

THE TAKEOVER PANEL

PURCHASES BEFORE AN OFFER PERIOD

Rule 6.1 of the Code currently states that when an offer is reasonably in contemplation, if the potential offeror acquires shares in the potential offeree company, any subsequent general offer made by or on behalf of that offeror or any person acting in concert with it to the shareholders of the same class shall not be on less favourable terms.

This Rule is an example of the first General Principle of the Code, which requires all shareholders to be treated similarly. It has, however, been applied in practice as requiring a matching bid value only when the purchases in question have been made shortly before the announcement of the offer.

The wording of Rule 6.1 is such that it can give rise to uncertainty, causing difficulties for companies and their advisers, which are highlighted by sharp falls in share markets, such as happened in October.

The Panel therefore proposes to meet the purpose of the Rule by adopting a fixed period which is to be capable of variation in certain circumstances but which will normally apply regardless of changes in stock market levels. The period chosen of three months is longer than has generally applied where the existing Rule has been operated. Purchases before this period will generally not come within the ambit of Rule 6.1. The Panel will, however, retain a discretion to apply the Rule to earlier purchases, although it will not normally be exercised unless the vendors of the shares in question are directors or other persons closely connected with the offeror or the offeree company. In exceptional circumstances, the Panel may also be prepared to agree that purchases which would otherwise fall within the scope of the new Rule should not affect the value of a subsequent

offer. Examples of the factors which the Panel might take into account in deciding whether it will agree to adjusted terms are set out in a new Note on the Rule. Minor consequential amendments have also been made to Rule 6.2.

The new Rule will come into effect immediately.

The text of the new Rule 6 is annexed together with the revised notes.

The text of the new Rule will be included in the revised edition of the Code to be published in the New Year.

17 December 1987

6.1 PURCHASES BEFORE AN OFFER PERIOD

Except with the consent of the Panel in cases falling under (a), where an offeror, or any person acting in concert with it, has purchased shares in the offeree company:-

- (a) within the three month period prior to the commencement of the offer period;
or
- (b) prior to the three month period referred to in (a), if in the view of the Panel there are circumstances which render such a course necessary in order to give effect to General Principle 1,

the offer to the shareholders of the same class shall not be on less favourable terms.

6.2 PURCHASES AT ABOVE THE OFFER PRICE

- (a) If, after the commencement of the offer period and before the offer closes for acceptance, an offeror or any person acting in concert with it purchases shares at above the offer price (being the then current value of the offer), it shall increase its offer to not less than the highest price paid for the shares so acquired.
- (b) Immediately after the purchase, it must be announced that a revised offer will be made in accordance with this Rule (see also Rule 32). Whenever practicable, the announcement should also state the number of shares purchased and the price paid.

NOTES ON RULE 6

1. Adjusted terms

The Panel's discretion to agree adjusted terms pursuant to Rule 6.1(a) will only be exercised in exceptional circumstances. Factors which the Panel might take into account when considering an application for adjusted terms include:-

- (a) whether the relevant purchase was made on terms then prevailing in the market;
- (b) changes in the market price of the shares since the relevant purchase;
- (c) the size and timing of the relevant purchase;
- (d) the attitude of the offeree board;
- (e) whether shares have been purchased at high prices from directors or other persons closely connected with the offeror or the offeree company; and
- (f) whether a competing offer has been announced for the offeree company.

2. Purchases prior to the three month period

The discretion given to the Panel in Rule 6.1(b) will not normally be exercised unless the vendors are directors or other persons closely connected with the offeror or the offeree company.

3. No less favourable terms

For the purpose of Rule 6.1, except where Rule 9 (mandatory offer) or Rule 11 (requirement for cash offer) applies, it will not be necessary to make a cash offer available even if shares have been purchased for cash. However, any securities offered

as consideration must, at the date of the announcement of the firm intention to make the offer, have a value at least equal to the highest relevant purchase price. If during the period ending at 5.00pm on the first business day after the announcement the value is not maintained, the Panel will be concerned to ensure that the offeror acted with all reasonable care in determining the consideration.

Existing Notes 2 to 9 inclusive should be renumbered accordingly.

17 December 1987