

# THE TAKEOVER PANEL

## INDIGO CAPITAL LLC ("INDIGO CAPITAL")

### REGUS PLC ("REGUS")

The Executive has been investigating certain dealings by Indigo Capital in contracts for differences referenced to Regus' shares, and certain further dealings in Regus' shares by Mr. Robert Bonnier (a managing partner, and associate, of Indigo Capital). The Executive has concluded that a number of breaches of the City Code on Takeovers and Mergers (the "Code") have occurred in relation to such dealings.

#### **Background**

At 1.57 p.m. on 7 January, Indigo Capital, at the request of the Executive and in accordance with Rule 2.2 of the Code, released the following statement:

*"Indigo Capital LLC ("Indigo Capital") notes the current press speculation linking it to Regus plc ("Regus") and would like to clarify its intentions in respect of Regus. Indigo Capital is interested in exploring a wide range of strategic, commercial and financing alternatives with the Board of Regus, one of which may include a recommended take-over."*

As a result of this announcement, an offer period began in relation to Regus.

Subsequent to this initial announcement, the Executive became concerned that the market was confused as to Indigo Capital's interest in Regus' share capital and, accordingly, on 9 January Indigo Capital, again at the request of the Executive, released the following statement:

*"Indigo Capital LLC ("Indigo Capital") notes the recent speculation as to its interest in the share capital of Regus plc ("Regus"). For the avoidance of doubt, Indigo Capital LLC ("Indigo Capital") would like to clarify its current shareholding in Regus. Indigo Capital has a beneficial interest in 700,000 shares of Regus being approximately 0.12% of the issued share capital of*

*Regus which are registered in the name of a nominee. In addition, between 18 December 2002 and 7 January 2003 Indigo Capital entered into a number of contracts for differences with Cantor Fitzgerald Europe in relation to an aggregate of 73,800,000 shares of Regus being approximately 12.67% of the issued share capital of Regus. The details of the contracts for differences are as follows:*

- 1. The lowest reference price per share is 13.05p and the highest reference price per share is 23.5p.*
- 2. The contracts are open-ended and there is no rollover into new contracts.*

*Indigo Capital does not have the right to acquire or to direct the voting of any of the underlying Regus shares represented by these contracts for differences."*

Later, on 14 January, the Executive was informed by Indigo Capital that the statement made on 9 January had contained certain inaccuracies. Accordingly, in order to clarify the position, Indigo Capital released the following further statement on 14 January:

*"Indigo Capital LLC ("Indigo Capital") has a beneficial interest in 545,000 shares of Regus plc ("Regus") being approximately 0.09% of the issued share capital of Regus which are registered in the name of two nominees. In addition, between 5 December 2002 and 7 January 2003 Indigo Capital entered into a number of contracts for differences with Cantor Fitzgerald Europe in relation to an aggregate of 73,850,000 shares of Regus being approximately 12.68% of the issued share capital of Regus. The details of the contracts for differences are as follows:*

- 1. The lowest reference price per share is 12p and the highest reference price per share is 23.5p.*
- 2. All of the contracts are open-ended and there is no rollover into new contracts.*

*Indigo Capital does not currently have the right to acquire or to direct the voting of any of the underlying Regus shares represented by these contracts for differences."*

### **Rule 8 and disclosure**

One of the consequences of the commencement of an offer period is that, under Rule 8 of the Code, any dealings in relevant securities by an offeror (or potential offeror), or by any of its associates, must be publicly disclosed by 12 noon on the business day following the date of the relevant transaction.

In this context, Note 2 on Rule 8 defines "relevant securities" as including the shares of the offeree company in question and also any derivative (such as a contract for differences) referenced to such shares. This Note 2 goes on to make clear that, in the case of a derivative referenced to the shares of the offeree company, each of the entering into, closing out or variation of the derivative (among other matters) will be regarded as a "dealing" in the derivative concerned and, therefore, subject to the disclosure requirements of Rule 8.

The Executive informed Indigo Capital on a number of occasions following the release of its initial statement on 7 January that, as a result of the commencement of the offer period in relation to Regus, Indigo Capital and its associates would be subject to the disclosure requirements of Rule 8 in the event of any dealings in Regus' shares, or contracts for differences referenced to Regus' shares, after that date.

### **Undisclosed dealings**

Notwithstanding this guidance from the Executive, after 14 January the Executive established that the following dealings in relevant securities had been undertaken since 1.57 p.m. on 7 January (i.e. the commencement of the offer period):

- on 7 January at 3.22 p.m., a contract for differences referenced to 250,000 Regus shares was entered into by Indigo Capital at a reference price of 23.5 pence per Regus share;
- on 8 January at 9.02 a.m., a contract for differences referenced to 1,000,000 Regus shares that had been entered into by Indigo Capital on 23 December

2002 at a reference price of 13.05 pence per Regus share was closed out by Indigo Capital at 27 pence per Regus share;

- on 8 January at 3.32 p.m., a contract for differences referenced to 750,000 Regus shares was entered into by Indigo Capital at a reference price of 23 pence per Regus share;
- on 8 January at 3.39 p.m., a contract for differences referenced to 250,000 Regus shares was entered into by Indigo Capital at a reference price of 22.5 pence per Regus share;
- on 13 January, Mr. Bonnier purchased 45,000 Regus shares, on behalf of Indigo Capital, at a price of 22.5 pence per Regus share; and
- on 14 January, Mr. Bonnier purchased a further 500,000 Regus shares, again on behalf of Indigo Capital, at a price of 21.5 pence per Regus share.

None of these dealings were disclosed as required by Rule 8 by 12 noon on the business day following the relevant dealing, although they were subsequently disclosed, when the Executive brought them to the attention of Indigo Capital, as part of a disclosure made by Indigo Capital in accordance with Rule 8 on 16 January.

### **The importance of disclosure**

The Panel attaches the greatest importance to proper compliance with the Code's dealing disclosure requirements set out, principally, in Rule 8. The Code does not impose numerous restrictions on the ability of a party to an offer, or any of its associates, to deal in relevant securities during an offer period, but it does require the prompt and accurate disclosure of any such dealings that do take place.

Disclosure underpins market transparency which, in turn, constitutes a fundamental protection for shareholders and others who deal in the UK securities markets. Disclosure is therefore a reflection of General Principle 6 of the Code which provides that:

*"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."*

The Code was amended in June 1996 specifically in order to provide that dealings in derivatives referenced to the share price of relevant securities, including contracts for differences, fall within the disclosure requirements of the Code.

The Panel considers it fundamental for the avoidance of a possible false market that all dealings in such derivatives by certain parties during the course of an offer period are fully disclosed in accordance with Rule 8 in the same way as dealings in the underlying shares themselves. The parties who are bound by this disclosure requirement are the offeror, the offeree company, their respective associates and any person who owns or controls (directly or indirectly) 1% or more of any class of relevant securities. Any such disclosure must include full details of the relevant dealing and of the resultant total amount of relevant securities owned or controlled (including full details of all open derivative positions held) by the person making the disclosure. In the case of any doubt as to the need for, or form of, the disclosure, the Executive should be consulted.

#### **Rule 4.2**

Rule 4.2 of the Code provides as follows:

**"4.2 RESTRICTION ON DEALINGS BY THE OFFEROR AND CONCERT PARTIES**

*During an offer period, the offeror and persons acting in concert with it must not sell any securities in the offeree company except with the prior consent of the Panel and following 24 hours public notice that such sales might be made. The Panel will not give consent for sales where a mandatory offer under Rule 9 is being made. Sales below the value of the offer will not be permitted. After there has been an announcement that sales may be made, neither the offeror nor persons acting in concert with it may make further purchases and only in exceptional circumstances will the Panel permit the offer to be revised."*

Rule 4.2 is designed to prevent offerors and persons acting in concert with them from misleading or manipulating the market, and is also therefore a reflection of General Principle 6 of the Code which addresses false markets. For example, a false market might be created in the shares of the offeree company if a potential offeror, who would reasonably be considered to be a purchaser of those shares, in fact disposes of his interest during the offer period. In other words, the market might reasonably consider such a sale to be an indication that the potential offeror does not intend to proceed with an offer for the offeree company.

In the case of an offeror, such as Indigo Capital, which has entered into contracts for differences referenced to the shares of the offeree company, the Executive considers that the closing out of such a contract for differences during the offer period should normally be treated as being equivalent to the sale of the underlying offeree company shares represented by the contract for differences, and as such subject to Rule 4.2. This is on the basis that it will most often be the case that a party with whom the contract for differences is entered into will hedge its exposure by acquiring an equivalent number of shares in the offeree company in the market. Similarly, when such a contract for differences is closed out, the party with whom the contract for differences was entered into can reasonably be expected to sell the shares it had acquired to hedge its exposure.

As explained above, Indigo Capital closed out a contract for differences in relation to Regus shares on 8 January, after the commencement of the offer period. The Executive was not consulted about this dealing and, accordingly, this dealing was in breach of Rule 4.2.

In addition, Rule 4.2 requires that when a sale of relevant securities is permitted by the Executive in accordance with the Rule and following 24 hours public notice that such sales might be made, no such sale can be made at below the prevailing offer price and thereafter neither the offeror nor any person acting in concert with it may make further purchases of offeree company shares. This is again designed to prevent an offeror from misleading the market by creating a false impression as to its intentions as regards the potential offer.

In a case such as the present one, where the offeror has not announced the price of its offer, the Executive will normally treat the requirement of Rule 4.2 that sales can not be made at below the offer price as setting a ceiling on the price at which the potential offeror will subsequently be allowed to make its formal offer, that ceiling being the price at which the relevant securities were sold.

In this case, in view of the fact that the closing out of the contract for differences was not disclosed to the market at the time (as it should have been) such that, in fact, there was no misleading impression that could have been created and also that to set a ceiling on the price would have the undesirable effect of possibly depriving Regus shareholders of any offer being made by Indigo Capital at above 27 pence per Regus share, the Executive has ruled (on an ex parte basis) that the closing out of the contract for differences on 8 January should not set a ceiling on the price of any future offer for Regus by Indigo Capital. The Executive also considered it relevant in making this ruling that further contracts for differences in respect of the same aggregate number of underlying Regus shares were entered into by Indigo Capital on the same date and that the number of underlying shares concerned was small.

The Executive has, however, ruled that the restriction on future purchases of shares set out in Rule 4.2 should apply as a consequence of the closing out of the contract for differences on 8 January, such that during the offer period neither Indigo Capital, nor any person acting in concert with it, will be permitted to acquire any further Regus shares or to enter into further derivatives referenced to Regus shares. Indigo Capital has accepted this ruling.

### **Dealings with the Executive**

As referred to above, the Executive informed Indigo Capital on a number of occasions following the release of its initial statement on 7 January that any dealings in relevant securities of Regus would be subject to disclosure under Rule 8.

The Executive also expressly instructed Mr. Bonnier and Indigo Capital on 9 January that all dealings in relevant securities of Regus must be cleared in advance with the Executive.

Notwithstanding these facts, the Executive identified the dealings detailed above in part as a result of its investigations into Indigo Capital's interests in the share capital of Regus and also in part as a result of the customary dealing enquiries that the Executive undertakes in relation to all companies which are in an offer period. These dealings in relevant securities had not at any time been brought to the attention of the Executive by Indigo Capital or Mr. Bonnier.

Indeed, as referred to above, the Executive was informed on 14 January that the statement released on 9 January relating to Indigo Capital's interests in Regus' shares contained certain inaccuracies. However, the Executive was led to believe that the statement later released on 14 January clarifying the position was a correct statement of Indigo Capital's holding of Regus shares and interest in contracts for differences as at that date, and also as at the commencement of the offer period on 7 January, since the Executive was not informed that any dealings had taken place in the intervening period.

In fact, the statement released on 14 January did not correctly state the number of shares that Indigo Capital held as at 7 January, since at that time it did not hold any Regus shares. The 545,000 Regus shares referred to in that statement had only been acquired by Mr. Bonnier, on behalf of Indigo Capital, on 13 and 14 January as set out above.

The Executive understands from Mr. Bonnier that these dealings were undertaken by him personally following a realisation by him that the statement released on 9 January was inaccurate and in an attempt to rectify the position, and to avoid any embarrassment, before the inaccuracy came to light. The Executive does not consider that this was an appropriate course of action and that, in fact, Mr. Bonnier should have informed the Executive immediately he became aware of the error in the statement made on 9 January so that a corrective statement setting out the position could have been released as quickly as possible.

### **The Executive's findings**

The Executive has concluded that the dealings in relevant securities by Indigo Capital and Mr. Bonnier referred to above should have been, but were not, disclosed in accordance with Rule 8.

In addition, the closing out by Indigo Capital of a contract for differences during the Regus offer period was in breach of Rule 4.2.

The Executive has discussed these breaches with Mr. Bonnier and Indigo Capital and understands that they arose from a failure properly to consider the Code consequences of, or to seek appropriate advice or to consult the Executive in relation to, those transactions.

Mr. Bonnier, for himself and on behalf of Indigo Capital, has apologised unreservedly to the Executive for these breaches.

The Executive regrets that these breaches of the Code occurred in this case and considers that the conduct of Indigo Capital and Mr. Bonnier has fallen well short of the standards required of parties involved in takeovers. The Executive is particularly concerned that the purchases of shares by Mr. Bonnier on behalf of Indigo Capital on 13 and 14 January were undertaken in direct contravention of previous instructions given by the Executive that all future dealings in relevant securities of Regus must be cleared in advance with the Executive and in an apparent attempt to avoid the need for disclosure.

Mr. Bonnier and Indigo Capital are accordingly each hereby criticised.

21 January 2003

**Notes:**

An "offer period" is defined in the Code as follows:

**"Offer period**

Offer period means the period from the time when an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when the offer becomes or is declared unconditional as to acceptances or lapses. An announcement that a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights of a company is for sale or that the board of a company is seeking potential offerors will be treated as the announcement of a possible offer. (See also Rule 12.2 regarding competition reference periods.)"

Note 2 on Rule 8 provides as follows:

*"2. Relevant securities*

*Relevant securities for the purpose of Rule 8 include:-*

- (a) securities of the offeree company which are being offered for or which carry voting rights;*
- (b) equity share capital of the offeree company and an offeror;*
- (c) securities of an offeror which carry substantially the same rights as any to be issued as consideration for the offer;*
- (d) securities of the offeree company and an offeror carrying conversion or subscription rights into any of the foregoing; and*
- (e) options in respect of any of the foregoing and derivatives referenced to any of the foregoing.*

*The taking, granting or exercising of an option (including a traded option contract) in respect of any of the foregoing or the exercise or conversion of any security under (d) above whether in respect of new or existing securities and the acquisition of, entering into, closing out, exercise (by either party) of*

*any rights under, or variation of, a derivative will be regarded as a dealing in relevant securities (see also Notes 5 and 7 below).*

*Disclosure of dealings in relevant securities of an offeror is only required (a) following the announcement of a securities exchange offer, or (b) following the earlier commencement of an offer period, if it has not been announced that any offer is likely to be solely in cash."*

The first paragraph of the definition of "associate", as it appears in the Code, is as follows:

**"Associate**

*This definition has particular relevance to disclosure of dealings under Rule 8.*

It is not practicable to define associate in terms which would cover all the different relationships which may exist in an offer. The term associate is intended to cover all persons (whether or not acting in concert) who directly or indirectly own or deal in the shares of an offeror or the offeree company in an offer and who have (in addition to their normal interests as shareholders) an interest or potential interest, whether commercial, financial or personal, in the outcome of the offer."