

# THE TAKEOVER PANEL

## **RELEASE OF PANEL EXECUTIVE PRACTICE STATEMENT NO. 5**

The Panel Executive has today released Practice Statement No. 5 (Note 2 on Rule 13 - Invocation of Conditions), a copy of which is attached to this Statement.

28 April 2004

**PRACTICE STATEMENT NO. 5**  
**NOTE 2 ON RULE 13 - INVOCATION OF CONDITIONS**

It is standard market practice in the UK for offers (other than mandatory offers, where the provisions of Rule 9 of the Code apply) to be stated as being conditional upon the satisfaction, or waiver, of a number of conditions. In a typical offer, the conditions can be broken down into four broad categories as follows:

- the acceptance condition - i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer;
- UK or EC competition clearances;
- other, effectively mandatory, conditions designed to give effect to some supervening regulatory requirement - for example, a listing condition on a securities exchange offer; and
- other conditions included for the benefit of the offeror in order to give it the right not to proceed with the offer in the circumstances stipulated. There is a wide range of conditions which fall within this category, although one of those more frequently encountered is the "material adverse change" (or MAC) condition, whereby the offeror can lapse its offer in the event of a material adverse change in the business or prospects of the offeree company in the period after announcement of the offer.

The principal provision of the Code applicable to conditions is Rule 13. This provides that offer conditions may not normally be in subjective terms. In addition,

Note 2 on Rule 13 provides that, except for the acceptance condition and any UK or EC competition condition:

"An offeror should not invoke any condition so as to cause the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer."

The purpose of Note 2 on Rule 13 is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of Note 2 on Rule 13 was considered by the full Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was a MAC condition. The Panel concluded that the necessary test of "material significance" was not met and in its decision stated that:

"... meeting this test [i.e. Note 2 on Rule 13] requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous ... to something that would justify frustration of a legal contract."

The Executive is aware that certain practitioners have interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer (other than the acceptance condition or any UK or EC competition condition). The Executive does not consider this interpretation to be correct.

In applying Note 2 on Rule 13 in the light of the Panel's decision set out in Panel Statement 2001/15, the Executive's practice is as follows:

- as set out in the Note, the appropriate test for the invocation of a condition under Rule 13 is whether the relevant circumstances upon which the offeror is seeking to rely are of material significance to it in the context of the offer - which must be judged by reference to the facts of each case at the time the relevant circumstances arise;
- in the case of a MAC, or similar, condition, whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and
- whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.

The Executive should be consulted in cases of doubt.

*Practice Statements are issued by the Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Code and the SARs in certain circumstances. Practice Statements do not form part of the Code or the SARs. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code and the SARs apply in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk).*

28 April 2004