

THE TAKEOVER PANEL

OFFER BY WPP GROUP PLC ("WPP")

FOR

TEMPUS GROUP PLC ("TEMPUS")

1. The Takeover Panel met on 31 October to hear an appeal by WPP against the Panel Executive's refusal to allow WPP to invoke the material adverse change condition in relation to its offer for Tempus as set out in paragraph (g)(i) of Appendix 1, Part A of its offer document dated 10 September. WPP also placed reliance on condition (h)(iii) of its offer document. WPP was of the view that there had been a material adverse change in the prospects of Tempus after the announcement of WPP's offer and, in particular, following the events in the United States on 11 September.
2. It was agreed between the parties that the issue for the Panel was whether WPP had established that there had been a material adverse change in the prospects of Tempus which was of material significance to WPP in the context of its offer for Tempus. As is always the case the Panel considered this issue afresh, but it noted particularly the points which WPP said were grounds for reversing the ruling of the Panel Executive. This statement is more detailed than usual because of the extensive and to some extent complex factual submissions of the parties, but even so it sets out to do no more than summarise the main points whilst preserving so far as possible the commercial sensitivity of the material put before the Panel.
3. All parties also agreed that for the purposes of the hearing the relevant period for determining whether or not a material adverse change had taken place was between 7 September, the last date on which WPP had received updated information about Tempus before posting its offer document and 22 October, the twenty-first day after WPP's offer became unconditional as to acceptances.

4. WPP is advised by Merrill Lynch and Goldman Sachs. Tempus is advised by Lazard Brothers. The Panel received detailed written and oral submissions from both the parties and their advisers, as well as from the Panel Executive.

Background

5. On 19 July, Havas Advertising ("Havas") announced a recommended cash offer of 541p per share for Tempus. On 22 July, WPP was granted access to a data room prepared by Tempus which included Tempus' then forecast for 2001 and certain information about the period beyond 2001. On 30 July, Havas posted its offer document. On 20 August, WPP announced a cash offer of 555p per share for the whole of the shares in Tempus not already owned by it, valuing Tempus at approximately £434 million. At the date of the announcement it already owned approximately 22% of Tempus. On 7 September, Tempus provided to WPP its draft interim results for the six months to 30 June with updated forecasts for the year to 31 December 2001. On 10 September, WPP posted its offer document.
6. On 11 September, the terrorist attacks in the United States took place. On 17 September WPP made share purchases in the market of approximately 3% of the share capital of Tempus, which together with the shares it already owned gave WPP a 25% holding in Tempus. On 24 September, Havas lapsed its offer as a result of insufficient acceptances.
7. On 25 September, Tempus publicly announced its interim results for the six months ended 30 June 2001. By 2 October, WPP had received acceptances in respect of 89.9% of the Tempus shares to which its offer related and, as a result of its share purchases on 17 September, WPP's offer became unconditional as to acceptances. WPP then extended its offer until 15 October. On 10 October, WPP announced that it was to seek a ruling from the Panel Executive that it was entitled under the Code to invoke its material adverse change condition. On 16 October, Tempus submitted to the Panel Executive that there had been no material adverse change or deterioration in

its prospects and included in its submission a private and confidential revised forecast of results for the year to December 2001, which submission was duly forwarded to WPP with Tempus' consent. On 22 October, WPP announced its offer would remain subject to conditions (g)(i) and (h)(iii) of its offer document, but was otherwise unconditional and extended its offer to 29 October and subsequently extended it further, presently until 12 November. On 24 October after hearing a number of submissions from each side, the Panel Executive ruled that WPP should not be permitted to invoke the material adverse change condition. WPP notified the Panel Executive on 25 October that it intended to appeal to the full Panel. On 26 October WPP made a procedural application to the Chairman of the Panel. It sought (as it had unsuccessfully done from the Executive) an order that Tempus should provide certain financial information about Tempus' trading for the third quarter of 2001. That application was dismissed by the Chairman after a hearing on 30 October, but on the basis that the full Panel, when hearing WPP's substantive appeal, could take a different view when considering the matter as a whole.

Relevant provisions of the WPP offer

Material Adverse Change Condition

8. The WPP offer is subject to the conditions set out in Part A of Appendix 1 to the offer document, paragraph (g)(i) of which provides that:

"(g) since 31 December 2000 and save as disclosed in the accounts then ended and save as publicly announced in accordance with the Listing Rules by Tempus prior to 20 August 2001 and save as disclosed in this document or as otherwise fairly disclosed in writing by Tempus to WPP:

(i) *no material adverse change or deterioration having occurred in the business, assets, financial or trading position or profits or prospects of any member of the wider Tempus Group."*

9. As mentioned above, the offer was also subject to condition (h)(iii) which provides that:

"(h) save as publicly announced in accordance with the Listing Rules by Tempus prior to 20 August 2001 or as otherwise fairly disclosed in writing to WPP prior to that date by any member of the Tempus Group, WPP not having discovered:

(iii) any information which materially affects the import of any information disclosed at any time by or on behalf of any member of the wider Tempus Group".

10. WPP acknowledged that it had no separate right to withdraw the offer on the basis of condition (h)(iii) but relied on this condition in order to protect its ability to rely on the conclusions derived from Tempus' 16 October forecast in support of its case under condition (g)(i). There was no dispute that WPP could rely on that forecast and condition (h)(iii) therefore requires no further consideration. The question for the Panel is whether condition (g)(i) can be invoked.

Jurisdiction

11. There is a contractual relationship between WPP and the shareholders of Tempus who have accepted WPP's offer, the determination of which is a matter of law. However, as WPP readily accepted, it was for the Panel to determine whether WPP should be permitted under the Code to invoke condition (g)(i) of its offer document and thereby lapse its offer.

The Code

12. The relevant provisions of the Code are:

Rule 2.7. Consequences of a "Firm Announcement"

When there has been an announcement of a firm intention to make an offer, the offeror must, except with the consent of the Panel, proceed with the offer unless the posting of the offer is subject to the prior fulfilment of a specific condition and that condition has not been met.

NOTES ON RULE 2.7

1. *Failure to proceed — exceptional circumstances*

A change in general economic, industrial or political circumstances will not justify failure to proceed with an announced offer: to justify a decision not to proceed, circumstances of an exceptional and specific nature are required.

2. ...

Rule 13. Subjective Conditions

An offer must not be subject to conditions which depend solely on subjective judgments by the directors of the offeror or the fulfilment of which is in their hands.

NOTES ON RULE 13

1. *An element of subjectivity*

The Panel may be prepared to accept an element of subjectivity in certain special circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition may depend, especially in cases involving official authorisations, the granting of which may be subject to additional material obligations for the offeror. It would also normally be acceptable in an announcement for an offer to be expressed as being conditional on statements or estimates being appropriately verified.

2. *Invoking conditions*

An offeror should not invoke any condition so as to cause the offer to lapse unless the circumstances which give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer.

13. In spite of changes in the circumstances in which offers are launched and the conditions to which they are subject, the Panel's approach has been consistently applied over many years and remains valid today. In a statement issued at a time of major market decline in 1974, the Panel said:

"In general...the Panel considers that a change in economic and industrial conditions, or even in legislative policy, which may suggest that a proposed acquisition will not be as advantageous for the offeror company as was hoped when the intention to offer was first announced, is one of the hazards which has to be accepted in a takeover situation. Even in more normal conditions than now exist, markets are volatile and it must be expected that they will sometimes over a period show wide fluctuations, which may for a

time put a different complexion on the economics of a particular offer. On the other hand, falls in market levels or depressions in the general economy are usually followed after a time by recovery. Similarly, legislative policy depends upon the exigencies of the time. The Panel considers that a change in economic, industrial or political circumstances will not normally justify the withdrawal of an announced offer. To justify unilateral withdrawal, the Panel would normally require some circumstance of an entirely exceptional nature and amounting to something of the kind which would frustrate a legal contract. It must be remembered that the terms and timing of an announcement of intention to offer and of the posting of offer documents are, subject to the Code, entirely in the hands of the offeror. It is therefore right that an offeror shall accept the risk of a change of circumstances in the intervening period. Once an offer is announced, the market in the shares of the offeree company is likely to be, at least to some extent, supported by the price at which the offer has been fixed. It follows that withdrawal would contribute to the market having been a false one.” (Panel Statement 1974/2)

14. In March 1974 the Panel issued a further statement in which it said as follows:

“Announcements of offers should not include conditions which depend on subjective judgments by the directors or the fulfilment of which are in the hands of the directors since these create unnecessary uncertainty; nor should they include a condition that, if the general economic situation deteriorates, the directors can withdraw the offer. It would normally be acceptable in an announcement for an offer to be expressed as conditional on statements or estimates being appropriately verified.” (Panel Statement 1974/7)

The application of the Rules and the current practice reflected in the Panel statements

15. There was much discussion in the parties' submissions to the Panel about the applicability of Rule 2.7. Tempus sought to argue that it applied directly to the invocation of a material adverse change condition and that WPP was not therefore able to trigger that condition on the basis of general changes in economic circumstances including those occasioned by the events of September 11th. WPP on the other hand contended that the purpose of Rule 2.7 was to prevent offerors from failing to post offers that had been announced and that thereafter an offeror was entitled to invoke the conditions to which it had made its offer subject, provided of course that the conditions complied with Rule 13 and the Notes to that Rule. WPP went on to say that even if it were wrong and Rule 2.7 was of direct application in the present case, then it had met the test because the events of September 11th had had an effect on Tempus of "an exceptional and specific nature".
16. The Panel considers that the history and wording of Rule 2.7 make it difficult to argue that it is of direct application to the operation of a material adverse change condition contained in an offer which has been posted. However, the Panel believes that the thinking underlying the Rule and the above quoted 1974 Panel Statements that gave rise to the Rule should be taken into account when considering the materiality test in Note 2 to Rule 13 (the application of which was accepted by all the parties) so that meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous, as the 1974/2 Panel Statement put it, to something that would justify frustration of a legal contract. To accept a lower test would allow an offeror to use a material adverse change condition to defeat the object of Rule 2.7 and the 1974 Panel Statements. The Panel, accordingly, did not accept the test proposed by WPP

that it is sufficient if there has been "a change which undermines, from the offeror's perspective, the rationale for having made the offer at the price and on the terms specified".

17. The Panel considers that a change in general economic circumstances may legitimately be relied upon when seeking to invoke the relevant condition, but only if and to the extent that in doing so the requirements mentioned in paragraph 16 are satisfied.
18. It was not disputed by WPP that the offeror cannot rely on what he knows or anticipates at the relevant time (or, the Panel would add, what he would have known if he had complied with his obligations under General Principle 3 to announce an offer only after the most careful and responsible consideration).
19. As Tempus said and WPP did not dispute, the events of 11 September occurred during a period of economic decline both generally and in the advertising sector and this was known to WPP and indeed reflected in the public statements by WPP before the announcement of its offer. WPP did not rely on the general economic decline which was already apparent. They relied on the effect of the events of 11 September on economic conditions as they affected Tempus. They said these events were exceptional and unforeseeable and this is indeed correct. Views on the likely progress and length of the decline varied widely before, during and after the announcement of this bid, and markets were unusually volatile during that time. Tempus said rightly that to succeed WPP had to distinguish between the causative effects and show what were the consequences on Tempus' prospects of the 11 September events and the aftermath as opposed to what was the effect of a known general and sectoral decline existing prior to 11 September. The Panel accepts this analysis by Tempus, which emphasises one of the difficulties facing WPP.

Subjective Conditions

20. WPP acknowledged that the question of whether a material adverse change has occurred is not simply to be determined by reference to WPP's subjective view though it considered there was an element of subjectivity. The Panel considers that the issue of material significance to the offeror in the context of an offer is to be determined objectively but would be heedful of the view of the offeror's Board on that question, and any other informed views such as those of the offeree, giving those views such weight as seems appropriate in the light of all the evidence.

Burden of Proof

21. All parties acknowledged that the burden of proof was on WPP to prove that a material adverse change affecting Tempus has occurred and that this was of material significance to WPP in the context of its offer.

Application by WPP for Discovery and Allegations of Breach of Regulatory Requirements

22. During the course of the Panel hearing, a number of questions were raised by both WPP and the Panel concerning the revised forecast of 16 October. In this context, the Panel specifically considered the question of whether to order Tempus to produce its third quarter figures. As indicated above this had been the subject of a preliminary hearing on 30 October before the Chairman of the Panel. It was the Panel's clear view that production of these figures was not necessary for the reasons that the Chairman of the Panel had communicated to the parties. The Panel was also satisfied that it could proceed fairly to reach a decision without these figures being available.

23. Two of the points raised in this connection should be mentioned. WPP alleged that Tempus was in breach of certain regulatory requirements and guidance requiring Tempus to notify the Companies Announcement Office of changes in its financial position. The Panel found this unhelpful. The issue for the Panel was not whether Tempus was in breach of different regulatory requirements expressed in different terms and for their own purposes. Nothing in this statement should be read as acceptance of the accuracy (or otherwise) of such allegations. Nor did the Panel accept that Tempus' unwillingness to disclose confidential information (albeit information which it had used for the purposes of its October forecast) to a competitor who was striving to remain precisely that, was to be regarded as evidence that such information would be damaging to Tempus, as WPP had contended.

Precedents

24. The Panel Executive informed the Panel that there are no precedents as far as the Code is concerned relating to the circumstances in which offers have been withdrawn, without the consent of the offeree, on the basis of a material adverse change in the business of the offeree. It should be noted that an offeror who wishes to lapse its offer is often able to do so by invoking the acceptance condition or an offer may fail if it is not approved by the offeror's shareholders, if this is also a condition of the bid. In these situations there is no need for an offeror to try to invoke the material adverse change condition.
25. In its submission WPP referred to a number of materiality tests referred to by various authorities in other contexts. The Panel considered that these were not particularly helpful in the present case where the focus of the issue and the approach to its determination was different.

Tempus' Profit Forecasts

26. Both WPP and Tempus referred to various profit forecasts for Tempus in their written and oral submissions before the Panel. The Panel considered all the points raised orally and in writing about the reliability of the forecasts and the conclusions to be drawn from them. The details of these are a matter of commercial sensitivity and remain confidential. Accordingly, the Panel does not consider it appropriate to set out these details, but it is necessary briefly to refer to them as so much of the argument turned on these and the inferences that could be drawn from them about the future prospects of Tempus.

27. As stated above, Tempus provided WPP with a forecast for the year to December 2001 on 7 September which had been prepared some days earlier. In early October, Tempus prepared a revised forecast for 2001 and this was the one supplied to the Panel Executive and WPP on 16 October with Tempus' consent. The October forecast was lower than the September forecast and included as exceptional operating items certain expenses principally concerned with reducing costs as a response to the decline in the Tempus' markets that had been gathering pace throughout 2001. WPP sought to suggest Tempus' October forecast was optimistic but also relied on its contents to justify its fundamental contention that there had been a material adverse change since the September forecast. It said in effect that the forecast and the inferences that WPP drew from it proved its case. Tempus emphasised the short term effect on profits of a fall in revenue that could not immediately be compensated for by cost reduction measures. Tempus said that the benefit of cost reduction measures taken in the second half of 2001 should flow through into 2002. The Panel was assured at the hearing that the forecast had been rigorously prepared with the involvement of the full Board, all of whom had been made conscious of their responsibilities and although it had not been formally reported on, Lazards had been involved as had Tempus' legal advisors.

28. In considering these forecasts and in arriving at the conclusions expressed below, the Panel considered amongst other factors WPP's arguments on Tempus' adjustment to its September forecast from in-fill acquisitions, the treatment of exceptional items for the purposes of the forecast, and the existence and implications of a major restructuring plan implemented by Tempus.

Longer Term Prospects

29. The Panel was addressed by both Tempus and WPP on the change in the long-term prospects of Tempus as a result of the attacks of 11 September and the events that followed. The 2001 figures did show a decline in the performance of Tempus (but not the reasons for that decline) for the current financial year, but WPP did not persuade the Panel that they showed a material longer term decline in the prospects of Tempus.
30. In support of its case WPP submitted its own projections of Tempus' profits for the year to December 2002 based on WPP's view of the current "run rate" as shown by the 2001 information, in particular WPP's analysis of Tempus' projections for the second half of 2001. Tempus did not accept WPP's figures for the year to December 2002, stating that they significantly understated the position, but did not put forward a revised projection of its own and there was no obligation upon them to do so. The Panel reached the view that there were no reliable figures for 2002 from which it could derive any useful conclusion and that any attempt by WPP to arrive at a projection for 2002, based on an extrapolation of Tempus' run rate profitability for all or any part of the second half of 2001 was unlikely to be meaningful.

31. It was clear to the Panel, applying the test in paragraph 16 above, that a temporary effect on profitability was not of itself sufficient. The adverse change had to be long lasting since a purchaser of 100 percent of a company for strategic reasons was clearly investing for the long term and therefore something of material significance to such an offeror "in the context of the offer" had to be long term.

32. The detailed submissions of the parties were supported by contributions from a number of representatives of the parties in the hearing. There was a considerable divergence of opinion as to Tempus' longer term prospects: WPP expressed the view that the nature of Tempus' business and the cost saving steps it had taken meant that its prospects were damaged for the long term as a result of those events. Tempus, however, was firmly of the view that its business remained robust and produced evidence from third parties that the recession in advertising had been underway for some time and that the impact of the events of 11 September was likely to be relatively short lived. The Panel was unable to conclude that WPP had demonstrated that Tempus' "franchise" (as WPP described it) was materially damaged as a result of those unforeseeable events.

Strategic Rationale for the Offer

33. In its offer document, WPP stated strongly that it believed that there was a variety of strategic and financial benefits arising from the takeover of Tempus which arose in a number of ways. The Panel was of the view that it was hard to say that those strategic benefits no longer remained available to WPP noting, in particular, the fact that on 10 October, WPP stated in its announcement that it "remained convinced of the strategic merits of combining WPP and Tempus". At the hearing WPP confirmed that the question of strategic rationale, although never overwhelming, remained but said it had to be weighed against the price to be paid for Tempus. The Panel concluded that the continuing strategic benefits of proceeding with the bid were significant in examining the issue *in the context* of WPP's offer.

Furthermore, in the context of the offer such effects as there may have been on Tempus' prospects as a result of the events of 11 September and following, over anything other than the very short term, remained unclear in spite of the attention paid to them.

Share Purchase

34. As has been indicated, WPP purchased 2.37 million Tempus shares on 17 September at the offer price of 555p. This took its stake to approximately 25%. There was considerable debate before the Panel as to the significance, if any, of this purchase in light of the case now put forward by WPP. WPP argued that the purchase had no bearing on the issue, claiming it was made for tactical reasons only in order to achieve a blocking 25% minority shareholding, and before it had appreciated the full extent of the effects on Tempus of the events of 11 September. The Panel is of the view that WPP's purchase sent a signal to the market and to Tempus shareholders in particular that, notwithstanding the events of 11 September, WPP did not then consider that condition (g)(i) applied and intended to proceed with its offer. It was not until 10 October that the impression thus given was reversed. This happened before WPP had received the October forecast and the reasons for WPP's change of position on 10 October remained obscure. In the circumstances, however, it was not necessary for the Panel to consider whether the purchase of shares had any bearing on WPP's ability to invoke the material adverse change condition.

Conclusion

35. For an offeror to invoke a material adverse change condition and so withdraw its offer requires, in the opinion of the Panel, the offeror to demonstrate to the Panel that exceptional circumstances have arisen affecting the offeree company which could not have reasonably been foreseen at the time of the announcement of the offer. The effect of the circumstances in point must be

sufficiently adverse to meet the high test of materiality described in paragraph 16 above and judged, at least in the present type of case, not in terms of short term profitability but on their effect on the longer term prospects of the offeree company. Indeed, as WPP made clear it was the longer term prospects of Tempus which had provided the strategic rationale for the offer and this seemed to the Panel to be central to the value which WPP placed on Tempus at that time.

36. The Panel considered the submissions of the parties and the arguments they made at the time of the hearing, including but not limited to the basis of the attempts to predict the future profits of Tempus, the longer term effects of the events of 11 September on Tempus, the general economic decline affecting the advertising industry before and after the posting of the offer and the strategic reasons for WPP's offer for Tempus. The Panel came to the conclusion, on the evidence before it, that WPP had failed to demonstrate that between 7 September and 22 October there was a material adverse change in the context of the bid such as to entitle them to invoke the material adverse change condition, and had so failed by a considerable margin. The appeal, therefore, failed.

6 November 2001