The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1979

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
G. G. Williams	Chairman, Issuing Houses Association
M. Pilch	Chairman, National Association of Pension Funds
N. P. Goodison	Chairman, The Stock Exchange
C. J. Messer	Chairman, Unit Trust Association
Lord Cross	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

D. C. Macdonald	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
J. A. Kitchen	Secretary
R. A. Wade	
C. Smith	
Miss J. E. Plumbly	
Miss E. G. Robinson	
Mrs. B. A. Evans	

FOREWORD

It is only about six months since I wrote a rather long preface to the Annual Report which marked the end of our first decade. The publication of that Report had been unavoidably delayed and the present Report is intended to bring us back to a more punctual annual publication coinciding, it is hoped, with the Annual Report of the Council for the Securities Industry.

In the short interval since our last Report, little has occurred which calls for comment by me. It is, however, the case that in the past year both the City Panel and the Bank of England have given evidence to the Committee to Review the Functioning of Financial Institutions under the chairmanship of Sir Harold Wilson. The evidence so given has been published and provides something of a brief for those interested in the system of voluntary self-regulation: many questions put were very much to the point but some of those asked by the Trade Union members of the Committee were interesting for the view that Trade Unions as such should be represented on the Council, no doubt to be followed by a claim for representation on the Panel. Certainly the Trade Unions are heavy investors both directly and through their pension funds in the market, but, as such, their interest does not differ from the public or other large investors and they are represented through the various institutions. It appeared to be thought, however, that the Trade Unions as such, forming some sort of Fourth Estate of the Realm, should have a right to take part in the City's system of self-regulation. It is, however, difficult to see how Trade Unions could be accepted and other sectional interests excluded. The C.B.I. are on the Panel because they represent the companies whose securities concern the Panel and, for this reason, C.B.I, representation is not an argument for T.U.C. representation. It is understood that the Wilson Committee will be studying the systems of regulation operating in other countries and its eventual report will be awaited with interest.

29th May, 1979

REPORT ON THE YEAR ENDED 31st MARCH, 1979

STATISTICS

The Panel held three meetings to hear appeals by parties to take-over transactions against rulings by the executive, three to consider disciplinary cases and two to consider cases referred by the Director General. There were two cases 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 167 (*225*) published take-over or merger proposals of which 158 (*214*) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 150 (*208*) target companies of which 112 (*181*) were listed on The Stock Exchange. In 14 (*16*) cases there were one or more rival offers. 7 (*7*) opposed offers succeeded; 3 (*2*) agreed offers failed.

A further 24 (*20*) cases which were still open at 31st March, 1979 are not included in these figures. The executive was engaged in detailed consultations in another 164 (*127*) 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

	1978/79	*1977/78*
Circulated by Exempted Dealers … … …	112	*151*
Circulated by Licensed Dealers … … …	6	*10*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	19	*21*
Circulated on the basis of specific authority from the Department of Trade … … … …	12	*12*
Scheme of Arrangement … … … …	9	*20*
	158	*214*

Outcome of proposals

	1978/79	*1977/78*
Successful proposals involving control (including Schemes of Arrangement) … … … …	117	*159*
Unsuccessful proposals involving control … …	25	*26*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	9	*11*
Offers and Schemes of Arrangement involving minorities … … … … …	16	*29*
	167	*225*

PRESS ADVERTISEMENTS AND INTERVIEWS (GENERAL PRINCIPLE 10, RULES 16 AND 22)

During strongly contested bids it is common for the participants to place advertisements in the press and also for personal views to be reported in press stories. The Code requires accuracy and fair presentation in advertisements. The making of a misleading statement is a serious matter. Once a misleading statement has been made no subsequent correction can truly restore the status quo and redress the damage caused. Advertisements should therefore be prepared with care by the parties concerned. The Panel appreciates that the text of an advertisement has often to be prepared at speed, but it is advisable to clear the wording and format with the Panel executive in advance by sending a proof to them. They will try to respond as quickly as necessary.

If the Panel considers that an advertisement was misleading, it will take a serious view of the matter. If there appears to have been no intention to mislead, the Panel may decide that a simple correction is enough. Any correction must be immediate.

Directors and company advisers who talk to journalists during the currency of a bid ought to consider carefully from a Code point of view what they say. Just as in the case of misleading press advertisements, so, in the case of press stories flowing from interviews, it is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely in the hands of the person being interviewed and if the Panel considers

a party to have acted irresponsibly or without due care it will contemplate some form of public rebuke. The particular areas of sensitivity on which comment should be avoided include future profits and prospects, asset values and the likelihood of the revision of an offer.

THE TIMING OF BID ANNOUNCEMENTS (RULES 5 AND 6)

In April 1977 The Stock Exchange and the Panel issued a joint statement on the difficult question as to when an announcement should be made as a bid situation is developing. One of the aims was to encourage companies to apply for temporary suspension of dealings in appropriate circumstances. Other matters dealt with in the statement have been embodied in the revised Practice Note No. 9 which was issued in December 1978.

In its last two Annual Reports the Panel has commented on the success of the new procedure in reducing the number of cases where there is a marked increase in the market price of shares shortly before an announcement is made. The success rate is not, however, 100% and advisers are urged to pay very careful attention to the wording of the Practice Note. Of particular importance is the number of persons being consulted about a proposed offer: the Panel will normally be critical of a failure to make an announcement when more than a very limited number of people have knowledge of the possibility of a bid.

It is not acceptable that a potential offeror should indicate to the board of an offeree company that there will be no offer unless X% of the share capital is first committed, then attempt (often at a weekend) to gather commitments from a wide range of people, followed perhaps by a price rise on Monday morning and an announcement on Tuesday. The board of the offeree company in such a situation should insist on making a warning announcement or ask for a suspension of dealings before the gathering of commitments begins.

SUBJECTIVE CONDITIONS (RULE 8)

Practice Note No. 9 requires that the conditions to which an offer is subject should not be framed in a manner which leaves the determination as to their fulfilment to the subjective judgment of the offeror. An exception is made where an offer is subject to a condition that it will not be referred to the Monopolies and Mergers Commission, when the offeror may state that the decision not to refer the offer must be on terms satisfactory to it. All other conditions should be framed so that their

fulfilment or otherwise may be gauged by reference to objective and clearly identified criteria.

The Panel may, however, be prepared to accept an element of subjectivity in certain special circumstances where it is not practicable to specify all the factors on which satisfaction of a particular condition may depend, especially in cases involving official authorisations (for example, Exchange Control consents), the granting of which may be subject to additional material obligations for the offeror. Companies and their advisers should consult the Panel in such cases prior to the issue of any announcement containing conditions which are not entirely objective.

SHUT-OFFS (RULE 23)

The Panel dealt with this subject in some detail in its last Annual Report.

Practice Note No. 9 (Rules 22 and 23) deals, *inter alia*, with the closure ("shut-off") of alternative offers provided by third parties (most usually cash underwritings) in competitive situations. In section 3 the Note indicates that where a shut-off notice of a third party alternative has been given before the competitive situation arises, the offeror may still end the alternative on its stated expiry date although it may not be bound to do so. The Panel wishes to make it clear that for this purpose the giving of a shut-off notice will be interpreted to include a public announcement of such notice and will not be limited to its inclusion in an offer document.

STATEMENTS ABOUT THE LEVEL OF ACCEPTANCES (RULE 24)

The entry under Rule 24 (2) in Practice Note No. 9 reads as follows:

> "If, during an offer, any statements, either orally or in writing, are made by the offeror or its advisers about the level of acceptances to the offer, an immediate announcement should be made in conformity with this Rule."

This provision is intended to cover any kind of reference either to the level of shares accepted or to the number of shareholders who have sent in acceptances. The purpose of the provision is to prevent the offeror making bullish noises about the way acceptances are coming in without publishing the full details as set out in Rule 24.

SPECIAL DEALS (RULE 36)

General Principle 8 of the Code requires that all shareholders of the same class of an offeree company shall be treated similarly by an offeror. One element of this wide-ranging principle is contained in Rule 36 which regulates arrangements that are entered into with some shareholders but are not extended to all other shareholders. The Rule requires that such arrangements shall only be entered into if the Panel's consent is first obtained. However, the issues that arise in the application of the Rule are not easy to determine and three areas, which have given rise to special difficulties, are discussed below.

In some cases assets of the offeree company may be of no interest to the offeror and thus the offer will be conditional upon satisfactory arrangements being concluded for their disposal. In such cases a shareholder in the offeree company may seek to acquire the assets in question. This introduces the possibility that the terms of the transaction will be such as to confer a special benefit on that shareholder. In any event, the arrangement is not capable of being extended to all shareholders generally. In these cases the Panel will normally consent to the proposed transaction, provided that the independent advisers to the offeree company publicly state that the terms of the transaction are fair and reasonable and the transaction is approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be taken on a poll and interested parties should be disenfranchised. Where a sale of assets takes place after the offer has become unconditional, the Panel will be concerned to see that there was no element of pre-arrangement in the transaction.

The Rule also covers cases where a shareholder in an offeree company is to be remunerated for the part that he has played in promoting the take-over transaction. There is no reason why a shareholder who has genuinely provided services to the offeror should not be remunerated. However, the test applicable is that the level of remuneration must be no greater than the shareholder would have been entitled to receive for the same services if he had not been a shareholder at all.

The final area of concern under the Rule is where an offeror wishes to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this might be achieved vary enormously but the point of principle which the Panel will be trying to safeguard when contemplating giving consent to any such scheme is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. Thus, an example of what the Panel would not normally find acceptable would be an

option arrangement which guaranteed the original offer price as a minimum; endorsement of the terms of the transaction by the independent adviser coupled with shareholders' approval given in the manner described above, may also be required as a condition of the Panel's consent.

These matters invariably involve difficult questions of interpretation or judgment and companies and their advisers should consult the Panel at an early stage.

PRACTICE NOTE NO. 9

It is the general intention that Practice Note No. 9 should, when necessary, be brought up to date each year at the same time as the Annual Report is published. Since the last edition of Practice Note No. 9 was issued as recently as December 1978, no changes are being made at this time.

STAFF

Since the last Annual Report was published Mr. J. M. Holt has returned to the Bank of England and been replaced by Miss J. E. Plumbly. Miss M. J. Tomlinson has also returned to the Bank after nearly nine years with the Panel and her position has been taken by Miss E. G. Robinson who began to work for the Panel during 1978. Mrs. B. A. Evans, also from the Bank of England, has recently joined the staff.

(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.**)