

THE TAKEOVER PANEL

RULES 9 AND 37

DIRECTORS AND CLOSELY CONTROLLED COMPANIES

The Panel has been considering the effect of Rule 9 of the Code insofar as it restricts:

- (a) directors' ability to purchase shares when the directors are presumed to be acting in concert solely under Rule 37; and
- (b) the purchase of shares by a controlling shareholder (or members of a controlling concert party) following the reduction or dilution of a controlling holding.

Following its review the Panel has decided that it would be appropriate for companies and their shareholders if these restrictions were relaxed to the extent described below.

Directors and Rule 37

There is no general presumption that the directors of a company are acting in concert unless the company is subject to an offer or the directors have reason to believe a bona fide offer for their company may be imminent. However, under Rule 37 directors are presumed to be acting in concert where the company has authority for a share buy-back. This presumption of concertedness arises from the time the directors resolve to seek shareholder authority for the buy-back. It is increasingly common for companies to renew buy-back authorities on a year-by-year basis and, in practice, many companies are now in the position that the directors are presumed to be acting in concert on, effectively, a permanent basis. A director is unable to purchase shares

when he is part of a concert party which holds 30% or more but not more than 50% of the company. Shareholders who have appointed directors are normally treated as directors for this purpose and the concert party will also include any other parties covered by the normal concert party presumptions in the Code. Accordingly, there are many companies in which the total concert party holding exceeds 30% when the presumption of directors' concertedness arises.

The Panel has decided that some limited purchasing freedom is appropriate where the Rule 37 concert party holds 30% or more but not more than 50% of the company and where the directors are in concert solely as a result of the presumption which arises under Rule 37. In such cases directors who would not be prohibited from purchasing, absent this Rule 37 presumption, will be permitted limited freedom to purchase shares provided that this is approved by a vote of independent shareholders. Subject to obtaining this approval, the directors may, between them, purchase shares carrying up to, but not more than, 1% per annum of the total voting rights in the company. The approval of independent shareholders of this purchasing freedom should be obtained on an annual basis at the same time as the general waiver which will be required under Rule 37 to permit the relevant buy-back authority to be implemented without giving rise to the requirement for a general offer under Rule 9. It will continue to be necessary for companies to consider the whitewash of directors' share options as a separate matter.

The purchasing freedom resulting from this change will only apply where the presumption of directors' concertedness arises solely under Rule 37. It does not affect the 30 % control threshold or the application of Rule 9 for any individual director, or for any concert party which exists independently of Rule 37.

Reduction or dilution of a controlling shareholding

The Panel has also been considering the position of shareholders (and members of concert parties) holding 30% or more of companies where such holdings are reduced by sales or diluted as a result of the issue of new shares. The Panel has concluded that it is appropriate to permit controlling shareholders some ability to purchase further shares in these circumstances, notwithstanding that they (or the concert party of which they form part) hold 30% or more of the company.

Accordingly, if a shareholder or group of shareholders acting in concert sells shares, but without reducing the holding to less than 30%, such shareholder or shareholders may subsequently purchase shares, subject to the restrictions below, without incurring an obligation to make a general offer. The Panel will regard reduction of percentage holdings by dilution following the issue of new shares as equivalent to sales for these purposes.

The total number of shares which may be purchased on this basis in any period of 12 months must not exceed 1 % of the voting share capital for the time being, and the percentage holding of the relevant shareholder or concert party resulting from any such purchase must not exceed the highest percentage holding in the previous 12 months. As a result of these restrictions, controlling shareholders will not be permitted to increase percentage holdings progressively from one year to another. For example, if a controlling shareholding (or controlling concert party holding) were reduced from 45% to 35%, the relevant shareholding (or total concert party holding) could within 12 months be restored to 36% by share purchases. However, no further purchases would be permitted unless they were preceded by another reduction of the total percentage holding. Thus, if the holding were further reduced from 36% to 35.5%, the shareholding could be restored to 36% (subject to the limit for purchases of 1% in any 12 month period), but it could not be increased above 36%.

Code changes

Appropriate amendments to the Code will be published in due course. In the meantime, the Executive should be consulted as appropriate.

16 July 1999