THE TAKEOVER PANEL

CORPORATE RESOLVE PLC

FOCUS DYNAMICS PLC

BACKGROUND

Introduction

On 27 November 1998 Corporate Resolve Plc ("Corporate Resolve") announced the terms and conditions of a unilateral cash offer to be made for all the shares of Focus Dynamics Plc ("Focus Dynamics") at 35p for each Focus Dynamics share. An alternative offer, constituting a mixture of Corporate Resolve shares and loan notes valuing each share at about 41p was also announced. Oriental and African Strategic Investment Services Limited provided a valuation of the loan stock and its redemption at maturity was guaranteed by VH Investments Limited.

Posting of the offer document

In accordance with Rule 30.1 of the Code, the offer document should have been posted to Focus Dynamics shareholders by 25 December 1998. (The Executive was also concerned that, in view of the Christmas holiday period, steps were taken to ensure compliance with Rule 19.7 of the Code which requires copies of all documents bearing on an offer to be lodged with the Panel and the advisers to all other parties to the offer at the time of their release). The Executive, therefore, contacted Christopher Jones of Travenen Jones, solicitors to Corporate Resolve and its principal adviser in relation to the offer. On 23 December Mr Jones confirmed to the Executive that the offer document would be posted on 24 December (and that arrangements had been made to ensure that copies of the offer document were provided to the Executive and Albert E Sharp, Rule 3 adviser to Focus Dynamics, at the time of their publication).

In the event, the offer document was not posted on 24 December. Despite repeated attempts, the Executive was not able to contact Travenen Jones (or the agents appointed by Mr Jones to deal with the posting of the offer document) during the course of 24 December. The Executive was not consulted regarding any delay in posting. Corporate Resolve's offer document was eventually posted on 29 December, although the first closing date had been altered to conform with this posting date.

On 31 December the Executive wrote to Ivan Couchman, the Chairman and Chief Executive of Corporate Resolve expressing concern at such breach and advising Corporate Resolve to ensure that its advisers were in a position to comply with the requirements of the Code.

Funding arrangements

Corporate Resolve's cash offer was stated to be conditional, inter alia, upon the Focus Dynamics group having sufficient distributable reserves to pay a special dividend or other distribution of £4,000,000. Such condition was stated to be waivable by Corporate Resolve. Following representations from the advisers to Focus Dynamics that Focus Dynamics did not have such level of distributable reserves, and in the light of concerns that Corporate Resolve was reliant upon the payment of the special dividend by Focus Dynamics in order to finance its cash offer, the Executive undertook an investigation into the funding arrangements for Corporate Resolve's offer.

The offer document stated that "the finance for the cash offer is being arranged through First Capital Securities S.A. ("First Capital"), a Swiss company appointed by Corporate Resolve as their financial adviser in Europe". A letter from Howard Marks & Co., Corporate Resolve's auditor, was included in the offer document by way of compliance with Rule 24.7 of the Code stating that the financing arrangements had been reviewed and that sufficient resources were available to Corporate Resolve to satisfy full acceptance of the offer.

The Executive contacted Mr Marks in order to investigate further the circumstances in which such cash confirmation had been provided. Mr Marks informed the Executive

that he had been appointed as auditor as recently as 19 November. He also informed the Executive that he had not seen any contract relating to the provision of funds by First Capital prior to writing his cash confirmation letter but had been provided with a copy of a letter from First Capital confirming that funds would be made available. Mr Marks was requested to provide the Executive with further information about the extent of the work performed.

Pending receipt of further information from Howard Marks & Co, the Executive was not satisfied about the availability of the cash to satisfy Corporate Resolve's cash offer. The Executive, therefore, approached Mr Christopher Jones of Travenen Jones and Mr Aiden Early of AIFEX (another adviser to Corporate Resolve) in order to obtain a copy of any financing agreement between First Capital and Corporate Resolve. After some delay, whilst clearance to release such documentation was sought from First Capital, the Executive was provided with a copy of a facility letter dated 21 November. Such letter had not been summarised in the offer document as a material contract as required by Rule 24.2 nor put on display for inspection as required by Rule 26.

Following a review of the letter of 21 November, the Executive was not satisfied that funds would be available to satisfy Corporate Resolve's cash offer in full. The Executive, therefore, approached First Capital to establish whether the cash was in fact available to Corporate Resolve without recourse to any third party. Mr Craig Whyte, Head of Corporate Finance at First Capital, explained to the Executive that the cash would be sourced from discretionary clients of First Capital. Mr Whyte was not, however, able to establish to the satisfaction of the Executive either that the funds were available to First Capital or that all conditions set out in the facility letter of 21 November had been satisfied such that the requisite funds were available to Corporate Resolve. The Executive, therefore, concluded that further assurance was required as to the availability of the cash to satisfy the cash offer in full if the cash offer was to proceed.

In the circumstances and in order to safeguard the interests of Focus Dynamics' shareholders who accepted the cash offer, the Executive required funds sufficient to enable the cash offer to be implemented in full to be placed on deposit with a bank in

the United Kingdom and for such bank to confirm to the Executive that it was in receipt of such funds. The Executive further informed Corporate Resolve that unless it could be satisfied that sufficient funds were available it would require the cash offer to lapse. In the event, no such bank deposit or confirmation was forthcoming. Corporate Resolve allowed its cash offer to lapse on 20 January, the first closing date.

Following the lapse of the cash offer and after some substantial delay, the Executive received written confirmation from Mr Marks that, before providing the cash confirmation, he had obtained confirmation of funding from First Capital by way of a letter dated 16 November from First Capital to Corporate Resolve. He also confirmed that he had obtained the balance sheet of Focus Dynamics as at 31 July 1998 showing cash at bank of £7.7m. Mr Marks noted that Corporate Resolve's offer was conditional on £4m of this cash being available for distribution. However Mr Marks had not seen the facility letter of 25 November obtained by the Executive as described above; the 16 November letter was a brief confirmation from First Capital that it would underwrite a placing of sufficient loan stock with its clients to finance the offer.

Disclosure

The Executive was also concerned that certain disclosure requirements of the Code had not been satisfied. In particular the Executive was concerned that the requirement set out in Rule 24.2(a)(ii)(3) to disclose interests in the share capital of Corporate Resolve (being a company which is not listed on the London Stock Exchange nor dealt in on the Alternative Investment Market) had not been met. The Executive, therefore, investigated the ownership of shares in Corporate Resolve. The outcome of such investigation revealed that Corporate Resolve was ultimately controlled by First Capital and its discretionary clients since discretionary clients of First Capital either directly or indirectly controlled 96% of the shares issued by Corporate Resolve.

For the purposes of the disclosure requirements of the Code, therefore, Corporate Resolve was controlled by First Capital and its discretionary clients. This fact should have been disclosed in the offer document and, in accordance with Note 2 on Rule 24.2, information on First Capital and any of its discretionary clients having a

potential direct or indirect interest of 5% or more in the equity capital of Focus Dynamics should also have been disclosed in the offer document. Upon it being established that Corporate Resolve was controlled by First Capital and its discretionary clients the Executive spoke to Craig Whyte, Head of Corporate Finance at First Capital, and wrote to that company but First Capital failed to provide any of the information requested by the Executive.

Lapsing of remaining offer

On 5 February Corporate Resolve announced that it would lapse its remaining loan note and share offer for Focus Dynamics with immediate effect.

CONCLUSION

The Code was breached in a number of respects in relation to the offer by Corporate Resolve for Focus Dynamics. The conduct of Corporate Resolve, its two directors and some of its advisers fell short of the best business standards required by the Code In particular, the breaches are sufficiently severe as to merit public censure as set out below.

Delay in posting offer document - Rule 30.1.

Rule 30.1 of the Code states

> "The offer document should normally be posted within 28 days of the announcement of a firm intention to make an offer. The Panel must be consulted if the offer document is not to be posted within this period".

This requirement is particularly important since the posting of the offer document will commence the 60 day timetable under the Code by the end of which an offer must either be declared unconditional as to acceptances or lapse. Any delay in the posting of the offer document can render the offeree company subject to unreasonable uncertainty and delay in advising its own shareholders on the merits of an offer.

The Executive was not consulted, as envisaged by Rule 30.1, with regard to any proposed delay in the posting of the offer document beyond the 28 days permitted. To the contrary, despite the Executive's concern as to a potential delay in view of the fact that the last day for posting fell on Christmas Day, confirmation was given by Mr Jones of Travenen Jones that the offer document would be posted on 24 December. Despite this, the offer document was not posted until 29 December and Rule 30.1 was, therefore, breached.

Particular responsibility for compliance with Rule 30.1 lies with the adviser to the offeror which has assumed responsibility for production and distribution of the offer document, in this case Mr Christopher Jones of Travenen Jones. It is a matter for concern that despite Mr Jones' confirmation that the offer document would be posted on 24 December this deadline was not met and that Mr Jones failed to ensure that he or the agents instructed by him to deal with the posting of the offer document were contactable by the Executive on 24 December.

As with all requirements of the Code, the directors of the offeror are ultimately responsible for compliance with Rule 30.1. Although the directors of Corporate Resolve subsequently apologised for the breach, this fact remains that they failed to take adequate steps to ensure that the offer document was posted in accordance with the timetable laid down by Rule 30.1, and in particular to ensure that arrangements were in place to monitor the timely posting of the offer document, and if difficulties arose to react, notifying the Panel if necessary. Responsibility for compliance was not discharged in this case by the appointment of agents.

Accordingly, Mr Christopher Jones of Travenen Jones, and Messrs Ivan Couchman and Christopher Keatings, the directors of Corporate Resolve are criticised for this breach of Rule 30.1.

Cash confirmation - Rule 24.7

General Principal 3 states:

> "An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror".

Rule 2.5 provides in the same terms. Compliance with General Principle 3 and Rule 2.5 is of great importance. The announcement of an offer is a highly significant event for the offeree company and will usually affect its share price. If General Principle 3 and Rule 2.5 are not complied with and an offer subsequently has to be withdrawn a false market in the shares in the offeree company is likely to have been created.

An important element in the ability of an offeror to implement an offer is the availability of funding to satisfy any cash element of the offer. This is recognised by Rule 24.7 which states;

> "When the offer is for cash or includes an element of cash, the offer document must include confirmation by an appropriate third party (e.g. the offeror's bank or financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer....."

In the present case such confirmation was given by Howard Marks of Howard Marks & Co., Corporate Resolve's auditor. Prior to the giving of such confirmation, the Executive was provided with written confirmation by Mr Marks of his familiarity with his responsibilities under the Code as provider of the cash confirmation.

The party providing a cash confirmation under Rule 24.7 is required to satisfy itself that the requisite funds are available. In this case Mr Marks' confirmation was given in reliance on a letter from First Capital to Corporate Resolve confirming that funds

were available and the balance sheet of Focus Dynamics which showed sufficient cash to pay the £4m special dividend referred to in the conditions to Corporate Resolve's offer.

Mr Marks failed to act responsibly and to take all reasonable steps to assure himself that the cash required to satisfy Corporate Resolve's cash offer was available. In particular, Mr Marks failed sufficiently to investigate and review the evidence as to Corporate Resolve's source of finance to complete the cash offer. He saw no detailed underwriting agreement or binding facility letter and did not investigate the ability of First Capital, upon whose assurances he relied, to procure the required funds. The onus on the adviser confirming availability of finance for an offer is particularly high when, as in this case, the offeror's own resources are inadequate to finance the offer. In such circumstances it is necessary as a minimum to have an irrevocable and effective commitment from a party upon whom reliance can reasonably be placed.

Accordingly, Mr Marks failed to exercise due care before providing his cash confirmation and the foundation of this confirmation was therefore inadequate for the purposes of Rule 24. Mr Howard Marks of Howard Marks & Co is therefore criticised for this breach.

At the time of announcing its offer, Corporate Resolve could not have had every reason to believe that it could and would continue to be able to implement its cash offer as required by General Principle 3 and Rule 2.5 until it had received an adequate and irrevocable commitment from First Capital to provide funds to satisfy the cash offer. The availability of funds under the facility letter from First Capital was, however, expressed to be subject to "the perfection of all documents and the settlement of our complete satisfaction of all matters, terms and conditions we may require of you at any time.....". Given the broad terms of this provision, the directors of Corporate Resolve could not reasonably have believed at the time of announcing the cash offer that they could and would continue to be able to implement the offer.

Accordingly, Messrs Ivan Couchman and Christopher Keatings, the directors of Corporate Resolve, are criticised for these breaches of General Principle 3 and Rule 2.5.

Disclosure of Information - Rules 24.2 and 26

General Principle 4 states:

> "Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information should be withheld from them."

The information to be disclosed by an offeror is set out in Rule 24.2. The relevant provisions of Rule 24.2 provide that an offer document must contain:

> "a summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeror or any of its subsidiaries during the period beginning two years before the commencement of the offer period...." (Rule 24.2(a)(i)(11)); and
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> "in respect of any person not included in (2) above those pre-existing interest in the offeror is such that he has a potential direct or indirect interest of 5% or more in any part of the capital of the offeree company which the Panel regards as equity capital, details of his identity and of his interest in the offeror and such further information as the Panel may require in the particular circumstances of the case (see Note 2)." (Rule 24.2(a)(ii)(3)).[1]

[1]. The relevant Rules are now Rule 24.2(a)(xi) and Rule 24.2(c)(iii) in substantially the same terms as those quoted above

Note 2 on Rule 24.2 states that for the purposes of Rule 24.2(a)(ii) the expression "person" will normally include the ultimate owners, and persons having control of the offeror and that the Panel must be consulted in advance in any case to which Rule 24.2(a)(ii) applies.
Rule 26 requires each material contract disclosed under Rule 24.2 to be made available for inspection from time to time the offer document is published until the end of the offer period.

These requirements are important to ensure that offeree company shareholders are given sufficient information about the party making an offer for their company and the ultimate ownership of that party. This is particularly the case where offeree company shareholders are being offered securities of the offeror in consideration for their shares. In the present case, shareholders of Focus Dynamics were offered Corporate Resolve securities as consideration but they were not given sufficient information about the ownership of Corporate Resolve or its financing arrangements in two important respects

First, the facility letter between First Capital and Corporate Resolve should have been disclosed as a material contract and a summary of its contents including the dates of the letter, parties, terms and conditions and any consideration passing to or from the offeror should have been included in the offer document. The facility letter itself should have been available for inspection in accordance with Rule 26. These requirements were not met although at the Executive's instigation, the letter was later sent to the Rule 3 adviser of Focus Dynamics and made available for inspection.

Secondly, the indirect interests of First Capital and its discretionary clients as the ultimate controllers of Corporate Resolve were not disclosed in the offer document and the Executive was not consulted regarding such interests in Corporate Resolve. Although the offer document contained financial information on Corporate Resolve as required by Rule 24.2, had the Executive been consulted, as required by Note 2 on Rule 24, it would have required information on First Capital and its discretionary clients to be disclosed as envisaged by Note 2 on Rule 24.2

The directors of Corporate Resolve are responsible for these breaches. It is the duty of the directors of an offeror company to ensure that requisite disclosures are made in accordance with the Code and to make such enquiries as may be necessary to ensure that such disclosure requirements are met. In the present case the directors of Corporate Resolve failed to pay due regard to the disclosure requirements of the Code and to make such enquiries as were necessary to ensure that such requirements were met. Accordingly, Messrs Ivan Couchman and Christopher Keatings, the directors of Corporate Resolve, are criticised for this breach.

It is a particular responsibility of the advisers to an offeror to ensure that the disclosure requirements of the Code are satisfied. In this case, Corporate Resolve did not appoint a financial adviser. Mr Christopher Jones, however, had a wide role as adviser to Corporate Resolve including responsibility for drafting of the offer document and liaison with the Executive. Mr Jones' role included advice on the Code and general transaction management. Mr Jones also informed the Executive that he had approved the offer document for the purposes of Section 57 of the Financial Services Act 1986.

Mr Jones, therefore shares with the directors of Corporate Resolve responsibility for the failure to meet the disclosure requirements of Rule 24.2. An adviser undertaking the role assumed by Mr Jones is expected to ensure that such enquiries are undertaken as are necessary to meet the disclosure requirements of the Code and to ensure that the offer document is verified to the prospectus standard which the Code requires. Mr Jones failed to exercise due care in ensuring that these disclosure requirements were met and/or to ensure that the offer document was properly verified. Accordingly, Mr Christopher Jones is criticised for these breaches of Rule 24.2.

7 February 2001