The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1980

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
J. R. Storar	Chairman, Association of Investment Trust Companies
G. Bowler	Chairman, British Insurance Association
Sir Jeremy Morse	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
D. G. Richards	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

G. R. Walsh	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
R. A. Freeman A. C. Jeans	Secretaries
Miss J. E. Plumbly P. A. Tedder Miss E. G. Robinson R. S. Baden-Powell	Assistant Secretaries
Mrs. B. A. Evans	
Miss S. D. Fury	

FOREWORD

Although actual take-over activity was slightly less during the past year than in the previous one, the Panel and its executive have remained fully occupied and a number of interesting problems have come under study. Some of these have been dealt with in particular statements already published. Others may involve some revision of the Code which is currently under consideration by the Markets Committee of the Council for the Securities Industry, now the "legislative" body in respect of the City Code.

Amongst the immediate matters which have concerned us are the consequences in relation to the administration of the Code of the abolition of the system of Exchange Control. As appears later in this Report, our definition of companies subject to the Code excluded those which "for Exchange Control purposes" were not resident within the United Kingdom and immediate attention has had to be given to an amended definition. More generally, however, the ability of the Bank of England to refuse Exchange Control permission for the acquisition of more than 10% of the equity of a United Kingdom company by foreign interests or to deny Exchange Control authorisation in other cases– as, for instance, where some non-resident was involved in a breach of the Code or of some direction by the Panel– formed a potential sanction for the self-regulatory authorities to hold in reserve in appropriate cases.

Foreign companies were concerned in a recent acquisition of a substantial holding in Consolidated Gold Fields Ltd. ("Gold Fields") but the anxieties, which are very real, to which the case gave rise are by no means restricted to foreign companies. There are two aspects of the matter to which the Markets Committee and the C.S.I. will have to give attention. The first is that the requirement of the Companies Acts that holdings of over 5% of its equity must be notified to the company concerned does not, or at least has not so far been held to cover the holding of shares by parties acting in concert the aggregate of which exceeds 5% although no single member of the concert party has over 5%. The expression "person interested in shares" used in the legislation is a wide one but the Department of Trade must surely be invited to include provision in forthcoming company legislation to make it clear beyond doubt, as it is in the USA, that where persons acting in concert, as happened in the Gold Fields case, acquire shares equal to 5% or more of the share capital the details must at once be disclosed to the company concerned. Measures

are also necessary to ensure that companies are not for long kept in ignorance of significant changes in the ownership of their shares by transferees deliberately delaying registration.

Equally worrying, however, but also more difficult to deal with are the so called "Market Raids" which are said to have taken place for example in the Gold Fields case and which resulted in the acquisition, at well above the previous market price, of a substantial shareholding amounting with shares already held to 25% of the equity in circumstances which, for practical purposes, seem to have denied at least those whose shares were not held by banks or brokers under discretionary management, the opportunity of selling their shares at the attractive price being held out.

This case has been well publicised and was summarised, whether accurately or not, in the newspapers as follows. At the close of business on Monday, February 11th the Gold Fields share price stood at 525p. Newspaper reports suggest that quite early the following morning, brokers acting for Anglo/ De Beers informed clients and/or jobbers that they would be in the market for substantial purchases of Gold Fields shares. When trading started the price quoted was 615/617p and by 10 a.m. brokers acting for Anglo/De Beers had in fact purchased 16.5 million shares at 616p. At this point the purchases on behalf of Anglo/De Beers are said to have ceased. The price then eased off and within a few minutes it had fallen to below the level of the previous evening, and closed at around 510p. It was of course open to institutions and others to come back into the market to pick up again, as well they might, shares on which they had turned a quick profit.

I have recited the circumstances thus alleged again not to suggest that there was any breach of the self-regulatory system, still less of the law. On the contrary it appears that those concerned were careful to abide by the rules. But the case is not a completely isolated one and it could be repeated. It would seem that most of the shares acquired in such circumstances had come from large institutional shareholders some of whom are said to have received enquiries from brokers before the opening of business. Ordinary shareholders–or at all events those who had not placed their portfolios in the hands of advisers to manage at their discretion–without previous knowledge of the intended buying plans would have had

no opportunity of offering their shares and the proverbial maiden aunt at Lands End with a small nest egg was out of the picture.

The question is not, therefore, whether the rules were broken, but whether the rules are adequate to secure, as is the object of self-regulation, reasonable equality in the treatment of all shareholders. I am, therefore, glad that the Markets Committee and the Stock Exchange have as a matter of urgency immediately undertaken studies of the problem, and that the Department of Trade has appointed inspectors. It is important that, as our practice provides, the market should not be fettered. Or at least unduly fettered. But in this sort of case “the market” may not really be operating and the normal market mechanism by which a share price adjusts itself according to supply and demand is not effective. Transactions of this kind give rise to suspicion, however unjustified, that there could have been exchange of inside information and that deals had in fact been organised in advance so that in effect shares were available immediately business opened. I am not sure that all this is as objectionable as at first sight it may seem and it would be improper for me to suggest how if at all this sort of situation can be dealt with under the Code. Shareholders must remain free to sell their shares at the best opportunity. So far as concerns buyers of large blocks of shares however which although not exceeding the arbitrary control figure under Rule 34 of 30 % may in many cases give effective control or at least discourage the possibility of other offers for the company, the Markets Committee will no doubt look at the proposal currently under consideration in the United States where purchases of over 10% in a limited period of time would have to proceed by way of tender, or at the possibility of requiring partial bids.

One other matter worth mentioning which continues to cause some anxiety is the perhaps increasing tendency for the first public announcement of an offer to be accompanied by a statement that the offer was already the subject of an irrevocable acceptance by the directors of the offeree company and their associates, possibly controlling a very large proportion of the shares. Under former practice, directors committing themselves in this way did have to secure clearance from the Panel but this was abolished with the revision of the Rules in 1976 when offeree companies were required to have independent advice. Again one has to weigh the undesirability of fettering the market against the desirability of equal treatment for all shareholders. The Code does provide that shareholders generally should have in

their possession sufficient material on which to make an assessment and decision. Statements as to irrevocable acceptances may, although no doubt usually wrongly, suggest that undisclosed assurances as to future association may have been given to those concerned. On the other hand the advantage to shareholders is not the only matter to which directors must have regard in deciding whether to accept an offer. They must consider the position of employees and perhaps even of customers. I believe the matter should continue to be watched.

In saying all this I confess I am influenced by my keen belief that small shareholders should be given every assistance and protection. In the past the concept of a property owning democracy has concentrated on house ownership. Socially and from the point of view of mobility, other forms of property ownership are to be encouraged.

I have referred to these matters at some length in this Foreword in order to illustrate what I believe to be an essential characteristic of self-regulation in this field. The self-regulatory system–if it is successfully to resist pressures for some form of statutory system like the S.E.C. in the United States–must build itself up, so far as it is practicable for any voluntary "legislature", to be one which regulates City affairs so as to avoid possible abuses before being forced into action by public outcry about the matter. The City Panel has always taken a broad view of its functions and it together with the Markets Committee must be constantly alert in its invigilatory role so as to adapt its practices to changing circumstances before abuse occurs.

One other matter on which action, although not by the Panel, is required was illustrated by the Saint Piran case. It is quite clear that the statutory rules, in regard to the disclosure of beneficial ownership where shares are held by intermediaries are inadequate, notwithstanding the importance of full disclosure to the company concerned. Where the shares are held in the name of a company an answer by that company that it holds the shares beneficially may be literally true and satisfies the statutory requirement. But the answer may be totally uninformative: what the company whose shares are so held requires to know is who is the owner of the shares in, or who controls, the intermediate company which is registered as the share owner. Under the existing law this information, particularly in the case of foreign companies, may be impossible to ascertain. The Department of Trade has power under Sections 172/3 of the Companies Act 1948 to enquire into the true ownership

of shares as indeed it is doing in the Saint Piran case. But their enquiries inevitably take time and may be difficult to pursue in cases where the shares are registered in non-resident names. United Kingdom companies might do well to include in their articles express powers to disenfranchise from voting rights any shares held by intermediaries or others where the ultimate ownership was concealed or where the Panel has found there to be breaches of the Take-over Code in relation to the disclosure of control.

Two final observations in this which is in fact my swan song as Chairman of the City Panel. I have been impressed by the fact that the membership of the Council for the Securities Industry includes lay members. I am sure that the Governor of the Bank of England was most wise in providing for the appointment–by him and not by election by any outside bodies–of a small leavening of independent members. This has helped to counteract the image which critics have sometimes sought to create that the self-regulatory bodies are no more than merchant bankers' or stockbrokers' clubs or protection societies. In truth, I believe that the members of the City Panel have always had full regard to the general public interest rather than to their own protection. But it is important not only that this should be so, as in fact it is, but that it should be manifestly seen to be so. As the City Panel is an arm of the C.S.I. lay representation on the Panel itself may not be called for. But I am sure that as the self-regulatory system extends, as eventually I hope it will so as to cover all major activities associated with the City of London, the importance of lay representation as adding credibility to the system will not be overlooked.

In my Foreword to the Annual Report for 1978 marking the end of the first decade of the City Panel's life, I was bold enough to observe that the Panel had become established and accepted as a useful and necessary part of City machinery. Perhaps in my final remarks it would be appropriate to say why this has been so.

Primarily, no doubt, the Panel's acceptance has been due to the fact that it was established by and has at all times operated under the aegis of the Bank of England. I must express my very warm appreciation of the support which has throughout been given by Lord O'Brien of Lothbury and Mr. Gordon Richardson as successive Governors of the Bank. Secondly, but flowing naturally from the first, has been the full and loyal support given by the City Institutions, and especially the

merchant banks, on occasion at some financial loss to themselves. The full recognition of the Code and of the Panel's decisions by the professional bodies concerned has helped to provide important sanctions.

I acknowledge with real gratitude the help which the individual members of the Panel and their alternates have constantly given me, an innumerate layman brought in from outside to preside over the Panel's affairs. And finally, but by no means least, I must thank the members of the Panel's executive.

As is well known, the executive consists in part of permanent members of staff and in part of members seconded to the Panel for two years or so by outside houses. The Directors General have from the beginning been seconded. The Deputy Directors General are permanent members of the staff. Whilst the permanent members are the repositories of the Panel's wisdom and practices accumulated over the years and provide an essential element of continuity, the seconded members keep us in the closest touch with developments in the market and its practical realities. Whilst it may sometimes have been difficult for men already established in management to take themselves out of the immediate stream of activity and promotion in their own firms, I believe it to be the fact that no one, whether in the top position of Director General or in the various other positions in the executive, has in the long run been other than benefited by the wider experience which their service with the Panel has ensured, and I have rejoiced to see how, on leaving the Panel, they have gone on from strength to strength in their careers outside. Whether seconded or permanent, all the members of the Panel's executive have shown extraordinary diligence and devotion. They have worked inordinately long hours and with great skill.

It may be invidious to mention names. But I must express my lasting gratitude to all the Directors General, in particular to the first, Mr. Ian Fraser, who taught me what it was all about–and to the present one, Mr. Graham Walsh in whose hands I very confidently leave the Panel executive now. And above all I must refer to the outstanding services of Sir Alec Johnston. Coming to us in 1970 with the prestige of having been Chairman of the Board of Inland Revenue, he has been an absolute tower of strength to all of us in his position of Deputy Chairman, devoting an immense amount of time, understanding and interest to our problems. We are all, and I particularly, very deeply in his debt for his ungrudging, self-effacing but enormous help.

The Panel administration is, I like to believe, in good shape and standing. I hand over the reins of chairmanship to Sir Jasper Hollom with the utmost goodwill and assurance that those reins could hardly be in safer hands. He will bring to the conduct of the Panel's affairs his long experience in the City and the great authority he acquired as Deputy Governor of the Bank. To wish him well would be impertinent but at that risk I most warmly do so!

16th May, 1980

REPORT ON THE YEAR ENDED 31st MARCH, 1980

STATISTICS

The Panel held two meetings to hear appeals by parties to take-over transactions against rulings by the executive, seven to consider three disciplinary cases and four to consider cases referred by the Director General. There were no 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 142 (*167*) published take-over or merger proposals of which 141 (*158*) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 139 (*150*) target companies of which 108 (*112*) were listed on The Stock Exchange. In 3 (*14*) cases there were one or more rival offers. 8 (*7*) opposed offers succeeded; 5 (*3*) agreed offers failed.

A further 21 (*24*) cases which were still open at 31st March, 1980 are not included in these figures. The executive was engaged in detailed consultations in another 157 (*164*) 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

	1979/80	*1978/79*
Circulated by Exempted Dealers … … …	92	*112*
Circulated by Licensed Dealers … … …	11	*6*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	22	*19*
Circulated on the basis of specific authority from the Department of Trade … … … …	10	*12*
Scheme of Arrangement … … … …	6	*9*
	141	*158*

Outcome of proposals

	1979/80	*1978/79*
Successful proposals involving control (including Schemes of Arrangement) … … … …	99	*117*
Unsuccessful proposals involving control … …	17	*25*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	1	*9*
Offers and Schemes of Arrangement involving minorities … … … … …	25	*16*
	142	*167*

REVISION OF THE CODE

A full review of the provisions of the Code is at present in progress. Such a review is carried out as a matter of course every few years, even though no substantive shortcomings have been identified. This is the first revision of the Code to be effected by the Markets Committee of the C.S.I., which has set up a small sub-committee to consider the matter.

The sub-committee has met on a number of occasions to go through submissions received from interested parties. It has also considered twenty papers prepared by the Panel executive on various topics. The process of consultation continues with meetings being held with some of those who have submitted papers. The drafting of amendments to the Code is now well in train.

There do not appear to be any major or urgent changes demanded to the Code, so that alterations will probably be on a smaller scale than in 1976. It is likely that the new Code will be published in the latter part of this year.

In the context of revision, concern has been expressed at the tone of certain recent advertising campaigns and it has been debated whether further restrictions should be placed on the use of advertisements in take-overs. The abolition of Exchange Control necessitates a new definition of the kind of offeree company that comes within the Code. The passing of the Companies Act making insider dealing a criminal offence may require changes to the Code's insider dealing provisions. The effect of changes in the statutory definition of private companies has also been considered.

THE REMOVAL OF EXCHANGE CONTROL

Before it was substantively removed last autumn, Exchange Control had a direct influence on the application of the Code to offeree companies, as those companies which were not resident for Exchange Control purposes in the United Kingdom, the Channel Islands or the Isle of Man were normally excluded from its effect.

It is now necessary for the Panel to adopt a revised definition of residence, and the current policy of the Panel executive is to use, as tests of residence for the purposes of the Code, the offeree's country of incorporation, the location of its Head Office and the place of central management.

These tests of residence are comprised in a new definition, provisionally being used by the Panel executive, and which is expected to be adopted in place of paragraph 7 of Practice Note 1 during the forthcoming revision of the Code.

This provisional definition reads:–

> "Any offer for a company that is regarded for the purposes of the Code as not being resident in the United Kingdom, including the Channel Islands or the Isle of Man, does not normally come within the Code. However, an offer for an Irish company listed on The Stock Exchange is subject to the Code.
>
> A company would normally be regarded as non-resident for these purposes if it were incorporated outside the United Kingdom or if its Head Office and place of central management and control were situated outside the United Kingdom."

CONSULTATION

From its earliest days the Panel has urged that people with a potential problem should consult the executive before taking action. The success of the system depends to no small degree on timely consultation and hence the indication in the Code that the Panel executive is readily available to give rulings on points of interpretation of the Code.

It is therefore regrettable that cases arise where actions contrary to practices developed under the Code have been taken "on legal advice". The Code is not a Statute

and it is no answer to a failure to consult the Panel executive that a legal opinion has been obtained on the interpretation of a Rule–for instance on the interpretation of acting in concert or whether a certain form of words constitutes a profit forecast. The authority designated to interpret the Code is the Panel and it is the Panel executive that should be consulted in any case of doubt.

OVERSEAS MATTERS

The Panel executive maintains contact with most of the major overseas authorities concerned with the regulation of securities markets or with other matters which could have a bearing on United Kingdom take-overs and the administration or development of the Take-over Code. Through this process of liaison and consultation, possible improvements to both our system and theirs are considered and in addition substantial assistance has been obtained during the course of certain Panel investigations.

Representations have been made to the United States Securities and Exchange Commission on various problems that can arise in cases where there are United States shareholders in United Kingdom companies. For example, changes in the anti-trust regulations in the United States (The Hart-Scott-Rodino Anti-trust Improvements Act of 1976) can mean that the timetable for bids for United Kingdom companies may have to be adapted and the Panel executive is prepared to consider a flexible approach in appropriate circumstances.

OWNERSHIP OF SHARES

In the recent statement in relation to Saint Piran, attention was drawn to the interpretation of acting in concert in circumstances where the ultimate beneficial ownership of shares is difficult to establish. It will be evident that there are circumstances where the Panel is faced with a declaration that a particular company is the beneficial owner of shares–a statement which may satisfy the requirements of Section 27 of the Companies Act 1976 on disclosure of the capacity in which a person holds shares in a company. Nonetheless, the ultimate ownership of that company, which is highly relevant to the question of acting in concert, may be difficult to establish, e.g. where the share capital of the investing company is in bearer form or where trusts without nominated beneficiaries are the registered holders of its share capital or where the identity of the shareholders is otherwise

unavailable. In such circumstances, the Panel may have to determine the existence of parties acting in concert in relation to a potential offeree company by reference to a common pattern of behaviour of the shareholders of the offeree company together with the conduct and composition of its board of directors.

IRREVOCABLE UNDERTAKINGS

Concern has been expressed at the form of irrevocable commitments being entered into prior to or during offers, with the result that consideration is being given to a change in the Code to require such documents to be put on display. In the meantime descriptions of such commitments should make it clear if there are circumstances in which they cease to be binding, for example, if a higher offer is made or a certain date passed.

DOCUMENTS AND SECURITY

The Panel executive is aware that sometimes offer documents are proof-printed before the offer concerned has been announced, with the resultant risk of leaks of confidential price-sensitive information. Rules 7 and 30 of the Take-over Code emphasise the vital importance of absolute secrecy before an announcement, and it is strongly recommended that offer documents are not proof-printed, with or without code names, until at least a talks or preliminary announcement has been made.

STAFF

Since the last Annual Report was published, Mr. G. R. Walsh from Morgan Grenfell has become Director General in succession to Mr. D. C. Macdonald who has returned to Hill Samuel. Mr. R. A. Freeman from Hambros Bank and Mr. A. C. Jeans from Lazard Brothers have been appointed Secretaries and Mr. J. A. Kitchen has left to join Lazard Brothers.

Mr. R. A. Wade has returned to Coopers & Lybrand and Mr. C. Smith is leaving to join Cazenove. Their replacements are Mr. P. A. Tedder from Deloitte Haskins & Sells and Mr. R. S. Baden-Powell from Carr Sebag.

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