

THE TAKEOVER PANEL

ACTING IN CONCERT - UNDERWRITERS

Following a number of recent cases, the Panel wishes to clarify, in general terms, the application to underwriters of the acting in concert concept under the Take-over Code.

Where the sole relationship of a person with an offeror is that of underwriter (or sub-underwriter) of a cash alternative offer, and the arrangements between them relate only to underwriting on arms' length commercial terms, those arrangements would not normally amount to an agreement or understanding within the meaning of acting in concert. The Panel also recognises that such underwriting arrangements may on occasions involve novel or unusual terms that are determined by the circumstances, such as a degree of weighting of commissions by reference to the outcome of the offer.

However, in some cases, features of the underwriting arrangements, including the proportion of the ultimate total liability assumed by an underwriter and the relevant commission structure, may be so extraordinary as to lead to a conclusion that a sufficient level of understanding has been created between offeror and underwriter which is only consistent with acting in concert. Other circumstances, for example an unusual degree of involvement of the underwriter with the offeror in the background to or in the course of the offer, either alone or together with the underwriting arrangements, may lead to a similar conclusion.

This subject is one that the Panel proposes to review over the coming months in the light of experience and a further statement may be issued in due course. In cases of doubt, the Panel executive should be consulted.

Note: The Code definition of "acting in concert" is as follows:

"Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined in the Code) of that company."

13 January 1987