

THE TAKEOVER PANEL

SUCCESS FEES; ONE MONTH FOR APPEALS; TIME LIMITS FOR COMPLAINTS

Introduction

In its statement of 3 February the Panel requested that the Executive consider three distinct matters with a view to bringing them before the Panel in due course. These issues were as follows:

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;

Whether "one month" in paragraph 3(c) of the Introduction might be better defined as "30 days"; and

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 Executive has examined each of these matters and reported to the Panel. The conclusions of the Panel following its review of these issues are set out below.

"Success" fees

Rule 3.3 of the Code states:

"The Panel will not regard as an appropriate person to give independent advice a person who.. has a significant interest in or financial connection with either an offeror or the offeree company of such a kind as to create a conflict of interest."

Arrangements which reward an adviser to the offeree dependent on failure of a hostile offer, irrespective of the offer price, give rise to, or create the perception of, an actual or potential conflict of interest. In these circumstances, the adviser will normally be disqualified from acting as independent Rule 3 adviser. Similar considerations will apply to any fee payable on failure of an offer below an unrealistically high price. The Executive should be consulted in any case of doubt. The Panel may in appropriate cases require disclosure in the offer documentation to enable the arrangements to be subjected to public scrutiny.

Appropriate amendments to the Code will be published in due course.

"One month" for appeal

The Panel considers that there should be no change to the requirement in paragraph 3(c) of the Introduction to the Code to notify an appeal at the latest within one month of the event giving rise to it, normally being the date of the relevant ruling by the Executive. "One month" is generally understood to mean one calendar month and although that period may vary in length this has not given rise to difficulties in practice.

Time limits for complaints

If a complaint is to be made that the Code has been breached, it must be made promptly. Delay may result in the Executive declining to investigate the complaint. However, the Panel has concluded that it is not appropriate to introduce a fixed time limit for the making of complaints.

The Executive already has a broad discretion as to when it may decline to investigate a matter. It may exercise this discretion if, for example, a complaint appears to be frivolous or vexatious, or a matter is raised very late and is deemed insufficiently material to warrant investigation. On this basis, specific time limits for bringing

complaints to the Executive's attention are not required. In addition, the Panel considers it important for the Executive to maintain the flexibility to consider all relevant factors, such as the nature and gravity of the complaint, the nature of the complainant and the possible impact of the relevant conduct on the outcome of the offer, in determining whether a matter brought to its attention should be investigated. Fixed time limits in this area would not recognise the wide range of circumstances which may be relevant in reaching such a decision, and are therefore not considered appropriate.

Any person wishing to raise matters relating to the conduct of the parties during a bid should consult the Panel Executive at the earliest opportunity and co-operate promptly and fully with its requests.

The appropriate amendment to the Code will be published in due course.

16 July 1999