TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to an application by International Capital Network Holdings Limited ("ICN") for a review of a ruling by the Executive that ICN must comply with the provisions of the Takeovers Code in response to an offer by Koffman Securities Limited.

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1. The Panel met on Thursday 31 October 2002 to consider an application under section 9.1 of the Introduction to the Takeovers Code ("**Code**") by ICN for a review of a ruling by the Executive that ICN must comply with the provisions of the Code in response to an offer by Koffman Securities Limited ("**Koffman**" or "**Offeror**").

Salient Facts

The Offer

2. On 5 September 2002 Koffman announced its intention to make a voluntary offer for all the issued shares in ICN ("**Offer Announcement**") at a price of $0.03 per share in cash with a securities exchange alternative ("**Koffman Offer**" or "**Offer**").

ICN's allegations against Koffman

3. ICN, through its financial adviser, advised the Executive that ICN did not consider the Koffman Offer to be bona fide or in accordance with the Code. Given this, ICN stated that it did not propose to take any further action in response to the Koffman Offer until these matters had been investigated fully and any breaches addressed.

4. ICN's refusal to respond centred on the following allegations:

   (a) The Koffman Offer was not bona fide as it formed part of a series of undisclosed arrangements between a group (which ICN alleged held a majority interest of the shares in ICN and was acting in concert in respect of ICN, "**Alleged Concert Party**") and Koffman. ICN alleged that these arrangements may have involved secret benefits for Koffman and members of the Alleged Concert Party that were not available to other ICN shareholders and were also related to a scheduled general meeting of ICN at which it was proposed to alter the composition of ICN's board of directors; and

   (b) The Alleged Concert Party had, at a date preceding the Koffman Offer, triggered a mandatory offer obligation under Rule 26.1 of the Code to make a general offer for all the shares in ICN at a price far exceeding $0.03. Given this, ICN did not

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19. Having reached this conclusion, the Panel determined that it would not now seek to hear further submissions on the Alleged Concert Party and promptly advised the Parties and the Executive of this decision.

The main issue

20. The Panel was now faced with the question of whether it was possible to consider fairly the matter before it when it was unable to form a view on the credibility of many of the allegations of an Alleged Concert Party on which ICN had built its case. In order to do so the Panel would have to be satisfied that a determination of whether the Koffman Offer was an offer to which the Code applied could be reached fairly and properly without having to have regard to evidence relating to the Alleged Concert Party: a proposition argued by both the Executive and Koffman.

21. The Panel, therefore, invited the Parties and the Executive to present their submissions on what "*bona fide*" means and how it applies within the broad functioning of the Code. The Executive and the Parties' views were also sought on whether an "*alleged breach*" was sufficient to interrupt or stop an offer timetable.

22. ICN, through its financial adviser, focused its arguments, as it had done in its written submission, on the need to establish the true intent of an offer. In its written submission ICN stated its view that *"a bona fide offer must be a genuine effort to effect a merger or takeover"* and *"Further, from the dictionary meaning of "bona fide", an offer to be "bona fide" must also be free from the intent to deceive*".

23. The Executive directed its arguments in seeking to demonstrate that the concept of "*bona fide*" had no place in the evaluation of an offer and to the extent it accepted the admissibility of the term within a Code context it sought to confine the concept to, as described in its written submission, "*a situation of potential or imminent offer before an actual announcement of an offer*."

24. Koffman, through its financial adviser, did not explore the meaning of "*bona fide*" as such but rather concentrated on seeking to establish that its offer could be logically and commercially justified without the need to suppose the existence of any alleged covert arrangements.

25. On the question of the effect of an "*alleged breach*" on an offer timetable ICN, through its financial adviser, emphasised the need in this circumstance for intervention by the Executive or the Panel where the alleged breach was serious and where a full determination of the alleged breach could not be made within the Code timetable or before the happening of certain other events. Little store was placed by ICN and its financial adviser in the efficacy of subsequent disciplinary action to redress a wrong done to shareholders. The Executive was, on the one hand, strongly opposed to intervention in an offer timetable based solely on an allegation. The Executive foresaw in such a doctrine grave potential for abuse in the context of hostile takeovers to the detriment of shareholders. The Executive held firmly to the view that subsequent action, if merited, was from a shareholder's standpoint, preferable to foregoing an opportunity to consider an offer and that a party unwilling

or unable to comply with a subsequent disciplinary finding was just as likely to withhold cooperation at an earlier stage.

"Bona fide"

26. Having carefully considered the submissions of the Parties and the Executive on the meaning and application of "*bona fide*", the Panel was not persuaded by the

42. The Panel did not agree with ICN' s proposition that pre-emptive action ahead of a conclusion to the Executive's investigations into the Alleged Concert Party provides a greater likelihood or certainty of protection for shareholders than lies both in the application of the relevant provisions of the Code to ICN consequent on the Koffman Offer proceeding and in the Executive concluding its investigation into the Alleged Concert Party and taking such action as it deems necessary or appropriate at that stage in the exercise of its regulatory function.

43. The Panel drew particular support for its view from the fact that as a direct consequence of the application of Code disciplines to ICN, its shareholders would be entitled to receive timely independent financial advice on the Offer and, through those means, to be apprised of the current position of the company in which they are shareholders, the shares of which continue to trade.

44. The Code seeks to provide protection to shareholders through a range of disciplinary procedures and sanctions which may include such remedies as the Panel thinks fit in the event that the Panel finds there has been a breach of the Code or a ruling. It is under these provisions that the Panel believes protection is properly afforded to shareholders in the event that there is a subsequent finding of a breach or breaches of the Code.

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that offer of the Code's disciplines on disclosure of information and the timely provision of independent financial advice.

49. These Code obligations rest firmly on all parties to a transaction and their professional advisers. Only by ensuring consistent adherence to and application of these disciplines can the integrity of regulation under the Code be maintained.

50. In reaching its decision, the Panel emphasised the importance of the Executive's investigative and regulatory role. While expressing no view on the Alleged Concert Party, the Panel urges the Executive to pursue its enquires with vigour and conclude its investigations as soon as practicable.

Dated 8 November 2002

Appendix 1

Rule 2.1 provides:

> "Board of offeree company
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> A board which receives an offer, or is approached with a view to an offer being made, should, in the interests of shareholders, retain a competent independent financial adviser to advise the board as to whether the offer is, or is not, fair and reasonable. Such advice, including reasons, should be obtained in writing and such written advice should be made known to shareholders by including it in the offeree board circular along with the recommendation of the offeree company's board regarding acceptance of the offer. If any of the directors of an offeree company is faced with a conflict of interest, the offeree company's board should, if possible, establish an independent committee of the board to discharge the board's responsibilities in relation to the offer."

Rule 8.4 provides:

"Timing and contents of offeree board circular

> The offeree company should send to its shareholders within 14 days of the posting of the offer document a circular containing the information set out in Schedule II, together with any other information it considers to be relevant to enable its shareholders to reach a properly informed decision on the offer. The Executive's consent is required if the offeree board circular may not be posted within this period and will only be given if the offeror agrees to an extension of the first closing date (see Rule 15.1) by the number of business days in respect of which the delay in the posting of the offeree board circular is agreed.
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> The offeree board circular must include the views of the offeree company's board or its independent committee on the offer and the written advice of its financial adviser as to whether the offer is, or is not, fair and reasonable and the reasons therefor. Reference is made in this regard to Rule 2. If the offeree company's financial adviser is unable to advise whether the offer is, or is not, fair and reasonable the Executive should be consulted."