

# THE TAKEOVER PANEL

## BRITISH TELECOMMUNICATIONS PLC ("BT")

### OFFER FOR

## PLUSNET PLC ("PLUSNET")

### **Introduction**

This is a statement of criticism by the Panel Executive of N M Rothschild & Sons Limited ("Rothschild"), financial advisers to BT, for failing to prevent breaches of Rules 9.1 and 7.1 of the Takeover Code (the "Code") in connection with the purchase of shares in PlusNet on behalf of BT on 21 November 2006.

### **Background**

On 16 November 2006 BT announced a firm intention to make a recommended cash offer for PlusNet under Rule 2.5 of the Code at 210p per share. BT was advised by Rothschild.

BT's offer document was posted to PlusNet shareholders on 17 November.

On 20 November BT requested JPMorgan Cazenove Limited ("JPM Cazenove"), which had not previously been involved in this transaction, to purchase shares in PlusNet on behalf of BT. A telephone call took place between BT, Rothschild and JPM Cazenove to discuss and agree the proposed share buying. Following that call a total of 5,093,104 PlusNet shares were acquired during the course of that day, all at a price of 210p per share. The shares acquired represented approximately 17.1% of the existing issued share capital of PlusNet.

Following those purchases, on the evening of 20 November BT, Rothschild and JPM Cazenove participated in a further telephone call to discuss the possibility of making

additional purchases of PlusNet shares the following day. On that call, BT gave instructions to JPM Cazenove to purchase up to a further 28% of PlusNet shares (which, taken together with shares it already held and shares in respect of which it had secured irrevocable commitments from the PlusNet directors to accept its offer, would represent over 50% of the existing issued share capital of PlusNet). Consequently, during the morning of 21 November a further 4,531,413 PlusNet shares were acquired, all at a price of 210p per share. The additional shares acquired represented approximately 15.2% of the existing issued share capital of PlusNet. Following these further acquisitions BT had acquired, in aggregate, 9,624,517 PlusNet shares representing approximately 32.4% of the issued share capital of PlusNet and carrying 32.4% of the votes in PlusNet.

As described in more detail below, the acquisition of an interest in shares carrying 30% or more of the voting rights of a company triggers a requirement under Rule 9.1 of the Code to make an offer for the rest of the equity share capital of the company or alternatively to alter the terms and conditions of any existing offer to conform with the requirements of Rule 9. However, at no stage prior to 20 November had Rothschild explained to BT these provisions of the Code. Furthermore, on 20 November neither Rothschild nor JPM Cazenove raised concerns about the Rule 9 consequences of the share buying exercise that was discussed and agreed with BT. As a result BT was not aware of the requirements of Rule 9 at the time it gave instructions in relation to the share purchases.

It was not the intention of BT to trigger a Rule 9 obligation; indeed, BT was keen to retain the benefit of the regulatory conditions to its offer and these conditions would have had to have been waived were the offer to conform with Rule 9.

It was only on the afternoon of 21 November that the potential Rule 9 consequences of the share purchasing instruction that had been given the previous afternoon were raised, the issue having been identified by BT's legal advisers who had not been on the previous afternoon's call. Rothschild then contacted JPM Cazenove to see how much of the order had been filled and JPM Cazenove confirmed that, as described above, share purchases had been made giving BT an aggregate interest in shares carrying more than 30% of the votes in PlusNet. The requirements of Rule 9 had

therefore been triggered. Rothschild subsequently contacted the Executive to explain what had happened and to request a dispensation from Rule 9.1 on the grounds that an inadvertent mistake had been made.

Following representations from Rothschild and discussions with the financial adviser to PlusNet, the Executive agreed not to require BT to conform its offer with Rule 9.1 on the condition that BT disposed of such number of PlusNet shares as would result in BT's holding of PlusNet shares falling below the 30% threshold in Rule 9.1 (as permitted under Note 4 of the Notes on Dispensations from Rule 9). This disposal took place early on the morning of 22 November. The acquisition of PlusNet shares on 21 November and the subsequent sale on 22 November were announced to the market by BT early on the morning of 22 November.

### **Relevant provisions of the Code**

Rule 9.1 provides as follows:

**“Except with the consent of the Panel, when ..... any person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with him are interested) carry 30% or more of the voting rights of a company ..... 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 share capital whether voting or non-voting and also to the holders of any other class of transferable securities carrying voting rights.....”**

Further, Note 9 on Rule 9.1 provides as follows:

*“9. Triggering Rule 9 during an offer period*

*If it is proposed to incur an obligation under this Rule during the course of a non-mandatory offer, the Panel must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule must be announced immediately. ....”*

Rules 9.3 and 9.5 provide, in general terms, that any mandatory offer made under Rule 9.1 must be in cash at not less than the highest price paid by the offeror (or any person acting in concert with it) during the 12 months prior to the announcement of that offer and the offer must be conditional only upon the offeror having received acceptances in respect of shares which, together with shares already acquired, will result in the offeror (and persons acting in concert with it) holding shares carrying more than 50% of the voting rights of the offeree company.

Rule 7.1 provides that immediately following any acquisition of shares which triggers the mandatory offer obligation under Rule 9.1 an appropriate announcement must be made by the offeror.

Note 4 of the Notes on the Dispensations from Rule 9 provides as follows:

*“If, due to an inadvertent mistake, a person incurs an obligation to make an offer under this Rule, the Panel will not normally require an offer if sufficient interests in shares are disposed of within a limited period to persons unconnected with him, so that the percentage of shares carrying voting rights in which the person, together with persons acting in concert with him, is interested is reduced to below 30% in a manner satisfactory to the Panel....”*

Finally, section 3(f) of the Introduction to the Code provides:

*“Financial advisers to whom the Code applies have a particular responsibility to comply with the Code and to ensure, so far as they are reasonably able, that their client and its directors are aware of their responsibilities under the Code and will comply with them and that the Panel is consulted whenever appropriate.”*

### **Application of Rule 9 in this case**

The acquisition of PlusNet shares on 21 November took BT's aggregate interest in shares carrying voting rights of PlusNet through the 30% threshold. By virtue of Note 9 on Rule 9.1 the Panel should have been consulted in advance of these purchases. Further, by virtue of Rule 9.1 and Rule 7.1 BT should, on making the purchases,

immediately have conformed its offer with Rule 9.1 and immediately have made an announcement of that fact.

The Executive accepted that the failure to identify the consequences of the acquisitions under Rule 9.1 was an inadvertent mistake and, in accordance with Note 4 of the Notes on the Dispensations from Rule 9, the Executive permitted BT to dispose of sufficient shares so that the percentage of PlusNet shares held by BT was reduced to below 30%.

### **Conclusion**

Share purchasing by or on behalf of an offeror can have serious consequences under the Code and offerors should proceed with share purchases only after the most careful consideration, in particular by their financial advisers, of the relevant provisions of the Code. Rule 9 is one of the fundamental rules of the Code.

Fortuitously, the specific facts of this case and the prompt co-operation of Rothschild and JPM Cazenove allowed the inadvertent breach of Rule 9 to be remedied without serious consequences. Nevertheless the Executive finds it unacceptable that Rule 9 should have been overlooked and that an offeror was not prevented from inadvertently triggering a mandatory offer obligation which could have had significant consequences and effects on the market and which could have been far more difficult, or even impossible, to rectify.

### *Rothschild*

Primary responsibility for ensuring that BT was aware of, and would comply with, the provisions of the Code rested with Rothschild as financial adviser to BT. The Executive is of the opinion that Rothschild failed adequately to fulfil its responsibilities under the Code and thereby failed to prevent the breaches of the Code described in this statement.

In considering the appropriate sanction in respect of Rothschild the Executive has taken into account all relevant factors and in particular (i) the seriousness of the error,

which led to a breach of a fundamental rule; and (ii) the compliance history of Rothschild, in which regard the Executive notes that on two previous occasions in recent years offerors for whom Rothschild was acting as financial adviser breached an important provision of the Code in the context of share purchasing operations.

Rothschild is hereby criticised for its conduct in relation to this case. Rothschild has accepted this criticism.

#### *JPM Cazenove*

The Executive has also considered JPM Cazenove's role in this case. As indicated above, financial advisers (in this case Rothschild) bear primary responsibility for ensuring Code compliance. Nevertheless brokers also have responsibilities under the Code, even when their role is primarily concentrated on executing trades on behalf of a client.

However, based on the specific facts of this case, the Executive has decided not to make any public statement of criticism of JPM Cazenove in connection with the matters described in this statement. In reaching that decision the Executive has taken into account, in particular, that: (i) JPM Cazenove was aware that Rothschild was acting as financial adviser to BT in relation to this transaction and therefore bore primary responsibility for advising in relation to Code matters and that Rothschild was involved in both the substantive calls which took place on 20 November relating to the proposed acquisition of PlusNet shares; and (ii) JPM Cazenove was aware that Rothschild had been advising BT in relation to this transaction for some time before JPM Cazenove became involved on 20 November and JPM Cazenove might therefore have assumed that Rothschild had previously given advice in relation to the relevant provisions of the Code.

12 February 2007