The Panel on Take-overs and Mergers

Report on the Year ended 31st March 1972

MEMBERSHIP OF THE PANEL

Lord Shawcross (Chairman)	Nominated by the Governor of the Bank of England
Sir Alexander Johnston (Deputy Chairman)	Nominated by the Governor of the Bank of England
K. M. Bevins	Chairman, British Insurance Association
Peter Cannon	Chairman, Issuing Houses Association
E. O. Faulkner	Chairman, Committee of London Clearing Bankers
G. H. Fletcher	Chairman, Association of Unit Trust Managers
Maurice Haddon-Grant	Vice Chairman, The National Association of Pension Funds
The Viscount Harcourt	Chairman, Accepting Houses Committee
P. T. Menzies	Nominated by the Confederation of British Industry
A. G. Touche	Chairman, Association of Investment Trust Companies
Sir Martin Wilkinson	Chairman of the Council of The Stock Exchange, London

Since the last Annual Report Mr. Bevins, Mr. Cannon, Mr. Faulkner and Mr. Touche have been appointed in place of Basil Robarts, K. C. P. Barrington, Sir Archibald Forbes and G. F. B. Grant respectively.

Lord Pearce	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

John Hull	Director General
W. S. Wareham	Deputy Director General
T. P. Lee	Secretaries
P. R. Frazer	
C. G. W. Kennedy	Assistant Secretary

FOREWORD

Contrary to what had seemed to be the trend when I wrote the foreword to last year's Report, the number of take-over transactions which has engaged the attention of the City Panel has substantially increased since last year and several of them have concerned companies of considerable size. Although the number of cases spread over the year has not unduly stretched the capacity of the Panel, there have been periods when the executive has been under very heavy pressure indeed. That this did not result in any slowing down of our procedures or relaxation of the detailed scrutiny of individual transactions has been due to the hard and devoted work of the executive staff to which I want to pay the warmest tribute.

An interesting feature of the Panel's activities has been the increasing use of the prior consultative and advisory facilities which the executive provides. Whereas in the first year's work of the re-constituted Panel something of the order of three quarters of the points arising from cases came under scrutiny owing to direct intervention by the Panel executive, the trend has been steadily to reverse this position and, in the year now under review, over two thirds of such points were dealt with at the instance of one or other of the parties involved. We greatly welcome this. Consultation at the executive level and the provision of advice or of a ruling at an early stage often avoids more difficult complications later. In dealing, in confidence, with *ex parte* applications of this kind, the executive has, of course, to have fully in mind the possible implications in relation to other parties whose views have not been heard. The practice is not to give a ruling which involves any departure from the express rules of the Code or unfairness to others without obtaining liberty to disclose the matter to all interested parties. It is, of course, understood that the validity of rulings at the executive level depends upon their not being set aside on appeal to the full Panel. This applies in particular to *ex parte* rulings. In fact, the number of such appeals has been very small indeed in relation to the totality of cases dealt with.

There have been many cases where the directors of an offeree company have sought the consent of the Panel to the acceptance of a so called "shut-out" bid. This matter is now dealt with under the new Rule 11, the old Practice Note No. 7 having been cancelled. It is considered by the Panel as falling within its discretionary jurisdiction. Those who hold shares in a company which is effectively controlled by a majority shareholding in the hands of its directors and their associates must, of course, recognise that in the end the Board's opinion on the merits of respective offers or the acceptance of a "shut-out" bid is likely to be decisive. It is not only minority shareholders who have rights. It is none the less the duty of the Board to act in good faith and to have regard to the interests of shareholders in general. Clearly, directors who accept some collateral advantage, such as a prolonged service agreement, a golden handshake or a gold plated motor car, may not be acting in good faith and the Panel would closely scrutinise any such objective factors. The criterion is good faith, a subjective matter which the Panel, like a court of law, seeks to assess as best it can.

I must end this foreword by noting that Mr. Ian Fraser, having concluded the period for which he had been good enough to serve the Panel, has now moved on to fresh fields of activity. The Panel, the City and industry owe him a great debt. Had it not been for the very high degree of expertise, knowledge and of firmness which he brought to our affairs, the Panel could certainly not have established its now accepted position as a City Institution. He was a tower of strength to me personally and I record my warm thanks and good wishes to him here.

I also record with regret that in a few weeks Mr. Wilfred Wareham will return to full time work as Head of the Quotations Department of The Stock Exchange, prior to retirement next year. His infinite knowledge and quiet wisdom have been of incalculable value to us and I am glad to say that he has agreed to assist in consultation from time to time if occasion arises.

We are fortunate in having secured the services of Mr. John Hull, a Merchant Banker of great experience (and also a lawyer) who has been kindly seconded to us by Schroders. From The Stock Exchange will come Mr. Basil Denington who was, for a considerable time, Deputy to Mr. Wareham in the Quotations Department and is presently Head of the Membership Department. The abilities and experience of these new officers ensure that the high tradition set by their predecessors will be well maintained.

I express my appreciation to the members of the full Panel for the great voluntary service which they have given, often at meetings called at inconvenient times and on very short notice. Finally, on their behalf as well as my own, I must thank the Council of The Stock Exchange for their continued co-operation and assistance.

24th May, 1972.

REPORT ON THE YEAR ENDED 31st MARCH 1972

General

The year ended 31st March 1972, particularly in its second half, was a year of more than ordinary activity in the field of take-overs and mergers. In consequence, the Panel was convened on a considerable number of occasions to consider operational matters in addition to the four regular quarterly meetings which, as heretofore, were devoted to general matters and questions of overall policy. These operational meetings were concerned with requests by the executive for authoritative rulings on exceptionally difficult matters, appeals by companies or their advisers against rulings given by the executive or disciplinary cases.

There were no appeals on disciplinary matters to the Appeal Committee during the year.

It was mentioned in the Report for the year ended 31st March 1971 that the Panel had set up a small committee to study the extent to which directors of public companies could have material interests in the assets and trading of the companies without full public disclosure. This committee took part in consultations with The Stock Exchange and the Panel welcomes the move by The Stock Exchange, announced last August, to extend the disclosure requirements.

Statistics

The Panel executive was concerned with take-over or merger proposals made in respect of 386 companies (last year *292*) of which 328 (*242*) were companies whose securities were quoted on a Stock Exchange. In 44 (*36*) cases there were one or more rival bids and altogether there were 436 (*331*) proposals. The great majority (393–last year *296*) of the proposals made reached the stage where formal documents were circulated to shareholders. Of the 393 merger documents, 292 (*219*) were circulated by Exempted Dealers, 20 (*9*) by Licensed Dealers, 31 (*36*) by others exempted under the Prevention of Fraud (Investments) Act, 1958 and 26 (*30*) on the basis of specific authority from the Department of Trade and Industry: there were 9 reverse take-over documents and 15 Schemes of Arrangement.

The merger proposals and their outcome are analysed as follows:–

	1971/72	*1970/71*
Proposals involving change of control		
Take-over bids recommended or unopposed from outset	219	*160*
Take-over bids opposed and later recommended	18	*7*
Take-over bids finally opposed (including 4 initially recommended)	50	*47*
Take-over bids withdrawn before issue of documents (including bids overtaken by higher bids)	43	*35*
Mergers by Scheme of Arrangement	13	*17*
Offers and Schemes of Arrangement involving minorities, preference issues, etc.	93	*65*
	436	*331*

	1971/72	*1970/71*
Successful proposals involving control	240	*186*
Unsuccessful take-over bids involving control	59	*44*
Unsuccessful Scheme of Arrangement involving control ..	1	*1*
Proposals withdrawn before issue of documents	43	*35*
Minorities, preference issues, etc.	93	*65*
	436	*331*

14 (*5*) agreed bids failed and only 5 (*8*) in the category "finally opposed" succeeded. The information given above refers to transactions where there was at least a public announcement of a firm intention to bid and includes cases where the offeree company was non-resident but had a substantial body of shareholders in the United Kingdom. The executive was consulted on a further 113 cases where the names were disclosed but no published proposals materialised. A further 81 (*60*) cases still open at 31st March are not included in the above figures.

Profit Forecasts

The keeping of records of profit forecasts which started in May, 1969, has continued. Last year's Report covered forecasts made in respect of periods ending on or before 30th September, 1970. Of the 245 forecasts made during that time the Panel executive had been unable to consider 19 at the date of the last Annual Report. These have now all been considered: 6 were achieved, 5 were failures (3 not satisfactorily explained) and 8 were not comparable with the forecast. 16 of the 40 cases classified as "failures" in the last Annual Report had not at that time been investigated by the Panel executive; these investigations have now been completed and in only 3 cases were satisfactory explanations not given.

The Panel executive has so far been able to consider 173 cases out of the 185 forecasts made for periods ending between 1st October, 1970 and 30th September, 1971. The table set out below shows the breakdown of these for the 12 month period, compared with those for the period up to 30th September, 1970, shown in italics.

Offeror forecasts achieved	56	*98*
Offeree forecasts achieved	66	*78*
Offeror forecasts that failed	9	*11*
Offeree forecasts that failed	26	*34*
Forecasts that were not comparable with the results	16	*24*
Number of forecasts	173	*245*

A profit forecast was regarded as achieved if the result was within approximately 10 per cent. of the forecast. Of the 35 failures, satisfactory explanations were not forthcoming in only 2 cases.

It will be seen that the proportion of forecasts achieved has remained fairly constant. One significant feature is that in only one case has a forecast by an offeree, which has successfully defended itself against a bid, proved to be a failure. Having kept records of profit forecasts covering a period of approximately 2½ years the Panel feels that the detailed exercise has served its purpose of establishing the degree of accuracy of forecasts in bid situations and that a less far reaching examination will suffice for the time being. The Panel executive will continue to hold a watching brief to make sure that the present overall high standard of forecasting is maintained.

This will be implemented by a system of random checks or sampling. The Panel executive has much appreciated the great help and co-operation it has received from financial advisers and their clients in the carrying out of this project.

Amendments to the Code

The most important developments during the year were undoubtedly the amendments to the City Code on Take-overs and Mergers–two new Rules, introduced in September 1971 and January 1972, and the general revision of the entire Code in February.

The two new Rules were made by the City Working Party, which has the rule-making responsibility, at the request of the Panel in order to deal with two types of transaction which did not appear to be specifically, or even by implication, covered by the Code as it then existed. These additions are represented in the revised Code by Rules 33 and 35. The former makes it obligatory for an offeror who has a paper offer outstanding to provide a cash alternative in cases where his offer is accompanied or preceded by massive cash purchases; the latter brings within the scope of the Code any series of purchases (or other acquisitions) of shares, however gradual, which brings about a change of effective control.

The new Code ("the orange book"), which has now been in force for over three months, has removed some minor anomalies which existed in the previous Code and has at the same time clarified some of the old Rules and restated others. It represents the experience of the principal City bodies as well as that of the Panel gained in the three-year period since the previous edition ("the blue book") was published. Every indication is that the new document has been well received and that the transition from the old to the new is being accompanied by fewer difficulties of interpretation than was at one time feared.

Shut-out Bids

A problem which presented itself in several forms concerned so-called shut-out bids–that is to say take-over or merger transactions which are only announced after the controlling shareholders of the target company have already committed themselves to the transaction. A shut-out bid normally has the effect that the general body of shareholders of the target company have to be content with the decision of the controlling shareholders (whose holdings may add up to well under one-half of the voting capital) and must recognise that the possibility of a better bid from another source is as good as excluded. The action of controlling shareholders in committing their company to a cash bid from an offeror of their choice may appear particularly offensive to the general body of shareholders if it is known or reliably believed that another offeror, perhaps less welcome to the controlling group, was ready to make a higher cash offer. In the case of an offer expressed in shares or convertible securities of the offeror company, however, the issue is less clear-cut; the accepting shareholders will have a continuing interest in the combined companies and the controlling shareholders of the offeree may sincerely hold the view that the future prospects of the combined companies are better than any realistically conceivable alternative.

Three cases involving this principle came up before the full Panel during the year. Each presented its special difficulties. In all three cases the controlling groups of the companies in question were closely identified with their boards. The Panel examined the directors concerned in some detail on their motives for committing themselves in advance to accept or cast their votes in favour of the take-over or merger of their choice, in the face of aggressive competition from a known but less-welcome competitor.

In each case the explanations were accepted. None of the cases involved competing cash offers only; it was held that the directors were entitled to their view of the continuing benefits arising from the merger of their choice and the general body of shareholders had to accept the position arising from this.

Nevertheless, the Panel continued to be concerned at the possibility of the public shareholders' legitimate interests being subordinated to the convenience of controlling directors, which could in some cases lead to a choice being made by them which is not purely related to their capacity as shareholders. This concern found its expression in Practice Note No. 7 which was issued during the year and is now represented in the orange book by Rule 11. Rule 11 requires controlling directors to clear any intended shut-out transaction with the Panel executive; there is however no such obligation on controlling shareholders who are not directors. Executive consent will normally be given where it is reasonably established that no competitive offeror has made approaches in the recent past or where the company concerned is facing a crisis of survival; there is no requirement for a company to advertise its availability before a shut-out is concluded.

Practice Notes and Publication of Rulings

In June 1971 the Panel published Practice Note No. 6. This Note, which was prepared after consultation with The Institute of Chartered Accountants in England and Wales, reviews the types of assumptions often listed as bases for profit forecasts and indicates how such assumptions should be framed to be as informative as possible. The first six Practice Notes have now been amended to conform to the new Code and have been bound as a single volume with it. Copies of these Practice Notes are available at the Panel's offices.

It is not felt necessary this year to give a resume of significant rulings given by the Panel during the year as these are substantially reflected in the new Code.

Public conduct of bids

The year under review has seen a substantial increase in the use being made of press, radio and television for the advancement of rival views in a contested take-over situation. Save in the rare cases where shares are held in bearer form the Panel considers that the first and most important forum for discussion of take-over bids and mergers should be the printed circular addressed to the registered shareholder. The circular alone can ensure total and, as near as the postal services will permit, simultaneous coverage of the shareholding body. The circular has the additional advantages that it can be comprehensive, it can be read and (if not fully understood on first reading) re-read, it can be discussed with professional advisers and, finally, it is a document which unequivocally engages the responsibility of its authors and thus is capable of being used as the foundation of any later court proceedings.

The Panel does not wish to suggest any restriction upon the use of the press for the conduct of contested bids, provided it is clearly understood that paid newspaper advertisements and organised press conferences fulfil a role which is secondary to that of the circular. The reader should be left in no doubt as to the authorship of and responsibility for advertisements. It should be borne in mind that not all shareholders necessarily take or read the newspapers in which the material will appear. The case for radio and television as media for discussion is very much less good, both on account of the haphazard coverage and because of the lack of written record easily available to the public. Company directors and their advisers are therefore

recommended to exercise great caution before accepting invitations to participate in such programmes. Many will feel that it is in the better interest of the whole body of their shareholders to refuse them in every case.

The Panel must record its dissatisfaction at the quality of some of the exchanges which took place in the course of some contested bids during the year. There is no proper place for vituperation or vendetta and it is the clear responsibility of advisers to take a firm lead in repressing emotional outbursts which damage the public standing of City institutions in general.

Investigations into Dealings

The Panel carried out a number of investigations into dealings. As was explained in the last Annual Report, investigations may be of two kinds depending whether their objective is to obtain a better understanding of current market transactions or to investigate allegations of improper dealings (usually in connection with Rule 30) in the past. There were six inquiries of the first kind. All were conducted with the full co-operation of The Stock Exchange authorities and enabled the Panel executive to assure itself that there was no breach of the Rules or, as the case may be, to take such corrective action as was necessary without infringing market confidentiality.

Of the nine investigations carried out under Rule 30 and completed, the Panel was able to satisfy itself in seven cases that there was no evidence of impropriety. These conclusions were reached after detailed examination of the reasons for the purchases by the persons concerned. The Panel has no statutory powers of any kind to require members of the public to attend its offices and the executive invariably makes this clear at the outset; it must, however, be placed on record that the overwhelming majority of members of the public who have been asked to attend the Panel offices for a discussion of their reasons for purchasing (or selling) the security in question have agreed to do so without the slightest hesitation.

In one case the executive found that the purchases were the result of a genuine accident arising from the machinery used for the public announcement of an impending offer; no action was taken. In a further case five individuals were referred to hearings by the full Panel which decided, in the particular circumstances, to limit the penalty to a private reprimand. Amounts equal to the profit obtained were paid over to charity.

Proceedings before the Panel

It is evident that the Panel executive cannot fulfil its role unless directors and advisers, as well as others, are prepared to disclose on request full details of transactions including the names of the parties thereto and the objectives to be achieved. The executive seeks to limit its request for disclosure to the minimum necessary to enable it to have a clear understanding of the issue at stake. It goes without saying that this information is confided to the executive on the clear understanding that it is for consideration by the members of the executive and the Chairman and Deputy Chairman of the Panel only. Should the matter in question come before the full Panel, it is the invariable policy of the executive to remain silent on the confidential matters unless express consent is given to mention them. In such cases there are usually also present directors and advisers of one or more contestants to the take-over or merger transaction; it may thus happen that parties may reveal at the hearing matters which would otherwise remain under the seal of secrecy purely with the

object of persuading the Panel of the rightness of their submission.

The Panel wishes to stress that confidential information obtained from one party in this manner is not available to another for publication or in order to secure an unfair advantage.

Staff

As mentioned in the Foreword to this Report, Mr. I. J. Fraser, Director General, left on 31st March 1972 at the end of his contract period and Mr. John Hull was appointed to that office on 1st April.

Mr. A. R. Beevor, Secretary and Mr. P. B. Mitford-Slade, Assistant Secretary, left at the end of their respective contract periods during 1971 to return to their firms, Ashurst, Morris, Crisp & Co. and Cazenove & Co. The Panel would like to place on record their appreciation of the important contribution made by Mr. Beevor and Mr. Mitford-Slade during the early, formative period. Their places were taken by Mr. T. P. Lee, seconded by Herbert Oppenheimer, Nathan & Vandyk, and Mr. C. G. W. Kennedy, seconded by Hoare & Co., Govett, both for two year periods.

Mr. Peter Frazer, formerly an Assistant Secretary, was appointed joint Secretary on 16th February.

(Further copies of this Report may be obtained from The Secretary, Panel on Take-overs and Mergers, P.O. Box No. 226, The Stock Exchange Building, London, **EC2P 2JX.**)