

**THE TAKEOVER PANEL  
HEARINGS COMMITTEE**

**OFFER BY  
JARPENO LIMITED (“JARPENO”)  
(A WHOLLY-OWNED SUBSIDIARY OF ONGC VIDESH LIMITED (“OVL”))  
FOR  
IMPERIAL ENERGY CORPORATION PLC (“IMPERIAL ENERGY”)**

**HEARINGS COMMITTEE’S REASONED DECISION**

**The issue**

Whether or not an extension of the Code time limit for the posting of the offer document should be granted.

**The parties**

The parties to the appeal were:

- (1) ONGC Videsh Limited. OVL is a wholly-owned subsidiary of Oil & Natural Gas Corporation Limited (“ONGC”), a company listed on the National Stock Exchange and Bombay Stock Exchange in India. The Government of India is ONGC’s major or controlling shareholder, having a 74% interest.
- (2) Imperial Energy Corporation PLC. Imperial Energy’s operations are focused on the Commonwealth of Independent States and, in particular, the Russian Federation. Imperial Energy is listed on the Official List of the London Stock Exchange.
- (3) The Panel Executive.

## **The background**

1. On 26 August 2008, the boards of OVL and Imperial Energy announced the terms of a recommended cash offer to be made by a wholly-owned subsidiary of OVL, Jarpeno, for the entire issued and to be issued share capital of Imperial Energy (the “Offer”).

The Offer (together with the offer for Imperial Energy Convertible Bonds announced at the same time) valued Imperial Energy at £1.4bn.

The Offer was a pre-conditional cash offer. It specified only two pre-conditions to the posting of the offer document. These related respectively to Russian anti-monopoly and Russian foreign investment clearances. No mention was made of any need for Indian Government approval.

2. The announcement was in the form of a firm commitment to make an offer and so was subject to Rule 2.5(a) of the Code which provides as follows:

*“(a) An offeror should only announce a firm intention to make an offer after the most careful and responsible consideration. Such an announcement should be made only when an 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.”*

The approach of this provision is reflected in Rule 2.7 which provides as follows:

### *“2.7 CONSEQUENCES OF A “FIRM ANNOUNCEMENT”*

*When there has been an announcement of a firm intention to make an offer, the offeror must normally proceed with the offer unless, in accordance with*

*the provisions of Rule 13, the offeror is permitted to invoke a pre-condition to the posting of the offer or would be permitted to invoke a condition to the offer if the offer were made.”.*

3. On 11 November 2008, OVL announced that the pre-conditions to the offer specified in the announcement had been satisfied.

Accordingly, pursuant to Rule 30.1 of the Code, the 28-day period within which the offer document should normally be posted to Imperial Energy shareholders was due to expire at midnight on Tuesday 9 December 2008.

4. On 4 December 2008, OVL sought an extension from the Executive on behalf of the Panel of the time limit for posting the offer document to 19 December 2008 to enable the approval of the Indian Government to the posting of the offer document to be obtained.
5. Having considered the application and discussed it with OVL’s advisers, the Executive refused OVL’s application late on 4 December 2008. On Friday 5 December 2008, OVL stated its intention to appeal against the Executive’s decision to the Hearings Committee of the Panel (the “Committee”). The appeal was heard on Monday 8 December 2008.

### **OVL’s submissions**

6. OVL confirmed (as it had to the Executive) that on 22 August 2008 it had received an approval to proceed with the Offer from the Government of India, and on the basis of this approval announced jointly with Imperial Energy on 26 August 2008 the terms of the Offer.

Although the announcement contained pre-conditions relating to Russian regulatory approval, OVL told the Executive that on the basis of the approval already received the announcement contained no pre-condition relating to Indian Government approval.

On 11 November 2008 (as stated above), OVL announced that the pre-conditions to the Offer had been satisfied.

7. OVL said that it received a communication from the Indian Government on 17 November 2008 requesting that OVL submit the draft offer document for its approval and for the approval of its posting to Imperial Energy's shareholders.

The Executive was told that the Directors of OVL felt compelled to respond to the Indian Government's request to approve posting of the offer document because of the Articles of Association of ONGC. In particular, Article 109 provides as follows:

*“Notwithstanding anything contained in these Articles the President may, so long as he holds 51% or more of the paid up equity share capital of the Company, from time to time issue such directives or instructions as may be considered necessary in regard to conduct of business and affairs of the Company and in like manner may vary or annul any such directive or instruction. The Directors shall give immediate effect to the directives or instructions so issued.”.*

OVL submitted the draft to the Indian Government on 19 November 2008 and also brought the Code timetable to the Government's attention.

8. OVL submitted that:

*“The recent terrorist attacks in Mumbai have resulted in taking up several measures by Government of India to prevent such attacks in future. There have been changes in Government. In the wake of terrorist attacks, the Government's attention is focused on establishing new measures (including anti-terror law, and a Federal investigating agency) and strengthening the existing measures to counter the threat of terrorism.*

*Consequently, the appropriate committee of the Indian Government has not yet had a chance to convene to approve the posting of the offer document.”.*

Further, it said that the extraordinary circumstances referred to “have forced the Indian Government to focus solely on national security issues in recent days”.

9. OVL explained at the hearing that, although it had taken the precaution of seeking an extension to 19 December 2008 in case the appropriate committee could not reach a decision before then, it would be acceptable to have an extension up to 12 December 2008.

#### **The Executive’s submissions**

10. The Executive submitted that no extension of the time limit should be granted. In support of this conclusion, it pointed to the distinction in the Code between an announcement of a firm intention to make an offer under Rule 2.5 and an announcement of a possible offer under Rule 2.4. The former represents a formal commitment to proceed with an offer and, as such, will almost inevitably have a profound effect upon the offeree company and the market price of its shares - hence the need for care on the part of both an offeror and its financial adviser (ahead of the release of a Rule 2.5 announcement) and the compelling terms of Rule 2.7.
11. The Executive further pointed to one of the “principal objectives” of the Code which is to provide an orderly framework for the conduct of offers, including the specified timetable within which steps must be taken after a Rule 2.5 announcement. It argued that the rationale behind the timetable is that the offeree company should not be exposed to an excessive period of siege, and that in practice an extension of time for the posting of the offer document would not be granted unless the offeree consented (which it had not done in this case).

This “siege principle” is stated in General Principle 6 of the Code (as it is in the Takeovers Directive) as follows:

*“An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.”.*

The Executive pointed out that the Rule 2.5 announcement, itself approved by the Indian Government, plainly recognised (in paragraph 16) OVL’s obligation under the Code to comply with Rule 30.1 and post the offer document within 28 days of satisfaction or waiver of the pre-conditions.

12. The Executive stressed that not only did the announcement make no reference to the need for the approval of the Government of India, but indeed, if any such approval had to be obtained, no Rule 2.5 announcement could have been made at all since a pre-condition to this effect would not have been permitted under Rule 13.3 of the Code.
13. The Executive noted that OVL’s advisers confirmed to the Executive on 18 August 2008 that, at the point of issuing the Rule 2.5 announcement, Jarpeno would “be able to implement the proposed offer without recourse to or consent from the Indian Government, ONGC or OVL” and confirmed to the Executive on 22 August 2008 that the Government’s consent had been obtained.
14. More fundamentally, the Executive contended that, whatever ability the Indian Government may have as against OVL to try to set aside its previous consent or to prevent the posting of the offer document (so as to seek to cause OVL to break its obligations under the Code), this should not in any way relieve or absolve OVL and Jarpeno of the obligation under the Code to post the offer document.
15. Noting that Imperial Energy had not agreed to an extension of the deadline, the Executive concluded that the Committee should not accede to OVL’s

application. It stated:

*“To conclude otherwise would open the door to offerors or persons controlling them having a unilateral right to introduce, after a Rule 2.5 announcement has been made, further pre-conditions to offers proceeding. This would: (i) be wholly inconsistent with the orderly framework requirements imposed by, inter alia, Rules 2.5 and 30.1; (ii) undermine the fundamental principle that shareholders should be able to rely upon an announcement of a firm intention to make an offer under Rule 2.5; and (iii) lead to a serious risk of false markets developing.”*

16. The Executive said that to introduce unilaterally a new pre-condition to the Rule 2.5 announcement is not permitted save where such condition is a legal requirement to implement an increased or improved offer in accordance with Rule 32.4 (and this requires, inter alia, the Panel’s consent). It believed that to grant OVL’s request without Imperial Energy’s consent could lead to significant market uncertainty relating to the likelihood of the Offer being made.

### **Imperial Energy’s submissions**

17. Imperial Energy supported the Executive’s arguments and confirmed that it did not consent to an extension of time, whether to 12 or 19 December 2008, nor indeed to any extension which was not accompanied by a guarantee that the extension would lead to the posting of the offer document. It contended that:

*“(a) an extension would, in the circumstances, disregard a number of Code Rules and undermine the fundamental principle of certainty that the Code imposes on an offeror;*

*(b) there is no legitimate need for an extension;*

- (c) *an extension would have a number of seriously adverse effects; and*
- (d) *an extension would provide an opportunity for the Offer to be frustrated.”.*

In line with the Executive, it supported these points by referring to Rule 30.1 and Rule 2.5(a) of the Code. In addition, it referred to Rule 1(c) which provides that a board approached with an offer “is entitled to be satisfied that the offeror is, or will be, in a position to implement the offer in full”.

18. On the facts, Imperial Energy also noted (inter alia) as follows:
- (i) Imperial Energy and OVL entered into an implementation agreement under which they both agreed to use reasonable endeavours to implement the Offer. Under that agreement OVL warranted that it had obtained all necessary approvals to enter into and perform the agreement;
  - (ii) before the making of the Rule 2.5 announcement, it was confirmed to Imperial Energy and its advisers that the Indian Government had approved it;
  - (iii) Imperial Energy was not aware until late on Wednesday 3 December 2008 that there was any question of OVL not posting its offer document or of OVL seeking an extension of time for doing so. When OVL did request Imperial Energy to consent to an extension to enable the consent of the Indian Government to be obtained, OVL and its advisers were unable to give Imperial Energy and its advisers any assurance that the Indian Government would approve the posting of the offer document or to say when such approval might be given; and
  - (iv) the effect of granting an extension for the reasons put forward could be to allow the controlling shareholder of OVL to prevent the offer from



proceeding contrary to the relevant provisions of the Code.

On the facts, Imperial Energy further said that there was no legitimate need for an extension. The provision in the Articles of Association of ONGC is an internal matter between the Indian Government and OVL and should not be allowed to interfere with (i.e. to override) the Code timetable.

Imperial Energy also stated that, whilst expressing every sympathy for those affected, the recent events in Mumbai ought not to affect the obligation to post the offer document by the deadline imposed by the Code.

19. Imperial Energy contended that its board of directors and the market have relied on the announcement since it was made. If OVL were to succeed in its application to the Committee, there will have been a false market since the announcement, since without that announcement the shares would have traded at a lower level. To announce an extension on the basis of a newly introduced pre-condition would be likely to lead to a dramatic fall in Imperial Energy's share price, making the granting of the Indian Government's approval even less likely.

### **The decision**

20. The Committee concluded that the Executive's arguments were compelling and dismissed OVL's appeal.
21. Without re-stating those arguments in detail, the Committee wishes to reiterate the importance of treating a Rule 2.5 announcement as a firm commitment to make an offer in accordance with the terms of the announcement and to follow the Code timetable unless and to the extent that the Panel modifies such obligations, something which all concerned would rightly expect to happen only in exceptional circumstances and with the consent of the offeree, at least in the event, as here, of a recommended offer. After a Rule 2.5 announcement, to attempt to introduce unilaterally a pre-condition to the offer is manifestly

unacceptable (subject to the very limited exceptions in Rule 32.4 of the Code).

22. The issue at the hearing seemed to the Committee (as was implicit in the Executive's submission) to be not whether the Government of India had other more pressing priorities and/or was unable or unwilling until some later date to decide whether or not to approve the posting of the offer document. Rather, the prior question was whether to allow to be imposed on OVL and Imperial Energy a pre-condition enabling the Government of India to grant or withhold such approval. This is a question of principle, not one requiring detailed exploration of such matters as why the Government of India asserts such a right or of whether it has already had sufficient time to reach a decision on the point.
23. Imperial Energy suggested that behind the application for an extension was a wish on the part of the Government of India to renegotiate the terms of the offer, and gave details of the basis for its belief. The Executive expressed no view on this point and, for the reasons already stated, the Committee considers that it is unnecessary for it to do so for the purposes of a decision which is one of principle.
24. The Committee is pleased to note that, following its decision, the offer document has been posted within the timetable imposed by the Code.

11 December 2008