TAKEOVER APPEAL BOARD

EUROTUNNEL P.L.C.

1. On appeal to the Takeover Appeal Board the central question is whether under a reorganisation of Eurotunnel Group the French Company, Groupe Eurotunnel SA ("GET SA"), should in making a general offer be required under the Takeover Code to treat shareholders, who hold certain travel privileges, differently from other shareholders and, in particular, whether a separate offer or offers should be made to them and, if so, on what terms.

The Matrix and History of the Dispute

2. Eurotunnel has for some time been in financial difficulties. Negotiations with lenders with a view to reducing liabilities have taken place. Eurotunnel Group is undergoing a reorganisation with a view to reducing the Group's substantial debt burden. A key component of this reorganisation is the making of an offer to holders of units ("unit holders" or "shareholders") in Eurotunnel by a newly established French company, GET SA. The offer is (insofar as it applies to Eurotunnel P.L.C.) subject to the Code.

3. In outline the impact of the offer on existing travel privileges, under the existing scheme is as follows:

   (1) Unit holders who accept the offer in respect of all their units will no longer be entitled to receive the existing Eurotunnel travel privileges since they will no longer hold the necessary qualifying units.

   (2) Unit holders who decline to accept the offer in respect of at least the minimum number of qualifying units will continue to benefit from their existing travel privileges in accordance with the rules of the relevant scheme.

4. Holders of travel privileges submitted to the Executive of the Takeover Panel that since the offer is made on the same terms to shareholders entitled to

certain travel privileges as it is to other shareholders in Eurotunnel, and as such does not take account of those travel privileges, it is in breach of the following provisions of the Code:

(a) General Principle 1 – because the unit holders having travel privileges are required to "give up" their travel privileges if they accept the offer, whereas other shareholders do not have to give anything up to do so, there is a breach of the principle in the first clause of General Principle 1 that all shareholders should be afforded equivalent treatment;

(b) Rule 14.1 – because the shares held by the unit holders having travel privileges should be treated as a separate class (or classes) of equity share capital of Eurotunnel, Rule 14.1 has been breached since GET SA has not made a comparable offer for each such class;

(c) Rule 14.2 – because the shares held by the unit holders having travel privileges should be treated as separate classes of equity share capital of Eurotunnel Rule 14.2 has been breached since GET SA has not made separate offers for each such class; and

(d) the nature and purpose of the Code – because GET SA has not taken account of the value to the unit holders having travel privileges of their travel privileges in setting the terms of the offer there is a breach of the Code's objective of ensuring that shareholders are treated fairly.

5. The holders of the travel privileges stated that the above breaches would be remedied if GET SA agreed to roll-over the existing travel privileges granted by Eurotunnel into similar privileges in GET SA. They suggested that the directors of Eurotunnel and GET SA (who are said to be one and the same) should transfer the contractual obligations in respect of the travel privileges to the new UK holding company, Eurotunnel Group UK plc, and change the rules of the existing schemes to specify that acceptance of the GET SA offer would not be considered as a transfer or disposal of Eurotunnel shares provided that the shareholders continue to hold continuously for the purposes of the travel privileges scheme the corresponding number of GET SA shares.

In their view (but disputed by Eurotunnel and GET SA) this would avoid any direct impact on GET SA and any such breach of French law as is suggested by Eurotunnel and GET SA.

6. The Executive ruled that the offer does not breach any of these provisions of the Code. The Executive has not required GET SA to roll-over the existing travel privileges into similar new privileges. Nevertheless, the Executive informed the unit holders having travel privileges and GET SA that should GET SA wish to make such a proposal to the unit holders having travel privileges this would be permissible under the Code.

7. On 9 May 2007, the Hearings Committee of the Takeover Panel (under the Chairmanship of Mr Peter D.J. Scott Q.C. and seven other members of the Panel) heard an appeal by Mr Russell Ford and Mr John Webley qua holders of travel privileges against the decision of the Executive. On 11 May 2007, the Hearings Committee dismissed the appeal. It gave a reasoned decision, which was furnished to the parties but not published as a public statement. For convenience the Appeal Board annexes the decision of the Hearings Committee to this public statement of the reasons of the Appeal Board.

8. On 14 May 2007, Mr Michael Spencer QC, Mr Ford and Mr Webley, representing Eurotunnel unit holders, who have travel rights pursuant to listing particulars relating to Eurotunnel PLC and Eurotunnel S.A. published on 16 November 1987 and 2 November 1990, lodged detailed grounds of appeal against the decision and rulings of the Hearings Committee. On Wednesday, 16 May 2007, respondents' notices were served respectively by (1) Eurotunnel P.L.C. and Groupe Eurotunnel S.A. and (2) the Panel Executive. On 18 May 2007, the Takeover Appeal Board heard the rival arguments arising on the appeal. The appeal was heard under the provisions of the Rules of the Takeover Appeal Board. Under Rule 2.8 the appeal was by way of a complete re-hearing of the matters contested. Immediately after the hearing the Board by unanimous decision resolved to dismiss the appeal and to confirm the decision of the Hearings Committee. The principal ground for this decision was that the holders of the relevant privileges do not constitute a separate class of shareholders within the meaning of Rules 14.1 and 14.2 of the Takeover

Code, and consequently separate offers are not required. At the same time the Board indicated that it would publish as a public statement its detailed reasons as soon as possible. The decision made by the Appeal Board was however, of immediate effect and was published as a public statement. It was signed by the members of the Appeal Board and made available to the parties by facsimile.

The Hearings Committee's Discussion of the Background

9. The Hearings Committee has helpfully and lucidly set out the structure of Eurotunnel, the background to the offer, the application of the Code to the offer, the existing travel privileges, the detailed impact of the offer on travel privileges and the relevant provisions of the Code. The Appeal Board therefore finds it unnecessary to traverse the same ground. Instead the Appeal Board will be able to turn directly to the issues. In doing so it acknowledges its indebtedness to all the parties for their careful written and oral arguments.

The Primary Issue: Rule 14.1

10. Rule 14.1 provides as follows

"COMPARABLE OFFERS

Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not; the Panel should be consulted in advance. An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances in respect of that class unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in Rule 15".

The Appeal Board noted that careful consideration was required to determine whether the travel privileges were "attached to" or an integral part of the share rights. Both sides agreed that if that was not the case there could not be more

than one class of equity share. The original prospectus stated, in respect of travel privileges "Individuals who continue to hold registered units acquired by them pursuant to the issue will be granted by EPLC the right". This, prima facie, indicates that the travel privileges are a separate and distinct contract or scheme between the company and individuals not as a right attaching to the share but such contract/scheme having a condition that they must retain a shareholding in the company. This condition by the company provides an obligation to holders of the travel privileges to retain a minimum shareholding but there is no evidence that Eurotunnel intended to create a separate class of share through the scheme for travel privileges. No rights have been incorporated in the Articles of Association of the company and no specific linkages to separate class rights exist in the prospectus statements. The travel privileges were ancillary to the share offer and a separate contract. The appellants accepted that no separate class rights existed through the Company's Articles of Association and contended that the Prospectus created such rights. Whilst the two Prospectuses carried separate chapters on the travel privileges there is no specific reference to creating a separate shareholder class. The appellants, when asked, could not identify any specific linkage. They could only rely on the shareholder retention requirement attached to the travel privileges and the comment that the travel privileges were offered in connection with the original share offers as an equivalent. As the Board could not accept that the travel privileges created a specific and separate class of share, Rule 14.1 of the Code does not apply.

11. The appellants strongly relied on observations by Scott J. (now Lord Scott of Foscote) in *Cumbrian Newspaper Group Limited v Cumberland & West Moreland Herald Newspaper & Printing Co. Ltd* [1987] Ch. Div. 1 made in the context of the words "rights attached to a class of shares" in section 125 of the Companies Act 1985. Undoubtedly there are some similarities between the *Cumbrian* case and the Eurotunnel case. On the other hand, there are also differences which were highlighted by the Hearings Committee. Most importantly, a different question arises in the present case, namely the contextual meaning of Rule 14.1 of the Code. The Cumbrian case does not assist on that point. Instead the Code must be interpreted in accordance with

its purpose and underlying objective. The Appeal Board rejects the reliance on the *Cumbrian* case.

A Subsidiary Argument: Rule 14.2

12. Rule 14.2 reads as follows:

"SEPARATE OFFERS FOR EACH CLASS
Where an offer is made for more than one class of share, separate offers must be made for each class".

The Hearings Committee trenchantly observed that unless it is established, which it is not, that there is more than one class of share for the purposes of this rule, Rule 14.2 does not apply at all. The Appeal Board agrees. The simple answer to Rule 14.2 is that it does not apply as there is not more than one class of share in Eurotunnel.

General Principle 1 of the Code

13. General Principle 1 provides as follows:

"All holders of the securities of an offeree company of the same class must be afforded equivalent treatment……"

The Hearings Committee did not consider that this is a case where in order to achieve equivalence between those unit holders who have and those who do not have travel rights the former should receive some additional consideration beyond that offered to the latter. In agreement with the Hearings Committee the Appeal Board concludes that the requirement of equivalence does not extend to requiring compensation or making arrangements in the terms of an offer to deal with personal rights as opposed to those attached to the shares (and typically constituting the statutory contract) although there is no objection in principle to separate arrangements between individuals and the company to deal with such personal rights.

The Nature and Purpose of the Code: Fairness (para 4 (b) above)

14. Lastly, the appellants invoked the criterion of the Code that shareholders should be treated fairly: see Introduction to the Code, para 2 (a). In view of the conclusions already arrived at this argument collapses. It cannot afford a separate ground for relief in this case.

Conclusion

15. For these reasons, which are substantially the same as those of the Hearings Committee, the Appeal Board unanimously dismissed the appeal and confirmed the decision of the Hearings Committee.

The Alternative Ground for the Decision of the Hearings Committee

16. The Hearings Committee also concluded that, if contrary to their views, separate classes of share and equity capital were involved, the Panel would have been entitled under the provisions of the Code to waive any obligations imposed on GET SA: Code, Introduction, para 2 (c) This issue does not arise for decision. In the context it would be a very strong and a surprising use of the Panel's undoubted power to derogate or waive in appropriate cases. Except to say that the Appeal Board regards this part of the reasoning of the Hearing Committee with great scepticism it is unnecessary to comment further on it in this appeal.

23 May 2007

ANNEX

DECISION OF THE HEARINGS COMMITTEE

THE TAKEOVER PANEL
HEARINGS COMMITTEE

EUROTUNNEL P.L.C.

Summary

The Hearings Committee of the Panel (the "Committee") met on 9 May 2007 to hear an appeal by Mr Russell Ford and Mr John Webley against rulings of the Executive in relation to Eurotunnel Group. The appeal was dismissed.

A. INTRODUCTION AND SUMMARY OF THE SUBJECT MATTER OF THE APPEAL

Introduction

1. Eurotunnel Group ("Eurotunnel" or the "Group") is undergoing a reorganisation with a view to reducing the Group's substantial debt burden. A key component of this reorganisation is the making of an offer to holders of units ("Unit Holders" or "Shareholders") in Eurotunnel (the "Offer") by a newly established French company, Groupe Eurotunnel S.A. ("GET SA"). As explained below, the Offer is (insofar as it applies to Eurotunnel P.L.C. ("EPLC")) subject to the Code.

Summary of the subject matter of the Appeal

2 The subject matter of this appeal related to whether GET SA should be required under the Code to treat Shareholders who hold certain travel privileges differently under the Offer from other Shareholders and, in particular, whether a separate offer or offers should be made to them and, if so, on what terms.

3. The appellants are Mr Russell Ford (whose wife is a Shareholder) and Mr John Webley (a Shareholder) (the "Appellants"). Mr Webley is a member of the

Steering Committee of the Eurotunnel Shareholders' Action Group ("ETAG"), a recently formed body lobbying on behalf of Eurotunnel Shareholders holding travel privileges in relation to the Offer from GET SA.

4. The Appellants argued that, since the Offer is made on the same terms to Shareholders entitled to certain travel privileges ("Travel Privileges") as detailed in paragraphs B13 to B26 below ("Unit Holders having Travel Privileges") as it is to other Shareholders in Eurotunnel, and as such does not take account of those Travel Privileges, it is in breach of the following provisions of the Code:

   (a) General Principle 1 – because the Unit Holders having Travel Privileges are required to "give up" their Travel Privileges if they accept the Offer, whereas other shareholders do not have to give anything up to do so, there is a breach of the principle in the first clause of General Principle 1 that all shareholders should be afforded equivalent treatment;

   (b) Rule 14.1 – because the shares held by Unit Holders having Travel Privileges should be treated as separate classes of equity share capital of EPLC (as determined by the nature of the privileges held), Rule 14.1 has been breached since GET SA has not made a comparable offer for each such class;

   (c) Rule 14.2 – because the shares held by the Unit Holders having Travel Privileges should be treated as separate classes of equity share capital of EPLC, Rule 14.2 has been breached since GET SA has not made separate offers for each such class; and

   (d) the nature and purpose of the Code – because GET SA has not taken account of the value to the Unit Holders having Travel Privileges of their Travel Privileges in setting the terms of the Offer there is a breach of the Code's objective of ensuring that shareholders are treated fairly.

5. The Appellants stated that the above breaches would be remedied if GET SA agreed to roll-over the existing Travel Privileges granted by EPLC into similar

privileges in GET SA. The Appellants suggested that the directors of EPLC and GET SA (who are said to be one and the same) should transfer the contractual obligations in respect of the Travel Privileges to the new UK holding company, Eurotunnel Group UK Plc, and change the rules of the existing schemes to specify that acceptance of the GET SA offer would not be considered as a transfer or disposal of EPLC shares for the purposes of the Travel Privileges scheme provided that the Shareholders continue to hold continuously the corresponding number of GET SA shares. In the Appellants' view (but disputed by Eurotunnel and GET SA) this would avoid any direct impact on GET SA and any such breach of French law as is suggested by Eurotunnel and GET SA.

6. The Executive ruled that the Offer does not breach any of these provisions of the Code. The Executive has not required GET SA to roll-over the existing travel privileges into similar new privileges. Nevertheless, the Executive informed the Unit Holders having Travel Privileges and GET SA that should GET SA wish to make such a proposal to the Unit Holders having Travel Privileges this would be permissible under the Code.

B. BACKGROUND TO THE APPEAL

Structure of Eurotunnel

1. Eurotunnel operates the Channel Tunnel under a concession from the UK and French governments which expires in 2086. The Group consists of Eurotunnel P.L.C. and its French sister company Eurotunnel S.A. ("ESA"). These are separate legal entities but they are 'twinned' under an agreement which provides for a sharing of revenues and costs.

2. Under the terms of the Articles of Association of EPLC, its shares are stapled to the shares of ESA, whose by-laws contain reciprocal stapling provisions. The shareholder registers of EPLC and ESA are thus identical. Shareholders hold units consisting of one EPLC share and one ESA share each (the "Units"). The Units are admitted to trading on both Eurolist and the London Stock Exchange.

Background to the Offer

3. Eurotunnel has for some time been in financial difficulty. Most recently, in 2005, it reopened negotiations with lenders with a view to reducing its liabilities. In 2006, as a result of the Group's inability to have its accounts signed as a going concern and the on-going negotiations with creditors, the UK's Financial Services Authority (the "FSA") and France's Autorité des Marchés Financiers (the "AMF") suspended the Group's listings in London (2 May 2006 at a Unit price of 25p) and Paris (15 May 2006 at a Unit price of €0.44) respectively and the Group Companies did not hold their AGMs. Following an announcement that the Group was in talks with its creditors about a potential restructuring, on the basis a restructuring might involve an offer for EPLC, EPLC went into an offer period under the Code on 31 May 2006.

4. The Paris Commercial Court agreed in August 2006 to place the Group under the French "Safeguard Procedure", a means of avoiding administration. Discussions with lenders continued and agreement was reached with the (non-shareholder) creditors on a restructuring plan (the "Safeguard Plan") which would reduce the Group's debt to approximately 50% of current levels and thereby reduce repayments to a manageable level.

5. Under the Safeguard Plan, approved by the Paris Commercial Court in January 2007, Eurotunnel's existing indebtedness is to be refinanced through the proceeds of a new term loan and through the issue to the relevant creditors of notes ("NRS") issued by a UK subsidiary of GET SA which will be redeemed for shares in GET SA at fixed future dates.

6. The Safeguard Plan is conditional on the Offer by GET SA for Eurotunnel being accepted. Under the Offer, Unit Holders would receive one new GET SA share and one warrant in GET SA for every Eurotunnel Unit. Accepting Unit Holders will also be able to subscribe for NRS if they accept this offer during the initial acceptance procedure.

7. Eurotunnel's Units were re-listed on 27 March 2007 and opened at a price of 24p per Unit in London and €0.48 per Unit in Paris. On 10 April 2007, GET SA's Offer was announced and posted.

Eurotunnel share structure

8. Eurotunnel's issued share capital consists of 2,546,164,213 Units each consisting of one underlying ESA share with a nominal value of €0.15 and one underlying EPLC ordinary share with a nominal value of 1p. At the stock market price as at the close of business of 4 May 2007 of 26p per Unit, the market capitalisation of the Group was £662m.

9. Travel Privileges by their terms cannot be transferred to a purchaser thus the Units held by Unit Holders having Travel Privileges have always traded at the same price as the other Units.

Application of the Code to the Offer

10. As the shares of ESA and EPLC are stapled as Units and cannot be transferred independently, the Offer is structured as a single offer for the Units, rather than two separate offers for the two constituent companies of the Group. EPLC is a company to which the Code applies under section 3(a)(i) of the Introduction, and since the Offer for the Units effectively comprises an offer for EPLC, it is subject to the Code. Likewise the Offer for the Units also effectively comprises an offer for ESA and is thus subject to regulation by the AMF. As a result, the Panel and the AMF are jointly regulating the Offer.

11. Recognising this dual jurisdiction and that the Offer is part of a wider financial restructuring of Eurotunnel carried out within the confines of the Safeguard Plan and under the control of the Commercial Court of Paris, the Executive granted a number of dispensations in respect of the application of the Code to the Offer. None of these dispensations related to the subject matter of the appeal.

Offer timetable

12. In view of a number of differences between the timetable requirements of the AMF General Regulations and the Code, the Executive agreed that the timetable for the Offer would be established by the AMF in accordance with the relevant provisions of their Regulations. As a result the indicative Offer timetable (following an extension announced by the AMF on 9 May 2007) consists of an initial 6 week acceptance period (10 April 2007 – 21 May 2007) after which the Offer will close for 10 days whilst the acceptances are counted. If the 60% acceptance condition (which is waivable to 50% in certain circumstances) is not met by the first closing date, the Offer will lapse. If the acceptance condition is met by that time, then the Offer will be reopened for at least a further 10 days to allow any further Unit Holders who wish to accept the Offer to do so. Withdrawal rights will be available for so long as the Offer is open for acceptance; however, Units tendered in the initial period cannot be withdrawn during the second period.

Existing travel privileges

13. The Group has historically introduced a number of travel privileges schemes which are available to individuals (but not institutional and other shareholders) who acquired their Units under certain circumstances and continue to hold a minimum number of Units. The schemes themselves are provided by EPLC and not by ESA.

14. There are three sets of travel privileges schemes currently available to Eurotunnel Unit Holders: one is available to Unit Holders who acquired Units through the 1987 IPO; one is available to Unit Holders who acquired Units through the 1990 Rights Issues; and one (the 1996 scheme) is available to all Unit Holders regardless of when they acquired their Units.

15. The outstanding benefits under the 1987 scheme and 1990 scheme are detailed in the table below:

Scheme	Number of Units held	Cost/Reduction	Travel Privileges on Eurotunnel shuttles	Expiry date
1990 (Units must have been acquired in 1990 Rights Issue and held since then)	500 - 699	50% reduction	1 return trip per year	November 2009
	700 - 1,499	50% reduction	1 return trip per year	End of concession (2086)
	1,500 and above	50% reduction	Unlimited number of trips	End of concession (2086)
1987 (Units must have been acquired in 1987 Offer For Sale and held since then)	1,000 - 1,499	Nominal cost per trip	2 return trips per year	End of concession (2086)
	1,500 and above	Nominal cost per trip	Unlimited number of trips	End of concession (2086)

These schemes (but not the 1996 scheme) are relevant to the subject matter of this appeal and are referred to in this paper as the "Travel Privileges".

16. In addition to these privileges, there were also other privileges offered (in 1987 and 1990) to holders of smaller numbers of Units, which were valid for one or more years from the date of issue and which have therefore now expired.

17. Travel Privileges apply to travel with a private motor car, private motor cycle or bicycle on Eurotunnel shuttles between Folkestone and Coquelles. The privileges can only be used for private use and not for commercial gain. The privileges are exclusively for use by the Unit Holder with the exception that investors in the 1990 rights issue were given the opportunity, on a one-off irrevocable basis, to allocate their travel privileges to another person, who would continue to enjoy the rights for as long as the original investor retained the shares.

18. The Travel Privileges expire on the death of a Unit Holder except that in cases where the Units are jointly held (provided by no more than two individuals), the privileges initially rest with the first named joint holder and, upon his death, the privileges pass to the second named joint holder.

19. The privileges are non-transferable (except in the very limited exceptions dealing with minors referred to below) and are lost or forfeited if a holder sells Units such that he then holds less than the relevant qualifying amount of Units.

20. In cases where a holder disposes of some but not all of his Units, any such Units sold are deemed to be sold on a presumed 'last in, first out' (LIFO) basis (for the purposes of the Travel Privileges) such that a Unit Holder increasing his holding above the relevant qualifying amount and then selling some of his Units, yet retaining more than the threshold, would be deemed not to have sold his original qualifying Units and thus would not lose Travel Privileges.

21. There are some limited exceptions to the scheme rules which allow Unit Holders to reduce their holdings below the qualifying amount without Travel Privileges being forfeited. These are:

    (a) where the Unit Holder in question is transferring his Units into or out of a PEP and is effectively disposing of/acquiring the Units in order to effect this;

    (b) a transfer of Units to an individual who was under 18 years of age at the time when the Units were acquired and for whose benefit the Units were at all times held, in which case the Travel Privileges pass to that individual when he reaches 18 years of age; or

    (c) a transfer of Units to an individual who is to hold the Units for the sole benefit of a person under 18 years of age and for whose benefit the Units have at all times been held.

22. In order to qualify for the privileges, qualifying Unit Holders are required to register and pay a nominal annual registration fee (which, in practice, has not normally been collected).

23. The Travel Privileges may be terminated by the Directors of EPLC giving notice to Unit Holders entitled to Travel Privileges if the Directors determine that continuance of the Travel Privileges may be or become (i) illegal; (ii)

materially prejudicial to the Unit Holders as a whole; (iii) no longer of material benefit to Unit Holders entitled to Travel Privileges; or (iv) materially prejudicial to any of the Group companies as a result of a change in the law or the interpretation or application thereof. Such notice shall not be given unless the Directors have first received a report from an appropriate independent adviser stating that in his view the Directors' determination is reasonable.

24. The Directors are also entitled to amend the rules of the Travel Privileges Schemes, although only where, in the opinion of the Directors, the changes do not materially prejudice the rights of those entitled to the Travel Privileges.

25. Current eligible Unit Holders under each of the 1987 and 1990 schemes number 10,546 and 11,732 respectively of which a total of some 11,900 are UK Unit Holders. Their qualifying holdings represent around 9% of the 135,000 UK Unit Holders. There are believed to be about 600,000 to 800,000 Unit Holders in all including those holding Units in bearer form.

26. The terms of the schemes are set out in the Rules of the EPLC Travel Privileges Schemes. The schemes are not referred to in the EPLC articles of association or memorandum of association.

Impact of the Offer on Travel Privileges

27. Assuming the Offer completes:

(a) Unit Holders who accept the Offer in respect of all their Units will no longer be entitled to receive any Eurotunnel Travel Privileges since they will no longer hold the necessary qualifying Units. They will, subject to holding a minimum number of GET SA shares, benefit from new privileges being put in place by GET SA (see below); and

(b) Unit Holders who decline to accept the Offer in respect of at least the minimum number of qualifying Units will continue to benefit from their existing Travel Privileges in accordance with the rules of the relevant scheme. It is unclear what changes, if any, might be made to these

privileges over time. Under the rules, the Directors of EPLC may vary or terminate the Travel Privileges under certain specified circumstances (see paragraph B23 above). If EPLC were ever to be liquidated, the Travel Privileges would (in all probability) be lost.

28. The new scheme being introduced by GET SA has two limbs:

(a) a programme which seeks to replicate the Eurotunnel 1996 scheme and allows existing Unit Holders who (A) held at least 1,000 Units for at least 3 months prior to 15 May 2006 (the date of the suspension of listing on Eurolist) and (B) tender all of their Units to the Offer, a 30% discount on 6 one-way trips per year, providing they continue to hold at least 1,000 GET SA shares; and

(b) a programme for all GET SA shareholders offering a 30% discount on 6 one-way trips per year, providing they hold at least 30,000 GET SA shares for more than 3 months on a rolling basis.

29. Both new schemes will be guaranteed until 31 December 2010 and thereafter will be renewable annually unless GET SA decides otherwise and announces its decision no less than 3 months prior to the renewal date.

C. RELEVANT PROVISIONS OF THE CODE

The following provisions of the Code were relevant to the subject matter of the appeal.

Introduction to the Code

1. Section 2(a) of the Introduction includes the following sentence:

"The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror."

2. This is a general statement setting out certain purposes of the Code and identifying the principal category of person which the Code is designed to protect.

General Principle 1 of the Code

3. Section 2(b) of the Introduction includes the following paragraph:

> "The Code is based upon a number of General Principles, which are essentially statements of standards of commercial behaviour. These General Principles are the same as the general principles set out in Article 3 of the [Takeovers] Directive. They apply to takeovers and other matters to which the Code applies. They are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied in accordance with their spirit in order to achieve their underlying purpose."

4. General Principle 1 requires equivalence of treatment for shareholders of the same class. It is a longstanding and fundamental principle of the Code and its application constitutes an important part of the way in which the fair treatment objective stated in the Introduction is achieved. The principle is reflected in several Rules of the Code which require equivalent treatment for shareholders of the same class in respect of offer consideration, offer terms and information.

5. The first clause of General Principle 1 provides as follows:

> "1. All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; … ."

Rule 14.1 of the Code

6. Rule 14.1 and its Notes provide as follows:

"**RULE 14.1 COMPARABLE OFFERS**

Where a company has more than one class of equity share capital, a comparable offer must be made for each class whether such capital carries voting rights or not; the Panel should be consulted in advance. An offer for non-voting equity share capital should not be made conditional on any particular level of acceptances in respect of that class unless the offer for the voting equity share capital is also conditional on the success of the offer for the non-voting equity share capital. Classes of non-voting, non-equity share capital need not be the subject of an offer, except in the circumstances referred to in Rule 15.

NOTES ON RULE 14.1

1. Comparability

A comparable offer need not necessarily be an identical offer.

In the case of offers involving two or more classes of equity share capital which are admitted to the Official List or to trading on AIM, the ratio of the offer values should normally be equal to the average of the ratios of the middle market quotations taken from the Stock Exchange Daily Official List over the course of the six months preceding the commencement of the offer period. The Panel will not normally permit the use of any other ratio unless the advisers to the offeror and offeree company are jointly able to justify it.

In the case of offers involving two or more classes of equity share capital, one or more of which is not admitted to the Official List or to trading on AIM, the ratio of the offer values must be justified to the Panel in advance.

2. Offer for non-voting shares only

Where an offer for non-voting shares only is being made, comparable offers for voting classes are not required.

3. Treatment of certain classes of share capital

For the purpose of this Rule, the Panel may not regard as equity share capital certain classes of shares which, although equity share capital under the Companies Act 1985, have in practice very limited equity rights. In appropriate cases, the Panel should be consulted."

Rule 14.2 of the Code

7. Rule 14.2 provides as follows:

"**14.2 SEPARATE OFFERS FOR EACH CLASS**
Where an offer is made for more than one class of share, separate offers must be made for each class."

This provision was adopted in 1968 primarily to ensure that, where an offer is made for different classes of equity share capital, an offeror would not be able to implement compulsory acquisition procedures provided by statute across both classes without having acquired 90% or more of each class.

D. SUBMISSIONS OF THE EXECUTIVE

RULE 14.1

Are the qualifying shares held by the Unit Holders having Travel Privileges a different class from the other shares in EPLC for the purposes of Rule 14.1?

1. The Executive argued that when considering the application of Rule 14.1 of the Code the Panel should regard shares as being of the same class if the rights attaching to them are the same. Other "personal" rights enforceable by an individual against the company in which he is a shareholder which are not attached to his shareholding are not sufficient to create or constitute separate classes of capital for the purpose of this Rule. It considered that the Code's purpose in requiring comparable offers is not to protect the position of shareholders who have such "personal" rights, even if it is a qualifying condition for the exercise of those rights that the person be a shareholder. Such

"personal" rights are a matter of contract between the holder of the rights and the Company and enforceable as such.

2. The Executive stressed in the forefront of its submissions the provisions of the Introduction to the Code quoted at C1 and 3 above: in particular, the statement that the Code is designed to ensure that shareholders are treated fairly and that those of the same class are afforded equivalent treatment by an offeror. It pointed out that for this purpose General Principles are expressed in broad terms, and the Code does not define the precise extent of, or the limitations on, their application. They are to be applied in accordance with their spirit in order to achieve their underlying purpose. In other words, a literal reading is not to be applied if it leads to a result which is not in accordance with the spirit of the Rules or this underlying purpose.

3. The Executive pointed out that Rule 14.1 was introduced in 1968 to address issues arising for consideration where the offeree company had separate classes of shares, in particular voting and non-voting shares. The Rule sought to preclude attempts to achieve control of the offeree by making an attractive offer to holders of the voting shares and either no offer or an offer at a price that was not comparable to the holders of non-voting shares. The Executive accepted that the wording of the first sentence of Rule 14.1 is not limited to this situation, but extends to holders of different classes of equity shares no matter how they differ (whether as to voting rights or otherwise).

4. It pointed out, however, that the Notes to the Rule specifically qualify this. Not only does Note 2 exclude from the operation of the Rule offers for non-voting shares only, but Note 3 quoted at C6 above indicates that when certain classes of shares have very limited equity rights, the Panel may not for the purpose of this Rule regard them as equity share capital, even though they would be so under the Companies Act 1985. The Executive pointed out that statutory definitions of words or phrases or those from legal precedents may not always be appropriate for the application of the Rules. In short, the Executive suggested that a central question is whether the fact that no "comparable" offer is to be made to Unit Holders having Travel Privileges is, having regard to Rule 14.1, unfair to those shareholders.

5. The Executive considered that the Travel Privileges are personal rather than attached to the shares of the Company. In support it pointed to numerous factual matters.

6. These included the following, of which the first two were described as major factors:

(a) Travel Privileges were granted only to specific individuals. Only those individuals who applied for shares in 1987 and 1990 were able to obtain them. No one else could obtain them eg by purchase in the market. This strongly suggests, said the Executive, the "personal" nature of the Travel Privileges.

(b) Travel Privileges are not transferable apart from limited exceptions (ie on death of the first named joint holder or the attainment of the age of 18 by a minor for whose sole benefit the units were held). The sale or disposal of the shares by eg gift or bequest does not carry with it the Travel Privileges. They cease to exist when this happens.

(c) However, the entitlement to Travel Privileges can be detached from the shares. Thus under the 1990 right issue, individuals who already held Travel Privileges granted in 1987 could when applying for further shares irrevocably nominate certain individuals to benefit from the 1990 privileges.

(d) Travel Privileges and the qualifications for such are not enshrined in the articles of association of EPLC. If the intention was to create a separate class of shares one would expect this to be the case.

(e) EPLC's Articles did empower the directors to issue shares "with such rights or restrictions as the Company may by ordinary resolution determine". Apparently, no such resolution was passed at any material time in relation to the shares and privileges in question.

(f) If rights are attached to shares otherwise than by the Articles or by a shareholder resolution, the company is obliged to file Form 128 under the Companies Act 1985 (s128(1)). No such form was filed.

(g) The Travel Privileges are described as "personal" in the summary of them contained in the 1987 IPO prospectus and the rules of the Schemes themselves.

(h) All the EPLC shares are fungible. A shareholder entitled to Travel Privileges may sell the shares he acquired in 1987 and 1990 whilst continuing to enjoy Travel Privileges, providing he still holds the relevant number of shares, even though those shares were not acquired at the time of the IPO or the rights issue.

(i) EPLC's conduct suggests it did not believe it was creating, did not intend to create and did not give the impression that it had created different classes of shares.

For example:

(i) when applying to the London Stock Exchange in 1987 and 1990 to list the Units, it confirmed that all the securities to which the listing related were identical in all respects;

(ii) it addressed correspondence to "Unit holders" or "Shareholders" without distinguishing between them;

(iii) neither the EPLC prospectuses in 1987 and 1990, its share certificates nor any other public documentation suggest that its share capital has more than one class of share.

(j) There were further features of Travel Privileges said not to be typical of rights attaching to shares. For example:

(i) only private individuals (but not institutional and other shareholders) may enjoy them;

(ii) the use of the privileges is limited. They are only useable for private use and not for gain or reward (though travel in the

course of employment or business is permitted provided it does not involve the commercial carriage of passengers or goods);

(iii) Unit Holders having Travel Privileges must register with EPLC and pay an annual registration fee in order to benefit from the Travel Privileges in respect of any period;

(iv) the directors of EPLC have power to vary the Travel Privileges to a limited extent without "class approval" of the Unit Holders having Travel Privileges in general meeting or in any other way.

7. The Executive considered that if the Units which entitled Unit Holders to have Travel Privileges were listed separately from the other Units, the price at which they would trade would be the same as the price of the other Units.

8. Lehman Brothers, the independent Rule 3 adviser to EPLC, agreed with the assessment of the Executive on this point.

9. The Executive pointed out that the Appellants' argument would extensively widen the ambit of Rule 14.1 if rights of this character were from now on to trigger an obligation to make separate and different offers and would create difficult problems in identifying what rights give rise to the creation of a class of equity share capital and the valuations needed to achieve comparability under Rule 14.1.

RULE 14.2

10. The Executive submitted that there is no reason to require a separate offer for the qualifying shares held by the Unit Holders having Travel Privileges, as it would serve no purpose. The offer would not comprise any different terms to the existing offer and such an offer would make no difference whatsoever to the conduct of the bid.

11. The Executive noted the Appellants' contention that the making of separate offers would have the consequence that the board of EPLC would be obliged under Rule 3.1 to obtain competent independent advice on each of the offers and to make known to the shareholders the substance of that advice. In

response to that, the Executive said that if competent independent advice were in such circumstances to be obtained in respect of each of the offers, the Executive considered it far from clear that the advice publicly reproduced would differ from that already obtained in respect of the current offer. The advice would be given to the board of EPLC and be likely to consider EPLC's interests as a whole, even though the advice related to separate offers. The Executive considered it unlikely that the advice to the board of EPLC, in the form it would be referred to in the offer documentation, would make a material difference in assisting Unit Holders having Travel Privileges in reaching a properly informed decision on the relevant offer. Indeed, in considering the position of shareholders, the board and its adviser may decide not to have regard to any shareholder entitlements which they saw as personal and not attaching to shares. For the above reasons, it was unlikely any shareholder in EPLC would materially benefit.

12. The Executive also noted the Appellants' contention that GET SA would be obliged to abandon its current offer and the restructuring and to make new offers and to recommence the restructuring process. The Appellants argued that the threat of this prospect would "focus the minds" of the GET SA Directors and may persuade them to make concessions to the Unit Holders having Travel Privileges.

13. The Executive considered this second reason cited to be tactical and self-serving. Furthermore, in the view of GET SA's advisers, this argument was, in addition, flawed in the sense that the making of any concession in respect of the Unit Holders having Travel Privileges would itself require the restructuring to be recommenced. The Directors of GET SA would therefore be put in a position in which EPLC's existing financing arrangements would be under threat whether they chose to make concessions to the Unit Holders having Travel Privileges or not.

14. Accordingly, the making of separate offers at the same price would not benefit the Unit Holders having Travel Privileges in respect of their qualifying shares (being 0.008% of the share capital of EPLC), but would on the other hand damage the interests of the other shareholders in EPLC. The Executive could

therefore see no reason why, in the circumstances set out above, a separate offer, or separate offers, should be required under Rule 14.2.

15. Finally, on this point the Executive noted that, as referred to in C7 above, this Rule was intended to deal with a particular mischief that was not in issue here - i.e. the inequitable use of statutory compulsory acquisition powers.

APPLICATION OF GENERAL PRINCIPLE 1

16. The purpose of General Principle 1, in the Executive's opinion, was to ensure that offerors treat shareholders of the same class equally under the terms of an offer and in respect of the rights attaching to their shares.

17. It would be wrong, the Executive suggested, to take General Principle 1 to imply that the effect of an offer on all shareholders must be the same. Acceptance of an offer, and the consequences of the offer completing, may be very different for different shareholders depending on a range of factors, including, for example, their tax position and other contractual relationships they may have with the offeree (for example, as director and/or employee, supplier, lender or customer). The Code only requires that an offer made to shareholders of the same class should be equivalent. The Code has never been applied so as to require an offeror to 'make whole' offeree shareholders in respect of various other contractual rights which they have with the offeree. In this case therefore there could be no obligation on the offeror to take account of the fact that accepting Unit Holders having Travel Privileges would no longer qualify under the relevant schemes for Travel Privileges. All that the Code should require is that they receive equivalent treatment in respect of the rights attaching to their shares. Provided that the offer to each shareholder was identical, as was the case here, equivalent treatment was being given.

18. In response to the Appellants' argument that the Executive would not allow the extension of new privileges to some (but not all) members of a single share class in the context of an offer, since that would be offensive to General Principle 1, and to make an offer to a single share class which effectively removed rights from some shareholders who accepted the offer but not others

should be equally offensive, the Executive did not accept that this was a case of an offeror removing rights from certain accepting shareholders.

19. Indeed, the premise for this latter argument from the Appellants, said the Executive, was flawed; given that as the Executive contended the Travel Privileges are not rights attaching to shares, but exist under a separate "personal" contract with Eurotunnel, the Executive would not prevent those rights being paid for (at a fair price) or rolled over, as in the case of Thomson Travel, without General Principle 1 being offended.

20. Accordingly, the Executive did not believe there had been a breach of General Principle 1 in respect of the treatment afforded to Unit Holders having Travel Privileges.

CONSISTENCY WITH THE INTRODUCTION TO THE CODE

21. Section 2 of the Introduction to the Code states that "The Code is designed principally to ensure that shareholders are treated fairly".

22. As explained earlier in this statement, the Executive submitted that the Code exists to ensure that shareholders are treated fairly in respect of the rights which attach to the shares which they hold and not in respect of any other rights which they have in relation to the offeree company. The Executive believed that this had been achieved in this case and that this conclusion was within both the spirit and the letter of the Code.

E. SUBMISSIONS OF EUROTUNNEL AND GET SA

1. In its submissions, the Executive was broadly supported by Eurotunnel and GET SA.

2. In addition to the points made by the Executive, Eurotunnel and GET SA suggested that the Travel Privileges are not rights which relate to the "essence" of membership of a company such as voting, dividend and capital rights. If a rollover or additional financial consideration were to be required, holders of

Travel Privileges who never have used them, nor are ever likely to do so, would unfairly benefit at the expense of other Unit Holders who would as a group receive proportionally less.

3. Eurotunnel and GET SA pointed to the potentially serious financial and other implications for the attempt to complete the financial restructuring of Eurotunnel if the existing offer had to be abandoned and replaced with two or more offers since those arrangements were dependent upon a time limited existing commitment from banks to refinance Eurotunnel's existing indebtedness. That commitment would expire before new offers could be launched and completed. There has been during this appeal no serious challenge to the potential gravity of the consequences which would flow in this event.

4. Finally, Eurotunnel and GET SA pointed out that no shareholder was obliged to accept the offer. Those now entitled to Travel Privileges can decide to keep all or some of their Units so as to continue to enjoy Travel Privileges if they consider that there is greater value in doing so than in accepting the relevant Units to the offer.

F. SUBMISSIONS OF THE APPELLANTS

1. A number of the Appellants' submissions have been set out when dealing above with the Executive's arguments.

RULE 14.1

2. The Appellants submitted that Unit Holders having Travel Privileges have valuable travel rights which are held in their capacity as shareholders and which other shareholders do not have. Yet this offer was the same for all shareholders.

3. Shareholders who do not have Travel Privileges will, if they qualify, enjoy the new discretionary travel privilege scheme, at least until 2010.

4. The Offer means that shareholders will not be able fully to benefit from the reconstruction of Eurotunnel unless they accept the existing Offer for all their Units, and thus lose their Travel Privileges.

5. The Appellants claimed that their rights are "worth tens of thousands of pounds" to each shareholder and it is unfair to "require" them to give up these rights by imposing the breach of a contractual obligation.

6. In response to the Executive's arguments on Rule 14.1, the Appellants accepted that the distinction to be made is between rights held by a shareholder in that capacity and other rights held by a shareholder against the Company but not in the capacity of a shareholder. However, they contended that the Unit Holders having Travel Privileges form a number of separate groups (according to the extent of their travel rights) in their capacity as shareholders and so are separate classes in law. If nothing else, in substance they form separate classes within the spirit of the Code. A wide and purposive interpretation of "class of share capital" should be adopted to ensure that the spirit of the underlying principles are adhered to. Otherwise companies will be able to evade the requirement of fairness. To be comparable, offers would need to recognise the value to the holder of the different rights of each class of shareholder.

7. The Appellants argued that the Travel Privileges were referred to in the 1987 and 1990 prospectuses in sections entitled "Returns for investors" which indicate that they were being treated as share rights. But elsewhere in both prospectuses the Travel Privileges are described separately from the "Returns for investors" and read as a whole the Committee does not consider that the whereabouts of these references provide any real assistance on the issues to be determined.

8. The Appellants also argued that bearer shares in EPLC are a separate class of shares. These shares were, it is said, created by Directors' resolution, and are not specifically described as such in the Company's articles of association. Though no form 128 was delivered to the Companies Registry in respect of this class of share the requirements of the Companies Act 1985 were satisfied by lodging the prospectuses. The Executive does not accept that EPLC's bearer

shares are a separate class. It points out that holding shares in bearer form in EPLC is simply an alternative method to holding shares of the same class in registered form. The rights and privileges of the bearer shares are the same as if the shares were in registered form, and this is borne out by article 40 of EPLC's articles of association. The Committee consider that the Executive is right on this point.

RULE 14.2

9. The Appellants' submission on Rule 14.2 was brief. It suggested that (assuming there are separate classes of shares) separate offers should be made to each class.

10. Details of the Appellants' submissions together with the responses of the Executive to those submissions are set out in paragraphs D11 to D15.

GENERAL PRINCIPLE 1

11. The Appellants argued that the terms of the GET SA offer were fundamentally unfair and this offended the nature and purpose of the Code because those shareholders who wished to retain their valuable existing travel rights were obliged not to accept the offer and thus prevented from participating in the reconstruction of Eurotunnel and denied the opportunity to become GET SA Shareholders or subscribe for NRS with the prospect of future dividends and capital growth.

12. In relation to General Principle 1 the Appellants argued that in the same way that offering a positive inducement to a particular shareholder or group of shareholders was a clear breach of the equivalence principle then so must requiring a particular group of shareholders to surrender a valuable right in order to get the benefit of the offer be a breach of the same principle.

G. DECISION

RIGHTS ATTACHED TO SHARES

1. Central to the Appellants' submission on the application of Rule 14.1 to this case was that the Travel Privileges are rights attached to the shares of the Unit Holders having Travel Privileges. They accepted that the rights may be described as "personal" but contended that personal rights can be attached to shares and that has happened here. They submitted that the Unit Holders having Travel Privileges in their capacity as shareholders form a number of separate groups (according to the extent of their Travel Privileges) and therefore must form separate classes in law. If there are separate classes of shareholders there must be different classes of shares. If nothing else, they form separate classes within the spirit of the Code.

2. In the Committee's view, a phrase whether in a statute or in a Rule of the Code must be interpreted by reference to the purpose of the provision and the context in which it appears. It follows that although regard should be had to interpretations given to statutory provisions which are to be found in different contexts, and put in place for different purposes, such interpretations are not in themselves conclusive of the meaning to be given to the same or similar phrases in Code provisions.

3. As is specifically said in the Introduction, the Rules are to be interpreted to achieve their underlying purpose, and their spirit must be observed as well as the letter.

4. The questions which should be addressed in the present case are therefore:

   (a) Would a court conclude that as a matter of law the shares held by groups of Unit Holders having Travel Privileges are classes of equity share capital, and each hold shares distinct from the rest of Eurotunnel's equity share capital?

(b) If so, should the Committee follow such conclusions when construing Rule 14.1 or 14.2?

(c) If the answer to the second question is affirmative, does the Committee consider that in all the circumstances of this case GET SA should be required in order to achieve comparability under Rule 14.1, to make offers to each group of Unit Holders having Travel Privileges in different terms to the Offer made to the other shareholders and/or to make a separate offer for each class of shares (Rule 14.2)?

5. The Appellants have produced a closely argued submission on the first point, and place particular reliance on two decisions. In the first (Soden v. British & Commonwealth Holdings PLC [1998] A.C. 298), the House of Lords considered whether a claim against a company by a member for damages for misrepresentation was a claim brought in the "character of a member" for the purposes of the Insolvency Act 1986. The misrepresentation relied upon was one which was alleged to have induced the member to purchase his shares.

6. The words quoted above from the Insolvency Act 1986 were designed to distinguish between those claims against the company which were to be subordinated to the claims of creditors and those which were not. The House of Lords said:

"Sums due under a separate contract with the company … would not appear to be sums due to the member in his character as a member."

7. It was held that the member was not exercising a right under the statutory contract between himself, the company and the other members. The Appellants say that since one of the considerations was whether the right could have been in the Articles, and a claim for damages for misrepresentation clearly could not, that case is distinguishable from the present one, as would be the case of a director whose "cause of action to recover his fee is not based on the rights of a member but on a separate contract to pay remuneration." (per Lord Browne Wilkinson at p324).

8. More importantly perhaps the Appellants rely upon the decision of Scott J. (as he then was) in Cumbrian Newspapers Group Ltd v. Cumberland & Westmorland Herald Newspaper & Printing Co. Ltd [1987] Ch. 1.

9. The Appellants suggest that case is directly in point on the present facts. Scott J considered that the special rights granted by the defendant's articles to the plaintiff by name were rights that, although not attached to any particular shares, were conferred on the plaintiff in its capacity as shareholder in the defendant and were attached to the shares for the time being held by the plaintiff without which it was not entitled to the rights. Accordingly the plaintiff had "rights attached to a class of shares" and since section 125 of the Companies Act 1985 provided that class rights could not be varied or abrogated without the consent of the class members the special rights enjoyed by the plaintiff company could not be varied or abrogated without its consent.

10. In Scott J's view Section 125 was

> "intended to provide a comprehensive code setting out the manner in which "rights attached to any class of shares" (whatever that phrase truly means) can be varied."

11. The specific question was thus whether the plaintiff's rights under the articles were <u>for the purposes of Section 125</u> rights attached to a class of shares. If they were, could they be altered in the manner provided by the articles or, where the company's articles do not contain provision for the alteration, only if there was consent by holders of three quarters in nominal value of the issued shares of that class of shares.

12. As summarised above, the category in which in Scott J's view the plaintiff's rights was to be placed for the purposes of Section 125 was the category of rights, which although not attached to any particular share, was nonetheless conferred on the beneficiary in the capacity of member or shareholder of the company.

13. In some notable respects the facts of the Cumbrian case are similar to those in the present case. For example, one of the rights (the right to appoint a director under article 12) could only be held so long as the plaintiff continued to hold at least 10 per cent of the shares in the defendant; but any 10 per cent would do. There was no need for them to be any particular shares. The rights of Unit Holders having Travel Privileges are not dissimilar to that arrangement in this respect. The other rights also enshrined in the articles were rights of pre-emption over existing issued shares and limited protection against the plaintiff's shareholding being diluted by new issues.

14. It can also be said that the plaintiff's rights, like the Eurotunnel Travel Privileges, were personal in the sense that they could not be transferred, and that they were granted as an incentive to the plaintiff to acquire shares in the company. At least in respect of the article 12 rights, they could only be enjoyed if the member held the qualifying shareholding.

15. On the other hand, there are significant factual differences between this and the Cumbrian case. The Travel Privileges are not referred to in the articles of association of the Company, nor for that matter in the memorandum of association. In the Cumbrian case, the articles were expressly amended to provide for the rights and to deal with the question of whether and to what extent the rights could be altered with or without the consent of the plaintiff. What gave rise to the Cumbrian case was a proposal to vary the rights in the articles so as potentially to deprive the plaintiff of rights which the company had accepted as part of the original arrangements (and subsequently enshrined in the articles).

16. It has been suggested that Directors of EPLC have an implied power under the articles of EPLC to create special rights attaching to shares, and therefore the absence of any reference to those rights in the articles or memorandum of EPLC does not defeat the Appellants. However, the significance of the provisions being in the articles is apparent in both the Soden and the Cumbrian cases, not least because the effect of such inclusion defines the extent of the "statutory contract", that is the contract that exists in law not only between individual members and the company but also between members inter se. One

would expect that arrangements intended to create new classes of shares would be reflected in the memorandum or articles and that those instruments would determine how those rights could be amended or abrogated.

17. Furthermore, it is not clear in the present case that as a matter of law the Directors of EPLC could without consent of the members create special rights attaching to the Company's shares. Article 5(2) of EPLC's Articles empowers the Directors to issue shares "with such rights or restrictions as the Company may by ordinary resolution determine". The Executive understood that no such resolution was passed in or prior to 1987 or 1990, and this understanding has not been challenged on appeal.

18. It is particularly striking how different in nature are the privileges in the present case to those in the Cumbrian case. The Travel Privileges are of a type such as is granted by many companies to individual shareholders encouraging them both to access the company's goods and/or services and to acquire and hold shares. By contrast, the rights enshrined in the Cumbrian company's articles were ones which directly affected the terms of the "statutory contract". The rights could realistically be seen as part of arrangements for the ownership and corporate structure of the company and were based upon the acquisition of a significant part of the company by the plaintiff.

19. It is not the function of the Panel to make determinations of law, still less to challenge conclusions of law reached in the courts. Its function is to interpret and apply the provisions of the Code according to their purpose and intent. In doing so it will not disregard statements of law which may be helpful but in the end must seek to apply the Code itself. Thus, in the present case it is not considered that the conclusions in the Soden and Cumbrian cases can be determinative of the meaning of phrases inserted in the Code. Whether a court would on the facts of the present case regard the Travel Privileges as "rights attached to a class of shares" for the purposes of section 125 of the Companies Act 1985, or as being held in "the character of a member" for the purposes of section 74 of the Insolvency Act 1986 is something upon which the Committee expresses no view. It is simply noted that the answer is not obvious as the

Appellants suggest, and even if it were it would still be necessary to consider the terms of the Code, its purposes and its intention.

RULE 14.1

20. The Committee considers that the points made by the Executive as set out in paragraph D6 above are persuasive, and emphasise the contrasts between the nature, genesis and purpose of the Travel Privileges and the bundle of rights which typically constitute the "statutory contract".

21. In addition, the Committee makes the following points:

(a) The thrust of the language as a whole in Rule 14.1 is plainly directed to what was perceived as an unacceptable feature of takeover offers, namely one which enabled voting control of a company to be acquired without an offer being made to the holders of non-voting (or limited voting) equity share capital which was comparable with that made for the other equity share capital. Whilst the language of the first sentence is wider, the use of the word comparable suggests that the Rule was intended to apply only if the values of the two or more classes were evidently not the same.

(b) The mechanism (Note 1) for the application of Rule 14.1 to determine comparability suggests at least normally that market prices over the preceding six months would provide an objective basis for values to be reflected in whatever comparable offer was required. Different equity rights tend to be reflected in different values. If there is no difference in value, it is less likely that the rights are attached to the shares.

(c) To apply the Rule in a wide literal sense so as to require offers to be made to separate classes of equity shareholders, which could when made legitimately be no different in value to the offer made to the other classes, would seem to be using regulatory powers in an unnecessary and inappropriate fashion. It would not be conducive to fulfilling the objectives of the Rule itself or the underlying purposes of the Code

which include of course the requirement that shareholders be treated fairly.

(d) It follows from the point made at D8 above, that if two or more offers were made, one to Unit Holders who do not have Travel Privileges, and the other(s) to Unit Holders who do have such Privileges, but on the same terms the independent advisers would continue to recommend the terms offered to all Unit Holders.

22. For the reasons stated above, it is not considered that the Travel Privileges in question are rights which attach to the shares held by Unit Holders who qualify for those privileges, and accordingly are not part of the bundle of rights attaching to those shares or of the statutory contract to which those Unit Holders are a party by virtue of their shareholdings. Thus, Eurotunnel has not created more than one class of equity share capital for the purpose of Rule 14.1.

RULE 14.2

23. It was submitted by the Appellants that even if the conclusion were reached that comparable offers could legitimately be made to the holders of Travel Privileges on the same terms as the one to the other shareholders, nevertheless a separate offer should still be required by virtue of Rule 14.2. That submission must fail. Unless it is established, which it is not, that there is more than one class of share for the purposes of this Rule, Rule 14.2 does not apply at all. Furthermore, to require such an exercise when there is no reason to suppose that it would lead to a more advantageous offer than that to the other shareholders would not, as stated above, be appropriate.

24. As appears above, there is in the view of the Committee, not more than one class of equity share capital and it follows not more than one class of share in Eurotunnel. The question of separate offers for each class of share does not therefore arise.

DEROGATION AND WAIVER

25. It is provided in the Introduction to the Code that the Panel may derogate or grant a waiver to a person from the application to a Rule (provided, in the case of a transaction and rule subject to the requirement of the Directive, that the General Principles are respected) in circumstances where the Panel considers that the particular Rule could operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner (in which case a reasoned decision will be given).

26. The Committee does consider that in the circumstances of this case to require separate offers to groups of Unit Holders entitled to Travel Privileges would operate unduly harshly or in an unnecessarily restrictive or burdensome or otherwise inappropriate manner. Accordingly, if contrary to the Committee's views, those groups did hold separate classes of share and of equity share capital and were otherwise entitled to insist that offers be made under the provisions of Rule 14, the Committee would waive any obligations so arising on GET SA, and does not consider that to do so would fail to respect the General Principles. The reasons for this include the fact that there is no requirement to make an offer to those groups which is more advantageous than that to the other shareholders. In addition, the Committee cannot ignore the very serious consequence which Eurotunnel and GET SA suggest may flow from restarting the offer period. Specifically, it is said that the commitment of lenders to Eurotunnel to refinance Eurotunnel's indebtedness will expire before there is time to launch and complete new offers. Thus, the financial restructuring will not be completed before this time, with the consequent uncertainty for all concerned about the outcome as well as potential additional costs.

THE NATURE AND PURPOSE OF THE CODE

27. The Appellants point out that Unit Holders having Travel Privileges are at least limited in the extent to which they can accept the Offer and thus participate in the prospect of future dividend and capital growth of Eurotunnel. This is because if they wish to keep their valuable travel rights they must keep whatever qualifying shares are needed to do so. It is correct to say that this is a choice to be made, and that Unit Holders must judge whether in all the circumstances they prefer to have one thing or the other. But this does not seem in itself to be unfair.

GENERAL PRINCIPLE 1

28. The Committee accepted the Executive's argument (paragraph D17 above) and therefore does not consider that this is a case where in order to achieve equivalence between those Unit Holders who have and those who do not have travel rights the former should receive some additional consideration beyond that offered to the latter. The requirement of equivalence does not extend to requiring compensation or making arrangements in the terms of an offer to deal with personal rights as opposed to those attached to the shares (and typically constituting the statutory contract) although there is no objection in principle to separate arrangements between individuals and the company to deal with such personal rights.

CONCLUSION

29. For the reasons given above, the appeal must be dismissed.