

The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1978

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
The Hon. John Baring	Chairman, Accepting Houses Committee
Lord Remnant	Chairman, Association of Investment Trust Companies
R. H. Peet	Chairman, British Insurance Association
Lord Armstrong	Chairman, Committee of London Clearing Bankers
E. H. Bond	Nominated by the Confederation of British Industry
F. P. Neill	Chairman, Council for the Securities Industry
E. C. Sayers	President, Institute of Chartered Accountants in England and Wales
I. G. Kennington	Chairman, Issuing Houses Association
K. G. Smith	Chairman, National Association of Pension Funds
N. P. Goodison	Chairman, The Stock Exchange
E. W. I. Palamountain	Chairman, Unit Trust Association
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Lord Cross	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

D. C. Macdonald	Director General
P. R. Frazer	Deputy Directors General
T. P. Lee	
J. A. Kitchen	Secretary
J. M. Holt	
R. A. Wade	
C. Smith	
Miss M. J. Tomlinson	
Miss E. G. Robinson	

FOREWORD

The Panel has now passed its first decade and looking at it as objectively as I can attempt to do, I believe it may fairly be said that it has not only become established as a useful and necessary part of City machinery but has provided a model elsewhere. Whether, in the particular field of take-overs and mergers or in the wider one of transactions of whatever kind in the securities industry, methods of voluntary self-regulation are to be preferred to rules imposed by law remains, of course, a matter on which different opinions are held, much depending on the traditions and circumstances of the country concerned. I adhere more strongly than ever to the view that in our own circumstances the machinery of self-regulation has significant advantages in flexibility, fairness, informality and expedition. One might indeed add finality in the particular case, in that the decisions of the Panel although sometimes open to immediate appeal to the Panel's own Appeal Committee, are not subject to lengthy delays of appeals through a hierarchy of legal courts. And the flexibility of the system was well illustrated by the Panel's recent ability to deal rapidly with the so-called formula bids for investment trusts, a new technique devised by a resourceful market. This view is supported by the fact that a number of countries, usually after consultation with us, have established systems clearly influenced by our own provisions and experience. A notable recent example of this has been in the European Community where a Code of Conduct relating to transactions in securities draws to a significant extent upon our own Code. Indeed the new Council for the Securities Industry here has itself now been designated as an authority in this country for supervising the implementation of the European Code which covers a wider field than mergers and take-overs.

The fact that the Panel has been so well accepted in the City is further evidenced by the generally welcomed establishment, under the aegis of the Bank of England, of the Council for the Securities Industry itself. The City Panel is an integral part of the machinery embraced by the Council though not subordinated to it. The administration and interpretation of the Take-over Code remain matters solely for the Panel, and not subject to any appeal other than the appeal in disciplinary cases to the Panel's Appeal Committee (which may now also deal with appeals from other arms of the Council). The Markets Committee of the Council, however, replaces the City Working Party as the "legislative" body responsible for the Code itself and for any amendments to it.

Whilst the activities of the Council must evolve gradually and as the need arises, the City Panel has remained busy. The upturn in the number of bids which began in 1976/77 has continued, being 225 in the year 1977/78 as compared with a low of 148 in 1975/76 and a high of 436 in 1971/72. In the 10 years since April 1968 the Panel has examined approximately 3,000 offer documents sent out to shareholders. These figures, however, by no means measure the extent of the Panel's activity. A great deal of work is involved in dealing with cases in which advice is sought by one side or another although in the event no formal offer materialises. And the scrutiny of offer documents is, of course, only a part of the Panel's involvement in those cases in which an offer is announced. In all these cases the Panel not only maintains a high degree of vigilance, enabling it to take its own initiatives when called for, but is immediately responsive to enquiries whether of a formal or informal kind. Matters are dealt with on a confidential basis unless they involve impropriety and whilst the Panel enjoys no special legal privilege and is, of course, subject to the ordinary jurisdiction of the Courts, it trusts that the importance of such confidentiality would be recognised by the Courts should the matter ever arise.

One important matter in take-over bids (and which may also engage the interest of the Council in cases not falling within the field of take-overs and mergers) is the question of profit forecasting. It is useful and proper for companies to give responsible forecasts of expected future performance. But they must be responsible. Whilst the Panel no longer monitors every forecast given, it examines the outturn in particular cases and has more than one case currently under examination. We wish to do nothing to discourage proper forecasts but will not hesitate to take severe action in the case of any which appear to have been made carelessly or in bad faith.

Where Panel rulings during the period under review have involved important conclusions of general application, reference will be found to them in the body of this Report or in the amended Practice Note No. 9 which accompanies its publication. One interesting matter led to consideration of the principles to be applied where control over a company is sought, partly by a purchase of shares which is not enough to create an obligation under Rule 34 to make a bid for all shares, and partly by the subsequent issue of shares by the target company to the company seeking control in consideration of the transfer by that company of an interest in some subsidiary. Some anomaly arises under the Code in that, if the procedures were conducted in the reverse order, a mandatory bid would be required under Rule 34. The Panel has therefore

to scrutinise such cases, not only to be sure that attention is directed to the substance of the arrangement, but also to see that all shareholders are treated fairly.

And in all these situations the interests of *all* shareholders have to be considered. It is, of course, true that under the law the management of a company is vested in the board of directors and that in some companies directors or institutions may have controlling shareholdings, so that, even if the general body of shareholders is consulted on some issue, the majority will decide and individual shareholders may be out-voted. This is fundamental to the system of company control as indeed to any democratic institution. But this does not mean that the interests of individual shareholders can be ignored. Shareholding by individuals is on the decline but ought to be encouraged and one of the functions of the Panel is to protect such shareholders who often cannot protect themselves. Meanwhile it is right that the institutions should increasingly interest themselves in the management of companies in which they invest and in so doing should regard themselves as in a sense representing the interest of all shareholders. Institutions are right also in insisting on the publication of fuller information about the affairs and condition of companies in which they invest and in encouraging where appropriate full consultation with all shareholders.

However, in the context of take-overs and mergers, it is necessary to preserve a high degree of secrecy before a bid is announced and consequently it is not possible for a company to consult its shareholders about a particular proposal before publicly announcing it. In such cases the most that can normally be done is for the company to inform its shareholders in general terms of its intended policy in regard to acquisitions and to adhere to policies which have been so announced and approved by the shareholders. This problem of secrecy and security has also to be faced in connection with the Government's proposals for "worker participation" in management which, while wisely very different from those in the Bullock Report, would seem to require merger and take-over plans to be discussed with worker representatives before decisions are taken. Any disclosure of such discussions would inevitably have repercussions on the market and if these proposals ever become the subject of legislation it is to be hoped that discussions of such plans would only be required in general terms and without prior disclosure of particular cases. In the event of the two tier board system being adopted, it should be the function of the management board to decide whether particular acquisitions should be attempted and to announce them publicly to all concerned at the appropriate time. It would indeed

presumably be the management board which alone could bind the company in relation to other parties.

This is not the only Government proposal which could have an impact on take-overs and mergers and which has, therefore, to be closely examined. Thus the Government have it in mind to amend the Prevention of Fraud (Investments) Act of 1958 and the Licensed Dealers' (Conduct of Business) Rules 1960. The Panel would wish to maintain the position that all those who engage in take-overs and mergers relating to listed securities must observe the Take-over Code which, as administered by the Panel, is a far more flexible and adaptable instrument than any statutory rules can be. Again the Government's recently published Companies Bill includes seven clauses on insider trading, their intention being to meet some of the criticisms made of earlier proposals which have been discussed in the European Community. It is quite impossible in this difficult matter to draft legislation which everybody will accept as perfect but the better must not be allowed to become the enemy of the good. The City Panel expressed a firm view some years ago in favour of legislation in this matter, as did The Stock Exchange. All three political parties favour it. There can be no resiling from that position and I have myself no doubt that the existence of legislation, however difficult to draft or to enforce, will itself significantly strengthen the climate of opinion which discourages insider dealing. That the drafting (as also the eventual enforcement) of legislation is difficult there is no doubt. The Council for the Securities Industry has commented upon the proposals contained in the White Paper of July. The City Panel has also had discussions with the Department of Trade and we shall continue to give what assistance we can with a view to achieving the most satisfactory legislation. Meanwhile the City Panel will continue to handle cases that come to its notice. The Companies Bill does not cover the much needed changes in the system of inspections under the Companies Acts, but it is to be hoped that steps will soon be taken to improve the quality, efficiency and expedition of this very important aspect of Company Law. The Department of Trade ought not to take the line of least resistance by leaving things as they are. Substantial, but I believe myself practicable, changes are necessary if the existing system, which in its basis is most valuable, is to work with the high quality of personnel, with the expedition and with the fairness which will command public confidence. It does not do so at present.

THE TAKEOVER PANEL
1977-1978 REPORT

For the rest, self-regulation, with all its virtues, has been preserved and, as I think, its role enhanced by the developments during the past year. Its capacity for initiative and quick decision must be maintained whilst ensuring that the increase in activity, which I believe to be desirable, in no way complicates its operation or creates the kind of bureaucratic maze which seems an increasingly inevitable concomitant of statutory arrangements and which so often stultifies their efficacy.

Following his appointment as Chairman of the Council for the Securities Industry Mr. Patrick Neill has become an ex officio member of the Panel. In addition, Mr. Eric Sayers, who is the President of the Institute of Chartered Accountants in England and Wales, has joined the Panel as a representative of the accountancy profession. We extend a warm welcome to them.

8th December, 1978.

REPORT ON THE YEAR ENDED 31st MARCH, 1978

STATISTICS

The Panel met six times to hear appeals by parties to take-over transactions against rulings by the executive and once to consider two disciplinary cases brought by the Director General. There was one case before the Appeal Committee during the year.

The statistics and commentary on them given below cover transactions where there was at least a public announcement of a firm intention to make an offer.

There were 225 (199) published take-over or merger proposals of which 214 (189) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 208 (188) target companies of which 181 (170) were listed on The Stock Exchange. In 16 (11) cases there were rival offers. 7 (4) opposed offers succeeded; 2 (*nil*) agreed offers failed.

A further 20 (38) cases which were still open at 31st March, 1978 are not included in these figures. The executive was engaged in detailed consultations in another 127 (117) cases which either did not lead to published proposals or were transactions, involving control blocks of shares, subject to approval by shareholders.

Category of documents	1977/78	1976/77
Circulated by Exempted Dealers	151	123
Circulated by Licensed Dealers	10	9
Circulated by others exempted under the Prevention of Fraud (Investments) Act, 1958	21	27
Circulated on the basis of specific authority from the Department of Trade	12	11
Schemes of Arrangement	20	19
	214	189

Outcome of proposals	1977/78	1976/77
Successful proposals involving control (including Schemes of Arrangement)	159	138
Unsuccessful proposals involving control	26	27
Proposals withdrawn before issue of documents (including offers overtaken by higher offers)	11	10
Offers and Schemes of Arrangement involving minorities	29	24
	<u>225</u>	<u>199</u>

THE COUNCIL FOR THE SECURITIES INDUSTRY

On 30th March, 1978 the Bank of England announced that, following extensive consultations with the chairmen and senior representatives of the member organisations of the Take-over Panel and with the Chairman of the Consultative Committee of Accountancy Bodies, general agreement had been reached for the setting up of a new self-regulatory body for the securities industry to be called the Council for the Securities Industry. Mr. Patrick Neill, Q.C., Warden of All Souls College, was appointed Chairman of the Council and Sir Alexander Johnston was appointed as Deputy Chairman while continuing his present role of Deputy Chairman of the Take-over Panel. Lord Shawcross was to continue as Chairman of the Panel and to be a member of the Council.

In the ensuing eight months the Council has begun work on a number of important issues affecting the operations of the market in securities in London. Temporary accommodation has been found in the Bank of England and it is planned to move the operation into premises next door to those of the Take-over Panel on the 20th floor of The Stock Exchange Tower.

The new supervisory body is being built around the existing machinery of The Stock Exchange as the central market for securities and of the Take-over Panel. The different sectors of the securities industry will continue to maintain and develop their internal supervisory and regulatory roles but the new body will formalise and extend the co-ordination, consultation and co-operation which presently exists between The Stock

Exchange and the users of the market with the object of sustaining, in the public interest, proper conduct and high standards in the securities industry.

In order to pursue one of its main objectives which is the framing and amendment of codes of conduct and the consideration of proposed U.K. and E.E.C. legislation, the Council has set up a Markets Committee. This Committee has subsumed the work of the City Working Party as the body responsible for drafting and issuing the Take-over Code.

PRELIMINARY BID ANNOUNCEMENTS

The Panel has carried out an analysis of bid announcements made following the joint Panel/Stock Exchange statement on price-sensitive matters issued on 14th April, 1977. This statement, which was drawn up in consultation with the Issuing Houses Association and representatives of the CBI, did not lay down any new rules as such; it was more in the nature of an exercise to draw people's attention to aspects of the existing rules. What was, however, new was an encouragement to apply for a temporary halt in dealings in certain circumstances.

There were during the period from 14th April, 1977 to 31st March, 1978, 217 firm bid announcements, 70 of them preceded by a preliminary announcement; in approximately one third of all cases, therefore, the parties concerned thought it desirable to make an early announcement. This probably represents a higher proportion than previously, but would indicate no great improvement if in a significant number of cases the early announcement was preceded by a price rise: in fact, there were only 23 such cases which indicates that in only about 1 case in 9 has a holding announcement been made because of a price rise.

It would be worrying if this willingness to make early announcements in advance of any price movements had given rise to a substantial number of holding announcements which did not result in bids. This would not seem to be the case. There were 11 cases in which companies volunteered a preliminary announcement (as opposed to 7 cases where they had an obligation to make one because of an untoward price rise) only to announce later that the talks had not developed into a firm bid. An examination of the facts in each case shows that there were few, if any, examples of companies preferring to remain silent but feeling under an obligation under the Code to say something which in the light of later events might be thought to have been misleading.

During this period 70 announcements were accompanied by a temporary halt in dealings. This is encouraging and indicates that companies and their advisers are now feeling greater confidence in using this mechanism to avoid sharp movements in share prices that might be caused by partially informed speculation.

FORMULA BIDS

In the course of the year the Panel's attention was drawn to certain features of offers for the share capital of authorised investment trust companies in which the offer consideration was expressed by way of a formula related to the net asset value of the offeree company. Formula considerations of this kind are, possibly uniquely, appropriate to offers for investment trusts, given that the worth of the underlying assets may change quite dramatically during the course of the offer as a result of movements in the securities markets in which the particular trust is invested and that the effect of such movements on asset values may be calculated regularly and with a high degree of accuracy. Indeed, normal market dealings in investment trust shares are carried out with reference to the daily calculations of specialist brokers and others as to the current net asset value per share of particular trusts.

It is, however, the case that the concept of "net asset value", as applied to investment trusts, is open to different interpretations. A majority of investment trust companies, in publishing a net asset figure for the guidance of shareholders and the market, do so on what is known as a "going concern" valuation, the principal features of which are that investments are taken at mid-market values, prior charge borrowings are deducted at market rather than nominal values and no deduction is made for tax payable on unrealised capital gains. Sometimes, however, the term net asset value is applied to a break-up value to indicate what, in theory at least, ordinary shareholders would receive in a liquidation. This figure is arrived at by taking investments at market values and deducting prior charges at par (or a redemption value when higher) and contingent capital gains tax liabilities. Offerors for investment trusts, however, have generally related their formula consideration to a calculation of net asset values on yet a third basis, broadly similar to break-up value but deducting preference capital (if bid for) at bid prices and in some cases deducting a provision for the cost of terminating existing management arrangements.

Although these represent validly differing views of asset value, there is some danger of confusion arising in the minds of shareholders when they are asked to consider the advantages or disadvantages of an offer by reference to net asset values which are calculated by either side on a different basis. Principals and their advisers should, therefore, ensure that wherever reference is to be made to net asset value as an argument for or against an offer, the utmost clarity is used to make plain the basis of calculation of the asset values in question. This applies to paid advertisements in the press as well as to documents addressed to shareholders directly.

Formula offers may also give rise to difficulties under Rules 32, 33 and 34 of the Code in relation to dealings by the offeror and its associates in securities of the offeree. Rule 32 requires an offeror who has purchased offeree securities during the offer period at prices higher than the then current value of the offer to increase the offer to not less than the highest price paid in such dealings. In formula offers, the current value of the offer is only determinable by reference to the ruling value of the assets to which the formula is related and the offer price is then the function of that asset value and the specific terms of the formula. If shares are purchased at above the offer price so calculated, it follows that the purchases will have been made on the basis of an improved formula and the Rule will require the offer to be increased by making the unproved formula generally available. The application of Rule 32 to formula offers will thus be identical to that in the case of a share exchange offer, where purchases of offeree shares at above the ruling value of the share exchange offer require an equivalent improvement in the offer terms.

Rules 33 and 34 will apply equally to formula offers so as to create an obligation on the offeror to pay in cash the highest price paid for shares in the offeree within the preceding 12 months (regardless of whether that highest price would have activated the requirements of Rule 32) in circumstances where the offeror has purchased shares carrying 15% or more of the voting rights of any class of shares under offer within that period or has acquired in all 30% or more of the voting rights of the offeree. In such cases the offer price available to accepting shareholders should be the higher of the formula price ruling as at the date the offer is declared unconditional as to acceptances and the highest cash price paid in respect of the share purchases to which the Rules apply.

In all circumstances the price payable under the formula should be determined as at the day the offer is declared unconditional as to acceptances. The formula would then

cease to operate, shareholders accepting the offer (if it remained open) after that date receiving the price then determined. The original formula could, however, be reintroduced, and relate to the asset values then ruling, in cases where the offeror subsequently put forward proposals relating to convertible securities of the offeree in conformity with the Code requirements.

In a number of formula offers for investment trusts, offerors have reserved the right to lapse the offer in the event that movements in the securities markets during the currency of the offer exceed certain specified limits. Where such conditions are incorporated in offer terms, they should be matched by a reciprocal right of withdrawal for accepting shareholders.

THE INVESTIGATION OF FAILED PROFIT FORECASTS

There have recently been a number of examples of successful bidders subsequently unfolding results for the companies acquired which fall well short of the profit forecast by the latter companies when the bids were made. The Panel has concerned itself with all these cases although the threat of litigation in two of them has, in accordance with the policy referred to in the last Annual Report, caused the Panel to reserve its position for the time being. The occurrence of a number of apparent profit forecast failures has, however, prompted the Panel to think that it might be helpful if it described how the task of carrying out an enquiry in this area is normally approached.

It was originally the Panel's practice to monitor the outcome of all profit forecasts made in bid situations. This was discontinued some years ago through lack of any evidence that this area of the Code was creating any particular problems so that the efforts being put into the total monitoring process did not seem to be justified. It would, of course, be possible for the Panel to revert to its earlier practice if there was evidence to suggest that this would be worthwhile. At the moment the Panel monitors forecasts on a sample basis of perhaps one in four of all bids in which profit forecasts are made. The sample is chosen at random unless the role of the forecast in a particular bid has seemed to the Panel to be of unusual significance in which case it will be specially included.

Although there is no formal obligation on companies to make profit forecasts in connection with take-over bids, the Code in effect encourages boards to put their shareholders in the picture about their company's current prospects so that the crucial investment decision facing them can be taken in the light of relevant and up-to-date information. The safeguards built into the Code are designed to strike a balance so that on the one hand recklessness and irresponsibility are discouraged but on the other hand directors are not made to feel so inhibited that they take refuge in silence and thus perhaps deprive shareholders of a measure of the proper value attached to their shares. There is also the danger that "unofficial" forecasts may begin to circulate freely.

The Panel does not endeavour to conduct a witch hunt when profit forecasts, for whatever reason, are not achieved. In any investigation of a failed forecast the Panel will be endeavouring to put itself in the position in which the directors were when the forecast was made and to establish the reasons for the subsequent discrepancy. The use of hindsight would only be legitimate if the events which have actually occurred were reasonably capable of being foreseen and even then it would not necessarily be a subject of criticism that a board took an optimistic view if the area of particular uncertainty or sensitivity was adequately highlighted in the form of an appropriately framed assumption.

When a bid has succeeded and the offeree company has been merged into the enlarged offeror group, there are obvious difficulties associated with trying to compare the outturn with a forecast made by the offeree (and conceivably also by the offeror) at the time of the bid. At one extreme this may be rendered impossible because the offeree may no longer have a separate identity. Changes in accounting dates may also create difficulties; in general, the impact of changes in accounting or management policies will be easier to gauge. It is, of course, no part of the Panel's function to adjudicate on the question of whether one of a number of alternative approaches in the application of particular accounting policies is necessarily the correct or preferable approach in the particular circumstances. The criterion that the Panel would be endeavouring to apply in such circumstances is—what would the results have been if the bid had not succeeded and the then board had been reporting to its shareholders its results as an independent company? It would be assumed that the company remained listed on The Stock Exchange and had to conform to The Stock Exchange's requirements and that the results were arrived at by the consistent application of the then existing management and accounting policies.

The Panel recognises, of course, that it is possible that legal responsibilities towards various parties may arise from statements made in take-over documents. Whilst the nature and extent of such responsibilities may have been affected by compliance with the requirements of the Code, the considerations applicable to an assessment of the legal consequences may well be very different from those which would be of concern to the Panel, with other objectives in mind, in administering the Code. It is therefore perfectly proper and in no sense a challenge to the Panel's authority and role in the matter for an aggrieved party to examine the possibility of legal recourse and, if he believes it worthwhile, to pursue any remedies which he is advised he may have at law. If legal proceedings had been initiated or threatened, the Panel would normally suspend its own enquiries. If the Panel did not do so there could be a danger that one of the parties might feel obliged, in order to protect its own interests, to seek an injunction restraining the Panel from pursuing its enquiries or making any statement on the ground that such conduct might prejudice the outcome of the litigation. At the least the parties may feel constrained from dealing with the Panel in a state of total frankness and there could, therefore, also be a danger that the Panel might, through relevant material being withheld in this way, reach a wrong conclusion.

DISCLOSURE OF FINANCIAL INFORMATION

General Principle 3 and Rule 15 set out the obligations of companies involved in take-overs to disclose financial information about themselves. Every case is unique and it is, therefore, impossible for the Panel to detail what information should be made available in every circumstance. However, the Panel wishes to stress the requirement of the Code that shareholders should be given sufficient evidence, facts and opinions upon which an adequate judgment and decision can be reached. The Panel relies upon boards of directors and their independent advisers to fulfil this obligation. The need for full compliance is perhaps even greater in the case of agreed take-overs, where every significant fact and argument does not so naturally become publicised as in a contested offer.

The Panel has never insisted that shareholders be provided with profit forecasts. However, boards and their advisers must always carefully weigh up whether or not it is in the best interests of shareholders that they should be given information about the immediate prospects or an estimate of results for a period recently expired. It is

recognised that forecasting profits is a hazardous business and the Panel realises that it is no easy task to walk the tightrope between not revealing sufficient information and indulging in irresponsible crystal ball gazing. The Panel executive is always available to give guidance on this difficult area.

GENERAL PRINCIPLE 8—PURCHASE OF SHARES AT ABOVE THE OFFER VALUE AFTER THE OFFER PERIOD

The Code is primarily concerned with events that take place during an offer period (as defined) and not with anything thereafter. General Principle 8 requires an offeror to treat all shareholders of the same class of an offeree company similarly. Rule 32 requires an offeror who buys offeree company shares during the offer period at above the offer price to increase the offer to that level.

In the interests of fairness the Panel considers that, even though the offer period may have ended, so long as the offer continues to be open the offeror should not buy shares in the offeree company at above the offer price without prior consultation with the Panel.

PRACTICE NOTE NO. 9

Practice Note No. 9 was issued with the 1976 edition of the Code but was not bound into the Code because it was visualised that new versions would need to be issued from time to time. The Practice Note has now been extensively revised to take into account a variety of changes or developments in practice over the past two and a half years. The new edition is being issued at the same time as the Annual Report. We have thought it appropriate to set out below comments on some of the matters covered in the new version.

General Principle 4 and Rule 38

It is possible to visualise that an interim dividend declared and paid during the course of an offer may be of such magnitude that it would amount in effect to a material disposal of the offeree company's assets and would therefore fall directly within the scope of the General Principle and Rule.

Even when the level of dividend proposed could not be regarded as untoward, when considered against the pattern of previous dividends and taking into account current trading and the impact of counter-inflation policy on earlier payments, the insistence of the offeree company that a special interim dividend should be declared and paid during the currency of the offer would suggest to the Panel that it was inspired by a desire to enmesh the offeror in a series of irksome technical difficulties. In these circumstances an offeror, whose offer was framed in the normal way so that he was entitled to the benefit of any dividends subsequently declared and paid and who represented that it would be unduly burdensome for him to have to seek to recoup an equivalent amount from offeree shareholders some of whom, as a result of market purchases, may not even have received the dividend, would be likely to receive the Panel's permission to withdraw if the offer document had not then been posted. The offeree shareholders themselves may well be the losers in this sort of situation and the Panel will be concerned to ascertain the reasons for an offeree company finding it imperative to rush out a dividend payment.

General Principle 6, Rule 4 and Rule 34

The paragraph under this heading draws attention to the requirement for independent advice not only in connection with offers but in all situations affecting the control of a company and to the necessity for boards to ensure that no conflicts of interest exist which could cast doubt on the objectivity of the advisers.

General Principle 10, Rule 16 and Rule 22

Particularly in contested situations, directors of companies are sometimes quizzed by the media as to their tactical intentions and it is important that great care is taken not to allow quotation of anything which might mislead shareholders, for example, regarding the possibility of the revision of the offer. Similarly pressure is sometimes put on directors to comment about future profits or asset revaluations or other material facts about their company: such pressure should be resisted. Any misquotation must be immediately corrected. Advisers should draw attention to these matters immediately a bid situation develops.

Rule 15

It is thought undesirable that there is no absolute requirement for offerors to give financial information about the offeree except in certain circumstances prescribed by

The Stock Exchange's "Admission of Securities to Listing"; such information is relevant to offeree shareholders, however small the transaction may be when viewed through the eyes of the offeror.

Similarly there is no requirement for the offeror to give information about itself except when it is offering paper. Where the offer is for cash, even an offeree shareholder who is minded to accept, is entitled to have some information by which he may, for instance, evaluate the prospects for the company and its workforce under the new controller. If he is likely to have a continuing connection with the offeror because he wishes to retain his shares or because the bid is a partial one only, the arguments for requiring minimum information about the offeror are possibly stronger. The Panel would dispense with this requirement when it would manifestly involve an excessive burden or serve no useful purpose.

Rule 16 and Practice Note No. 5, Section 9

This paragraph has been rewritten to deal with a lack of clarity in the previous version brought to light in a number of recent cases.

Rule 22 and Rule 23

Under Rule 23(1) an offeror can only avoid the normal obligation to extend his offer for 14 days, once it succeeds, by imposing a "shut-off" notice, i.e., by committing himself whilst the outcome is still in doubt to bring his offer to a close on a definite date having given 14 days' notice that in no circumstances would it be available for acceptance thereafter. In general, the same choice faces an offeror in relation to any alternative form of consideration included in his offer. In certain circumstances, however, notably those of a cash underwritten alternative, where an offeror is dependent on support from outside, it may be impracticable for him to run the risk of having to extend an alternative beyond the normal period for which he can expect to be covered. The Practice Note explains how the Panel proposes to apply the Rule to alternatives of this kind so as not to compel an offeror in these circumstances to deny himself the freedom to extend or revive the alternative at a later stage.

This reflects the guidance given in last year's Annual Report, although at that time there remained some uncertainty as to how the Rule should be applied in competitive situations. This has now been resolved as set out in the Practice Note. In the interests of shareholders who have accepted an earlier offer, no subsequent offeror may impose

a “shut-off” notice of any kind in relation to any part of his offer. “Shut-off” notices and other similar statements of intent made before the competitive situation arose, which would otherwise have committed the offeror, may be withdrawn once a competing offer is announced, provided that an adequate opportunity to withdraw acceptances is given to shareholders who may have been induced to accept as a result of those earlier statements.

Rule 27, Rule 34 and Practice Note No. 8, Section 9

When a transaction is to be effected as a result of which the general body of shareholders will find themselves in a minority position, the Panel is now insistent that the implications of this position in relation to subsequent protection under the Code should be clearly in front of shareholders when they make their decision.

Rule 34 and Practice Note No. 8, Section 5

The substituted passages result from a change in emphasis in the practice relating to sales of part of a control block. The Code is not designed to prevent the partial disposal of existing control blocks. Indeed for taxation or other personal reasons, a progressive reduction in the size of family holdings may be inevitable. It is not the function of the Code either to prevent vendors from seeking a favourable price for their shares or to operate so as to put pressure on shareholders to dispose of their entire holdings against their wishes. Accordingly, the concern of the Panel will be to satisfy itself that the partial disposal is not merely a device to escape the impact of Rule 34 by putting a purchaser in the same position as regards rights of control as he would have secured if he had purchased the entire holding or at any rate 30 % or more.

Rule 34 and Practice Note No. 8, Section 9

The amendments to paragraphs 1 to 4 incorporate developments in practice made since the 1976 edition of the Code was published. In particular, companies are called upon to have regard to a number of procedural points when seeking a “whitewash” from their shareholders.

With regard to paragraph 5, the Panel has had under consideration the relatively uncommon type of case in which control is secured partly by a purchase of shares giving

the purchaser rather less than 30% of the voting rights and partly by the issue to the purchaser of further shares, bringing his holding above 30%, in exchange for assets. If the two transactions are regarded quite separately, the first does not necessitate a bid under current practice, nor would the second if a meeting of shareholders "whitewashed" the assets deal. Yet, if the order in which the transactions were carried out were reversed, the shareholders of the controlled company would have to receive a bid at the highest price paid for the shares. Rule 34 is designed to protect all shareholders and in the ordinary case which it covers there is no question of a majority of shareholders being able to deprive a minority of their right to an offer at the appropriate price. Accordingly, where the two transactions, purchase of shares followed by receipt of shares in return for assets, are interconnected, the Panel will look at the operation as a whole and it should not be assumed that the Panel will be prepared to give a dispensation.

INTERNATIONAL DEVELOPMENTS AND OTHER MATTERS

Reference was made in last year's Annual Report to the European Code of Conduct relating to transactions in transferable securities. This was published by the Commission during 1977. It is proposed that the Council for the Securities Industry should take on the task of supervising the implementation of the Code at national level and in due course supplying representatives to an annual liaison committee meeting in Brussels. There have been no other international developments of major significance for the Panel during the year.

We have continued to exchange information and experience with a number of overseas regulatory agencies, a process which is both interesting and useful.

In the spring the Panel submitted its evidence to the Wilson Committee and recently appeared before the Committee to give oral evidence.

There has been regular discussion with the Department of Trade and other government departments in particular on the subjects of insider dealing, the conduct of company directors and possible changes to the Prevention of Fraud (Investments) Act, 1958 and the Licensed Dealers' (Conduct of Business) Rules 1960.

Members of the Panel executive spend a certain amount of time addressing appropriate conferences and other interested bodies on the regulation of take-over bids and the general regulation of the securities market.

STAFF

Since the last Annual Report Mr. F. J. P. Madden's term of secondment has ended and he has taken an appointment at N. M. Rothschild & Sons Limited. Mr. J. A. Kitchen of Samuel Montagu & Co. Limited has been appointed as Secretary. Mr. P. R. Hamilton has returned to Rowe & Pitman, Hurst-Brown and has been replaced by Mr. C. Smith of W. Greenwell & Co.

(Further copies of the 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**.)