# THE TAKEOVER PANEL

## B.A.T INDUSTRIES p.l.c.

**The Issue**

Hoylake Investments Limited ("Hoylake") announced an offer for the entire issued share capital of B.A.T Industries p.l.c. ("BAT") on 11 July 1989. The offer contained a standard condition relating to the obtaining of all necessary regulatory approvals. BAT indirectly owns Farmers Group, Inc. ("Farmers"), a US insurance company. So the necessary regulatory approvals included approval by the insurance commissioners in the states in which Farmers is authorised to carry on business. There are nine such states.

Since the announcement of the offer by Hoylake, BAT and Farmers have taken various actions in the United States which Hoylake submitted have frustrated its offer. Hoylake invited the Panel to rule that the directors of BAT are in breach of General Principle 7 of the Code, which requires the approval of shareholders prior to the taking of frustrating action. The Executive ruled that the action of BAT did not constitute frustrating action within General Principle 7, and Hoylake appealed that decision.

Hoylake also suggested that the position has now been reached in which it is effectively impossible to achieve the relevant Unite States regulatory approvals within the Code timetable. It therefore requested the Panel to rule that, if Hoylake were to lapse its offer immediately, it should be permitted to make a new offer for BAT once the United States regulatory position is resolved in its favour. It thus submitted that the Panel should give its consent under Rule 35.1(a) to a relaxation of the usual one year moratorium. The Executive did not itself rule on this issue but referred it to the full Panel.

**Rulings**

The Panel met on 13 September 1989 and ruled as follows:-

(1) That the actions to date of BAT, either directly or through Farmers, in lobbying politicians and others who they considered might influence the outcome of the offer in the United States did not constitute frustrating action. Nor did the participation by Farmers in the regulatory processes in the nine states, nor its intervention in legal proceedings brought by Hoylake to restrain the insurance commissioners from conducting regulatory proceedings.

(2) The regulatory proceedings are most unlikely to be concluded within the timetable prescribed by the Code. This will have the effect that shareholders will not have a real opportunity to consider an offer for BAT on its merits. In these circumstances, the Panel considers that it should grant its consent pursuant to Rule 35.1 (a) so that, if and when it becomes lawful as a matter of US law for Hoylake to complete its offer for BAT, Hoylake will be entitled within 21 days to announce a fresh offer, subject to the conditions set out below.

By this ruling, we attempt to apply the principles of the Code to a situation in which a foreign regulatory process, as distinct from a reference to the Monopolies and Mergers Commission ("MMC"), may operate so as to prevent shareholders considering an offer for their company. In essence, BAT and Farmers will continue to be able to participate in the regulatory processes in the United States but, should Hoylake obtain the necessary regulatory clearances, it will be entitled to offer again within a 21 day period in the same way as if an offer had been referred to, and cleared by, the MMC. During the period between now and the expiry of the 21 day period, BAT will be bound by General principle 7 and Rule 21 to the same extent as it would have been bound had the Hoylake offer been referred to the MMC.

The consent granted to Hoylake is conditional, however, on three things. First, that it lapses its current offer as soon as is reasonably practicable following this decision and the completion of any appeal against it. Secondly, it continues to use its best efforts to conclude the regulatory processes within as short a timescale as practicable and thirdly, neither it nor any concert party purchases any BAT shares between now and the announcement of any new offer within the 12 month period. This third condition is important to ensure that the status quo is preserved.

The principle of our ruling is that Hoylake should be entitled to make a new offer at any time within 21 days after it has become lawful as a matter of US law for it to complete its offer for BAT. The exact definition of this date, to remove any residual uncertainties as to precisely when Hoylake might be free to offer again, will be determined shortly by the Executive (subject, of course, to the right of appeal to the full Panel) after hearing the suggestions of Hoylake and the comments of BAT. Hoylake is required to make an announcement as soon as this date is reached.

We emphasise subsequently in this ruling that we are applying the existing Principles of the Code to a situation which is novel. But situations of this kind, where the interaction of the Code and foreign regulatory processes falls to be considered, are likely to recur. Whilst, inevitably, decisions must be made on a basis which takes account of the facts of individual cases, and which may be refined and developed in the light of further experience, the Panel will seek to prepare an additional note to Rule 35.1 which gives an indication of the general approach which we think should be adopted in cases of this kind.

This is an extremely difficult case. We consider that, exceptionally during the course of a takeover, it is right to grant BAT leave to appeal to the Appeal Committee against our ruling. BAT must decide by opening of business on Tuesday 19 September whether to exercise this right of appeal. If so,

the Code timetable will be frozen in order to accommodate the appeal. In the meantime, it is frozen until BAT decides whether it is going to appeal.

As a supplementary matter, BAT appealed a ruling by the Executive that "day 39" should be extended until whichever was the later of the three days after publication of the Panel's judgement in this case or Monday 18 September. As a consequence of the Panel's decision on the main issues Hoylake's offer will lapse shortly and accordingly it was not necessary for the Panel to rule on this supplementary issue. If the Panel's decision were to be overturned on appeal it would be for the Appeal Committee to determine how the timetable should restart.

**Background**

BAT acquired Farmers in 1988. Before doing so, it had to satisfy the insurance commissioners in those states of the United States in which Farmers carried on business as to the propriety of such acquisition. Farmers carried on insurance business, directly or indirectly, in nine states of the United States where, subject to certain limited exceptions, state insurance holding company legislation requires regulatory approval of any direct or indirect acquisition of control of a domestic insurer. These states are Arizona, California, Idaho, Illinois, Kansas, Ohio, Oregon, Texas and Washington. Farmers is an important company within the United States insurance markets, and within each of the individual states. This has regulatory consequences.

The regulation of the business of insurance in the United States is conducted by the individual states. The object of such regulation is to protect the financial security of policyholders within that state. The state regulators, in discharging this function, are entitled to review both the plans and financial condition of a party who proposes to acquire an insurance company.

The procedure for securing regulatory approval is as follows. The proposed acquirer is required to submit an application for approval of the transfer by filing a statement on Form A. This Form calls for detailed information. The commissioners not infrequently request supplementary information. In some states there is a timetable of 60 days for completion of the regulatory processes, but this may be extended. In some cases the timetable does not start to run until the insurance department decides that the submission by the applicant is substantially complete.

The insurance commissioners invariably seek the views of the target company on the application. The target company, however, will often go well beyond responding to requests for information. It is common ground that it has a fiduciary duty to policyholders to lay before the commissioners information which is relevant to the protection of such policyholders. The form of the proceedings reflects the constitutional requirement of due process, and there are provisions for documentary and oral discovery. In practice, the submissions of the target company may affect the extent to which the insurance commissioners require further assistance and information from the potential bidder. If the target company contests the acquisition, the process may inevitably go less smoothly and more slowly than if the target company is cooperating with the acquirer. Whilst the proceedings are technically administrative in concept, they have a very substantial quasi-judicial element. The procedures, in a contested case, were said to be nearly as onerous as those in litigation. They are, however, ultimately in the control of the insurance commissioner. They are, moreover, initiated by the proposed acquirer and never by the target company.

**The facts**

It is in this context that Hoylake made its offer for BAT. Hoylake will become a subsidiary of Anglo Group plc ("Anglo"). At the time of the announcement of its offer, on 11 July, the other investors in Hoylake included General Oriental Investments Ltd, the Chairman of which is Sir James Goldsmith, J Rothschild Holdings plc and its associate company RIT Capital Partners plc,

and also C.P Investments (Singapore) Pte. Limited, a company indirectly controlled by Mr Kerry Packer. Anglo was, and is, controlled jointly by General Oriental Investments, J Rothschild Holdings and RIT Capital Partners, since together they hold 75% of its existing share capital.

Under the Hoylake offer, each BAT shareholder who accepts will, if that offer goes wholly unconditional, receive £4,250 nominal of Hoylake's senior secured notes, $4,182 nominal of Hoylake's subordinated notes and 387 Anglo Ordinary shares for every 1,000 BAT shares held. Thus, if all BAT shareholders were to accept the Hoylake offer and it were to be declared wholly unconditional, BAT shareholders would hold 92% of the issued ordinary share capital of Anglo. Anglo would in turn hold approximately 75% of the issued ordinary share capital of Hoylake which would then own 100% of BAT.

It has been disclosed since the offer was announced that various new investors will subscribe for shares in Hoylake. These new shareholders will, in essence, hold shares which would otherwise have been held by the original investors in Hoylake, other than Anglo. So they do not materially affect the nature and effect of the offer as we have described it. They do, however, affect the position of shareholders in Hoylake other than Anglo. In particular, Axa Midi Assurances ("Axa Midi") has conditionally agreed to invest £600mn in Hoylake subject to Hoylake announcing a revised offer for BAT or Hoylake's offer for BAT lapsing. In the light of this, Axa Midi may become the second largest shareholder in Hoylake, after Anglo, holding 15% of its Class A shares.

As is now well known, at the time of announcing its offer Hoylake had, and now has, no intention of retaining Farmers should it acquire control of BAT. It therefore proposed to the insurance commissioners a "standstill" agreement and an agreement whereby the shareholding in Farmers would be put into a voting trust with independent US trustees. In due course, the new ultimate owner would have to be approved by the commissioners. The use of such voting trusts is apparently not new in the United States. It is

said on behalf of Hoylake that there is some limited precedent in the context of takeovers in the insurance business, although BAT cast doubt on whether any such voting trust would be approved unless the commissioners were also able to approve Hoylake as acquirer.

On 9 August Hoylake announced that three independent trustees had been chosen. Hoylake followed this by entering into an agreement on 23 August for the sale of Farmers to Axa Midi for $4.5bn, subject to certain conditions. It was this agreement which committed Axa Midi to its investment in Hoylake in the event of a revised offer.

We turn to the entry of Farmers into the regulatory process. Hoylake, as required by statute, sent copies of its Form A submissions to Farmers at the same time as they were submitted to the local insurance regulatory authorities. Farmers thereafter participated in the state regulatory proceedings. This participation has undoubtedly been diligent and thorough.

Hoylake has made a number of submissions to the United States regulators. Hoylake submits, in a number of the states, that there is a statutory exemption from the need for approval because, as it is suggested, the target company is engaged primarily in business other than insurance. It has also argued that the effect of the voting trust would be to cause the regulators to minimise their review of Hoylake since they could rely on the protection which the trust provides. Hoylake has also suggested that there would be no change of control since, if the offer were successful, BAT's shareholders would own approximately 92% of Anglo, with Anglo being the ultimate parent of Hoylake.

At the time it made its offer, Hoylake held the view that the commissioners would be inclined to give prompt attention to an offer outside the US by a UK group for another UK group. Hoylake, in the light of legal advice, apparently concluded that there was a reasonable prospect of resolving the United States regulatory process by day 81 of its offer (ie the last day for

fulfilment of all conditions of its offer pursuant to the Code). This advice appears to have been based on the belief that the creation of the voting trust would have the effect of lessening the extent to which the full regulatory process would have to be conducted. BAT make the point that Hoylake should instead have concentrated on satisfying the regulators that it met on the merits the criteria for control of an insurance company.

In addition to the submissions which Hoylake has made to the insurance commissioners, Hoylake has commenced Federal legal proceedings against commissioners in all nine states alleging that the relevant state laws constituted an unconstitutional interference in inter-state commerce to the extent that they applied to Hoylake's offer for BAT. It only commenced these proceedings at the end of July after, as it suggested, BAT had sought to "poison the well" with the insurance regulators. Hoylake has claimed interim relief by way of preliminary injunction in all these proceedings. So far the only courts which have ruled on this claim, the District Courts in California, Texas, and Washington, have denied it. Hoylake says it will appeal these decisions. Whilst the proceedings were brought against the commissioners alone, Farmers has in each of the states filed a motion to intervene as a defendant opposing Hoylake's claim. This has apparently been welcomed by several insurance commissioners, since it is said that additional resources will be brought to the assistance of the regulators. The regulators inevitably consider that they would otherwise be hard pressed effectively to defend a major constitutional case. There is no prospect whatsoever of this litigation being completed in a short period of time.

It might be thought at first sight that any preliminary injunction granted to Hoylake in these proceedings would inevitably have the effect of preventing Hoylake's offer being considered by the commissioners during the Code timetable. However, according to Hoylake and its advisers, (and not, we understand, disputed by BAT), if Hoylake had obtained the preliminary injunction preventing the regulators temporarily from ruling on the proposed acquisition, Hoylake would then have had a

"window of opportunity" to complete its offer while the regulators were in baulk. If the preliminary injunction were subsequently discharged, the regulators' powers would include the ability to order divestment of the insurance company, but the offer would not be unscrambled. This consideration in part explains why Hoylake pursued litigation which might otherwise be thought to give rise to self-induced frustration of its offer.

In addition to participating in the regulatory process, and intervening in the constitutional proceedings, BAT and Farmers also engaged in intensive lobbying in the United States. Hoylake suggested that it is the influence of BAT which led two Senators from Kentucky, the state where the headquarters for BAT's United States operations is located and a state with a large tobacco industry, to obtain signatures of 200 members of Congress to a letter to the US Secretary of State, James Baker, urging him to "communicate our concern to the British Government" about Hoylake's bid and about how "foreign financiers are seeking to buy up America". Hoylake also claimed that one of the Kentucky Senators has asked the United States General Accounting Office to conduct within sixty days an investigation of the Hoylake offer, including the implications of the offer for investors in markets, and that in making this request he was prompted by BAT. Hoylake points to lobbying which it suggests has taken effect at the state level.

We would emphasise that these are but illustrations of the conduct of which Hoylake complains.

The scale of operations on both sides in the United States has been massive and intense. Hoylake has deployed in excess of 110 individual lawyers, lobbyists and public relations personnel on a full time basis. BAT's battalions are said to include 21 law firms, 15 lobbying firms and 12 public relations companies. It is against this background that Hoylake submitted that BAT have breached General Principle 7 of the Code by acting in such a way as to frustrate the offer, whereas BAT submitted that Hoylake have failed to act effectively so as to secure the appropriate regulatory decisions within the Code timetable.

**General Principle 7**

General Principle 7 of the Code provides as follows:-

> "At no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits."

This principle is fundamental to the Code. It cannot always be easy for the management of a target company to distinguish its own interests from those of its shareholders; this is potentially damaging in circumstances where the two do not necessarily correspond. One of the principal objects of the Code is to enable the shareholders in the target company to have an opportunity to consider an offer for their company on its merits on an informed basis in an orderly and limited timescale. There are no corresponding provisions in United States law or practice. In general the primary limitation in the United States is that the directors must act in accordance with their fiduciary duty, and the courts allow considerable latitude to the directors to exercise their business judgment in deciding what action to take in response to a takeover offer. Thus in the BAT offer for Farmers, Farmers vigorously participated in the regulatory process which took substantially longer than the timescale provided by the Code. This was, however, irrelevant since the offer for Farmers, as a US company, by BAT was not subject to the Code and, accordingly, no issue arose in the UK as to whether Farmers had engaged in frustrating action.

The issue which we now have to consider arises in an increasingly important context. Where multi-national companies, based in this country and subject to the Code, have interests in the United States or other countries, the possibility of foreign regulatory scrutiny on public interest grounds may often be present.

Hoylake submitted that the board of BAT has sought to frustrate the offer in three ways:-

i) by lobbying of Congressmen and others;

ii) by encouraging and persuading the various US commissioners to block Hoylake's offer and by taking every opportunity to delay the regulatory proceedings by seeking extensive discovery, depositions and adjournments; and

iii) by intervening in Hoylake's legal actions against the US insurance commissioners.

Hoylake submitted that the words of General Principle 7 of the Code are wide enough to cover each of these situations. However, paragraph 3(a) of the Introduction to the Code states that the General Principles are "expressed in broad general terms and the Code does not define the precise extent of, or limitations on, their application". The Code is to be interpreted in accordance with its spirit and purpose, and with regard both to common sense and the precedent which has developed over the twenty one years of the Panel's existence. In this context we turn to the specific allegations.

**Lobbying**

Historically, it has been common in this country for target companies to lobby both the Department of Trade and Industry ("DTI") and the Office of Fair Trading ("OFT") in order to seek to secure a reference of an offer to the MMC. In such event, the offer would automatically lapse (pursuant to Rule 12(a) of the Code). The target company would hope that the effect of such a reference would be that the MMC would be persuaded that the offer was contrary to the public interest, or that the bidding company would simply lose interest in the light of the reference or, at very least, that the target company would gain time which might, in the event of clearance and a renewed offer, give it a better prospect of a successful defence.

Hoylake does not challenge the view which has historically been taken that such lobbying is unobjectionable. It submitted, however, that the position is not analogous to an investigation by the OFT. In particular, it suggested that the OFT procedure is designed to fit in with the Code timetable, and so does not offer the opportunity for frustration which is offered by the US procedure.

This misses, however, what we consider to be the essential point. We do not consider that lobbying generally of politicians and others is capable of contravening General Principle 7. It is not a very direct way of obstructing an offer, and since it is possible for the bidder to engage in counter lobbying, the effect of the process is simply to enable one of the public interest decision takers to have presented to them both sides of the argument. Irrespective of its effectiveness the lobbying of politicians is a democractic right which it would be inappropriate for the Panel to inhibit. Nor could the Panel properly draw a line between permissible and impermissible lobbying. If it is accepted by Hoylake that an offerer is entitled to engage in lobbying on the public interest issue, it would be one-sided if the target company was not permitted to do so. The scale of the publicity or the lobbying must inevitably depend upon the efforts which the parties consider sensible in the light of the issues involved. Illustrations of extensive lobbying in this country can be found in the offer by BTR for Pilkington and by Nestle for Rowntree. The nature of Hoylake's offer for BAT was, bearing in mind the presence of Farmers in the United States, perhaps bound to attract intense public interest and give scope for considerable lobbying. In the event, the Panel does not consider that lobbying constitutes frustrating action.

**The proceedings before the insurance commissioners**

Hoylake submitted that the proceedings before the insurance commissioners were tantamount to adversarial proceedings between parties, and, accordingly, that BAT and Farmers should not be

able to participate without the consent of shareholders, since the effect of such action will be to prevent Hoylake obtaining appropriate consents within the bid timetable.

Whilst there is some conflict of evidence as to the exact effect of what has been done by BAT and Farmers in regard to the US regulatory proceedings, there is no doubt that such involvement has been substantial. We are concerned about the opportunities which may be created by the nature of the United States regulatory proceedings for a party to delay the regulatory process. We do not exclude the possibility that, in an appropriate case, it may be established that the target company had acted in such a way as constitutes frustrating action. Indeed, in the present case, we note with approval that BAT/Farmers were specifically advised by their English lawyers that, in discharging their fiduciary duty to policyholders to place information before the insurance commissioners, they should have regard to the obligations of BAT under General Principle 7. We do, however, consider that in general the nature of litigation and administrative proceedings are different. The administrative proceedings are initiated by the regulators, and the target company may have as in the present case an obligation to cooperate, whilst its legal duties to shareholders or policyholders may extend the ambit of that formal obligation. We would, therefore, be very slow to characterise conduct in regulatory proceedings which are controlled by the regulator as being frustrating action. We emphasise, however, that we cannot be too dogmatic on this issue, since in each case something must depend upon the nature of the foreign regulatory process and the action taken by the target company. It is the responsibility of the target company at all times to keep General Principle 7 well in mind. In the present case, we do not consider we would be justified in reaching the conclusion that the actions of BAT, through Farmers, can be regarded as frustrating conduct. They are certainly wide-ranging, and thorough, and in another jurisdiction might be regarded as over-diligent. But those foreign regulators who have been contacted by the Executive have

not suggested that Farmers have in any way behaved inappropriately or been other than prompt in the actions they have taken.

We bear in mind that State officials in some states have indicated that they support intervention by BAT and Farmers. They apparently consider that the resources which are thereby brought to bear will assist them more effectively to discharge their regulatory duty. Moreover, it would seem that BAT/Farmers have to a degree refrained from action as thorough and persistent as that carried out by Farmers in response to the prior offer by BAT. Sir James Goldsmith drew attention to what he described as the change in attitude of Farmers to their duties to assist the regulator when, at a late stage of their contest with BAT, terms were agreed. The Hoylake side are clearly cynical as to BAT's motives for the action it is taking. BAT riposted by pointing out that the nature of the agreements between BAT and Farmers at that late stage ironed out many of the regulatory difficulties. We cannot fully evaluate these contentions. Whilst it is understandable that Hoylake are cynical about BAT's motives we do not consider, having heard the evidence of Mr Don Greene of LeBoeuf, Lamb, Leiby & MacRae that we would be justified in concluding that BAT's conduct was frustrating action. BAT should, however, continue to heed the advice given to them by their English lawyers that they should act in such proceedings in such a way as to avoid a charge of frustration.

**Federal Court proceedings**

The decision of the Panel in regard to Minorco's offer for Consgold clearly established that the taking of legal proceedings, whether in the jurisdiction of the UK Courts or elsewhere, might fall within General Principle 7. In that case, Consgold were acting as plaintiffs. In the present case, however, Farmers are not plaintiffs. The proceedings were initially brought against the insurance commissioners as defendants. Farmers took the initiative in seeking to join in those suits, and have succeeded in doing so in eight of the nine relevant states. They thus were not joined in the proceedings as

defendants, but the effect of their voluntary intervention is that they have at their own initiative been added as defendants. It is accepted by BAT that Farmers has done so with the intention of seeking to assist the commissioners to succeed in resisting those actions.

In the litigation, BAT has confined itself to supporting the commissioners in their unsuccessful motions for summary dismissal and in their successful resistance of the applications for a preliminary injunction. Both these actions are designed to uphold the jurisdiction of the regulators, so that they can fulfil their statutory function of deciding whether an acquisition should be permitted. Whilst this may deprive Hoylake of the benefits which a preliminary injunction might give, we consider it is essentially linked to the participation by the target company in the regulatory process. We consider that it is not frustrating action for the target company, having regard to its fiduciary duty to policyholders, to uphold the jurisdiction of the regulators to seek to protect those policyholders. If this litigation continues, however, BAT should consider its future involvement very carefully with regard to General Principle 7.

Finally, in coming to the conclusion that the Panel should be slow to hold that actions such as taken by BAT/Farmers in this case are a breach of General Principle 7, we had regard to the fact that any disadvantage to shareholders would be mitigated if, as discussed in the next section, the Panel were to exercise its discretion under Rule 35.1(a) to permit an early new offer.

**Rule 35.1(a)**

It should be emphasised that Hoylake does not seek an extension of the Code timetable in regard to the present offer. Hoylake submits that, by analogy with the procedure where an offer is referred to the MMC in this country, it should be permitted to renew its offer as soon as the US regulatory position is completely resolved in Hoylake's favour.

Rule 35.1(a) provides as follows:-

> "Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offerer, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-
>
> i) make an offer for the offeree company; or
>
> ii) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer."

The principal purpose of the Code is to uphold the interests of shareholders in the target company, as well as seeing fair play between the respective parties. In order to secure the interests of shareholders, the Panel is frequently required to ensure that shareholders are given the opportunity of considering an offer which someone wishes to make for their shares. This is, for example, the central philosophy underlying General Principle 7. The Code recognises, however, that it is not in the interests of shareholders for their company to be continually under siege. This may result in the management devoting considerable time and resources to defending offers, rather than managing the company for the benefit of shareholders. It is this consideration which underlies Rule 35.1. This emphasises that the main consideration which the Panel has to apply in considering whether to grant consent to a renewed offer within the 12-month period is the interests of shareholders.

Before we turn to the substance of the issue, there is a preliminary consideration as to whether application for consent should be considered now or later. These applications are normally made at the time when the prospective offeror wishes to launch its second offer.

It was argued for BAT that Hoylake is premature in seeking consent before it is ready to make a new offer, or, at very least, before its first offer has certainly failed or

shareholders have expressed their views on its merits. In developing this submission, BAT urged that we should require Hoylake to decide whether it was prepared to increase its offer or, as BAT put it, make a "real" offer. Once Hoylake had made its revised offer, shareholders could consider whether to accept the offer on its merits. It was argued that shareholders would not be influenced by the regulatory uncertainty. So, if the offer failed on its merits there would be no reason for granting consent to an exemption from the twelve month moratorium.

We cannot accept this submission. We recognise that, even if all regulatory consents had been obtained, the offer might fail. We consider, however, that a significant number of shareholders might be influenced towards inaction by the uncertainty surrounding the regulatory process. To this extent the offer could not be properly considered on its merits. The Panel, which included representatives of investor organisations, doubted whether shareholders would accept the offer if there was substantial regulatory uncertainty as to whether it could ever go unconditional. We do not think that the approach put to us by BAT is one to be adopted. We therefore consider that we should deal with the issue now. We think it is desirable in principle to end the uncertainty surrounding the current Hoylake offer as soon as reasonably practicable. We consider it is in the interests of shareholders that we should lay down the ground rules which enable the parties to move towards resolution of the regulatory uncertainty as speedily as possible.

Hoylake submitted that, in the light of the inability to complete the regulatory process within the Code timetable, fairness to shareholders in BAT makes it appropriate that consent should be given to Hoylake to re-bid within 12 months of the lapsing of its current offer. It pointed to the fact that, without flexibility in the application of Rule 35.1, the ability of the Code to provide a sensible framework for offers, particularly for multi-national companies, could be called into question and certain companies rendered bid proof by the interaction of the Code and foreign regulatory systems.

Hoylake submitted that, at the time it launched its offer, it was advised and considered that there was a reasonably good prospect of completing the regulatory process in all states within the prescribed timetable. It submitted that the vigorous participation by BAT in the regulatory process, to which we have already referred, has caused or at any rate significantly contributed to what is now perceived as an inability to complete the process in due time. It submitted that the essential reasoning by which the Panel allows an offerer to launch a second offer after clearance by the MMC, namely that shareholders have been deprived of the opportunity to consider any offer for their company, applies in the present case.

BAT made a number of responses. First, it submitted that Hoylake has been dilatory and inefficient in pursuing the regulatory process, and that this has caused the failure to obtain the decision from the insurance commissioners within the regulatory timescale. Secondly, BAT pointed out that the condition which Hoylake must satisfy (ie that there are no unresolved regulatory issues) is self-imposed. Thirdly, BAT suggested that the circumstances surrounding Hoylake's offer differ from a reference to the MMC principally because there is no strict timetable within which the US regulatory proceedings should be commenced or concluded. We consider these main arguments separately. BAT also addressed subsidiary arguments which do not convince us and which do not require separate comment.

In its submission, BAT set out in some detail what it alleged were failures by Hoylake to submit completed Form A material to the various insurance commissioners, giving full detail which satisfied the insurance commissioners, in good time. BAT submitted that Hoylake had, instead of seeking to argue the case before the insurance commissioners on its merits, concentrated on other arguments, such as that it was entitled to an exemption from the application of the legislation, that the acquisition of BAT would not result in a change of control of Farmers, and that the proposed voting trust arrangements meant that the department should not scrutinise the application on its merits. BAT suggested that this strategy was "high-risk". BAT also suggested

that Hoylake's subsequent introduction of Axa Midi added a new complicating factor which will delay the process. It further suggested, by reference to a judgment of a magistrate in Ohio proceedings, that Hoylake has delayed submitting Messrs Goldsmith, Packer and Rothschild to the taking of depositions.

Hoylake, for its part, set out the details of its offer strategy, the reasons why it has sought to advance the various arguments which we have set out, and has given a summary of its attempts to resolve the US regulatory position. There could be a case in which the conduct of the offeror, whether for tactical reasons or because of incompetence, was sufficiently dilatory that it had only itself to blame for failure to complete the regulatory process in due time. In such a case, this would clearly lessen the prospect of the Panel granting consent to a renewed offer for 12 months. So an offeror who in fact delayed would do so at its own risk. In the present case, however, we do not consider that the conduct of Hoylake falls into this category.

Both Hoylake and BAT originally considered that it might well have been possible to conclude the regulatory processes within the Code timetable. In addition to its argument relating to the submission of Form A material BAT also criticised Hoylake because it sought to avoid a hearing on the merits of its application by placing reliance on the concept of the voting trust. It may possibly be that reliance on this approach was, with the benefit of hindsight, over-optimistic, and that other advisers might have pursued a different strategy. In any process of this kind, it is always possible to criticise the approach adopted after the event. But we do not consider that Hoylake's phalanx of advisers has failed to pursue its applications with reasonable diligence.

To some extent the conduct of BAT, which we have already agreed was permissible under the Code, must necessarily of itself have contributed to the delays in completion of the process since the object of the intervention by BAT and Farmers was to ensure that scrutiny by the Commissioners was as rigorous as possible. We have little evidence of past practice in the United States, but

it is noteworthy that, when BAT bid for Farmers in 1988, only two states completed the regulatory processes within what would have been the Code timetable if that offer had been subject to the Code. The times taken by other states varied from approximately 135 days to nearly 250 days. Whilst BAT suggest that this stems from their deliberate decision to tackle the various states consecutively rather than concurrently, the comment of those insurance commissioners to whom the Panel Executive has spoken suggests that there are difficulties inherent in the need to obtain multiple consents.

We consider that the number of states in which approval is required is a fact which must in reality affect the timetable. Processes in various states do not appear to be co-ordinated with each other, although sometimes common depositions and discovery may be accepted by different insurance departments. Thus an offeror may have to conduct its case differently in each state. If an offeror could concentrate on one state alone, then it might be possible to achieve the speed in the process in that state which met the Code timetable. If, as in the present case, an offeror needed to concentrate and pursue applications for clearance simultaneously in a number of states, the prospects of success are considerably reduced. The Panel considers that, with hindsight, the view that all the consents could be obtained within the Code timescale even if vigorously opposed by BAT was perhaps too hopeful. So the Panel does not consider that Hoylake's application should fail because of the way in which it has conducted its application for regulatory consents.

We can deal briefly with the suggestion that the problem arises from Hoylake's own decision to make the completion of regulatory processes a condition of the offer. In the light of the importance of Farmers to BAT, and the need for regulatory consents, Hoylake had no realistic option but to include such condition and it is fanciful to expect it to waive that condition. To do so would mean that Hoylake was potentially in breach of the law of a number of US states and so exposed, together with its officers, to various civil and, in some cases,

criminal penalties. No offer could sensibly have been conducted without the imposition of such a condition, and no waiver could responsibly be made.

BAT developed its argument that proceedings before the MMC provided no analogy in a number of ways. First, it suggested that the OFT, and the DTI, operate within a very restricted timetable in reaching a decision as to whether to refer an offer to the MMC. Thus the initial time period during which a target company is under siege before a reference is much more restricted than may be the case when other regulatory consents are involved. Secondly, it pointed out that the MMC operates wihin a restricted timetable and that a report is made between three and six months after a reference. By contrast it is possible Hoylake may not obtain its consent for over 12 months. In any event, the date at which consent might be obtained within the 12 months would be unknown and so there would be considerable uncertainty as to when Hoylake could bid again. Thirdly, BAT submitted that in the case of a reference to the MMC, there is a clear event triggering a mandatory lapse of the relevant offer, and a further clear event triggering the start of the 21 day period during which the relevant offeror can make a fresh offer. It was said that these features do not exist in the present case. Fourthly, it was pointed out that, if Hoylake's request succeeded, it could be very difficult to refuse similar requests in any number of other cases. It was suggested hypothetically that if a particular offerer still required the consent of, say, a minor regulatory body in a small state where a small part of the offeree's assets happened to be located, it could come to the Panel, even after a long siege, and obtain a second opportunity. Finally, BAT submitted that Hoylake's application was completely novel, and that no precedent supports it. It was suggested that it would be inappropriate for the Panel to make a radical innovation in the course of a takeover.

These arguments are to varying degrees cogent and forceful, and the Panel has given full weight to them. We do, however, consider that it is necessary to address this issue in the context of the present offer. Rule 35.1 gives sufficient

discretion to the Panel for the granting of consents to be considered on a case by case basis, and with such flexibility available it would be wrong not to consider Hoylake's current application. Nor should the distinctions between the present situation, involving the US regulatory process, and the MMC procedure be decisive. One of the functions of the Code, and advantages of its flexibility, is that it can adapt to new situations. Foreign regulatory intervention is clearly one such situation, and because we are familiar with the interaction of references to the MMC and the Code, this does not mean that we should decline to apply the principle underlying these procedures to a different regulatory process.

In our view, the central consideration must be that the effect of the US regulatory process means that shareholders will not have an opportunity of considering an offer from Hoylake free from regulatory consents and within the Code timescale. Whatever controversy there may be over Hoylake's offer, and whatever public interest considerations it may raise, our principal function is to ensure that shareholders are dealt with fairly. We do not regard it as desirable that the management of BAT should be subject to uncertainty during the 12 month period after the offer lapses. We understand their concern that such uncertainty, particularly having regard to the nature of Hoylake's offer, may inhibit their raising of finance, and their acquisition policy, as well as being of anxiety to employees. But we consider that, even if the twelve month moratorium applied, many of the same features would be present if Hoylake continued to seek to discharge the requirement of the United States regulatory commissioners. Hoylake would be entitled to do this without an actual offer being in existence, irrespective of any refusal on our part to grant an exception to the twelve month moratorium period. We regard it as undesirable that, should Hoylake complete the United States regulatory processes, they should be inhibited from putting an offer to shareholders during the remainder of the twelve month period. We think there is much to be said for requiring Hoylake to use its best efforts to conclude the regulatory processes as speedily as possible, and then to decide whether or not to bid again for BAT, so that the

uncertainty may at least be resolved as speedily as possible. We think the bid might well hang over the head of BAT in any event. We consider, however, that Hoylake should proceed as fast as it is reasonably able, so that shareholders may know whether they are going to receive an offer for their company and its future should be resolved.

We therefore consider that the balance is in favour of granting consent that, on the condition that it lapses its current bid as soon as reasonably practicable following this decision and the completion of any appeal against it, Hoylake should, if and when during the subsequent 12 months it becomes lawful as a matter of US law for Hoylake to complete its offer for BAT, be permitted within 21 days after the final clearance to announce a new offer for BAT.

The principle of our ruling is that Hoylake should be entitled to make a new offer at any time within 21 days after it has become lawful as a matter of US law for it to complete its offer for BAT. The exact definition of this date, to remove any residual uncertainties as to precisely when Hoylake might be free to offer again, will be determined by the Executive (subject, of course, to the right of appeal to the full Panel) after hearing the suggestions of Hoylake and the comments of BAT. Hoylake will be required to make an announcement as soon as this date is reached.

Whilst BAT will be entitled to raise before the Panel any suggestion that Hoylake has not used its best efforts to obtain regulatory consents as speedily as possible during the ensuing period, we should expect such an application only to be made if there was real evidence of serious dilatoriness or incompetence. In particular, we would not entertain any objection from BAT on this score unless Hoylake's efforts were materially less than they have been to date.

Finally, we should make it clear that nothing in this decision should be taken to restrict the Panel's ability to give Hoylake permission under Rule 35 to rebid within 12 months on other grounds, in particular those listed in the Note on Rules 35.1 and 35.2.

We think it desirable in the interests of the market that the nature of this decision should be announced immediately even though BAT has the right to appeal.

15 September 1989