

THE TAKEOVER PANEL

EUROPEAN COUNCIL REGULATION (EEC) No 4064/89

The Panel draws attention to the fact that the EC Mergers Control Regulation comes into force today. Whilst the precise manner in which the Commission will deal with relevant Mergers has yet to be determined, the Panel believes that it is logical to require such offers to lapse once the Commission has initiated proceedings under the provisions of the Regulation.

Accordingly, amendments to the Code are being issued today which should be regarded as coming into immediate effect.

It should be noted that these amendments will be subject to review once the Panel has had an opportunity to assess the practical impact of the Regulation.

Offerors and their advisers should carefully consider the implications of Council Regulation No 4064/89 with regard to the timetable for their offers as prescribed by the Code. In particular, attention is drawn to the powers of Commission to, inter-alia, suspend concentrations and impose fines and penalty payments in appropriate circumstances.

21 September 1990

**APPENDIX TO THE PANEL'S STATEMENT DATED 21 SEPTEMBER 1990
(1990/18): AMENDMENTS TO THE TAKEOVER CODE CONSEQUENT ON
EUROPEAN COUNCIL REGULATION NO 4064/89**

1. RULE 5.2 (c) (iii)

(a) Delete Rule 5.2(c) (iii) (1) and substitute:

"(1) the first closing date of that offer has passed and the Secretary of State has announced that such offer is not to be referred to the Monopolies and Mergers Commission (or such offer does not come within the statutory provisions for possible reference) and it has been established that no action by the European Commission or a competent authority of the United Kingdom will any longer be taken in respect of such offer pursuant to Council Regulation (EEC) 4064/89 (or such offer does not come within the scope of such Regulation); or"

(b) Delete Rule 5.2(c) (iii) (2) and substitute:

"(2) the first closing date of any competing offer has passed and the Secretary of State has announced that such competing offer is not to be referred to the Monopolies and Mergers Commission (or such competing offer does not come within the statutory provisions for possible reference) and it has been established that no action by the European Commission or a competent authority of the United Kingdom will any longer be taken in respect of such offer pursuant to Council Regulation (EEC) 4064/89 (or such offer does not come within the scope of such Regulation); or"

2. RULE 9.3 NOTE 3 (b)

Delete Note 3 (b) on Rule 9.3 and substitute:

"(b) when any regulatory clearance is required before the offer document is posted. The person who has incurred the obligation under Rule 9 must endeavour to obtain clearance with all due diligence. If clearance is obtained, the offer document must be posted immediately. If clearance is not obtained, the same consequences will follow as if the merger were prohibited following a reference to the Monopolies and Mergers Commission (see Rule 9.4)."

3. RULE 9.4 and NOTES 1 and 2 ON RULE 9.4

(a) Delete Rule 9.4 and substitute:

"9.4 The Monopolies and Mergers Commission and the European Commission

Offers under this Rule must, if appropriate, contain the terms required by Rule 12 (a) and (b)."

(b) Delete Note 1 on Rule 9.4 and substitute:

"1. If an offer lapses pursuant to Rule 12 (a) or (b)

If an offer under Rule 9 lapses pursuant to Rule 12 (a) or (b), the obligation under the Rule does not lapse and, accordingly, if thereafter the merger is allowed, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the merger is prohibited, the offer cannot be made and the Panel will consider whether, if there is no order to such effect, to require the offeror to reduce its holding to below 30% or to its original level before the obligation

to offer was incurred, if this was 30% or more. The Panel would normally expect an offeror whose offer has lapsed pursuant to Rule 12(a) or (b) to proceed with all due diligence before the Monopolies and Mergers Commission or the European Commission. However, if, with the consent of the Panel, an offeror sells to unconnected parties within a limited period sufficient shares to reduce its holding to below 30%, or to its original level before the obligation to offer was incurred if that was 30% or more, the Panel will regard the obligation as having lapsed."

- (c) Delete Note 2 on Rule 9.4 and substitute:

"2. Further acquisitions

While the Monopolies and Mergers Commission or the European Commission is considering the case (following a reference, initiation of proceedings or referral) where an obligation to make an offer under this Rule has been incurred, the offeror or persons acting in concert with it may not acquire any further shares in the offeree company."

4. RULE 12 and NOTE 1 ON RULE 12

- (a) Delete the heading to Rule 12 and substitute:

"12 The Monopolies and Mergers Commission and the European Commission"

- (b) Delete Rule 12(b) and substitute:

"(b) where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation (EEC) 4064/89, it must be a term of the offer that it will lapse if the European

Commission either initiates proceedings under Article 6 (1) (c) or makes a referral to a competent authority of the United Kingdom under Article 9(1) before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later."

(c) Add new Rule 12(c) as follows:

"(c) Except in the case of an offer under Rule 9, the offeror may, in addition, make the offer conditional on a decision being made that there will be no reference, initiation of proceedings or referral. It may state, if desired, that the decision must be on terms satisfactory to it."

(d) Delete Note 1 on Rule 12 and substitute:

"1 After a reference, initiation of proceedings or referral

Following the lapse of an offer on a reference, initiation of proceedings or referral, General Principle 7 and Rule 21 will normally continue to apply (see also the Note on Rules 35.1 and 35.2)."

5. RULE 13 NOTE 2

Delete Note 2 on Rule 13 and substitute:

"2. Invoking conditions

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 acceptance condition,

and any condition included pursuant to Rule 12(c), are not subject to this provision."

6. RULE 21 NOTE 4

Delete Note 4 on Rule 21 and substitute:

"4. The Monopolies and Mergers Commission and the European Commission

When an offer is referred to the Monopolies and Mergers Commission, or the European Commission initiates proceedings or makes a referral, the offer must lapse in accordance with Rule 12. The Panel will however normally consider that General Principle 7 and Rule 21 apply during the reference, proceedings or referral, but on a more flexible basis. For example, issues of shares, which do not increase the equity share capital or the share capital carrying voting rights as at the end of the offer period by, in aggregate, more than 15%, would normally not be restricted; and for the purpose of Note 2, a 15% rather than a 10% test would normally be applied."

7. RULE 31.6 NOTE 4

Delete Note 4 on Rule 31.6 and substitute:

"4. The Monopolies and Mergers Commission and the European Commission

The Panel may use its discretion to permit an amendment to the offer timetable if there is a significant delay in the decision on whether or not there is to be a reference, initiation of proceedings or referral of an offer."

8. NOTE ON RULES 35.1 and 35.2

Delete Note (a) (iii) on Rules 35.1 and 35.2 and substitute:

"(iii) the previous offer lapsed in accordance with Rule 12(a) or (b) and the new offer follows the giving of clearance by the Monopolies and Mergers Commission or the issuing of a decision by the European Commission under Article 8(2) of Council Regulation (EEC) 4064/89. Any such offer must normally be announced within 21 days after the announcement of such clearance or decision; or"

21 September 1990