

# THE TAKEOVER PANEL

## **BLUE CIRCLE INDUSTRIES PLC ("BLUE CIRCLE") / BIRMID QUALCAST PLC ("BIRMID")**

The Panel has now completed its investigations into the events which led to Blue Circle reversing its earlier declaration that its offer for Birmid was unconditional. These events have received considerable publicity but it is appropriate that they should be summarised for the record.

On the evening of 13 February, Baring Brothers & Co Limited announced that its offer on behalf of Blue Circle for Birmid had been declared unconditional. The announcement indicated that Blue Circle and its associates had received acceptances in respect of 5,152,134 shares (7.1% of the issued share capital of Birmid) and had purchased 24,295,150 shares (33.6%): they held 6,700,000 shares (9.3%) before the offer. The necessary 50% of the share capital of Birmid had thus been achieved by a small margin, namely 9,323 shares. For the statement to have been made, the acceptances and purchases would have to comply with the requirements, respectively, of Note 4 and Note 5 on Rule 10 of the Code.

During the week beginning 15 February, discussions were held between the Panel and the advisers to Blue Circle as a result of which the latter decided to re-examine the purchases and acceptances held. Early on 17 February, Blue Circle announced that it had emerged that additional verifications, and rulings by the Panel, would be necessary. The Stock Exchange suspended dealings in Birmid's shares. Finally, early on 19 February, Blue Circle announced that its offer for Birmid had lapsed since, following the further verification, the aggregate of its holding, purchases and acceptances totalled approximately 49.5% of Birmid's share capital. Later that day, Blue Circle confirmed

that on or before 13 February it had acceptances in respect of 4,813,953 shares (6.6%) and had purchased 24,250,375 shares (33.6%) for which it held valid documents at that date (in addition to the 6,700,000 shares held before the offer).

The reduction in the numbers of shares claimed by Blue Circle was due to two discrepancies.

The first was that Hoare Govett Limited, brokers to Blue Circle, made an error in the certificate they supplied to Barings on 13 February as to the number of shares purchased by them on behalf of Blue Circle or its associates and for which they held the necessary documents of title to comply with Note 5 on Rule 10. This certificate overstated the number of valid purchases by 44,775 shares. The second was that two funds managed by Royal London Mutual Insurance Society Limited had sold 338,181 Birmid shares to Blue Circle via Hoare Govett and subsequently purchased an identical number of shares through the market for account settlement; settlement date was after the offer had closed but nevertheless it had accepted the offer in respect of these shares.

As regards the first discrepancy, it appears that Hoare Govett held at that time stock transfers accompanied by valid documents of title for a total of some 24mn shares comprised in over 1000 separate documents of title. The Panel was told that the bundles of documents were counted, checked and, where discrepancies arose, counted twice more by appropriately qualified members of Hoare Govett's staff on the afternoon of 12 February and morning of 13 February. The only possible explanation for the discrepancy appears to have been that a bundle of documents representing 44,775 shares was transferred from one group of documents which had already been counted to another group which had not; this bundle was therefore counted twice.

There can be few matters more important than correctly counting purchases that are going to be relied on by an offeror in declaring his offer unconditional as to acceptances. In the

view of the Panel, Hoare Govett are to be criticised for failing to provide an adequate system to ensure complete accuracy in these circumstances. On the other hand, the Panel acknowledges that, once their error was discovered, Hoare Govett immediately reported it to Barings (and Barings reported it both to the Panel and to the advisers to Birmid). Whilst the error should not have been made, the Panel accepts that it was not deliberate.

As regards the Royal London transaction, the shares purchased in substitution for the holding sold to Blue Circle were assented to the offer because Royal London considered that it was the beneficial owner of these new shares. However, it could not supply a valid document of title because, at the time of the closing date of the offer, Royal London was not entitled to take delivery of the shares it had purchased. The shares should not, therefore, have been included in acceptances of the offer for the purposes of the 50% condition. The problem arose because the Code allows acceptances not accompanied by share certificates to be specifically checked against the register since to do otherwise could adversely affect the interests of acceptors (and offerors) when, as is common, certificates are deposited with banks or others for safe keeping. In the present case such a check resulted in the acceptance being treated as valid because, according to the copy of the register being used for this purpose by the receiving bankers to the offer, the acceptor was still registered in respect of the original holding which it had sold to Blue Circle.

In the present case, the copy of the register supplied by Birmid to Blue Circle's receiving bankers was dated 2 February, eleven days before the closing date of Blue Circle's offer. A time difference of this kind is not unusual because s356 of the Companies Act 1985 allows a company ten days in which to respond to a request for a copy of its share register. However, when the offeree has complied with the Act in this way the risk of an error, such as occurred in this case, is clearly greater: indeed the Panel understands that Royal London ceased to be registered in respect of its original holding on 3 February.

Again, it is right to record that as soon as this error came to light, Blue Circle and its advisers disclosed the position to the Panel and to Birmid and caused the offer to lapse. In the circumstances, the Panel does not wish to take the matter any further so far as this particular case is concerned.

It has been alleged that Hoare Govett had encouraged Royal London and other institutions to "arbitrage" their Birmid holdings by selling to the offeror and purchasing an equivalent number of share in the market which would be accepted to the offer. Such action would only be wrong if it was designed to enable the offeror to count the same holding twice. Hoare Govett has categorically denied any such allegation and the Panel has received no evidence to the contrary.

As regards the future, there is an urgent need to take steps to ensure that the problems of the Birmid situation do not recur. A fundamental need is to ensure against inaccurate counting. It is also necessary to provide against the danger of "overlap" between shares purchased by the offeror and acceptances in respect of the same shares either through inadvertence, deliberate intent, or, as in the present case, because acceptances were "covered" by shares of which delivery had not yet been made.

The technical measures necessary to achieve this are being discussed as a matter of urgency with a special working party set up at the request of the Panel by the Issuing Houses Association. This working party includes, among others, receiving bankers, registrars, representatives of The Stock Exchange and the Panel executive. Any necessary changes to the Code or to recommended procedures will be announced as soon as possible.

The Panel will also consider with the assistance of the working party, the extent, if any, to which it might be appropriate to require independent verification of the result. In the meantime, however, and with immediate effect, the Panel requires parties to take-overs to comply with the following procedures.

Offerors and their advisers should make appropriate arrangements to ensure that purchases and acceptances, in respect of the same shareholding, are not counted twice. To assist this process the receiving bankers to an offer (or any other person responsible for counting acceptances) should also be responsible for counting purchases. In addition, the offeree company and its advisers will be expected to cooperate so as to ensure that up-to-date information is made available to the offeror for this purpose. In most cases this will involve provision of an up-to-date copy of the Share Register, together with any subsequent amendments, so as to show the position as at the final date. It is, of course, already a requirement of the Code (Rule 22) that during the course of offers, registrars of offeree companies should register transfers promptly. Until the publication of new rules, the parties involved should consult with the Panel on appropriate procedures to be adopted.

A further statement containing any relevant changes to the Code will be issued in due course.

4 March 1988