

# THE TAKEOVER PANEL

## NATIONAL WESTMINSTER BANK PLC

### BANK OF SCOTLAND/THE ROYAL BANK OF SCOTLAND GROUP PLC

The Panel met on 1 November to hear an appeal by Bank of Scotland (“BOS”) against a ruling of the Executive that, pursuant to Rule 19.3 of the Code, the Executive will not presently set a firm deadline for The Royal Bank of Scotland Group plc (“RBS”) to announce either a firm intention to make an offer for National Westminster Bank plc (“NatWest”) or that it does not intend to bid for NatWest, but that the Executive would, depending on the circumstances, expect to require clarification no later than 10 days prior to the end of BOS’ 60-day offer timetable.

#### **Background**

On Friday 24 September BOS announced the terms of an offer for NatWest. BOS is advised by Credit Suisse First Boston and Morgan Stanley jointly. Following BOS’ announcement, there was a substantial amount of press comment over the weekend of 25/26 September and speculation as to the identity of potential competing offerors (including RBS). On the morning of Monday 27 September the Executive was informed by RBS’ advisers that RBS proposed to make an announcement in response to the press speculation. At 12.05 p.m. on 27 September RBS announced that it had been considering the position of NatWest for some time and was watching the situation as it developed.

Following the issue of RBS’ announcement, the Executive ruled that the announcement had the effect of putting RBS into an offer period, and RBS accepted this ruling.

Since the RBS announcement, there has been continuing press speculation concerning the identity of potential competing offerors for NatWest. RBS has been widely referred to in the press as a potential competing offeror.

On 14 October BOS published its offer document for NatWest, thus commencing its 60-day offer timetable.

On 18 October the Executive received a written submission from Credit Suisse First Boston, on behalf of BOS, requesting the Executive to rule that RBS should be required, pursuant to Rule 19.3, to clarify, within 48 hours of the publication of NatWest's first defence document, whether or not RBS intended to bid for NatWest.

On 27 October (Day 13) NatWest published its first defence document.

### **The Executive's Ruling**

The Executive consulted Merrill Lynch and Goldman Sachs on behalf of RBS and JP Morgan and Dresdner Kleinwort Benson on behalf of NatWest. After reviewing the arguments of the parties, the Executive, on 25 October, ruled in the following terms:

- (a) that the Executive would not require RBS to announce within 48 hours of the publication of NatWest's defence document either a firm intention to make an offer for NatWest or that it did not intend to make such an offer; and
- (b) that the Executive would not set a firm deadline for RBS to make any such announcement but would, depending on the circumstances, expect to require clarification, no later than 10 days prior to the end of BOS' 60-day timetable, in order to provide a reasonable time for NatWest shareholders to make acceptance decisions in the light of knowledge of all parties' intentions.

BOS notified the Panel of its intention to appeal this ruling.

### **Code Issue**

Rule 19.3 and Note 1 thereon states that:-

“Parties to an offer or potential offer and their advisers must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.

### *NOTES ON RULE 19.3*

#### *1. Holding statements*

*While an offeror may need to consider its position in the light of new developments, and may make a statement to that effect, and while a potential competing offeror may make a statement that it is considering making an offer, it is not acceptable for such statements to remain unclarified for more than a limited time, particularly in the later stages of the offer period. Before any statements of this kind are made, the Panel must be consulted as to the period allowable for clarification. This does not detract in any way from the obligation to make timely announcements under Rule 2.”*

The Code issue for the Panel therefore, was how the reference to “more than a limited time, particularly in the later stages of the offer period” in Note 1 on Rule 19.3 was to be interpreted in the circumstances of the present case and whether the Executive was correct not to specify at this stage a firm deadline for RBS to make a clarificatory announcement.

#### **Submissions of the parties**

On behalf of BOS, it was submitted that RBS, by making the announcement which it had done, had created market uncertainty and that RBS had obtained an unfair advantage over BOS: RBS had been able to test the water but without committing itself either to making or to not making a bid; and that that advantage would continue until the statement was clarified. At the hearing of the appeal BOS accepted the Executive’s ruling under (a), and so no longer maintained its earlier submission that clarification should occur within 48 hours of the publication of NatWest’s first

defence document (alternatively within 48 hours of this hearing). It, however, further submitted that clarification should now be timed to occur not later than two working days after Day 39 (the final day for the release by NatWest of any further financial information).

On behalf of RBS, it was submitted, supporting the ruling of the Executive, that RBS had done nothing to create or increase market uncertainty. It was further submitted that no deadline should now be imposed for clarification; but that if the Panel considered that a deadline should now be imposed, it should not be earlier than Day 46 (the final day for any revised offer by BOS).

On behalf of NatWest, it was submitted that, whilst otherwise agreeing with the ruling of the Executive, paragraph (b) of the ruling might be onerous for a potential bidder: to allow only four days (Days 46-50) might, to the possible disadvantage of NatWest's shareholders, hinder a potential bidder's ability to put forward an offer; and that Day 53 would accordingly be a more appropriate day.

### **Decision**

It is common ground that the announcement made by RBS was an announcement within Rule 2.2, that it was a 'holding statement' within Note 1 to Rule 19.3, and that, as such, it would need to be clarified at an appropriate time.

It is also common ground that it would be inappropriate, in the present circumstances, now to require RBS to clarify its statement earlier than Day 39.

The issues which now arise are these. First, by what day in this 60-day timetable should RBS be required to clarify its statement? Secondly, when should this be determined?

Note 1 to Rule 19.3 was not incorporated into the Code with the present circumstances in mind. Nevertheless the Panel takes the view that clarification in accordance with the Executive's proposals, as expressed in paragraph (b) of its ruling, would result in clarification within 'a limited time' because it achieves the objective

of the Rule, namely sufficient time for NatWest shareholders to reach a decision on whether or not to accept an offer. Any uncertainty about RBS' intentions that might exist in the meantime was similar to that which necessarily persists during the currency of a hostile bid. Furthermore it was insufficient justification to change the tactical balance by requiring RBS to decide its intentions prior to the final date for revision of the BOS offer.

Accordingly, the Panel is of the view that, in the present circumstances, it would be inappropriate to require clarification to be made now or in the immediate future. It is not possible for the Panel (or the Executive) now to anticipate how the bid is likely to develop during the next few weeks. The Panel must always have the interests of NatWest shareholders at the forefront of its mind.

Accordingly, the Executive (or, on appeal, the Panel) should retain as much flexibility as possible to assess not only by what date clarification should be made, but also when the issue should be addressed. Although Day 50 presently appears to the Panel to be the latest appropriate day for clarification, circumstances may arise which would point to an earlier or later day as being more appropriate. It will be for the Executive, in the first instance, to decide, in due course, when it should consider and rule on this matter, and how, in the light of the circumstances then obtaining, it should be resolved.

This appeal is accordingly dismissed.

3 November 1999