

THE TAKEOVER PANEL

THE GREAT UNIVERSAL STORES PLC

ARGOS PLC

An appeal by The Great Universal Stores Plc ("GUS") against certain procedural rulings of the Executive in relation to complaints made by GUS following its successful bid for Argos Plc ("Argos") was unanimously dismissed by the Panel after a Hearing on 27 January 1999 (1999/3). The Panel again met on 16 February 1999 to consider three further issues, namely

- (1) a substantive appeal by GUS against the Executive's ruling that the Code was not breached in relation to statements made by Argos, concerning a proposed "Home Delivery" service, principally in a document dated 3 April 1998;
- (2) a contention by GUS that the Executive was incorrect in treating GUS' allegations regarding a statement made by Argos, comparing initial trading of its pilot stores in the Netherlands with the launch of Argos in the Republic of Ireland (the "Irish Comparison"), as part of the same issue as other allegations regarding statements made by Argos about the early trading of the Netherlands stores; and
- (3) an assertion by GUS in relation to the fee payable to Schroders, Argos' financial advisers, that the Executive did not make or give a ruling, on or by 29 June 1998, or at any time subsequently, whether such arrangements were in breach of Rule 3 of the Code.

BACKGROUND

1. Home Delivery

- 1.1 By letter dated 16 November, GUS sent to the Executive a copy of a letter dated 16 October addressed to the former directors of Argos. The letter of 16 October invited the recipients to provide explanations in respect of certain issues forming the subject matter of complaints notified to the Executive on behalf of GUS in May and June 1998. A further allegation was, however, referred to in that letter, which related to Argos' statements during the bid regarding its Home Delivery project. Details of this allegation were set out in a document sent to the Executive on 24 November (the "GUS Document"). The Executive, having deliberated whether or not to investigate the allegation, bearing in mind the substantial period of time that had elapsed since the bid, confirmed to GUS by letter dated 8 December that, on balance, it proposed to investigate the matter, which was the only new issue raised in the GUS Document.
- 1.2 On 26 February Argos referred in its first defence document to its planned Home Delivery service. A full page on this subject was included in Argos' Day 39 document on 3 April. The GUS Document focused on the statements contained in Argos' Day 39 document. GUS asserted that these statements regarding the project were factually inaccurate or misleading, and that since no binding agreement existed between Argos and Parcelforce to provide such service, Argos was not in a position to make such statements.
- 1.3 Following a detailed investigation, the Executive ruled that the Code had not been breached and this decision was communicated to GUS by letter dated 7 January. GUS notified the Panel of its intention to appeal this decision.

- 1.4 The issue for determination by the Panel was whether or not the statements about Home Delivery referred to above were factually inaccurate or misleading, and thereby in breach of the Code. GUS alleged breaches of General Principles 5 and 6 and of Rule 19.3 in respect of the relevant statements. These General Principles and this Rule are in the following terms:

General Principle 5:

Any document or advertisement addressed to shareholders containing information or advice from an offeror or the board of the offeree company or their respective advisers must, as is the case with a prospectus, be prepared with the highest standards of care and accuracy.

General Principle 6:

All parties to an offer must use every endeavour to prevent the creation of a false market in the securities of an offeror or the offeree company. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market.

Rule 19.3: Unacceptable Statements

Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty.

2. **The Irish Comparison**

- 2.1 On 26 February Argos issued its first defence document, which ran to 29 pages. Appendix 1 reproduced the preliminary announcement of results for 1997 (published on the same day). At page 17 it was stated:

"The five pilot stores in The Netherlands are now trading. Initial sales are ahead of expectations and the initial performance exceeds that achieved on the successful launch of Argos in the Republic of Ireland in 1996. However, with its own catalogue and discrete merchandise range, the investment in The Netherlands is budgeted to affect operating profit adversely by some £9 million in 1998."

This was the only comparison drawn between Argos Holland and Argos Ireland (the "Irish Comparison") published by Argos during the bid.

- 2.2 By letter dated 19 June, Linklaters, GUS' legal advisers, raised with the Executive the accuracy of certain statements which had been made about the initial performance of Argos' pilot stores in Holland in the light of their subsequent performance. On 29 June the Executive ruled that the Code had not been breached in relation (inter alia) to statements made about Argos Holland.
- 2.3 On 28 July, at a meeting requested by GUS, Lord Wolfson told the Executive that the statements made in respect of Argos Holland represented the single most important issue about the Argos bid defence which concerned him. At that meeting GUS presented to the Executive certain papers in which GUS compared initial trading in Holland to that in Ireland.
- 2.4 By the letter dated 16 November, GUS sent to the Executive a copy of the letter dated 16 October addressed to the former directors of Argos (referred to in paragraph 1.1 above). The letter of 16 October included the complaints previously raised with the Executive about Argos Holland. The point regarding the Irish Comparison was included in the section headed "Holland".

- 2.5 By letter dated 23 December, GUS contended that failure to update the earlier favourable comparison between Argos Holland and Argos Ireland was a "new issue" and sought the Executive's confirmation that it would investigate the matter.
- 2.6 By letter dated 30 December, the Executive informed GUS that it did not agree that the Irish Comparison constituted a new issue, contending rather that it amplified the original complaint made in June relating to Argos' alleged failure to update the position concerning Dutch performance, on which it had already ruled. By its decision, published on 3 February (1999/3), the Panel (inter alia) dismissed GUS' procedural appeal against the Executive's ruling that a substantive appeal in relation to Argos Holland was out of time.
- 2.7 By letter dated 28 January 1999, GUS sought (inter alia) to appeal to the Panel in relation to the Irish Comparison, on the basis that it was a discrete and separate representation and, accordingly, should be investigated by the Executive as a "new issue", separate from the Argos Holland issue it had already ruled on.

3. Success Fee

- 3.1 Linklaters' letter to the Executive dated 19 June raised "a new point", relating to a success fee, payable in the event of the successful rejection of the bid, which Argos had negotiated "with both its merchant bank, Schrodgers, and its stockbroker, SBC Warburg." The letter alleged that the success fee created a situation where there was a conflict of interest between the interests of the shareholders of Argos and the interests of its advisers and questioned whether such arrangements should be disclosed. The Executive considered whether or not, quite apart from any issue about disclosure requirements, the arrangements breached Rule 3.3.

- 3.2 The Executive concluded that Schroders had not been influenced by the success fee and asserted that a ruling that the fee did not breach Code standards was conveyed by telephone both to Linklaters and to Schroders on 29 June, and that this disposed of any Rule 3 issue. At the end of the conversation with Linklaters the Executive drew the inference that the matter was concluded.
- 3.3 The GUS Document (of 24 November) included a section on the success fees payable to Schroders and Warburgs and the implications under Rule 3.
- 3.4 By letter dated 8 February, Linklaters wrote to the Executive in relation (inter alia) to the fee arrangements. The Executive responded by letter dated 9 February to Linklaters to seek clarification of an assertion by GUS that no ruling by the Executive had ever been made in relation to Rule 3.3. The Executive also wrote to Lord Wolfson on 9 February. Linklaters responded to both letters by a letter dated 10 February confirming that GUS was not arguing that Warburgs, as Argos' stockbroker, fell within the independence requirements of Rule 3.3.
- 3.5 GUS asserted that it was not until 24 November that the complaint was made that the success fee might have, or ought to have, rendered the potential recipient a "disqualified" adviser ie one having a conflict of interest which could render it ineligible to give "independent" advice in terms of the Code, in particular Rule 3.3.
- 3.6 GUS contended that it had not received a ruling on Rule 3 aspects of its "conflict of interest" concern in June 1998 or at any time subsequently, contrary to the Executive's assertions set out in paragraph 3.2 above.

DECISIONS

4. Home Delivery

- 4.1 The Panel took the view that Argos' document dated 3 April 1998 had to be considered as a whole and, indeed, with earlier documents issued by Argos. From this it was plain that Argos was setting out its strategy, growth prospects, initiatives and plans for the future in a variety of ways.
- 4.2 Included within this overall framework, were Argos' plans, clearly described as such in a number of places, for introducing a full Home Delivery service. It was in this context that there appeared (at page 16) the following passage:

"Home Delivery

Argos will be rolling out nationally a full home delivery service in 1999:

- the total cost of national roll-out will be less than £15 million
- customers will be able to order from home the full range of Argos' products at Argos' prices, for home delivery or for collection in store.
- Argos, through Parcelforce, will offer its customers a next-day delivery service which is better value than that provided by most mail order houses, including GUS:
 - £2.95: no choice of delivery slots
 - £5.00: choice of three delivery slots
 - Free: choice of three delivery slots (orders over £150)."

- 4.3 Argos had a longstanding working commercial relationship with Parcelforce. In respect of the proposed national Home Delivery service, Argos had itself carried out considerable commercial research and was working closely with Parcelforce on preparation for the pilot. The Board of Argos had resolved to provide the necessary funds to support the project. The Panel has no doubt that, as a matter of commercial reality, the Directors of Argos fully believed

that, under Argos' continued independent management, the planned Home Delivery service would be rolled out during 1999.

4.4 The Panel takes the view that the use of the word "will" (wherever it appears) in the passage quoted in paragraph 4.2 above, without qualification, was, if considered in isolation, over-confident. But the Panel is also of the view that, when considered in context, and having regard to the fact that the passage made clear that completion of the development outlined was still some way off in point of time, the material under consideration was neither factually inaccurate nor misleading.

4.5 Accordingly, the Panel unanimously dismisses this appeal.

5. **Irish Comparison**

5.1 In the view of the Panel, GUS' concerns in relation to the Irish Comparison also have to be viewed in the overall context of Argos' relevant documentation. The comparisons drawn by Argos, whether against budget or against initial trading in Ireland, formed a part, but only a part, of Argos' overall presentation; and it has not been suggested that the Irish Comparison was inaccurate at the time when it was made.

5.2 In the view of the Panel, references to Argos' trading in Holland have been sufficiently investigated, and neither the Executive nor the Panel should be required to investigate these matters further. Considered in its context the statement about the Netherlands is a single statement, whether comparing its trading with budget or with Ireland. Accordingly, in the view of the Panel the comparison with the launch of Argos in the Republic of Ireland was not a "new issue", but was an amplification of the matter raised in June; and the Executive had ruled on that matter in June.

5.3 Accordingly, the Panel unanimously rejects this contention advanced by GUS.

6. Success Fee

6.1 The rival contentions of GUS and the Executive, as set out in paragraph 3 above, inevitably gave rise to a conflict of fact.

6.2 Having regard to all the evidence that was available to the Panel, the Panel concluded that the account given by the Executive was preferable. In particular, the Panel concluded that the effect of the ruling communicated by the Executive in June 1998 was that Rule 3 had not been breached.

6.3 Accordingly the Panel unanimously rejects the assertion advanced by GUS.

7. Conclusion

In the result the Panel dismisses these appeals. Nevertheless before parting with this matter, the Panel would re-iterate that it has instructed the Executive to consider whether an agreement to pay a success fee, payable to an adviser in the event of a successful rejection of a hostile bid, should be disclosed in the bid process. Where the Panel itself wishes to consider a particular matter, it is the Panel's practice to instruct the Executive to prepare a position paper as a basis for its discussion of the matter in question; and that is what has been done in this instance.

22 February 1999