

THE TAKEOVER PANEL

IMI plc/BIRMINGHAM MINT GROUP plc

The Panel Executive has examined, in the context of Rule 21, the events surrounding the placing by Birmingham Mint Group plc ("Birmingham Mint") of a purchase order in relation to certain nickel plating plant after the announcement of the unilateral offer for Birmingham Mint by IMI plc ("IMI") on 22 October 1990.

1. THE FACTS

The minting operations of Birmingham Mint and IMI, together with The Royal Mint, form a consortium in the UK which manufactures coins solely for overseas customers outside the EEC. It has been clear both to Birmingham Mint and to IMI since at least September 1989 that, with the increase in demand for plated coinage, each of them would be required to invest in new nickel plating plant in order to meet this new demand and to preserve its position within the consortium.

In March 1990, Birmingham Mint Limited ("BML"), a wholly-owned subsidiary of Birmingham Mint which carries on the Group's minting operations, put forward a proposal to the Board of Birmingham Mint relating to the necessary investment in nickel plating plant. On 23 May, a consultancy agreement was signed with The Royal Mint pursuant to which a fee was paid to The Royal Mint for the acquisition of know-how which The Royal Mint had acquired in relation to nickel plating. On 14 August, the Board of Birmingham Mint decided to proceed with the investment, subject only to receipt of a grant from the Department of Trade and Industry ("DTI") and further consideration of the manner in which the investment was

to be financed. A formal detailed quotation was received from the proposed supplier of the nickel plating plant on 17 August. The Royal Mint was informed of Birmingham Mint's decision to proceed and this was subsequently confirmed during a visit to The Royal Mint in early September.

On 2 October, the Board of Birmingham Mint considered again the financing requirements and formally authorised the managing director to proceed subject to his being satisfied as to certain further funding information which was to be available shortly thereafter. On 11 October, DTI grant approval was received and, at the weekly management meeting of the directors of Birmingham Mint at 8.30am on 16 October, a funding schedule was tabled and the investment proposal finally approved. Oral instructions were given that morning by the Board of Birmingham Mint to the general manager of BML to place an order for the nickel plating plant. A letter was subsequently sent by the general manager of BML to the supplier on 18 October, authorising the supplier to proceed with the order and confirming that a detailed purchase order would follow. The formal purchase order was completed on 25 October.

Late in the afternoon of 16 October, IMI spoke to the chairman of Birmingham Mint asking for an urgent meeting but without indicating its purpose. The meeting was held on 17 October. At that meeting Birmingham Mint was asked whether it would be prepared to enter into discussions with a view to a recommended offer for the company from IMI. Birmingham Mint asked for time to consult its professional advisers.

Birmingham Mint was unable to use its traditional merchant banking advisers because of a perceived conflict of interest. Accordingly, Chartered WestLB Limited ("Chartered WestLB") was formally appointed on 19 October

and held its first meeting with representatives of Birmingham Mint on the morning of the same day. At that meeting, and in subsequent discussions, Chartered WestLB discussed with Birmingham Mint the company's responsibilities under the Code and was made aware, in general terms, of the arrangements regarding the nickel plating plant. However, Chartered WestLB did not specifically enquire whether a formal contract had been entered into at that stage and did not approach the Panel Executive to discuss the arrangements.

On 22 October, IMI announced a unilateral offer for Birmingham Mint. On 26 October, Samuel Montagu & Co Limited ("Samuel Montagu"), advisers to IMI, brought to the attention of the Panel Executive the fact that IMI had reason to believe that Birmingham Mint might have placed a formal order for nickel plating plant and asked the Panel Executive to investigate the position. IMI's offer document has not yet been posted.

2. RULE 21 OF THE CODE

Rule 21 of the Code provides as follows:

"During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general meeting:-

- (a) . . .
- (b) . . .
- (c) . . .
- (d) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or

(e) . . .

. . .

Where it is felt that an obligation or other special circumstance exists, although a formal contract has not been entered into, the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained".

It was accepted by all parties that the nickel plating plant was an asset of a "material amount" for the purpose of Rule 21(d). No formal contract for the purchase of the plant was entered into until arguably 18 October (being the letter from the general manager of BML to the supplier) or, more likely, 25 October (being the purchase order) and, in either case, until after the meeting between IMI and Birmingham Mint on 17 October, from which date the Panel Executive considers Rule 21 to have been applicable.

Note 5 on Rule 21 provides that:

"The Panel may allow an offeror not to proceed with its offer if, at any time during the offer period prior to the posting of the offer document, the offeree company:-

(a)...

(b) announces a transaction which would require such a resolution [under Rule 21] but for the fact that it is pursuant to a contract entered into earlier or that the Panel has ruled that an obligation or other special circumstance exists."

The purpose of Rule 21 is, in conjunction with General Principle 7, to prevent an offeree taking action, without

the approval of shareholders in general meeting, which could effectively result in a bona fide offer being frustrated or in shareholders being denied an opportunity to decide an offer on its merits. However, it is recognised in Rule 21 that it would be inconsistent with this purpose to prevent an offeree from fulfilling a contractual commitment already entered into before it was aware of the possible offer. It is also recognised that, in certain cases, although a legally-binding contractual commitment has not been entered into, an offeree may be under an obligation, or other special circumstance may exist, such that it would not be appropriate to characterise a particular transaction as frustrating action and thus require that any contract formalising the arrangements be approved by shareholders in general meeting. This would be true, for example, where an offeree has gone a sufficiently long way down a particular path, before an offeror came on the scene, that it should not be asked to stop that process because of the emergence of the offeror. Each case will depend on its own particular facts.

In the present case, clearly, Birmingham Mint had invested a considerable amount of time and money in the proposal for a nickel plating plant and had, at least in its own mind, an obligation to The Royal Mint to make the necessary investment. Further, the Board of Birmingham Mint had taken the decision to proceed with the investment, and within a particular timescale, before it had reason to believe that an offer from IMI might be imminent.

However, in all cases other than where a formal contract has already been entered into, it is essential that the offeree and its advisers consult the Panel before any formal contract is entered into so that proper consideration can be given to the matter (after consultation, if appropriate, with the offeror and its

advisers). Neither Birmingham Mint nor Chartered WestLB consulted the Panel. The Panel Executive is satisfied that this did not arise from any bad faith on the part of Birmingham Mint or of Chartered WestLB but arose, in the case of Birmingham Mint, from a lack of familiarity with the Code and, in the case of Chartered WestLB, from a failure to advise Birmingham Mint fully of its responsibilities in relation to Rule 21 and to make sufficient enquiry of the circumstances surrounding the investment in the nickel plating plant. The Panel Executive recognises that Chartered WestLB became involved at very short notice and without any prior knowledge of Birmingham Mint, but does not attach much weight to these mitigating circumstances.

3. THE PANEL EXECUTIVE'S RULING

The Panel Executive has ruled that:

- (a) From the time of the meeting with IMI on 17 October, the Board of Birmingham Mint had reason to believe that a bona fide offer from IMI might be imminent. Hence, Rule 21 was relevant from that date.
- (b) On the basis of the facts presented to the Panel Executive, the Panel Executive is of the view that a "special circumstance" did exist in relation to the nickel plating investment by Birmingham Mint which, had the Panel been consulted before the formal purchase order was placed on 25 October, it would have been prepared to allow to proceed without requiring that shareholders' approval be sought.
- (c) The Panel Executive should, however, have been consulted by Birmingham Mint and its advisers before the purchase order was placed on 25 October and the order should not have been placed without the

Panel's consent. This is a serious breach of the consultation requirement of Rule 21, for which both Birmingham Mint and Chartered WestLB are criticised.

- (d) In view of the existence of a "special circumstance" in this case, the Panel Executive gave IMI the opportunity to lapse its offer for Birmingham Mint without posting the offer document in accordance with Note 5(b) on Rule 21. IMI has, however, decided to proceed with its offer.

IMI, Birmingham Mint and their respective advisers have accepted the Panel Executive's ruling.

7 November 1990