

THE TAKEOVER PANEL

PETROCON GROUP PLC ("PETROCON") / JAMES WILKES PLC ("WILKES")

The Panel met on 3 April 1992 to hear an appeal by Petrocon, advised by Robert Fleming & Co. Limited ("Flemings"), against a ruling by the Executive that its offers for Wilkes (the "offer") should not be extended beyond the final closing date and should therefore lapse as insufficient acceptances had been received by that date.

On 3 February, Petrocon announced a unilateral share exchange offer for the ordinary shares of Wilkes, advised by N M Rothschild & Sons Limited ("Rothschilds"). The offer document was posted on 17 February. Institutional shareholders who owned or controlled approximately 27.4% of Wilkes ordinary shares confirmed in writing before the offer was announced that they intended to accept the offer; such intentions to accept are not legally binding.

On 9 March, the offer was extended but not revised. In its final offer document to Wilkes' shareholders dated 15 March, Flemings included the following paragraph:

"The Offers will not be revised or increased and will not be further extended beyond 1.00pm on Monday, 30 March 1992 unless the Ordinary offer has by or on that date been declared unconditional as to acceptances, save that Petrocon and Flemings reserve the right to revise or increase or extend the Offers (or any of them) should a competitive situation arise or if this would enable the Offers to be recommended for acceptance by the board of Wilkes."

At 1pm on Monday, 30 March acceptances of the offer for the ordinary shares, when aggregated with shares in Wilkes already owned by Petrocon, amounted to 35.88%; no competitive situation had arisen nor had the Wilkes board recommended the offer. The offer would, therefore, in the ordinary way have lapsed at that time.

On the morning of Monday, 30 March, the Executive received allegations from Flemings that certain shareholders in Wilkes might have received material new information from Wilkes which had not been previously published in its various circulars. Flemings, therefore, asked the Executive to permit the offer to be extended to allow time for such information to be made available to all Wilkes' shareholders so that they could take such information into account in deciding whether or not to accept the offer. The Executive allowed the offer to be frozen while it made appropriate enquiries.

Following the completion of its enquiries, the Executive ruled, late on Tuesday, 31 March, that the offer should not be extended and therefore would lapse. On Wednesday, 1 April Petrocon appealed against that decision and the Executive released a statement later that afternoon to keep the market informed of the position.

In the course of its enquiries the Executive established that at private meetings with selected institutional shareholders Mr Watt, chairman of Wilkes, and representatives of Rowe & Pitman, Wilkes' stockbrokers, had given information about Wilkes which had not been made available to all shareholders as required by Rule 20.1 of the Code.

Rule 20.1 provides:

"Information about companies involved in an offer must be made equally available to all shareholders as nearly as possible at the same time and in the same manner."

Note 3 to Rule 20.1 permits meetings between directors of companies involved in a takeover (or their advisers) and selected shareholders to take place provided that, inter alia, no material new information is forthcoming. Note 3 states that a representative of the financial adviser or corporate broker of the companies concerned should be present at the meeting and that the representative should be responsible for confirming to the Panel no later than noon on the following day that no material new information had been forthcoming at the meeting. In the present case Rowe & Pitman gave appropriate confirmation in accordance with these requirements.

The new information given at the meetings with the institutional shareholders was the information (not previously disclosed) that two executive directors of Wilkes would probably be asked to leave the company within the next few months if the offer lapsed.

Flemings, on behalf of Petrocon, claimed that the credibility of Wilkes' management had been central to the arguments raised in the course of the bid, that the two directors concerned constituted one-third of the Wilkes board and that the information must therefore be regarded as material and should have been made available to all shareholders.

Rothschilds, on behalf of Wilkes, did not dispute that the information regarding the probable departure of the two directors had been given at the meetings but asserted that this information was not material in the context of the offer. The two directors were not part of the operational management but fell within the head office administrative functions which (as had been stated in Wilkes' various circulars) were being radically streamlined. No firm arrangements had been made for their departure.

At the hearing the Panel heard evidence from the representatives of three institutional shareholders who had

attended meetings at which the new information had been given. Two of these witnesses (neither of whom had accepted the offer) regarded the information as having little or no significance in their decisions not to accept it; the third shareholder (who had accepted the offer) told the Panel that it was one of a number of factors which it had taken into account in making its decision.

The concept of equality of information to shareholders as embodied in General Principle 2 of the Code is of fundamental importance and it is for this reason that Rule 20.1 places severe restrictions on the conduct of meetings with selected shareholders during offer periods. However, the applicable Note to Rule 20.1 explicitly refers not simply to information which may be disclosed at any such meetings but to material new information. The test as to whether new information is or is not material has to be applied in the context of the circumstances of each case. The application of this test is not always easy. In the present case the Executive concluded that the new information did not satisfy the test of materiality and that there was no justification for granting an extension to the offer. The Panel agreed, in the particular circumstances of this case, with this conclusion. Accordingly Petrocon's appeal fails and the offer has therefore lapsed.

The Panel takes the opportunity of emphasising the importance it attaches to the manner in which meetings held between parties to a takeover transaction and selected shareholders during an offer period are conducted, in particular to the over-riding requirement that no material new information should be forthcoming and no significant new opinions should be expressed. It is the responsibility of the financial adviser or corporate broker attending a meeting to ensure that this requirement is strictly followed.

3 April 1992