

THE TAKEOVER PANEL

NORTHERN ELECTRIC PLC

The full Panel met on 20 December to consider an appeal by CE Electric UK PLC ("CE") against a ruling of the Executive to allow purchases of shares in Northern Electric Plc ("Northern") made by Schroders and BZW to continue to stand provided that a discretionary performance element in BZW's fee arrangement with Northern was not paid. This fee had not been disclosed at the time of the Panel hearing on 18 December. CE considered that these new facts required the Panel to reverse its earlier decision that the purchases did not amount to a breach of General Principle 7 and Rule 21 of the Code. The Panel concluded for the reasons set out below and in all the circumstances of the case that the latest time for acceptances should be extended until 1 pm on Tuesday 24 December.

BACKGROUND

On 28 October CE announced the terms of cash offers for the whole of the issued share capital of Northern. On 6 December CE announced increased and final cash offers of 650p per Northern ordinary share and 105p per Northern preference share. The final cash offers were open for acceptance until 1 pm on Friday 20 December and Northern and its advisers continued to recommend rejection of these offers. By 1 pm on 20 December, CE had valid acceptances and purchases of Northern shares amounting to 49.77% of the Northern ordinary share capital.

The Panel met on 18 December to consider an appeal by CE against a ruling of the Executive to allow purchases of shares in Northern to be made as principals by Schroders and BZW. The Panel concluded that there had been no breach of the Code and issued Panel Statement 1996/17.

At 8.15 am on 20 December the Executive was informed for the first time at a meeting with BZW that there was a discretionary performance element in its fee

arrangement with Northern which amounted to 14 per cent of the total fee. This was in addition to a residual element which was determined in accordance with a sliding scale relating to the final offer consideration. Neither element of the fee arrangement was dependent upon the success or failure of the offer. BZW argued that this could still be considered to be consistent with the wording in the Panel Statement in that it did not regard the discretionary element as success related or an inducement to it to purchase Northern shares. Nevertheless, BZW wished to inform the Executive about it.

Having considered this issue and made further enquiries of Northern, the Executive considered that the existence of the discretionary fee element was material information which ought to have been made known to the Executive and those attending the Panel Hearing on Wednesday, 18 December. On 20 December, the Executive ruled that the discretionary element of the fee to BZW should not be paid. The Executive further ruled that, subject to the discretionary fee element not being paid, the purchases of Northern shares by Schroders and BZW on or since 18 December should continue to stand and not be considered in breach of the Code. In total Schroders purchased 803,333 shares (0.79%) and BZW purchased 1,655,197 shares (1.63%).

CE appealed against the Executive's latter ruling, arguing that if this information had been known on 18 December the Panel should, and would, have reached a different conclusion, namely that such purchases were in breach of General Principle 7 and Rule 21 of the Code.

THE PANEL'S REASONS

The Code and the Panel operate principally to ensure fair and equal treatment of all shareholders in relation to takeovers.

The Code is based upon a number of General Principles, which are essentially statements of good standards of commercial behaviour. They are, however, expressed

in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied by the Panel in accordance with their spirit to achieve their underlying purpose.

It is impracticable to devise rules in sufficient detail to cover all circumstances which can arise in offers. Accordingly, persons engaged in offers are made aware that the spirit as well as the precise wording of the General Principles and the ensuing Rules must be observed. Moreover, the General Principles and the spirit of the Code will apply in areas or circumstances not explicitly covered by any Rule.

The Panel had difficulty with the proposition that the relatively small performance fee that might have become available to BZW should cause the Panel to reverse its earlier decision. Such a fee did not appear to amount to action by the board of the offeree company of a kind prohibited by General Principle 7 or Rule 21. The Panel therefore believes that its decision would have been no different although it recognises that the issue was not debated in the knowledge of the full facts at the hearing on 18 December. What is clear is that BZW had failed to inform the Panel of the full facts and that during the last days of the offer it purchased shares in Northern Electric whilst these facts remained undisclosed.

In all the circumstances the Panel therefore feels that justice requires it to allow CE a final opportunity to obtain sufficient acceptances to declare its offer unconditional as to acceptances. At the hearing on 20 December the parties had before them a proposal that an extension of the latest time for acceptance might be an appropriate remedy. The Panel has therefore allowed the offer to be extended until 1 pm on 24 December. The Panel also considers that each of Schrodgers and BZW should not be permitted to purchase shares in Northern during this period.

The Panel decision set out above was the subject of an appeal by Northern to the Appeal Committee of the Panel, leave to appeal having been given by the Panel on 23 December. The Appeal Committee (The Right Honourable Sir Michael Kerr, Antony

Hichens and Ian Salter) heard the appeal on 23 December and unanimously dismissed it.

The Appeal Committee agreed with the decision of the Panel that the latest time for acceptance should be extended from the original time of 1 pm on Friday, 20 December to 1 pm on Tuesday, 24 December and considers that any valid acceptances and withdrawals received by the latter time should be taken into account.

The power of the Panel in its discretion to extend closing dates for offers in exceptional circumstances is conferred by Rule 31.6.

In the view of the Appeal Committee it is impossible to know what would have been the subsequent course of events if there had been full and proper disclosure by BZW to the Panel on 18 December of the nature of the fee arrangements in force between BZW and Northern. This non-disclosure deprived CE of the opportunity of addressing submissions to the Panel on the basis of all the facts, and it may also have had market consequences affecting the outcome of the bid, bearing in mind the narrow margin between success and failure in this case.

In all these circumstances the Appeal Committee considers that the Panel was justified in regarding the events in this case as constituting exceptional circumstances and as a basis for exercising the powers of extension conferred by Rule 31.6.

23 December 1996