

# THE TAKEOVER PANEL

**CALA PLC ("CALA")**

**DOTTEREL LIMITED ("DOTTEREL")**

**MILLER 1999 PLC ("MILLER")**

The Panel met today to hear an appeal by Miller against the Executive's ruling that, in accordance with Rule 32.2 of the Code, Miller would not be allowed to increase its current offer for CALA if Dotterel were to announce an increased offer at a price equal to, but no higher than, Miller's own current offer of 200p cash per CALA share.

## **Background**

CALA is a company listed on the London Stock Exchange. Its principal activity is house-building in Scotland, Yorkshire, the Midlands and the South East of England.

On 15 March 1999 CALA announced that it had received an approach on behalf of Dotterel proposing a cash offer for the whole of the issued share capital of CALA at 165p per share. Dotterel is a newly-formed company which has been incorporated as the vehicle for this offer, and its shareholders are, amongst others, the executive directors of CALA. Accordingly, Dotterel's approach was made to the two directors of CALA (the "Independent Directors") who are independent of Dotterel and are responsible for considering any offers made, ensuring that competent independent advice is obtained by CALA and transmitting their recommendation to shareholders.

On 22 April Miller announced a cash offer of 175p per CALA share with a full loan-note alternative. The announcement stated that this offer would be recommended by the Independent Directors, subject to there being no higher offer from any third party. Miller is a subsidiary of The Miller Group Limited, a privately-owned development and construction company.

On 30 April Dotterel announced a cash offer of 190p per CALA share with a full loan-note alternative. The announcement stated that this increased offer would be recommended by the Independent Directors, again subject to there being no higher offer.

On 10 May Miller announced an increased cash offer of 200p per CALA share, again with a full loan-note alternative (the "Latest Miller Offer"). In the announcement of the Latest Miller Offer, it was stated as follows:

"The Increased Offer is final and will not be increased further, except that Miller 1999 reserves the right to raise the Increased Offer by up to a further 10 pence in cash - to a maximum of 210 pence per CALA Ordinary Share - in the event that an offer for CALA is announced by or on behalf of Dotterel or another offeror and the value of such offer (or any alternatives available under it) is, in the reasonable opinion of Miller 1999, higher than the value of the Increased Offer." (the "No Increase Statement").

On 10 May, the same day on which the Latest Miller Offer was announced, Noble Grossart approached the Executive on behalf of Dotterel, for a ruling on whether Miller would be prohibited from raising the Latest Miller Offer in the event that Dotterel were to increase its own offer to exactly 200p per CALA share, accompanied by a loan-note alternative worth no more than 200p.

Although offers have been announced by both Dotterel and Miller, no offer document has yet been posted pending resolution of this matter.

### **The Executive's Ruling**

After hearing the arguments of all parties, the Executive ruled that if Dotterel were to announce an offer which was equal to, but no higher than, 200p per CALA share, Miller would not be entitled to increase the Latest Miller Offer in view of the No Increase Statement.

## Code Issue

Rule 32.2 of the Code states:

"If statements in relation to the value or type of consideration such as "the offer will not be further increased" or "our offer remains at xp per share and it will not be raised" ("no increase statements") are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (eg the introduction of a lower paper alternative) except where the right to do so has been specifically reserved."

Note 1 on Rule 32.2 states that: "In general, an offeror will be bound by any firm statement as to the finality of its offer. In this respect, the Panel will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply."

Notes 2 and 3 on Rule 32.2 stipulate circumstances in which an offeror can elect not to be bound by a no increase statement previously made by the offeror. These circumstances include the situation where a competitive situation arises after a no increase statement has been made. However, Note 4 on Rule 32.2 provides that:

"A no increase statement may be set aside in the circumstances set out in Notes 2 and 3 above only if the offeror has specifically reserved the right to do so in such circumstances at the time the statement was made..... If the right to set aside the no increase statement has not been specifically reserved as set out above, only in wholly exceptional circumstances will the offeror be allowed to increase its offer after a no increase statement, even if a recommendation from the board of the offeree company is forthcoming or if the offer is unconditional in all respects."

It is common ground between the parties that the statement by Miller reproduced above is a "no increase statement" to which Rule 32.2 of the Code applies.

Miller did not specifically reserve the right to set aside its No Increase Statement in the event of a matching offer by Dotterel or any other party at 200p per CALA share.

The Code issue for determination by the Panel, therefore, was whether or not a matching offer by Dotterel or any other party at 200p would justify Miller being permitted to set aside its No Increase Statement in circumstances where it had not specifically reserved the right to do so.

### **Panel Decision**

The Introduction to the Code sets out the purpose and underlying philosophy of the Code. In particular, it is stated:

"The Code and the Panel operate principally to ensure fair and equal treatment of all shareholders in relation to takeovers. The Code also provides an orderly framework within which takeovers are conducted."

The underlying purpose of Rule 32.2 is to preserve an orderly framework for the conduct of takeovers and to guard against the possibility of shareholders and the market being prejudiced by misleading statements and any lack of certainty.

The ruling by the Executive, prohibiting Miller from increasing its offer, may have the effect of depriving shareholders in CALA of a higher offer, but this is a consequence which must be likely in any case in which a no increase statement is made.

The Rule seeks to set a balance between the potential disadvantages to shareholders from this consequence and the undesirable consequences for shareholders and the markets if they cannot rely on the accuracy of statements made by an offeror.

As a matter of policy, and in the absence of "wholly exceptional circumstances", it is more important that the principle of certainty and orderly conduct should be upheld rather than to risk compromising this principle to accommodate the apparent disadvantages which may result from the application of the Rule in a particular case.

Submissions were addressed to the Panel, on behalf of Miller, that "value" in the context of the expressed reservation, should not be restricted to the price of the shares. In the view of the Panel, in the context in which "value" was used in the reservation, "value" has no meaning other than the price of the shares. However, the crucial issue for the Panel to determine is whether "wholly exceptional circumstances" have arisen in this case, as would justify the Panel in granting a dispensation to allow an increased offer to be made.

"Wholly exceptional circumstances" is not a term of art. It is not to be confined to a limited number of specific factual situations. Whether "wholly exceptional circumstances" arise in any particular case must be considered in the context of the facts of that particular case. The range of circumstances which may be "wholly exceptional" can never be closed.

An example of "wholly exceptional circumstances" occurred in an appeal in relation to the offer by Service Corporation International plc for Great Southern Group plc in 1994 (Panel Statement 1994/8). In that case the offeror had failed expressly to reserve its position in the event of a competitive situation arising. The Panel was satisfied that the omission was attributable to a proven administrative mistake on the part of the offeror's advisers. But for this, the circumstances would not have been "wholly exceptional".

It has been contended, on behalf of Miller, that there are "wholly exceptional circumstances" in this case. It has been pointed out to the Panel, and not disputed, that the language of the express reservation follows the form of words which has been used in other cases, so that, to that extent, Miller was following precedent. It has

further been pointed out, and again not disputed, that there is no recorded instance of a matching bid ever having previously been made in a competitive situation. Further, it was suggested, on behalf of Miller, that, to deprive Miller of the opportunity to make an increased offer, could only be to the disadvantage of shareholders and, in particular, could give rise to the possibility that both offers might lapse.

In the view of the Panel these are submissions which are plainly worthy of careful consideration. The Panel recognises the novelty of the situation which has arisen in the present case, but it also takes the view that the suggested effect on the offers for CALA is too speculative for any meaningful conclusions now to be drawn.

There is no obligation on an offeror to make a no increase statement. If it chooses to do so, the statement must be precisely drawn. If the offeror wishes to reserve the right, notwithstanding the no increase statement, to increase its offer, the circumstances in which it can do so must be explicitly and plainly spelt out.

In the present case the reservation is drawn in such a way as to prevent the reservation from operating in the circumstances of a matching offer: it is restricted to an offer which is "higher" than the value of the existing offer. There would have been nothing to prevent the draughtsman from including the words "the same as or" immediately before the word "higher", had Miller so intended, but that was not done. It is not suggested that this was due to any error, but rather the fact that the draughtsman did not address the possibility of a precisely matching offer. In the view of the Panel, and in the light of the purpose and form of Rule 32.2, there are no "wholly exceptional circumstances" as would justify allowing Miller to enlarge the express reservation which it made on 10 May.

The appeal is accordingly dismissed.

28 May 1999