

ENFORCEMENT OF THE SECURITIES REGULATION CODE AND THE ROLE OF THE COURTS

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SUMMARY

The Companies Act 61 of 1973 lays down the legislative framework for the regulation of takeovers and mergers in South Africa. The Act established the Securities Regulation Panel (hereinafter “the Panel”) and gave it the power to regulate affected transactions. The Securities Regulation Code on Takeovers and Mergers contains the rules that regulate such transactions. The Code enjoys the force of law and section 440L provides that unless an exemption has been granted by the Panel, no person is entitled to enter into or propose an affected transaction except in accordance with the rules. No difficulties arise if the parties involved in affected transactions obey the Code and any rulings issued by the Panel. However, various issues arise if any party refuses to comply with the Code or obey a ruling. This article considers how the Panel must proceed in order to enforce the Code or one of its rulings. It also considers the role of the court in this process, the status of Panel rulings and the ability of parties to frustrate an affected transaction. The financial ability of the Panel to ensure the enforcement of the Code is commented on. Further, consideration is given to the City Code on Takeovers and Mergers and the position of the UK Takeover Panel, bearing in mind the need to implement the European Takeover Directive and the UK Department of Trade and Industry’s proposals to do this.

1 INTRODUCTION

Chapter XVA of the Companies Act 61 of 1973 laid down the broad legislative framework for the regulation of takeovers and mergers in South Africa. The Act established the Securities Regulation Panel and gave it the power to regulate affected transactions.¹ The Securities Regulation Code on Takeovers and Mergers which contains the rules regulating affected

¹ The Securities Regulation Panel (hereinafter “the Panel”). The Panel was established by s 440B(1) of the Companies Act 61 of 1973 and s 440C sets out the functions and powers of the Panel.

transactions was made by the Panel and came into operation on 1 February 1991.²

The Code enjoys the force of law³ and unless an exemption has been granted by the Panel,⁴ no person is entitled to enter into or propose an affected transaction except in accordance with the rules.⁵ One of the functions of the Panel is to make provision for the effective monitoring of compliance with, and enforcement of, its rules.⁶

Circumstances may arise, for example, where the Panel is of the opinion that an affected transaction⁷ has occurred and the obligation to make a mandatory offer under rule 8.1 of the Code has been triggered. The relevant party may apply for an exemption from this obligation. However, the executive director of the Panel may issue a ruling that a mandatory offer must be made.⁸ If the party wishes to contest this ruling he may take it on appeal to the executive committee and then to the Panel itself.⁹ No difficulties arise if the Panel confirms the ruling and the party against whom the ruling is issued complies with it and proceeds to make the mandatory offer as directed. However, various issues may arise if the party simply refuses to comply with the ruling of the Panel.

The first relates to how the Panel must proceed in order to enforce its ruling that a mandatory offer be made. If the Panel decides to apply to the court for an order that a mandatory offer be made, the question then arises as to the role of the courts in this context. If the court is required to hear the matter in full and come to its own conclusion, the status of rulings and decisions of the Panel is called into question. Further issues then arise regarding the purpose of the Panel and the ability of parties to frustrate an affected transaction by taking legal action. Another real consideration is the financial ability of the Panel to ensure the enforcement of the rules of the Code. All these issues raise the question whether the approach that has been adopted in the Code and the Companies Act 61 of 1973 are sufficient to ensure the enforcement of the Code so that parties involved in the

² The Securities Regulation Code on Takeovers and Mergers (hereinafter "the Code"). The Code was brought into operation by GN R29 in GG 12962 of 1991-01-18 (*Reg Gaz* 4632).

³ Explanatory Note 1(c) of the Code.

⁴ The Panel has a general discretion to grant an exemption from compliance with the Code subject to any terms and conditions it may prescribe: rule 34 of the Code.

⁵ S 440L of the Companies Act 61 of 1973. The word *rules* is defined by s 440A(1) for the purposes of Chapter XVA of the Companies Act 61 of 1973 to mean "the rules made or amended from time to time by the Panel and approved by the Minister and published by him by notice in the *Gazette*". Contrast this with the use of the word *rules* in the actual Code where the word is normally used to refer to specific provisions of the Code as opposed to the introduction, definitions and general principles of the Code: *LAWSA IV Companies* (1995) Part 1 par 274.

⁶ S 440C(4)(e) of the Companies Act 61 of 1973.

⁷ See s 440A(1) of the Companies Act 61 of 1973 for the definition of an "affected transaction". See also s B of the Code.

⁸ See Explanatory Note 2 of the Code where it is stated that the executive director is available for consultations and rulings.

⁹ The Panel was given the authority to make rules dealing with appeals from decisions of the executive director and executive committee to the Panel by s 440C(3)(d) of the Companies Act 61 of 1973. See s A(2)(d) of the Code for the appeal procedure.

takeover industry respect the Panel's rulings and the Code. These various issues will be considered below. Some consideration will also be given to the position of the UK Takeover Panel and the City Code on Takeovers and Mergers,¹⁰ bearing in mind the need to implement the European Directive on Takeover Bids¹¹ and the Department of Trade and Industry's proposals to do this.¹²

2 SECTION 440M OF THE COMPANIES ACT 61 OF 1973

The first issue to be addressed relates to how the Panel must proceed in order to enforce a ruling that it has made. The Panel has various ways of enforcing compliance with the Code and the choice of procedure to be adopted is at the discretion of the Panel.¹³ Section 440M(1) of the Companies Act 61 of 1973 grants the Panel authority to apply to the court when there has been a contravention of any rule and section 440M(2) grants the Panel authority to apply to the court where it has a reasonable suspicion either that any rule is likely to be contravened or that a contravention is likely to continue or be repeated.¹⁴ The court could grant an order of specific performance, an interdict or a declaratory order or any combination of these orders to enforce the Code.¹⁵ Another option is for the Panel to issue a notification to interested parties and/or to make a general announcement that there has not been compliance with the provisions of the Code and/or that a particular offer is not or was not valid.¹⁶

¹⁰ Hereinafter "the Takeover Code".

¹¹ Hereinafter "the Takeover Directive". After 20 years of negotiation there was agreement on *Directive 2004/25/EC of the European Parliament and of the Council of the 21 April 2004 on Takeover Bids*. This Takeover Directive came into force on 20 May 2004 and is required to be implemented by Member States by 20 May 2006. See L 142 *Official Journal of the European Union* 2004-04-30.

¹² See the DTI's *Company Law Implementation of the European Directive on Takeover Bids – A Consultative Document* (January 2005) www.dti.gov.uk/cld/current.htm visited on 2005-08-01. This document is referred to as the DTI's *Implementation Proposals*.

¹³ Rule 1.17 of the Administrative Rules made in terms of s 440C(4) of the Companies Act 61 of 1973.

¹⁴ Note that the provisions of s 440M do not affect the right to any other remedy which a person may have: s 440M(5) of the Companies Act 61 of 1973. Blackman, Jooste and Everingham *Companies Act III* (looseleaf) (first publication 2002) 15A-163 give various examples of such other remedies including a claim for damages for fraudulent or negligent misrepresentation and a breach of the duty to disclose which duty arises from a fiduciary relationship between the parties. S 440M(4) provides that any person who contravenes any of the rules is liable to any other person for any loss or damage suffered by that person as a result of the contravention. Blackman *et al* 15A-161–15A-162 point out that this subsection imposes statutory liability and that it is very broad in its potential application. It is submitted that this should not be viewed as a problem as they also point out, it is possible for the Panel to use the general discretion found in rule 34 of the Code to exonerate a party from failure to comply with a requirement and further that any court could use s 248 of the Companies Act 61 of 1973 to grant relief.

¹⁵ See Explanatory Notes 1(c) of the Code.

¹⁶ Explanatory Notes 1(c) of the Code.

Let us assume that the Panel is of the view that an affected transaction has occurred and that although the relevant party applied for an exemption, the Panel has ruled that a mandatory offer to minority shareholders must be made under rule 8.1 of the Code. If the relevant party refuses to make the mandatory offer, the Panel may apply to court for an order in terms of section 440M(1). Thus the Panel may apply to court for an order that the person (who has not been exempted by the Panel) comply with rule 8.1 and make a mandatory offer. This would be tantamount to applying for an order that the relevant party comply with the Panel ruling that he must make a mandatory offer.

3 THE STATUS OF RULINGS AND THE ROLE OF THE COURTS

If the Panel applies for an order that a mandatory offer must be made, the question then arises as to the role of the courts in this context. Is it for the court to decide on the facts presented to it that an affected transaction has occurred and that a mandatory offer must be made or should it simply issue an order that the party comply with the ruling of the Panel that a mandatory offer be made? The answer to this question would seem to depend on the status of the rulings and decisions of the Panel.

Blackman *et al*¹⁷ point out that no express power is given to the Panel to make rulings and decisions on the provisions of the Code and that the status of rulings which the Panel has assumed it has authority to make is not specified. The authors assert that the rulings of the Panel are not binding “in the sense that they impose obligations or duties on the person concerned. Rather, its rulings are no more than rulings as to whether, in the opinion of the Panel, the Code is or is not being, or has or has not been, complied with. If a person does not comply with these rulings, he does not thereby commit a breach of a duty or obligation. Rather, the question is whether, in so acting, he is contravening the Code; and that ultimately, is a question for the court to decide”.¹⁸ Blackman *et al*¹⁹ then state that the Panel has the power “to institute legal proceedings to enforce the Code (but not its own rulings) by interdict. At that stage, the court does not review the Panel’s rulings. Rather it decides whether the conduct in question would or has constituted a contravention of the Code”.

Although no mention is made of the Panel being authorised to issue rulings on whether conduct complies with the Code and this power is also not specifically included as one of the rules of the Code, section 440C(1) of the Companies Act 61 of 1973 does give the Panel the power to make rules to regulate affected transactions and to make rules relating to the duties of the offeror and the offeree company. Further, section 440C(4)(a) gives the Panel the authority to make rules dealing with the administration of the

¹⁷ 15A-45.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Panel. Under this authority, the Panel has made the Administrative Rules, one of which states that the Code shall be administered by the Panel and that the executive committee and the executive director shall have full powers to make rulings and decisions under the Code subject, to the right of appeal provided in the Code.²⁰ Although it might be questioned whether a rule authorising the making of decisions and rulings under the Code can properly be made under a power which gives authority to make rules dealing with the administration of the Panel, it should be noted that section 440C(4)(d) also specifically authorises the Panel to make rules relating to appeals from decisions of the executive director right through to the Panel. This would thus seem to assume that someone has the authority to make rulings and decisions which can be appealed. Further, although it is not specifically stated that rulings of the Panel are binding and enforceable, it should be noted that in the Introduction of the Code, where the authority of the executive director, the executive committee and the Panel to give rulings on the interpretation of the Code is provided for,²¹ it is specifically stated as being binding as part of the Code.²²

Blackman *et al* are correct in the view that no express authority is given in the Companies Act 61 of 1973 to the Panel to make rulings on the provisions of the Code and that the Panel has assumed the power to make rulings on the application and interpretations of the provisions of the Code.²³ They are also correct in their view that although section 440M(1) gives the Panel authority to apply for the enforcement of a rule of the Code, no express authority is given to the Panel to apply for the enforcement of one of its rulings.²⁴ However, it is difficult to escape the conclusion that an application to enforce a rule in effect involves an application to enforce a Panel ruling that the party is not exempt from complying with the rule.

It is clear that the authors are of the view that where the Panel applies for an order enforcing compliance with a rule of the Code, it is the court that decides whether the conduct complained of constitutes a contravention of the rule. Thus in our example it would be up to the courts to consider all the facts and to decide whether an affected transaction had occurred and if so, whether a mandatory offer must be made. The Panel would seem to support the view that the court will not summarily enforce a ruling made by the Panel. In the case of *Securities Regulation Panel v MGX Holdings Ltd*²⁵ the Panel brought an action to have a transaction declared an affected transaction and it applied for an order directing the defendants (who it alleged were acting in concert) to make a mandatory offer to minority shareholders. When the Panel gave notice of its intention to amend its particulars of claim the defendants objected to this. The basis of the

²⁰ Rule 1.6 of the Administrative Rules.

²¹ See s A(2)(c) of the Code.

²² See s A(1) of the Code.

²³ S A(2)(c) of the Code where it is explained that parties can consult the executive director for a ruling on the application or interpretation of the Code.

²⁴ Blackman *et al* 15A-45.

²⁵ 2004 CLR 444 (W).

objection was that the amended particulars of claim lacked essential allegations to found a cause of action and were vague and embarrassing.²⁶ One of the objections was that the allegations, even if established, did not justify the conclusion that the defendants were acting in concert.²⁷ In dealing with this objection, Malan J analysed the requirements that need to be satisfied before it can be said that a person is acting in concert and he concluded that sufficient allegations had been made to found a cause of action.²⁸ However, as the precise transaction which allegedly constituted the affected transaction did not form part of the grounds of objection and was therefore not dealt with,²⁹ the extent to which the courts would inquire into and need to be satisfied regarding the alleged facts and the interpretation placed upon them by the Panel is unclear.

4 THE POSITION OF THE PANEL AND THE FRUSTRATION OF AFFECTED TRANSACTIONS

The approach that the rulings and decisions of the Panel are not binding in the sense that they do not impose obligations and duties on the parties against whom they are issued and the view that it is for the courts to decide whether there has been compliance with the Code gives rise to questions regarding the position and purpose of the Panel and the ability of parties to frustrate affected transactions by taking legal action.

If persons involved in affected transactions feel free to disregard rulings given by the Panel and if it is ultimately for the courts to decide whether a particular person's conduct amounts to a contravention of the Code, the position of the Panel as a regulator of affected transactions and the notion that the rules in the Code express the principle of self-regulation by the securities industry is seriously undermined. It is the Panel that is involved in the day-to-day issues relating to affected transactions and it is best placed to make decisions and issue rulings in quick, decisive and fair manner. However, if the parties involved do not respect the rulings of the Panel by abiding by them and the Panel is required to take court action to enforce the Code, the Panel is effectively nothing more than a rule-making body which must monitor whether, in its opinion, there has been compliance with its rules. If it considers that there has been non-compliance, it has no real authority to do anything, except to issue a non-binding ruling requesting compliance. Parties can ignore these rulings with impunity unless the Panel applies to and receives an order from the court enforcing the Code. Before such an order will be granted the court will have to be persuaded that the Panel's interpretation of the rule is correct and that the conduct of the party involved indeed amounts to a contravention of the rules. Thus the function of the interpretation and enforcement of the Code belongs to the courts. The Panel is the linesman and the court, the umpire.

²⁶ *Securities Regulation Panel v MGX Holdings Ltd supra* 447 par 6.

²⁷ *Securities Regulation Panel v MGX Holdings Ltd supra* 467 par 21.

²⁸ *Securities Regulation Panel v MGX Holdings Ltd supra* 467-469 par 22.

²⁹ *Securities Regulation Panel v MGX Holdings Ltd supra* 451 par 9.

If one accepts that in an application by the Panel for an enforcement of a rule (in respect of which no exemption has been granted) it is up to the court to decide whether the particular conduct is in contravention of the Code, one needs to note that this could have the effect that the timetable for a takeover is exceeded, ultimately resulting in the lapsing of an offer. An offer will lapse if it does not become, or is not declared, unconditional within 60 days after the posting of the initial offer document³⁰ and there is also a restriction on the making of another offer for the securities of the offeree company for 12 months after an offer has lapsed or been withdrawn because it did not become, or was not declared, unconditional as to acceptances.³¹ It is clear that if the Panel is required to bring an application to court to have a rule of the Code enforced by the courts, the legal action could effectively result in a *bona fide* offer being frustrated or the holders of securities in the offeree company being denied the opportunity to decide the offer on its merits. This could be seen as running contrary to the spirit of general principle 7 of the Code which prohibits frustrating action.³² It is thus of real concern that a refusal by a party to comply with a ruling of the Panel and the necessity of bringing a court application to have the rule enforced could result in the frustration of an offer.

Even in the situation where a Panel ruling requiring the making of a mandatory offer is being disputed and thus the offer timetable has not started running, it is still questionable whether the holders of securities in the offeree company should be left in a position of considerable uncertainty while a court application is heard and judgment given. The shareholders of EC Hold Ltd are still waiting to see if the court will order that a mandatory offer be made to them by MGX Holdings Ltd and the Mandy Rebecca Trust. The transactions which allegedly triggered the obligation to make such an offer occurred towards the end of 1999.³³ That such a situation has been allowed to develop clearly does nothing to engender confidence in the Panel and respect for its rulings.

Another real consideration that arises is the financial ability of the Panel to ensure the enforcement of the rules of the Code. Section 440C(4)(a) of the Companies Act 61 of 1973 has given the Panel the power to make rules dealing with its administration and financing. Rule 2 of these Administrative Rules deals with the financing of the Panel. In terms of rule 2.1 the funding of the Panel is partially met from a fee equal to a percentage (determined from time to time at the discretion of the Panel) of the annual listing fee charged by the Stock Exchange to each listed company and a fee equal to a percentage of the initial listing fee charged by the Stock Exchange to a company which is listed during the year and which is not charged the annual fee. Fees and charges are also levied for various categories of services

³⁰ See rule 28.6 of the Code.

³¹ See rule 32.1 of the Code.

³² See *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1977] 1 Lloyd's Law Rep 505 (CA) 510 where Lord Denning MR stated in relation to the equivalent of general principle 7 of the Code that "the very moving for an injunction would seem to be a breach of general principle ... of the Code seeing that it is an action which is designed to frustrate the making of a bid".

³³ See *Securities Regulation Panel v MGX Holdings Ltd supra* 452-453 par 10.

provided by the Panel.³⁴ These services include consultations, hearings, giving of rulings, the examination of documents and other services.³⁵ In his report included with the Annual Financial Statements dated 28 February 2005, the Executive Director of the Panel commented on the deficit incurred and the dwindling reserves of the Panel. It is not hard to imagine that the increase in enforcement and legal costs which could arise if parties refused to comply with Panel rulings and the Panel was obliged to apply to court to enforce its rules could impact severely on the continued financial viability of the Panel.

5 THE UK TAKEOVER PANEL AND THE TAKEOVER CODE

The non-statutory UK Takeover Panel which issues, administers and enforces the Takeover Code and which, at present, does not enjoy the force of law, has managed to secure compliance with the Takeover Code through consensus and without resorting to the courts.

Persons not satisfied with a ruling of the executive of the Takeover Panel can request that the matter be reconsidered by the Takeover Panel³⁶ after which there may be an appeal to the Appeal Committee.³⁷ Thereafter a party may bring an application for judicial review of a ruling of the Appeal Committee. The approach adopted by the courts in this context has limited the potential for such an application to be used to frustrate an offer.³⁸

The Takeover Panel has used its powers of private and public censure to punish non-compliance. Reporting conduct to professional bodies so that they might take action against their members has also been used as a sanction for non-compliance. The endorsement of the Takeover Code by the Financial Services Authority (the "FSA") in December 2001 in terms of section 143(1) of the Financial Services and Markets Act 2000³⁹ gave the FSA the authority to take action if requested to do so by the Panel.⁴⁰ This

³⁴ Rule 2.2 of the Administrative Rules.

³⁵ See the Schedule of Fees and Charges attached to the Administrative Rules for the fees chargeable and who is obliged to pay the fees.

³⁶ Introduction s 3(c) of the Takeover Code.

³⁷ See Introduction s 3(f) of the Takeover Code. In some cases there is a right of appeal and in other cases an appeal may be made with the leave of the Takeover Panel. See Button (ed) *A Practitioner's Guide to The City Code on Takeovers and Mergers 2004/2005* (2004) par 1.5.3.

³⁸ See Luiz *An Evaluation of the South African Securities Regulation Code on Takeovers and Mergers I* (2003) (unpublished thesis) par 3.8.5 for a consideration of the issue of judicial review of the rulings of the Takeover Panel and the frustration of the offer. See also the DTI's *Implementation Proposals* par 2.37 where it is stated that in the case of *R v Panel on Takeovers and Mergers, ex parte Datafin plc (Norton Opax plc and another intervening)* [1987] 1 QB 815 (CA); [1987] 1 All ER 564 (CA) "the court took a robustly practical approach, concluding that generally the courts should limit themselves only to reviewing the Panel's decision-making processes after the bid had been concluded".

³⁹ C8. See *Endorsement of the Takeover Code* ch 4 of the Market Conduct Sourcebook (the "MAR") in the FSA Handbook of Rules and Guidance <http://fsahandbook.info/FSA/html/handbook/MAR/4/3> visited on 13-10-2005.

⁴⁰ S 143(4) of the Financial Services and Markets Act 2000.

action relates to exercising powers of intervention,⁴¹ powers to take disciplinary measures of public censure and impose penalties⁴² or powers to apply to court for an injunction and restitution order.⁴³ A failure to comply with a requirement imposed or a ruling given by the Takeover Panel under the Takeover Code is treated as a failure to comply with the endorsed provision under which the requirement was imposed or the ruling was given.⁴⁴ Further, the FSA made certain cold-shoulder and co-operation rules in support of the functions of the Takeover Panel. The cold-shoulder rule requires firms not to act or continue to act for a person in connection with a transaction to which the Takeover Code applies if the firm has reason to believe that the person or his principal is not complying with the Takeover Code or that they are not likely to comply with it.⁴⁵

6 THE DTI'S IMPLEMENTATION PROPOSALS AND THE TAKEOVER PANEL'S EXPLANATORY PAPER

The coming into force of the European Takeover Directive and the need for implementation by member states by May 2006 led to the release of the DTI's *Implementation Proposals*. In response to those proposals, the Takeover Panel released an *Explanatory Paper on the European Directive on Takeover Bids* "setting out in broad terms how it intends to put into effect the necessary changes that will result from the [Takeover] Directive and the [DTI's] proposals".⁴⁶

The DTI proposes to place the regulatory activities of the Takeover Panel within a statutory framework and to authorise the Takeover Panel to act as the competent authority to supervise bids.⁴⁷ The Takeover Panel would be given statutory power to make and amend rules in relation to takeovers.⁴⁸ Thus the rules in the Takeover Code will be given statutory effect by the implementing legislation. The legislation will provide that the rule-making and judicial functions of the Takeover Panel be carried out by separate Panel committees with mutually exclusive membership.⁴⁹ These committees will be called the Code Committee and the Hearings Committee respectively.⁵⁰

Appeals against rulings of the Hearings Committee of the Panel will be to an independent appeal committee, the Appeal Tribunal,⁵¹ whose members

⁴¹ See Part XIII of the Financial Services and Markets Act 2000.

⁴² See Part XIV of the Financial Services and Markets Act 2000.

⁴³ See Part XXV of the Financial Services and Markets Act 2000.

⁴⁴ S 143(5) of the Financial Services and Markets Act 2000.

⁴⁵ See MAR 4.3.1R.

⁴⁶ See The Takeover Panel's *Explanatory Paper on the European Directive on Takeover Bids 2005/10* (January 2005) www.thetakeoverpanel.org.uk visited on 13-10-2005. This document will be referred to as the Takeover Panel's *Explanatory Paper*.

⁴⁷ Par 2.19 and 2.21 of the DTI's *Implementation Proposals*. This is to implement article 4.1 of the Takeover Directive.

⁴⁸ Par 2.25.

⁴⁹ Par 2.21.

⁵⁰ See the Takeover Panel's *Explanatory Paper* 8.

⁵¹ See the Takeover Panel's *Explanatory Paper* 9.

should not be members of the Panel.⁵² Parties would still be entitled to take the decision on judicial review provided there are grounds for this. However, the DTI has stated that the approach adopted by the court in the *Datafin* case⁵³ is the preferred approach for dealing with such applications.⁵⁴

The DTI also proposes to include measures to prevent tactical litigation. These measures include a proposal that legislation will exclude any right of action against the Takeover Panel or any other person for breach of statutory duty and a proposal that a transaction should not be able to be set aside because of a breach of the Takeover Code or a failure to comply with a ruling by the Takeover Panel.⁵⁵ This is to ensure that parties to a bid can rely on the certainty of the Takeover Code and rulings made by the Takeover Panel.⁵⁶ Further, the DTI proposes that the legislation will provide that parties who attend or are invited to attend hearings of the Takeover Panel and who do not successfully challenge the decisions of the Takeover Panel will be bound by these decisions.⁵⁷ The whole intention of these aforementioned proposals is to “ensure that consideration of rulings on matters of takeover regulation takes place within the context of procedures established under the Panel framework, backed up by the availability of review”.⁵⁸

In order to implement the Takeover Directive it is necessary to grant specific powers to the Takeover Panel so that it has the powers to ensure that all parties to a bid comply with the Takeover Code.⁵⁹ The DTI therefore proposes to give the Takeover Panel information gathering powers,⁶⁰ powers to issue compliance rulings⁶¹ that parties must act in a certain way or refrain from particular actions,⁶² powers to issue compensation rulings,⁶³ as well as powers to enforce its rulings.⁶⁴

An example of a compliance ruling given in the DTI Implementation Proposals is where the Takeover Panel requires a party to make a mandatory offer because that party has passed the relevant control threshold of voting rights.⁶⁵ The Takeover Panel's *Explanatory Paper* states that compliance rulings will be given if the Panel is satisfied that there is a reasonable likelihood that a person will breach the Code or a ruling of the Panel, or that a person has breached the Code and there is a reasonable likelihood that the breach will continue or be repeated, or a person has

⁵² Par 2.21 of the DTI's *Implementation Proposals*.

⁵³ *Supra*.

⁵⁴ Par 2.38 of the DTI's *Implementation Proposals*.

⁵⁵ Par 2.39. Misrepresentation or fraud could still be used to set aside or unravel a transaction.

⁵⁶ Par 2.39 of the DTI's *Implementation Proposals*.

⁵⁷ Par 2.39.

⁵⁸ Par 2.40.

⁵⁹ This is to implement article 4.5 of the Takeover Directive. See par 2.43 of the DTI's *Implementation Proposals*.

⁶⁰ Par 2.44 of the DTI's *Implementation Proposals*.

⁶¹ See the Takeover Panel's *Explanatory Paper* 13.

⁶² See par 2.47 of the DTI's *Implementation Proposals*.

⁶³ See par 2.47.

⁶⁴ Par 2.45.

⁶⁵ Par 2.47.

breached the Code or a ruling and there are steps that might be taken to remedy the breach, or a compliance ruling is necessary to ensure compliance with the Code or Panel ruling.⁶⁶

A compensation ruling involves the power to order restitution or financial redress where there has been a breach of certain rules of the Code.⁶⁷ This would result in compensation being paid to relevant holders or former holders of securities in order to place them in the position they would have been in had there been compliance with the rules.⁶⁸

The enforcement powers which the DTI proposes to include in the legislation would work on the following basis. First, the Takeover Panel would, if it is not possible to proceed by way of consent, issue a ruling. If a party subsequently fails to comply with that ruling, the Takeover Panel would then have the power to apply to the court for the summary enforcement of that ruling. Failure to comply with a court order enforcing the ruling would amount to contempt of court.⁶⁹

It is specifically stated in the DTI's *Implementation Proposals*⁷⁰ that where a court is asked to enforce a ruling it is not envisaged that the court in exercising its proper judicial authority would need to reopen the substance of the ruling. This is because the ruling could have been challenged using the normal avenues of appeal to the Appeal Tribunal and judicial review in appropriate cases.⁷¹ The enforcement powers proposed to be conferred on the Takeover Panel are stated as being specifically "designed to respect the Panel's existing judicial processes whilst ensuring an effective means of enforcement is in place".⁷² The Takeover Panel has stated that it intends to exercise its new powers to seek a court order "only as a matter of last resort or in urgent cases".⁷³ The Takeover Panel will focus on the consequences that any breach of the Code will have for shareholders and it will aim to prevent these before they occur or to provide timeous and appropriate remedial or compensatory action.⁷⁴

Despite the relatively light sanctions for non-compliance,⁷⁵ the Takeover Panel has achieved considerable success in ensuring compliance. Noting these successes,⁷⁶ the DTI proposes to extend a specific rule-making power to the Takeover Panel to censure those who do not comply but it does not propose to extend the ability of the Takeover Panel to punish non-

⁶⁶ See the Takeover Panel's *Explanatory Paper* 13.

⁶⁷ Par 2.47 of the DTI's *Implementation Proposals*.

⁶⁸ See the Takeover Panel's *Explanatory Paper* 13.

⁶⁹ Par 2.45 of the DTI's *Implementation Proposals*.

⁷⁰ Par 2.46.

⁷¹ Par 2.46.

⁷² Par 2.46.

⁷³ See the Takeover Panel's *Explanatory Paper* 14.

⁷⁴ See the Takeover Panel's *Explanatory Paper* 14.

⁷⁵ Sanctions for non-compliance have been through private and public censure, the reporting of misconduct to professional bodies, the FSA taking action against financial advisers and through the use of the cold-shoulder rules: see par 2.51 of the DTI's *Implementation Proposals*.

⁷⁶ Par 2.50.

compliance by, for example, granting it the power to issue fines.⁷⁷ Thus the power of the Takeover Panel to issue a private or public censure, to report conduct to other professional bodies, to use the cold shoulder rules, to issue compliance rulings and to make compensation orders will be Code-based but will derive from a statutory power.⁷⁸ Further, as the Takeover Code will have statutory effect, the DTI proposes the repeal of section 143 of the Financial Services and Markets Act 2000 under which the Takeover Code is presently endorsed by the FSA.⁷⁹ This, however, would not stop the Takeover Panel from reporting conduct of financial advisers which may have been in breach of the Code to the FSA.

Some concern has been expressed regarding the power to be granted to the Takeover Panel to apply to court for the summary enforcement of certain of its rulings and doubt regarding the veracity of the DTI's statement that "it is not envisaged that the court asked to enforce the ruling would normally need to reopen the substance of any ruling made by the Panel".⁸⁰ After posing the question as to whether the courts will be willing to simply rubber-stamp the rulings of the Panel, Saul⁸¹ concludes that "before it summarily enforces a ruling, the court will want to satisfy itself as to the merits of the Panel's position and to hear from the affected party". Saul is clearly not convinced that the court will refuse to hear argument on the substance of a Panel ruling before it issues an order to enforce the ruling. He then raises the concern⁸² that parties may simply refuse to comply with Panel rulings unless the Panel gets a court order and that the result of this is that the approach in the UK will have moved away from the "current consensual world to a world where the regulator has – and may have to use – a legal enforcement right against a principal involved in a bid". Daring the Panel to obtain a court order may be used as a tactic to delay the bid or alter the outcome.

It is ironic that the non-statutory UK Takeover Panel which issues, administers and enforces the Takeover Code and which at present does not enjoy the force of law has managed to secure compliance with the Takeover Code without resorting to the courts. It is even more ironic that the DTI's proposals for implementing the European Directive on Takeover Bids in the United Kingdom which include a power to approach the court in certain instances, a power which the Takeover Panel does not have at present, is giving rise to concerns that this will undermine the success of the Takeover Panel.

⁷⁷ Par 2.52.

⁷⁸ See par 2.56 where a table sets out the formal sanctions and other remedies available to the Takeover Panel and compares the position before and after the implementation of the Directive.

⁷⁹ Par 2.54.

⁸⁰ Par 2.46. See Saul "UK Takeover Regulation: No Change or Sea Change" 2005 *International Financial Law Review Guide to Mergers and Acquisitions* 163-165.

⁸¹ 165.

⁸² Saul 165.

7 CONCLUSION

The main question raised in this article is whether the approach that has been adopted in the South African Securities Regulation Code on Takeovers and Mergers and the Companies Act 61 of 1973 is sufficient to ensure the enforcement of the Code so that parties involved in the takeover industry respect the Panel rulings and the Code. It emerged that the Panel has no statutory authority to issue rulings and that if a party involved in a takeover were to contest a ruling or simply refuse to comply with one, the Panel would have to take legal action to enforce the ruling. It is unlikely that the courts will summarily enforce a ruling of the Panel. It seems more probable that the role of the courts in this context would be to hear the matter in full and come to its own conclusion on the facts as to whether the Code has been breached and thus whether a ruling was correctly made and should be enforced. This runs contrary to the whole notion of self-regulation and a speedy and flexible approach to the regulation of takeovers. It also clearly makes it possible for parties involved in takeovers to frustrate an affected transaction or at least considerably delay it by taking legal action. Further, it raises serious concerns about the financial ability of the Panel to ensure the enforcement of the Code.

Clearly, these concerns need to be addressed. Better funding of the Panel, in order to ensure that it has the financial ability to pursue the enforcement of the Code through the courts, might need to be considered. Ideas such as a specialized court or tribunal could be investigated. However, the costs may be prohibitive. It may be possible to follow the approach adopted in the Securities Services Act 36 of 2004 and to establish an enforcement committee.⁸³ Such a committee, whose members should not be members of the Panel, could be authorised to hear matters referred to it by the Panel and be given the authority to issue compliance and compensation orders which could have the effect of a civil judgment. However, the constitutional right of access to the courts provided for in section 34 of the Constitution of the Republic of South Africa, 1996, and whether the jurisdiction of the courts may be replaced by that of an independent and impartial forum or tribunal, would need to be fully considered.⁸⁴ Until some solutions to the issues raised are considered and found, one will be left with the disquieting notion that the Code and the rulings of the Panel can be disregarded with impunity.

⁸³ See s 97 and 98 of the Securities Services Act 36 of 2004 for the establishment and the composition of the enforcement committee under the Act.

⁸⁴ For a consideration of whether the jurisdiction of the courts may be replaced by that of an independent and impartial forum or tribunal, see Hoexter (with Lyster and Currie (eds)) *The New Constitutional and Administrative Law II* (2002) 307-308.