

THE TAKEOVER PANEL

THE GREAT UNIVERSAL STORES PLC

ARGOS PLC

The Panel met on 27 January 1999 to consider an appeal by The Great Universal Stores Plc ("GUS") against certain procedural rulings of the Executive arising as a result of certain allegations made by GUS following its hostile bid for Argos Plc ("Argos") that the former directors of Argos and Schroders their financial advisers had breached the Code. The Executive ruled, in June 1998, that the Code had not been breached as alleged. The central issue for determination by the Panel was whether GUS, having regard to the time which had elapsed, should be permitted to appeal the Executive's rulings.

BACKGROUND

On 27 April 1998 GUS declared its hostile bid for Argos wholly unconditional. On 13 May GUS, through letters from its legal advisers, complained to the Executive that certain historic sales information released by Argos during the course of the bid was allegedly misleading. A further letter from GUS' legal advisers, dated 19 June, repeated the complaint made on 13 May, made a further complaint relating to other historic sales information and raised a further matter with regard to the independence of the Rule 3 advisers (which later became the subject-matter of a further complaint).

The Executive investigated the matters raised on behalf of GUS. The Executive concluded that neither Argos nor Schroders had breached the Code and that no criticism was or could be justified. The Executive gave these rulings to GUS' legal advisers in two separate telephone calls, the first being on 16 June (in relation to the first complaint), and the second being on 29 June (in relation to all three complaints).

On 28 July, at the request of Merrill Lynch on behalf of GUS, the Director General together with the two case officers from the Executive, met Lord Wolfson (chairman of GUS), GUS' Finance Director and a representative of Merrill Lynch. At that meeting the Director General explained his own position as a director of Warburg Dillon Read and his position in relation to Argos. He also explained why the Executive did not consider that the Code had been breached. The Director General expressed the hope that Lord Wolfson was satisfied with the explanation provided, but that if Lord Wolfson was concerned about the Panel's procedures, he could write to the Chairman of the Panel. Lord Wolfson indicated that he was not satisfied, but nothing was said to suggest that GUS was considering appealing the Executive's rulings which had been given in June or that the Director General should not himself have been involved either in monitoring the progress of the bid or in considering the complaints raised on behalf of GUS in May and June. One matter which was raised at the meeting related to the significance of the five Dutch Argos pilot stores, and subsequently, on 5 August, an officer of the Executive spoke to Merrill Lynch to confirm that, having investigated the matter, the Executive confirmed the conclusion which it had reached in June, on the ground that no new information had been provided.

During the next four weeks, there was no contact between the Executive and GUS (or any of its advisers). On 2 September, however, Merrill Lynch informed the Executive by telephone that Lord Wolfson was still concerned and that a letter was being drafted by GUS. A further two months then elapsed without any further contact being made by or on behalf of GUS with the Executive.

On 3 November, however, Merrill Lynch telephoned the Executive to say that GUS' legal advisers were currently advising GUS on matters relating to the Argos bid. Merrill Lynch said that GUS had sent a document of complaints to the former Argos directors for comment (but no such document was then sent to the Executive).

On 16 November, however, the Executive received a letter from GUS which suggested that the Director General should not himself have been involved in considering GUS' complaints and which requested that the full Panel should review the process. Attached to this letter was another letter from GUS dated 16 October, which the Executive had not previously seen. This was addressed to Sir Richard Lloyd, the former Chairman of Argos, detailing certain complaints. There was also enclosed Sir Richard's letter in rebuttal, dated 2 November, written on behalf of those ex-directors of Argos who had received it.

On 18 November the Executive responded to Lord Wolfson explaining (inter alia) that the time for lodging an appeal against the rulings of the Executive had long since elapsed, and that accordingly there was no question of an appeal to the full Panel against the rulings of the Executive given in June.

On 24 November GUS suggested (inter alia) that GUS' complaints should be reviewed "de novo" by the Executive under the supervision of one of the Deputy Directors General.

On 8 December the Executive outlined, in a letter to GUS, the three procedural rulings of the Executive in respect of which GUS had a right of appeal to the Panel. Those procedural rulings can be summarised in this way:

- (a) Any request by GUS to appeal the substantive rulings given by the Executive in June 1998 was out of time;
- (b) GUS had no right to appeal a decision of the Executive in relation to the initiation of disciplinary proceedings; and
- (c) A review by the Executive "de novo" of GUS' complaints under the supervision of one of the Deputy Directors General would be otiose.

On 5 January 1999 GUS gave notice that it wished to appeal to the Panel on all three procedural issues set out in the Panel's letter of 8 December 1998. (GUS also indicated that it wished to appeal a ruling of the Executive that "Irish comparisons" did not constitute "a new issue" and that therefore the Executive did not propose to investigate or rule on this issue any further; but, at the Hearing, it was accepted that, without prejudice to GUS' position, it would be inappropriate to pursue this issue at the meeting of the Panel on 27 January 1999.)

Subsequently, it was accepted that, since the Executive had not found any breach of the Code, the ruling with regard to the initiation of disciplinary proceedings did not presently arise: GUS, however, made it plain that it sought to be allowed to appeal against the ruling of the Executive that there had been no breaches of the Code.

Further, in its submission, GUS agreed that a fresh review by the Executive would be inappropriate, but contended that the review should be undertaken by the full Panel.

CODE ISSUE

Paragraph 3(c) of the Introduction to the Code is in these terms:

"Appeals to the Panel

If a party or its adviser wishes to contest a ruling of the executive, he may ask for the matter to be reviewed by the Panel, which can be convened at short noticeWhen the executive considers that it is necessary to resolve an issue urgently, it may stipulate a reasonable time within which an appeal must be notified; in any other case it must be notified at the latest within one month of the event giving rise to it".

DECISION

Having heard the parties and the Executive, the Panel reached the following conclusions:

- (1) The requirement to notify an appeal within the one month period applies, and was intended to apply, not only to a ruling given during the course of a bid, but also in response to a complaint made after the bid process had been completed. The rule is plain and explicit in its terms. Further, the shareholders, the business community and the public at large have a justifiable interest in knowing whether a ruling of the Executive is accepted or disputed. Further, if there is no challenge within the specified period to a ruling by the Executive, the parties are entitled to proceed on the basis that the ruling has been accepted.
- (2) The "one month" rule is not wholly inflexible, and exceptional circumstances might arise which would entitle the Executive (or the Panel) to extend the period.
- (3) Nevertheless, in the circumstances of the present case, there would be no justification for extending the period.
 - (a) The rulings had been given in June. The right of appeal must have been well known to GUS (and certainly to its advisers) at the time, and yet they did not appeal.
 - (b) There can be no doubt that "the event" in this case was the rulings of the Executive, given in June, and that time began to run from that date; but if there was in fact any doubt, GUS (or its advisers) was under a duty, in accordance with the Code, to consult the Executive, and this was not done.

- (c) Neither at the meeting on 28 July nor at any other time between 29 June and 16 November did GUS (or its advisers) suggest that GUS was contemplating lodging an appeal.
 - (d) In the result, a period of over four months elapsed before the possibility of an appeal was raised.
 - (e) To extend the period in the present case would be unfair to the former directors of Argos.
- (4) The Director General should, save in the most exceptional circumstances, take part in all the deliberations of the Executive. The Executive acts collegiately. The Executive is staffed by a small number of individuals. It comprises practitioners on secondment to the Panel for a limited period of time (including the Director General) and permanent staff who provide continuity and long experience. This results on occasions in certain seconded individuals having connections with one side or the other or both in particular transactions, by virtue of their employers' involvement in an advisory capacity. The identity of the Director General and of senior staff, and their professional connections is a matter of public and common knowledge. Further, there is the inbuilt safeguard of a right of appeal to the Panel.
- (5) In the most exceptional circumstances it could be appropriate for a Director General to absent himself from discussions taking place within the Executive in relation to a particular bid; but the occasions in which this is likely to be appropriate must indeed be rare.

- (6) On the facts of the present case, there would have been no justification for the Director General to have absented himself from the relevant deliberations. Further, no suggestion was made at the time of the bid, at the time when the complaints were made in May and June 1998, or at the meeting on 28 July 1998 or at any time thereafter before November 1998 that the Director General should not himself be personally involved in the relevant deliberations within the Executive.

For these reasons, the Panel unanimously dismisses this appeal.

Before parting with this matter, various matters arose during the course of this Hearing which the Panel would wish to bring to the attention of the Executive with a view to bringing them before the Panel in due course:

- (1) Whether an agreement to pay a "success" fee, payable to an adviser in the event of the successful rejection of a hostile bid, should be disclosed in the bid process.
- (2) Whether "one month" in paragraph 3(c) of the Introduction might be better defined as "30 days"; and
- (3) Whether some control should be placed on the time within which a complaint can be made with regard to the conduct of the parties during a bid and on the speed with which such proceedings should be conducted.

The Panel recognises that each of these matters would need to be carefully and fully considered before any change was made to the Code.

3 February 1999