

THE TAKEOVER PANEL

Changes in circumstances

In view of the present change in the economic and industrial situation of the country and of actual or possible legislation the City Panel has been asked to advise a number of companies on their position under the Code in cases where they had announced an intention to make an offer but had not yet become legally bound by the posting of formal offer documents. The Panel has assisted by giving its view based on the circumstances of each particular case but, at the request of the companies concerned, these opinions have, for good reasons, not been made public. The Panel thinks it may be useful, however, to indicate the general considerations which guide its approach to such cases.

The City Panel will of course give careful consideration to the facts of each particular case which may come before it. In general, however, the Panel considers that a change in economic or industrial conditions, or even in legislative policy, which may suggest that a proposed acquisition will not be as advantageous for the offeror company as was hoped when the intention to offer was first announced, is one of the hazards which has to be accepted in a take-over situation. Even in more normal conditions than now exist, markets are volatile and it must be expected that they will sometimes over a period show wide fluctuations, which may for a time put a different complexion on the economics of a particular offer. On the other hand, falls in market levels or depressions in the general economy are usually followed after a time by recovery. Similarly legislative policy depends upon the exigencies of the time. The City Panel considers that a change in economic, industrial or political circumstances would not normally justify the withdrawal of an announced offer. To justify unilateral withdrawal the Panel would normally require some circumstance of an entirely exceptional nature and amounting to something of the kind which would frustrate a legal contract. It must be remembered that the terms and timing of an announcement of intention to offer and of the posting of offer documents are, subject to the Code, entirely in the hands of the offeror. It is therefore right that an offeror should accept the risk of a change of circumstances in the intervening period. Once an offer is announced, the market in the shares of the offeree company is likely to be, at least to some extent, supported by the price at which the offer has been fixed. It follows that withdrawal would contribute to the market having been a false one.

The Panel has been asked about the position of directors of a company who, having announced an intention to make an offer, become convinced, before a legally enforceable obligation to offer has arisen, that circumstances have changed so as to make the proposal no longer economically advantageous to their company. Directors are of course trustees for their company in the exercise of their powers. They must always act in good faith; they ought to consider the long term interests of the company and to have regard not only to immediate financial considerations but to the company's public reputation. Thus they should not neglect consideration of the public interest, the regulations of The Stock Exchange (which attach great importance to compliance with the City Code) and the City Code itself, adhered to as it is by the Confederation of British Industry. Consideration of such factors as these have been described as constituting enlightened self-interest on the part of the company concerned, which is expected to behave as a "good citizen". It is not for the Panel, nor even for lawyers, to dictate to directors how they should act in the best interests of their company; this is a matter on which each director must satisfy his own conscience after having regard to all relevant considerations. The Panel can only say that for part they expect companies to accept the Code as binding upon them; it is well established that the courts will not interfere with directors' exercise of discretionary powers unless it is proved that they have acted from some improper motive or arbitrarily and capriciously. Compliance with the requirements of the City Code voluntarily adopted by the City institutions and by industry in order to promote orderly markets and secure fair treatment for shareholders would certainly not be so considered. The general position is indicated in General Principle 2 of the Code and directors must give due weight to this and the other requirements of the Code.

The general acceptance of the Code, as administered by the Panel, has in more than one case in the past led to the acceptance of some economic disadvantage in the short term. To be offset against this disadvantage is the long term benefit to investors and the financial and industrial community as a whole and to the company in question - as part of that community - which the Code seeks to achieve.

The Panel takes the opportunity of pointing out that Rule 8 of the Code requires the statement in the offer announcement of any conditions to which the offer or the posting of it is subject "other than normal conditions relating to acceptances, quotation and increase of capital". Experience has shown that the omission of the so-called normal conditions can give rise to misunderstanding. The Panel is therefore inviting the City Working Party to consider

the deletion of the exception from Rule 8. In the meantime offerors should state all conditions to which their offer is subject without exception and the Rule will be so administered.

15th January, 1974.