

THE TAKEOVER PANEL

REDEMPTION OR PURCHASE BY A COMPANY OF ITS OWN SHARES

RULE 37.1

Rule 37.1 stipulates the circumstances in which a mandatory offer obligation under Rule 9 may arise in consequence of increases in percentage shareholdings beyond the limits provided for in Rule 9 resulting from the redemption or purchase by a company of its own voting shares. Rule 37.1 currently provides that a mandatory offer obligation may be incurred by the directors and persons acting in concert with them.

Where a company renews annually its authority to buy in its own shares, this has the consequence that its directors are perpetually regarded as acting in concert. If their total holding is between 30% and 50%, their ability to buy shares is severely inhibited. The same inhibitions affect shareholders represented on the board, who are normally treated on the same basis as directors for these purposes. In a number of cases the Panel believes that such inhibitions are unwarranted and has therefore reviewed the provisions of the Rule.

Following completion of its review of Rule 37.1, the Panel has concluded that the Rule should be applied on a basis which continues to recognise the special circumstances which may arise in connection with a redemption or purchase by a company of its own shares (and the special position of directors in this respect) but which, at the same time, would provide greater flexibility when a redemption or purchase of own shares is proposed in circumstances where there is no agreement or understanding aimed at, or resulting in, the acquisition or consolidation of control. Accordingly, Rule 37.1 will henceforth be applied on the basis that:

- (a) increases in percentage holdings of voting rights resulting from the redemption or repurchase by a company of its own shares will be treated as acquisitions for the purpose of Rule 9: accordingly, Rule 9 will be relevant whenever the limits in Rule 9.1 are exceeded in respect of the holding of any shareholder or group of shareholders acting in concert;
- (b) however, there will be no presumption that the directors as a whole (or any two or more directors) are acting in concert solely by reason of a proposed redemption or purchase by the company of its own shares, or the decision to seek shareholders' authority for any such redemption or purchase;
- (c) in order to avoid triggering a mandatory offer obligation, a whitewash following the procedures on the lines set out in Appendix 1 to the Code will be required as a condition to implementation of any redemption or purchase by a company of its own shares whenever the Rule 9.1 limits would be exceeded as a result of such redemption or repurchase in respect of the holding of a director or of any group of shareholders acting in concert which includes any of the directors;
- (d) a shareholder who is neither a director nor acting in concert with any director will not normally incur an obligation to make a mandatory offer under Rule 9; however, in accordance with current practice, a shareholder who has appointed a representative to the board of the company and managers of investment trusts will continue to be treated on the same basis as directors;
- (e) the exception in (d) above for shareholders who are neither directors nor acting in concert with any of the directors will not apply (and a mandatory offer obligation may therefore arise) if the relevant shareholder has purchased shares at a time when he had reason to believe that such a redemption or purchase of its own shares by the company would take place (that is, at a time when that shareholder had knowledge that a redemption or purchase for which requisite shareholder authority existed was being, or was likely to be, implemented in whole or in part); and

- (f) each individual director should draw the attention of the board to shareholdings of that director and all parties acting in concert with that director at the time any redemption or purchase of the company's own shares is proposed, and whenever shareholders' authority for any such redemption or purchase is to be sought.

This revised basis of application of Rule 37.1 is adopted with immediate effect. As a result, the dispensation relating to Rule 37.1 announced in Panel Statement 1999/12, which was introduced pending completion of the Panel's full review of the Rule, now ceases to be relevant since, as indicated above, the various members of the board will no longer be presumed to be acting in concert solely by reason of a proposed redemption or purchase of the company's own shares.

The Panel must be consulted in advance in any case where Rule 9 might be relevant. This will include any case where a shareholder or group of shareholders acting in concert holds 30% or more but not more than 50% of the company, or may come to hold 30% or more on full implementation of the proposed redemption or purchase of own shares. In addition, the Panel must be consulted if the aggregate holdings of the directors and any other shareholders acting in concert, or presumed to be acting in concert, with any of the directors amount to 30% or more, or may be increased to 30% or more on full implementation of the proposed redemption or purchase of own shares. In appropriate cases, the Panel may require inclusion in the circular to shareholders of confirmation by the directors that the directors are unaware of any agreements or understandings between directors or shareholders acting in concert with directors.

Appropriate amendments to the Code will be published in due course.

15 October 1999