the case may be) either the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to the shares or general control of them; ...

...”.

2.2 Entering into an irrevocable commitment which relates only to acceptance of an offer will not therefore, of itself, normally result in a shareholder being considered to be acting in concert with an offeror.

2.3 Although the precise wording of a voting undertaking contained in an irrevocable commitment to accept an offer may vary from case to case, it generally comprises, among other things, an undertaking to vote the relevant shares in accordance with the instructions of the offeror in the context of:

- (a) resolutions required to implement its offer; and
- (b) resolutions which, if passed, might result in a condition of its offer not being fulfilled or which might impede or frustrate the offer in some way (for example, by approving a competing scheme of arrangement).

2.4 This raises the question of whether the inclusion of a voting undertaking of this kind in an irrevocable commitment to accept an offer should be regarded as giving the offeror “*the right ... to exercise or direct the exercise of the voting rights attaching to the shares or general control of them*” for the purposes of paragraph (a) of Note 9 on the definition of “acting in concert”.

2.5 The Executive considers that, in entering into a voting undertaking of the type described above, a shareholder is doing no more than what is logically consistent with his irrevocable commitment to accept the offer, since he is undertaking to vote his shares in the context of that offer in a manner which is supportive of his acceptance decision. As such, the Executive would not normally consider the offeror to have acquired a right to exercise or direct the exercise of the voting rights attaching to, or general control of, the relevant shares for the purposes of Note 9 on the definition of “acting in concert”, provided that the voting undertaking is:

- (a) given in the context of an irrevocable commitment to accept the offer;
- (b) limited to the duration of the offer or, if earlier, until the irrevocable commitment otherwise ceases to be binding; and
- (c) limited to matters which relate to ensuring that its offer is successful.

- 2.6 Consequently, a shareholder which enters into an irrevocable commitment to accept an offer which includes a voting undertaking that satisfies the criteria above would not normally be considered by the Executive to be acting in concert with the offeror.

3. Interests in securities and irrevocable commitments

- 3.1 The definition of “interests in securities” provides, among other things, as follows:

“... a person will be treated as having an interest in securities if:-

...

(2) he has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them;

...

(5) in the case of Rule 5 only, he has received an irrevocable commitment in respect of them.”.

- 3.2 Where an offeror has received an irrevocable commitment to accept its offer, that will not, of itself, result in the offeror being considered to be interested in the shares to which the irrevocable commitment relates (other than for the purposes of Rule 5). However, where an irrevocable commitment includes a voting undertaking, the question arises of whether this gives the offeror “*the right ... to exercise or direct the exercise of the voting rights attaching to [the shares] or general control of them*” for the purposes of paragraph (2) of the definition of “interests in securities”.

- 3.3 For the same reasons as are described in paragraph 2.5 in the context of the definition of “acting in concert”, and provided that the three criteria referred to in paragraphs 2.5(a) to (c) are satisfied, the Executive would not normally consider an offeror which enters into an irrevocable commitment including a voting undertaking with a shareholder to be interested in the shares to which the irrevocable commitment relates (other than for the purposes of Rule 5,

pursuant to paragraph (5) of the definition of “interests in securities”).

4. Disclosure

4.1 Paragraph (a) of the definition of “dealings” provides, among other things, that:

“A dealing includes ... :

(a) the acquisition or disposal ... of the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to securities, or of general control of securities;

...”.

4.2 In applying paragraph (a) of the definition of “dealings”, neither the procuring of the voting undertaking by the offeror, nor the entering into of such a voting undertaking by the shareholder, would amount to a dealing and neither action would therefore need to be disclosed under Rule 8.1 or Rule 8.3 provided that the three criteria referred to in paragraphs 2.5(a) to (c) above are satisfied. However, the procuring by an offeror of the irrevocable commitment to accept its offer would be required to be disclosed under Rule 8.4 in the normal way.

Practice Statements are issued by the 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 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.

10 July 2008