

THE TAKEOVER PANEL

HEARINGS COMMITTEE

OFFER BY

COSTAR GROUP, INC.

FOR

ONTHEMARKET PLC

RULING OF THE CHAIRMAN OF THE HEARINGS COMMITTEE

This Panel Statement sets out the Ruling of the Chairman of the Hearings Committee of 29 November 2023. The period for appeal to the Takeover Appeal Board has expired without any such appeal having been made. It is now published in accordance with paragraphs 6.5 and 6.6 of the Hearings Committee Rules of Procedure (with redactions where appropriate).

Introduction

1. On 19 October 2023, CoStar Group, Inc. (“CoStar”) announced a recommended cash offer by its wholly owned, indirect subsidiary, CoStar UK Limited, of 110 pence per share for OnTheMarket Plc (“OTM”) (“the Acquisition”). The Acquisition values OTM at approximately £99 million and is to be implemented by a scheme of arrangement. The shareholders’ meetings to vote on the Acquisition are scheduled to be held on 4 December 2023 and, in the event shareholders’ approval is given, a court hearing to sanction the scheme is scheduled for 7 December 2023.
2. OTM is an AIM listed, United Kingdom residential and commercial property portal which operates and provides services through the OnTheMarket.com portal. The services it provides are not dissimilar to other property portals such as Rightmove and Zoopla. The majority of OTM’s share capital is owned by estate agents who have acquired their shares with the agreement of OTM at the time of entering into contracts with OTM to list properties on the OnTheMarket.com portal. Such agreements also provide for the agents to pay fees to OTM. The number of shares issued, the fees payable and the contract term will vary from agent to agent.
3. CoStar is a data and portal conglomerate based in Washington DC.

4. Mr Brett Stone (“Mr Stone”) requests that the Hearings Committee (“the Committee”) be convened to review certain rulings of the Executive of the Takeover Panel (“the Executive”) made, or at least anticipated, in connection with the Acquisition. Mr Stone’s application is set out in a submission dated 27 November 2023. Although by then the Executive had explained its position in relation to the complaints raised by Mr Stone, it had not issued a ruling which could serve as a subject for possible review by the Committee under the Committee’s Rules of Procedure. Accordingly, by its submission of 28 November 2023 made in response to Mr Stone’s request to convene the Committee, the Executive set out a ruling that determined what it understood to be Mr Stone’s complaints. That ruling is set out below.
5. In light of the unusual sequence in which matters have developed and the fact that the Executive’s ruling post-dated Mr Stone’s original submission, I allowed Mr Stone and the Executive to serve supplementary submissions by 5pm on 28 November.
6. Rule 1.1 of the Committee’s Rules of Procedure states where relevant as follows:

“The Hearings Committee may be convened in the following circumstances:

- (a) If a party to a takeover, or any other person affected by a ruling of ... the Executive ... and with a sufficient interest in the matter, wishes to contest a ruling of the Executive, that party or other person is entitled to request that the Hearings Committee be convened in order to review the matter;*
- (b) ...*
- (c) ...*
- (d) in other circumstances where the Executive or the Hearings Committee considers it appropriate for it to be convened.”*

7. Rule 2.1 of the Committee’s Rules of Procedure states in relevant part as follows:

“The chair of a hearing or prospective hearing may, without convening the Hearings Committee, reject a request that the Hearings Committee be convened on any matter if he or she considers:

- (a) that the person making the request is not affected by the ruling of the Executive;*
- (b) that the person making the request does not have a sufficient interest in the matter;*
- (c)*
- (d) that the matter has no reasonable prospect of success.”*

Rule 2.2 states that

“In such cases, the chair of the hearing may determine the application or request without an oral hearing.”

8. The Executive opposes Mr Stone’s request for the Committee to be convened on three grounds:
 - (i) that he is not a person affected by the Executive’s ruling;

- (ii) that he does not have a sufficient interest in the matter; and
 - (iii) that his complaint has no reasonable prospect of success.
9. Although (a) and (b) of Rule 2.1 contemplate potentially distinct grounds of objection, in many cases, including the present, they may involve similar considerations.

Standing under the Committee's Rules of Procedure

10. Mr Stone is the sole managing partner of Edengen, a private investment partnership. He has strong views on the Acquisition and has written open letters (to some of which he refers in his original submission) to various public figures, groups and organisations. These letters include a letter of 9 November 2023 to shareholders of OTM informing them of his views on the Acquisition and a further letter of 24 November 2023 in which he was highly critical of a press release published on OTM's website and through the RNS. In October of last year, Mr Stone sent to the chair of OTM a reasoned proposal for a [Redacted] underwritten capital raise which had involved considerable work and which he intended as helpful. Mr Stone maintains that his proposal was effectively ignored.
11. There is no doubt, therefore, that Mr Stone is a person who has taken an interest in and has spent considerable time and energy in opposing, the Acquisition. But this does not mean that he is a person affected by the Acquisition (or specifically, a person affected by the Executive's ruling in relation to the Acquisition). Nor does it mean that he is a person with a "sufficient interest" in the matter within the meaning of Rule 1.1 of the Committee's Rules of Procedure.
12. Mr Stone is not a party to the offer, nor does he own any shares in OTM. According to the Executive, Mr Stone is on record as saying that he has no intention of acquiring shares in OTM [Redacted]. However, in view of Mr Stone's clarification of his intentions in his supplementary submission and his statement that he remains interested in acquiring a significant number of OTM "new shares" I attach no weight to this. Nevertheless, it remains the case that Mr Stone is not a current shareholder of OTM affected by the offer. Nor does Mr Stone hold shares in CoStar.
13. Mr Stone stated in his original submissions that it is his public-spirited interest in the success of small business member-shareholders of OTM and in the long-term development of the United Kingdom property commerce category that has caused him to voice his opposition to the Acquisition.
14. These may be very worthy considerations, but they do not mean that Mr Stone is a person affected by the Executive's ruling, as distinct from someone taking it upon himself to speak on

behalf of those he believes will be affected. Neither the ruling nor the Acquisition generally has a direct impact on Mr Stone.

15. Mr Stone has no greater claim to a sufficient interest in the Acquisition than any other person with the relevant background or expertise who has strong views on the merits or demerits of the takeover or the conduct of the parties. If an interest such as this were to qualify as a “sufficient interest” for convening the Committee, any well-informed or not so well-informed member of the public with strong views would have standing to invoke the relevant machinery and to intervene in the process. This would not be conducive to the efficient regulation of takeovers. Mr Stone’s lack of standing to have the Committee convened is not, therefore, a purely technical objection to his application, as there are sound policy reasons for limiting those who are entitled to have the Committee convened.
16. Accordingly, Mr Stone does not have standing within the Committee’s Rules of Procedure to request that the Committee be convened, and his application is rejected for that reason.

No reasonable prospect of success? – General Principle 1(1) and Related Matters

17. The above findings would be sufficient to dismiss Mr Stone’s application, but in light of the measured manner in which he has developed his submissions I will address briefly Mr Stone’s substantive objections to the Executive’s ruling.
18. By its initial ruling of 28 November 2023, the Executive stated as follows:
 - “(a) *Notwithstanding that many of the shareholders in OnTheMarket are also agents who have entered into bespoke agreements with the Company to list properties on the OnTheMarket.com portal prior to the Company entering into discussions with CoStar, General Principle 1(1) will be complied with if each agent who is also a shareholder receives 110 pence per share in connection with the Acquisition, and there is no requirement for the agent’s other pre-existing relationships with the Company to be taken into consideration; and*
 - (b) *the arrangements which OnTheMarket has entered into with agents who are also shareholders since it commenced discussions with CoStar were in the ordinary course of business and were not in breach of General Principle 1(1).”.*
19. That ruling was made in response to Mr Stone’s complaint that the arrangements outlined in the scheme circular would contravene General Principle 1(1) of the Code which states that:

“All holders of the securities of an offeree company of the same class must be afforded equivalent treatment.”

20. To understand Mr Stone's complaint and the Executive's ruling it is necessary to explain a little of the background.
21. OTM is the parent company of Agents' Mutual which was formed in 2013 by several leading estate and lettings agents with the intention to create a new residential property portal as a challenger to the two existing major portals, Rightmove and Zoopla. Agents' Mutual was constituted as a company limited by guarantee and was wholly owned by its member agents.
22. In September 2017, Agents' Mutual underwent a reorganisation through a scheme of arrangement pursuant to which the members received shares in OTM in exchange for their member interests in Agents' Mutual. As a result of this reorganisation, Agents' Mutual became a wholly owned subsidiary of OTM.
23. In February 2018, OTM's shares were admitted to trading on AIM ("the Admission"). OTM also carried out a placing of new shares in order to raise £30 million of new funds.
24. Following the Admission, a majority of the issued share capital of OTM was owned by agents, and this continues to be the case today. Although he suggests that his figures be checked, according to Mr Stone, as of 17 January 2023, OTM had more than 3,600 shareholders who are estate agents, owning an aggregate of 45,628,757 shares (representing approximately 60% of the Company's issued share capital at that time).
25. At the time of the Admission, approximately 5,500 branches of estate agents listed properties on the OnTheMarket.com portal. 3,039 of these agents had agreed new five-year contracts as part of the 2017 reorganisation. Of the balance, 1,253 branches had existing contracts with more than two years to run and the remainder was on rolling shorter-term contracts.
26. In OTM's admission document, the directors stated that in order to encourage other agents to list properties on OnTheMarket.com, the intention was to use a combination of new share issues to selected key agents in return for them entering into long term listing agreements. Shorter term free or discounted listing arrangements were to be agreed with other agents.
27. OTM continues this strategy today. It uses a combination of share issues and flexible fee arrangements to encourage agents to list. Each contract is individually negotiated and regulates the number of shares granted to the agent, the fees payable by the agent and the term of the contract, with all such components varying from contract to contract.

28. OTM has continued these practices since CoStar's approach. Consistently with OTM's normal course of business, new listing contracts have been entered into and existing free of charge or limited term contracts have been converted into new agreements.
29. Against this background, Mr Stone had two concerns relevant to the Code. The first was [*Redacted*].
30. Mr Stone's more general concern was that the bespoke inter-connected fee and share issue agreements which it was OTM's practice to negotiate with agents, meant that a flat payment of 110 pence per share to all shareholders would not afford equivalent treatment to all shareholders of the same class and would, accordingly, contravene General Principle 1(1). Mr Stone submitted that the number of shares held by an agent was part of a contractual package and was inextricably linked to other components of the agent's contract such as fees and the duration of the listing. The result was that a flat payment to all shareholders would ignore other aspects of their contractual rights and fail to achieve equivalent treatment of all shareholders. The same flat payment to all shareholders would, according to Mr Stone, be unfair to some shareholders unless each shareholder was afforded the most favourable terms granted by OTM to any of its member-agents.
31. The Executive was undoubtedly correct, in my view, to reject this argument. General Principle 1(1) requires equivalent treatment of all shareholders of the same class with regard to their shares, that is to say *qua* shareholder: it is not concerned with ensuring that shareholders are afforded equivalent treatment as regards other aspects of their contractual relationship with the company. This remains the position notwithstanding arrangements under which the number of shares issued to a member is contingent upon other aspects of the member's contract with the company such as the fees payable for listing rights and the duration of those listing rights. Such other rights, even if agreed as part of a package that includes the grant of a certain number of shares, will no doubt be contractually enforceable against the company, but they do not fall within the ambit of General Principle 1(1).
32. In the 2007 case of Eurotunnel PLC ("Eurotunnel") (TAB Statement 2007/2) the Committee and Takeover Appeal Board distinguished between rights attaching to shares and other personal rights conferred under a contractual arrangement with the company. Certain shareholders of Eurotunnel enjoyed travel privileges granted as a result of their investing in the company at the time of its IPO or pursuant to a later rights issue. Under the offer made by Groupe Eurotunnel SA to implement a group reorganisation, shareholders who accepted the offer would lose these travel privileges. This was alleged to contravene the principle of equivalent treatment between shareholders, as shareholders who forfeited their travel rights would be offered no more than

those who had no travel rights to lose. The Committee and Takeover Appeal Board rejected this argument, holding that the travel privileges, although granted as a condition of taking up shares, were in the nature of personal rights and were not rights attaching to the shares as such (such as voting rights and the rights to dividend and capital). The argument that shareholders with travel privileges constituted a different class from those without such rights was similarly rejected.

33. Mr Stone correctly points out that there are many factual distinctions between the present case and Eurotunnel; but the distinctions he mentions do not affect the difference in principle between rights attaching to shares and other rights granted to agents as part of a package of contractual arrangements that include the issue of shares. Such other rights are personal rights enforceable by action under the contract between the agent and OTM, but they are not rights attaching to the shares of OTM.
34. Accordingly, the Executive was correct to conclude that an offer of 110 pence to all shareholders gave effect to General Principle 1(1); and that the same flat offer to all shareholders of the same class would be the only way of acting in accordance with that General Principle.
35. The Executive was also justified in its conclusions on two other matters, namely that:
 - (i) OTM's business model and practices before it received the approach from CoStar fell outside the jurisdiction of the Code; and
 - (ii) it investigated the matter following Mr Stone's complaint, and having done so, found no evidence to suggest that OTM's practices since receiving the approach were other than practices followed in the ordinary course of its business. It is significant that despite Mr Stone's many public letters, no shareholder has made the same or similar complaints.
36. In summary, Mr Stone has not in my view made out an arguable case that the Code has been or will be contravened and, in the circumstances, nothing would be achieved by convening the Committee.

General Principle 2(1)

37. Before receiving Mr Stone's initial submission, the Executive had not understood the nature of Mr Stone's complaint under General Principle 2(1). This complaint was, accordingly, addressed by the Executive in its supplementary submission.

38. General Principle 2(1) states that:

“The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid.”

39. In my view, Mr Stone has no reasonable prospect of satisfying the Committee that either the timing of the offer or the information supplied to shareholders of OTM gives rise to a contravention of General Principle 2(1).

40. As regards timing, the offer period commenced on 19 October 2023 and the scheme circular was published on 7 November. As noted above, the shareholder meetings to approve the Acquisition have been scheduled for 4 December. There is nothing unusual or particularly demanding in this timetable.

41. As regards sufficiency of information, the scheme circular has been approved by the board of OTM and contains a responsibility statement in accordance with Rule 19.2 which includes the statement that the scheme circular accords with the facts and omits nothing likely to affect the import of the information provided. No shareholder or agent has contacted the Executive to express concerns about the timing or paucity of information.

42. Mr Stone observes that the views of [Redacted] which are hostile to the Acquisition, have not been included in the scheme circular. But other than in limited circumstances which do not apply in this case, there is no requirement in the Code to publish the views of specific shareholders. Furthermore, [Redacted] could, if [Redacted] wished, publish [Redacted] views as Mr Stone has done. There has been ample opportunity for debating the merits or demerits of the Acquisition and it is not the purpose of the Code either to facilitate or to impede takeovers.

43. In my view, therefore, Mr Stone has not made out an arguable case that General Principle 2(1) has been contravened.

44. For the reasons stated above, Mr Stone’s request to have the Committee convened is dismissed.

45. Any appeal against this ruling must be filed with the Takeover Appeal Board in accordance with its Rules of Procedure by 11 am on Thursday 30 November 2023.

Michael Crane KC

Chairman of the Committee

29 November 2023