

THE TAKEOVER PANEL

THE BRITISH PETROLEUM COMPANY PLC ("BP") / BRITOIL PLC ("BRITOIL")

The full Panel met on 22 December to consider the implications for the purposes of the Code of the existence of the Special Share in the share capital of Britoil in the context of BP's proposed offer for the issued ordinary shares of Britoil announced on 18 December. The question for decision was the appropriate form of the acceptance condition.

The Panel decided that, under the Code, BP should be able to proceed with the offer for the ordinary shares of Britoil on the terms of the acceptance condition contained in BP's announcement: that is excluding any votes attributable to the Special Share. To do otherwise would deprive the ordinary shareholders of the opportunity to consider the BP offer on its merits.

The Panel would emphasise that its decision in no way bears on the separate question of whether, and if so how, H M Treasury should exercise the rights of the Special Share. Such considerations are not within the province of the Panel.

The circumstances of the case were highly unusual and were also well publicised in advance of the Panel hearing. The reasons for the decision are therefore set out in some detail. The hearing was attended by BP and Britoil and their advisers. Atlantic Richfield Co as an active purchaser of Britoil shares was, exceptionally, given the opportunity to attend but chose not to do so.

THE ISSUE

The share capital of Britoil consists of ordinary shares carrying the entire economic interest in Britoil and one vote each in general meetings. H M Treasury holds the Special Share, the significance of which is its voting power. Although in normal circumstances the Special Share does not carry voting rights, it carries a majority of the voting rights on a poll at general meetings of shareholders of Britoil in the event of any person offering to acquire more than 50% of the ordinary shares, as well as on certain other events. Accordingly, even if BP were to acquire under its offer more than 50% of the ordinary shares, and if H M Treasury were to exercise its rights in relation to the Special Share, BP would not be in a position to exercise the degree of control that is normally associated with the ownership of more than 50% of the voting shares.

The central issue was the appropriate acceptance condition for the offer, which determines the number of shares an offeror must acquire before its offer can succeed. The relevant requirement of Rule 10 of the Code is that, in the case of an offer which, if accepted in full, would give the offeror over 50% of the voting rights, the offer must not be capable of becoming unconditional unless the offeror in fact acquires shares carrying over 50% of the voting rights. Rule 10 is set out in full as an Appendix to this statement.

Rule 9 of the Code, generally, requires that a person who acquires 30% or more of the voting rights of a company must make a general offer to the holders of all other voting equity shares. Such an offer must be subject to a similar acceptance condition. The implications for the purposes of Rule 9 therefore also fell to be considered. The relevant parts of Rule 9 are also set out in full in the Appendix to this statement.

The issue for the Panel was how to apply these Rules to a situation where there is a Special Share, as in Britoil.

THE FUNCTIONS OF THE PANEL

The Panel emphasises that, as is clear from the Code, it is not concerned with the question of whether an offer price represents the appropriate price for the shares in question: this is a matter for the company itself and its shareholders. Nor is the Panel concerned with those wider questions of public interest which are the concern of the Government. The Panel's duty is to provide an orderly framework within which the shareholders can decide upon whether to accept an offer for their shares on the basis of full and equal information and on the basis that they are treated fairly and equally.

It is the Special Share which gave rise to the issue before the Panel. The task of the Panel is, however, to have regard to the interests of ordinary shareholders in the context of the proposed offer. H M Treasury, as holder of the Special Share, did not attend the hearing: they acknowledged that the issue was one for the Panel to determine, but did not wish to express any view as to what decision should be reached.

THE PURPOSE OF THE RELEVANT RULES AND BACKGROUND TO THE ISSUE

The Code is founded on certain General Principles, which are reflected in the Rules, and the Code frequently has to be applied to meet new situations. This is why the Code places specific emphasis on applying the spirit of the Code to situations not explicitly covered by the Rules. It is on this basis that the Panel approached its consideration of Rule 10.

The purpose of Rule 10 is straightforward. It seeks to secure that, where a person attempts to take over a company, the premium necessary to obtain control must be paid. This can only be said to have been achieved if over 50% of the voting shares are acquired. In this way the majority of voting shareholders express their view as to the appropriate price. In addition, shareholders are entitled to be certain that, if they accept an offer, the offeror will only acquire their shares in the event that he acquires over 50% of the voting rights and legal control

accordingly passes. Once this position has been reached, the Code protects other shareholders who had not previously decided to accept the offer by requiring the offeror in a normal case to leave the offer open for a further 14 days. The acceptance condition under Rule 9 is designed to secure the same result with regard to a mandatory offer as Rule 10 provides for a voluntary offer.

All the parties appreciated that Britoil's Special Share gave rise to difficulty in the application of Rules 9 and 10. Britoil's advisers took the view that any hearing to resolve the issue prior to the announcement of an offer would be inappropriate, since it would involve a formal ventilation of matters affecting a bid for Britoil which might never materialise. BP, in its offer announcement, expressly recognised the need for a decision by the full Panel. The acceptance condition in their offer, which effectively takes no account of the Special Share, was expressed to be subject to the requirements of the Panel. So the market was informed of BP's intentions, but also of the question which needed to be resolved. BP had announced their offer on 18 December, and the hearing was immediately convened for the earliest date which would enable the parties to make submissions.

THE PANEL'S DECISION

The Panel approached the position in the context of the rights of the Special Share. The Articles of Britoil provide that in certain eventualities H M Treasury may exercise control over Britoil. One of the situations in which such control would become exercisable was expressly stated to be upon an offer being made for Britoil's ordinary shares. So such an offer is fully consistent with the continued existence of the Special Share and the exercise of the rights conferred thereby. The Panel therefore approached its consideration of the case on the basis that the existence of the Special Share does not prevent shareholders from receiving and considering an offer for their shares.

The Panel considered that a literal application of Rule 10 would be inappropriate. It would have the effect that the BP offer would not fall within the ambit of the Rule at all, since, if accepted in full, it would not lead to BP holding shares carrying over 50% of the voting rights of Britoil. The existence of the Special Share would preclude this outcome. This would be so despite the fact that BP were offering for all the ordinary shares. Thus, on a literal reading, the criterion of the Rule could not be achieved and shareholders would lack proper protection. The Panel took the view that such an approach would be unacceptable and that it should interpret the Rule in accordance with commonsense and fairness to all involved.

Once the Panel had rejected a literal approach, there were two possibilities open to it. It could either permit the offer to go ahead with the condition incorporated in its offer by BP (which ignores the Special Share) or the Panel could require BP to make its offer subject to H M Treasury requiring Britoil to redeem the Special Share. The imposition of the latter condition would have the effect that the ordinary shareholders would not be able to consider an offer for their shares until such time in the future as H M Treasury required redemption of the Special Share. The Panel did not consider it right that shareholders should be deprived of this opportunity, and considered that it was fair to all the ordinary shareholders that they should have the opportunity of considering the BP bid on its merits without a condition of a kind which BP could not itself fulfil being imposed.

Britoil did not urge the Panel to take any particular approach, and expressed their own concern that the imposition of a normal acceptance condition with a further condition requiring redemption of the Special Share might have the effect of denying the shareholders an opportunity to realise their shares in early 1988 at the current offer price.

Britoil did however very helpfully set out for the consideration of the Panel a number of concerns they would have if the bid were to proceed in accordance with BP's offer announcement. These

related to the question whether shareholders in Britoil would receive a proper premium for control of their shares and the uncertainty, for minority shareholders who decline to accept the offer, as to the future management of the company given the existence of the Special Share.

As to the proper premium, BP informed the Panel that in formulating its offer it had made no discount for the existence of the Special Share from the premium for control which they would otherwise have offered. Britoil contended by contrast that there would be uncertainty as to whether shareholders were receiving a full premium for control whilst the Special Share remains in existence. The Panel considered that it would be wrong to prevent the shareholders from being entitled to consider whether, in their judgment, they were receiving an adequate premium for parting with control of the shares of their company. It is the shareholders who should evaluate the rival arguments of the parties.

Britoil also suggested that shareholders could be protected by requiring BP not to make its offer unconditional as to acceptances unless holders of 90% of the shares offered for had accepted. The Panel did not consider that this was appropriate. It would give a veto to a small percentage of shareholders. The Panel, whilst appreciating that shareholders would require careful advice as to the elements of uncertainty to which Britoil had drawn attention, considered that there may always be uncertainties affecting the future of a company which shareholders have to take into account in deciding whether to accept an offer. Although the Special Share is unusual in character, it is an aspect of the affairs of the company on which shareholders are essentially called upon to make their own judgment.

The Panel was confirmed in its view that the conditions of BP's offer should be framed so as to ignore the Special Share because of the difficulties that would otherwise arise in the case of a mandatory bid. If the Special Share was included, a mandatory bid in accordance with Rule 9 would be ineffective, because a

purchaser might acquire 30% or more of the ordinary shares in Britoil without the possibility of a full offer succeeding. This would be wholly contrary to the principle underlying Rule 9.

The Panel also considers it would follow from its decision that, in the event of any mandatory bid for Britoil becoming required by reason of the acquisition by any purchaser of 30% or more of the ordinary shares, it would be appropriate for the acceptance condition to such a mandatory bid similarly to exclude any votes attributable to the Special Share.

The Panel is aware that there are a number of other companies in which Special Shares exist. The Panel wishes to make it plain that the present decision would only be treated as a precedent in regard to a Special Share in companies whose Articles conferred a Special Share in equivalent terms to that in the case of Britoil and would consider any issues which arose out of other Special Shares as and when occasion arose.

23 December 1987

APPENDIX**G1****SECTION G. THE VOLUNTARY OFFER AND ITS TERMS****RULE 10. THE ACCEPTANCE CONDITION**

- 10 It must be a condition of any offer for voting equity share capital which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting rights of the offeree company that:—
- (a) the offer will not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights attributable to the equity share capital; and
 - (b) the offer will not become or be declared unconditional as to acceptances unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights.

SECTION F. THE MANDATORY OFFER AND ITS TERMS**RULE 9****9.1 WHEN IT IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT**

Except with the consent of the Panel, where:—

- (a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company, or
- (b) any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 12 months additional shares carrying more than 2% of the voting rights,

such person shall extend offers, on the basis set out in Rules 9.3, 9.4 and 9.5, to the holders of any class of equity capital whether voting or non-voting and also to the holders of any class of voting non-equity share capital in which such person or persons acting in concert with him hold shares. Offers for different classes of equity capital must be comparable; the Panel should be consulted in advance in such cases.

F10**RULE 9 CONTINUED****9.3 CONDITIONS AND CONSENTS**

- (a) Offers made under this Rule must be conditional upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any persons acting in concert with it holding shares carrying more than 50% of the voting rights.
- (b) Other than as set out in (a) above, offers under this Rule must be unconditional (but see also Rule 9.4).
- (c) Except with the consent of the Panel, no acquisition of shares which would give rise to a requirement for an offer under this Rule may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements.