

THE TAKEOVER PANEL

1. One of the objectives of the City Code was to prevent the directors of companies from announcing offers and then without adequate reason withdrawing from them - thus creating a false market and often leading to unfair treatment as between shareholders of the offeree company. The Panel has therefore been and remains very reluctant to agree to the withdrawal of an offer that has been announced. In its statement, dated 15th January 1974, the Panel indicated that a change in economic, industrial or political circumstances would not normally justify the withdrawal of an announced offer. To justify unilateral withdrawal, the Panel would normally require some circumstance of an entirely exceptional nature, and amounting to something of the kind that would frustrate a legal contract. This statement indicated how existing policy, which regarded the withdrawal of an announced offer as an exceptional matter, was to be interpreted in current circumstances. Directors, in announcing an offer and the terms and conditions on which it will be made, must have carefully considered the matter and must fully intend to go through with the operation.

Conditional Offers

2. Rule 8 of the Code states that the announcement of an offer must indicate any conditions to which the offer is subject and the Panel has recently indicated that this should include, where applicable, what are usually described as the "normal" conditions, viz.,

- (i) Percentage acceptance by offeree shareholders (normally 90% at the outset).
- (ii) A resolution of the shareholders of the offeror company.
- (iii) Stock Exchange consent to listing of any new capital.

3. Announcements of offers should not include conditions which depend on subjective judgments by directors or the fulfilment of which are in the hands of the directors since these create unnecessary uncertainty; nor should they include a condition that, if the general economic situation deteriorates, the directors can withdraw the offer. It would normally be acceptable in an announcement for an offer to be expressed as being conditional on statements or estimates being appropriately verified.

Monopolies Commission References

4. The Panel believes that in future the best course would be for an offer to be withdrawn on a reference of the proposed merger to the Monopolies and Mergers Commission. This would mean that, in cases of the type that come within the statutory provisions for possible reference to the Commission the offeror should indicate, as a condition of the offer, that the offer would be withdrawn if there was a reference. Such withdrawal would not prevent the offer, or another offer, being made if the Monopolies Commission gave the merger a clearance.

Shareholders' Approval

5. There remains the question of the position of directors and shareholders where a resolution of the shareholders of the offeror company is required, e.g., for an increase in authorised capital or under the Regulations of The Stock Exchange.

6. A refusal by offeror shareholders to pass any necessary resolution should not be equated with a withdrawal by directors of an offer. The condition of shareholders' approval would have been specified at the outset.

7. The Panel does not take the view that directors are obliged by the Code to recommend shareholders to vote in favour of such a resolution in all circumstances. Equally, the directors are not free to ignore what they have done in the name of the company. The failure to proceed with an announced offer, even an offer subject to conditions, is a serious matter and the directors must bear this in mind in their recommendation to shareholders. The Panel will not criticise a board that has weighed up, and is seen to have weighed up, all factors in its recommendation. The shareholders are free to take their decision in the light of all the circumstances.

8. The position is different where a company has already incurred under the Code a mandatory obligation to make an offer because of large purchases of shares. Most of these cases involve a cash offer and it is exceptional for the consent of shareholders to be required. Obviously, directors should not incur an obligation to make an unconditional offer under the Code unless they are in a position to honour the obligation. In the highly exceptional case where the approval of shareholders is required, directors have to give their advice to shareholders in the knowledge that a refusal

by shareholders to pass the necessary resolution will give rise to a breach of the Code and will result in some penalty or sanction, depending on the circumstances, being imposed on the company in breach.

Announcements of offers

9. In view of the above the Panel stresses the serious responsibility that lies on directors at the time of making an announcement of an offer.

13th March 1974.