

THE TAKEOVER PANEL

2000 ANNUAL REPORT AND REVISED CODE

The Panel's 2000 Annual Report was published today. Attached are extracts from the Report by the Director General contained in the Annual Report, in which the following topics are addressed.

- Communication of Executive rulings by financial advisers to their clients
- Pension funds
- Shareholder meetings
- Websites
- Note 1 and Note 4 on Rule 16
- Rule 20.2: equality of information to competing offerors

The Panel's website, referred to in the Annual Report, is likely to be in place shortly.

A revised edition of the Code has been published today.

12 July 2000

COMMUNICATION OF EXECUTIVE RULINGS BY FINANCIAL ADVISERS TO THEIR CLIENTS

As the Introduction to the Code makes clear, the responsibilities described in the Code apply to all professional advisers, insofar as they advise on the transactions in question. Professional advisers are required to observe the highest standards of care in connection with all matters relating to a transaction governed by the Code. Invariably one or more professional advisers will assume responsibility for liaising and communicating with the Executive on behalf of their client. Such advisers are responsible for ensuring that any rulings or instructions of the Executive given to them are communicated clearly and unambiguously to their client and any other relevant persons (including other professional advisers engaged in the transaction). Professional advisers should ensure that their clients (and any other recipients) understand fully the consequences of the Executive's rulings or instructions.

PENSION FUNDS

In the definition of acting in concert a company is presumed to be acting in concert with any of its pension funds whether or not the assets of those pension funds are managed on a discretionary basis. For the purposes of the presumption, the constitution, organisation and management/operation of a particular pension fund are irrelevant.

The Executive is concerned that in certain cases companies and their advisers may have been making an assumption that a company's pension fund was not acting in concert on the basis of their view of the pension fund's independence from the company. If a company or its pension fund wishes to seek to rebut the presumption of concertedness the Executive must always be consulted.

SHAREHOLDER MEETINGS

Under Rule 20.1 information about companies involved in an offer must be made equally available to all shareholders as nearly as possible at the same time and in the same manner. The Code does not restrict parties to a bid from holding meetings with

shareholders provided no new material information is given and no significant new opinions are expressed. These meetings must also have an appropriate representative of the relevant financial adviser or corporate broker present who is responsible for confirming to the Executive, by 12 noon on the next business day, in writing whether or not any such information was forthcoming or opinions were given. This letter must be signed by the representative personally who must also ensure that a list of all the attendees at the meeting is also provided to the Executive. The Executive expects to receive such letters even in circumstances where the potential offeror has not been named.

If a meeting is to be held before the publication of an announcement or document, for example to gather irrevocable commitments or ascertain the views of selected major shareholders, the Executive may permit those present at the meeting to receive new information or opinions provided all new material information or opinions will be in the relevant document or announcement. If it is proposed to hold such meetings the Executive must be consulted in advance.

WEBSITES

During the course of the year the Executive has noted a significant increase in the availability and distribution of offer-related information on websites. The use of new media, such as the internet and CD ROMs, does not cause any particular concerns provided that the Code's principles of care, responsibility and availability of documentation are upheld. The Executive has considered how the Code should apply in this area and has formulated the following policy applicable to all offers.

Rules 19.1 (standards of care) and 19.3 (unacceptable statements) should be applied in the same way as to other offer-related information.

Rule 19.2 (responsibility) will apply to all offer-related information on a website or CD ROM. In particular, a responsibility statement will be required to be attached to such information even if it has first been announced without the inclusion of such a statement. As an alternative, however, to including a responsibility statement on each document or page of the website or CD ROM, it will be acceptable for such a

statement to be included on the gateway to the area of the website or CD ROM where the offer-related information is located, provided that access to the relevant area can only be obtained through this gateway.

Rule 19.7 (distribution and availability of documents and announcements) should be applied so that a CD ROM and copies of all relevant website pages (whether or not previously published via another medium) should be lodged with the Panel and the advisers to all other parties to the offer at the time of release.

For the purpose of Rule 20.1 (equality of information to shareholders), the posting of information on a website will not satisfy the obligation to notify all offeree shareholders of material new information or significant new opinions. Accordingly, a financial adviser to the offeror or offeree should, by 12 noon on the business day following the posting of the information on a website, provide the Executive with a letter confirming that no material information or significant new opinions have been placed on a website.

NOTE 1 AND NOTE 4 ON RULE 16

Under Rule 16 an offeror, or person acting in concert with it, may not make any arrangements with shareholders and may not deal or enter into arrangements to deal in shares of the offeree, or enter into arrangements which involve acceptance of an offer, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all shareholders.

In certain circumstances an offeror may ask a member of its concert party (usually the financial adviser or stockbroker) to acquire and hold offeree shares. In such circumstances it is essential that any arrangements entered into between the financial adviser and the offeror are carefully reviewed to ensure they do not breach Rule 16. Note 1 on Rule 16 makes it clear that these arrangements must ensure that the offeror will bear all the risks and receive all the benefits of the shareholding. In addition, the financial adviser must not receive any other benefit (or potential benefit), for example a fee for undertaking the buying exercise, beyond normal expenses and carrying costs. This can be a difficult area and advance consultation with the Executive is advised.

Note 4 on Rule 16 recognises that in certain offers, for example MBOs, the services of certain of the offeree management need to be retained, but that management may need to be given an incentive to remain and perform in the form of a continuing financial involvement (usually including some form of equity participation) in the company. Where the management are shareholders, this may mean that they are offered a deal which is different from that being offered to other shareholders. Note 4 sets out the parameters which can make the difference acceptable, by balancing any benefits of the management's retained interest with appropriate risks.

The Executive was asked by the Panel to consider whether all arrangements coming within Note 4 should, as a condition of any Panel consent to such arrangements, normally be subject to approval by independent shareholders (in addition to the normal requirement of a fair and reasonable opinion from the Rule 3 adviser). Following a review, including a consultation exercise with practitioners and Panel members, the Panel decided that, in applying Note 4, a vote of independent shareholders should normally be required if the participating management and the offeror together hold more than 5% of the offeree. This change of practice has been reflected in an amendment to the Code.

RULE 20.2: EQUALITY OF INFORMATION TO COMPETING OFFERORS

Under Rule 20.2 any information given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror. This requirement usually only applies once there has been a public announcement of the existence of the offeror or potential offeror. An announcement that a company is in talks about a possible offer would constitute the public announcement of the existence of a potential offeror, even if the potential offeror has not been named.

However, the Executive may also require information passed to one potential offeror to be passed to another bona fide offeror or potential offeror if such offeror or potential offeror is informed authoritatively of the existence of the first potential offeror, even though there has been no public announcement to this effect.