

Practice Note 21 (PN21) – N 65g/MCID 4N7((1)-a15765]B.(N)5 (r)-5.1 ()65]B.(N)

“The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:–

- (i) the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies; or
- (ii) the acquirer is a member of a group of persons comprising an individual, his close relatives and related trusts, and companies controlled by him, his close relatives or related trusts, and the acquirer has acquired the voting rights from another member of such group of persons.”

9. Points to note about Notes 6(a)(i) and (ii):

- (a) Notes 6(a)(i) and (ii) are confined to acquisitions by a member of a concert group from another member of the concert group when the relationship is particularly close, being either a company with its subsidiaries or an individual together with his/her close relatives, related family trusts and companies controlled by the individual or close relatives.
- (b) Note 6(a)(i) relates to a group consisting of a parent company and its subsidiaries and is interpreted strictly in accordance with the definition of “subsidiary” in the Takeovers Code. The exclusion of associated companies (which are included in class (1) of the presumption of acting in concert in the Codes as presumed concert parties) is intentional. Unless a parent subsidiary or fellow subsidiary relationship can be demonstrated, based on the definition of “subsidiary” in the Takeovers Code, the concession provided for in sub-paragraph (i) will not be available.
- (c) Similarly, Note 6(a)(ii) is interpreted strictly. The application of Note 6(a)(ii) by its wording, and as it has been applied for many years by the Executive, relates specifically to transfers between persons who are closely related, that is family members.

10. If Notes 6(a)(i) and (ii) do not apply, Note 6(a) sets out the following criteria that “will” be taken into account in considering whether to grant a waiver:

“In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:–

- ~~(i)~~(1) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;
- ~~(ii)~~(2) the price paid for the shares acquired; and

~~(iii)~~(3) the relationship between the persons acting in concert and how long they have been acting in concert.”

11. Points to note:

- (a) Whilst Note 6(a) provides that the above criteria “will” be taken into account, it is clear that the Executive and the Takeovers Panel may also take into account all other relevant facts and circumstances.
- (b) In determining the leader of the concert group for the purpose of Note 6(a)(i) above, the focus will be on the holder or controller of the relevant voting rights. The fact that one member of the concert group may have taken a leading role in terms of managerial and executive decisions is unlikely of itself to be determinative.
- (c) In many cases where a waiver under Note 6(a) is granted, no premium is paid for the acquired shares. A substantial or atypical premium paid for the shares acquired would normally indicate a premium for control and therefore be an important factor in determining whether the grant of a waiver under the Note is appropriate. However, the absence of a control premium is unlikely of itself to be determinative of whether it is appropriate to grant a waiver under Note 6. Each case will rest on its own facts and circumstances.
- (d) The relationship between the persons acting in concert and how long they have been acting in concert are fact specific matters and often necessitate the Executive raising enquiries. The Executive should be given sufficient time to raise enquiries and analyse the responses.
- (e) Note 6(a) provides that the factors set out in Note 7 to Rule 26.1 may also be relevant in considering whether to grant a waiver under Note 6(a). These factors include whether (i) the vendor was an “insider”; (ii) there is a payment of a very high price for the voting rights; (iii) the parties negotiate options over the retained voting rights; and (iv) the purchaser’s nomination of board representation is supported by the vendor. Again these factors are highly fact specific and are examined on a case-by-case basis.

Announcement of ruling granted

12. In the interests of transparency and to ensure an informed market, the Executive strongly encourages an applicant to inform the offeree company promptly about a waiver granted under Note 6. The offeree company should, with regard to other applicable statutory disclosure obligations, consider announcing that the waiver has been granted. The Executive also has the discretion to publish its rulings where the rulings are considered to