

THE TAKEOVER PANEL

OFFERS BY
TIGER ACQUISITION CORPORATION PLC (“TIGER”)
AND
BELEGGINGSMAATSCHAPPIJ FLORISSANT N.V. (“FLORISSANT”)
FOR
QXL RICARDO PLC (“QXL”)

Introduction

This is a statement of criticism of Teather & Greenwood Limited (“Teather & Greenwood”) which committed a number of breaches of the Code while acting as broker to Florissant in the context of the recommended cash offer by Florissant for QXL.

Background

In late 2004 and early 2005, QXL was the subject of competing offers by Tiger and Florissant. On 26 November 2004, Tiger announced a recommended cash offer for QXL of 700p per share. Following the receipt of a number of proposals from parties interested in acquiring all or part of the business of QXL, the independent directors subsequently withdrew their recommendation of this offer and, on 14 January 2005, Florissant announced a unilateral cash offer of 800p per share. On 14 February, Tiger announced an increased recommended offer of 1000p per share in cash plus one litigation entitlement unit. Florissant responded on 3 March by announcing an increased recommended cash offer of 1400p per share.

On 4 March, the Executive announced rules relating to a controlled auction procedure to resolve the competitive situation. Following the announcement by Tiger of minor revisions to the litigation entitlement units on the first two days of the auction,

Florissant announced, on 10 March, the final day of the auction, that it would not be revising its offer of 1400p per QXL share. This was on account of the fact that Great Hill Equity Partners II LLC (“Great Hill”), the principal funder of Tiger, had taken an option to acquire a minority equity interest in Florissant, conditional on Florissant’s offer becoming or being declared unconditional in all respects. Accordingly, Great Hill announced that it intended to lapse Tiger’s offer at its next closing date.

Florissant was initially advised only by Hawkpoint Partners Limited (“Hawkpoint”) and ISB Corporate Finance (ISB”). However, on 4 February, Teather & Greenwood was approached to act as broker to Florissant and a draft engagement letter was sent to Florissant on 9 February. Although this letter was not signed by Florissant until 18 February, Teather & Greenwood was named as broker to Florissant in an announcement released by Florissant on 11 February under Rule 17.1 of the Code detailing its level of acceptances as at its first closing date. However, it was not until 18 March that the Executive was contacted by Teather & Greenwood and notified that it was acting for Florissant.

On 11 March, the day following the conclusion of the auction procedure, Teather & Greenwood was instructed by Florissant to buy up to 306,000 QXL shares at 1400p per share (being the price of the Florissant offer). Teather & Greenwood satisfied this order through its market-maker acquiring stock from the order book, from market counterparties and from clients of Teather & Greenwood. On 14 March, Teather & Greenwood received an order to buy a further 154,000 QXL shares for Florissant. However, on this occasion, Teather & Greenwood was unable to fulfil the order from the sources referred to above and so its market-maker went short the balance (leaving the market-maker with a short position of 20,183 QXL shares). On 16 March, Florissant submitted an order to buy a further 48,000 shares. Again, Teather & Greenwood was unable to fulfil the order and again its market-maker went short the balance. This resulted in the market-maker’s short position increasing to 35,582 QXL shares. Each of these purchases of QXL shares by Florissant was disclosed by Teather & Greenwood on behalf of Florissant under Rule 8.1(a).

The short position of 35,582 shares in favour of Florissant at 1400p per QXL share was “naked” as Teather & Greenwood had not borrowed stock to deliver to Florissant.

However, Teather & Greenwood was not unduly concerned at this since it believed that, following the conclusion of the auction, the Florissant offer was likely to succeed. Accordingly, Teather & Greenwood believed that it would be able to fill this short position by purchasing QXL shares in the market at or below 1400p per share. However, on 21 March, prior to Teather & Greenwood having filled its short position, the QXL share price rose to above this level (where it has remained ever since) on account of, inter alia, the Izaki Group purchasing shares in the market at above Florissant's offer price. As a result, Teather & Greenwood was exposed to the risk of having to fill its short position at above 1400p per QXL share. This would not only result in a cost to Teather & Greenwood, but would also mean that certain shareholders in QXL would be taken out of the market at above the offer price indirectly by Florissant.

In the light of this concern, and in view of the fact that, under Note 5 on Rule 10, Florissant would not be able to count the shares which it had been sold short and for which it should have not yet received valid title towards its acceptance condition, on 23 March, the Executive agreed that Florissant should publish an amended disclosure under Rule 8.1(a). This disclosed that Florissant had been unable to obtain satisfactory title to 17,948 of the QXL shares purchased (being Teather & Greenwood's outstanding short position of 11,948 shares and the 6,000 shares which Teather & Greenwood had acquired above 1400p per share – see further below) and that Florissant's resultant total holding was in fact 490,052 shares, being 28.83% of QXL's issued share capital, and not 508,000 shares as previously disclosed. This effectively unwound the acquisition by Florissant of the shares which it had been sold short to the extent that Teather & Greenwood had not subsequently been able to fill the short position at or below 1400p per share. As a result, the Executive was, in all the circumstances, satisfied that none of the shares acquired by Florissant could be said to have been acquired at above its offer price.

On 7 April, the final date by which, under the auction procedure, Florissant's offer could become or be declared unconditional as to acceptances, Florissant announced that it had received acceptances in respect of 10.2% of the issued share capital of QXL and that, accordingly, its offer had lapsed.

Issues arising under the Code

Introduction

Under presumption (5) of the definition of acting in concert, a financial adviser or stockbroker is presumed to be acting in concert with its client in respect of the shareholdings of the adviser or broker and persons controlling, controlled by or under the same control as the adviser or broker (except in the capacity of an exempt market-maker). If a market-maker has been granted exempt status by the Panel (because the Panel is satisfied as to its independence from the group's corporate finance or broking operations), then dealings by it will not be subject to the normal presumption of concertedness. However, as a condition of being granted exempt status by the Panel (and to the relaxation of the normal presumption of concertedness), exempt market-makers are required to comply with Rule 38 of the Code.

Teather & Greenwood's market-making operations were granted exempt status by the Executive on 15 November 2002.

Breach of Rule 38.2 by Teather & Greenwood

Rule 38.2 provided as follows¹:

“38.2 DEALINGS BETWEEN OFFERORS AND CONNECTED EXEMPT MARKET-MAKERS

An offeror and any person acting in concert with it must not deal as principal with an exempt market-maker connected with the offeror in relevant securities (as defined in Rule 8) of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule rather than the market-maker.”

¹ On 25 April, amendments were made to a number of Rules of the Code, including minor amendments to Rule 38.2. This statement has been drafted on the basis of the Code as it was at the time that the breaches occurred.

The purpose of Rule 38.2 is to ensure that there is no risk of an exempt market-maker connected with an offeror abusing its exempt status by, for example, purchasing shares at above the offer price for delivery to the offeror in exchange for an enhanced corporate finance or broking fee. The safeguards provided by Rule 38.2, Rule 38.3 (which prohibits an exempt market-maker connected with an offeror from assenting shares to the offer until the offer is unconditional as to acceptances) and Rule 38.4 (which prohibits an exempt market-maker connected with an offeror or the offeree company from voting securities in the context of an offer) are fundamental to the Panel's willingness to grant market-makers exempt status.

In this case, Teather & Greenwood not only breached Rule 38.2 by purchasing shares from the market to sell to Florissant (i.e. the offeror with which it was connected) but it compounded that breach by selling QXL shares short to Florissant. As a result, and as explained above, Teather & Greenwood was exposed to the risk of having to fill its short position at above the Florissant offer price and, on two occasions, did so – on each of 21 March and 22 March, Teather & Greenwood purchased a tranche of 3,000 QXL shares from clients of the firm at 1420p per share and 1430p per share respectively. Indeed, but for the Executive agreeing to the amended disclosure under Rule 8.1(a) as set out above, the entirety of Teather & Greenwood's outstanding short position as at 23 March of 11,948 QXL shares would also have been filled at above 1400p per share.

The Executive has investigated this breach of Rule 38.2 and has received confirmation from Teather & Greenwood that there were not, nor are there, any agreements, arrangements or understandings in place between it and Florissant under which it was to be compensated by Florissant for any loss it might suffer in purchasing QXL shares for Florissant. However, although the Executive does not believe that Teather & Greenwood deliberately flouted the Rule, it is clear from the Executive's investigations that Teather & Greenwood did not consider the requirements of Rule 38.2 or how to comply with them.

Dealing through an anonymous trading system

On each of 11, 14 and 16 March, Teather & Greenwood purchased QXL shares on behalf of Florissant from the SETS order book. As was made clear in Panel Statement 1997/11 and in paragraph 3 of each of PCP 2004/3 and RS 2004/3, and as has been codified with effect from today, the Panel does not consider it appropriate for an offeror or any person acting in concert with it to purchase shares in an offeree company through an anonymous order book system unless it can be established that the vendor is not an exempt market-maker connected with the offeror. This is in order to ensure compliance with Rules 38.1 (which, inter alia, prohibits an exempt market-maker connected with an offeror from carrying out dealings with the purpose of assisting the offeror) and 38.2 and underlines the importance which the Panel attaches to those Rules. This point was also specifically drawn to Teather & Greenwood's attention in a letter from the Executive dated 15 November 2002 confirming the grant of exempt status to its market-making operations. However, the Executive's investigations also revealed that Teather & Greenwood did not consider how to comply with this requirement.

Failure by Teather & Greenwood to make timely disclosures under Rule 38.5

Teather & Greenwood acknowledges that in practice it started acting as broker to Florissant on 9 February, being the date on which it sent a draft engagement letter to Florissant. Given that Florissant was at that time an announced offeror for QXL, and given that Teather & Greenwood's exempt market-maker was continuing to deal in QXL shares, disclosures of such dealings should have been made with immediate effect under Rule 38.5. However, it was not until 18 March, when Teather & Greenwood notified the Executive that it was acting for Florissant, that Teather & Greenwood started to disclose its market-making dealings under Rule 38.5 whereupon, at the request of the Executive, Teather & Greenwood also made appropriate disclosures dating back to 11 February. The requirement to make timely disclosures under Rule 38.5 is clearly important in order to ensure that there is transparency as to the operations of a connected exempt market-maker.

Conclusion

The failure by Teather & Greenwood to comply with Rule 38 as explained above constituted serious breaches of the Code. Teather & Greenwood is criticised for these breaches. As broker to Florissant, Teather & Greenwood was responsible for compliance with Rule 38 in this case and the Executive attaches no blame to either Hawkpoint or ISB.

25 April 2005