The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1981

MEMBERSHIP OF THE PANEL

Sir Jasper Hollom (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
P. R. Dugdale	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
H. B. Singer	President, Institute of Chartered Accountants in England and Wales
The Hon. T. J. Manners	Chairman, Issuing Houses Association
M. H. Oldfield	Chairman, National Association of Pension Funds
N. P. Goodison	Chairman, The Stock Exchange
M. V. St. Giles	Chairman, Unit Trust Association
Lord Cross	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

J. M. Hignett	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
R. A. Freeman A. C. Jeans	Secretaries
Miss E. G. Robinson R. S. Baden-Powell G. B. Morgan P. J. Clokey	Assistant Secretaries
Miss S. D. Fury	
D. J. Basterfield	

FOREWORD

This is only the second time in the thirteen year history of the Panel that its Annual Report has been introduced by a Chairman other than Lord Shawcross. This demonstrates the extent of the influence which he has exerted over the Panel's work and of the contribution which, as Chairman, he has made to its present standing. Equally the fact that the revision of the Code which was issued this year embodied only relatively minor changes reflects the wide measure of acceptance which, under his guidance, the Code has won in what was once a highly contentious and is still a highly competitive field of activity.

That there are now few appeals in individual cases from the rulings of the Panel executive bears witness to the position that the executive has established for itself in the City. The Panel has been extremely fortunate in the consistently high ability of successive Directors General and Mr. Graham Walsh, who has recently returned to Morgan Grenfell, fully maintained the best of past standards. We welcome Mr. John Hignett who has joined us as Director General from Lazard Brothers.

Despite the efforts of the Panel and the executive alike, there remains a lack of understanding in the minds of the public and of many commentators on the role of the Panel and the scope of its work. This is evidenced by the reporting of one or two cases over the years where it has been suggested that the failure of the Panel to secure compliance by some individual with its rulings is to be seen as a fundamental failure of the system.

The recent case involving Saint Piran Limited, which has concerned the Panel throughout the last year, is an example in point. There was much in their investigation of the complicated affairs of Saint Piran, Mr. J. J. Raper and various associated companies in which the executive could take pride, and the thoroughness of their work enabled the Panel to reach firm decisions on the obligations which under the Code should have been fulfilled in this case. It is noteworthy too that the Department of Trade inspectors, who also enquired into the affairs of Saint Piran and who had power which the Panel does not possess to summon witnesses and examine them on oath, broadly confirmed the analysis made by the Panel and were not able to add substantially to the evidence which had been collected.

While the Panel was unable to bring Mr. Raper or his associated companies to fulfil the obligations in question, to describe this, as some commentators have done, as a failure of self-regulation is clearly mistaken. Since the Panel is not a regulatory but a self-regulatory body, its essential task is the regulation of the behaviour of professional practitioners in this country in the field of take-overs and mergers. As far as is possible, it reaches out beyond that to affect the behaviour of individuals and companies, wherever based, who use the services of such practitioners; and in this it has in general been very successful for most individuals and companies can readily be persuaded of the advantages of complying with established best practice. But persons who operate principally from overseas and who may not be much concerned about their reputation in the City cannot be brought against their will to observe its requirements.

The fact that in the last resort the behaviour of those who are not professional practitioners can only be affected by the influence of the Panel on the one hand and by rules resting on statute on the other underlines the importance of close and understanding relations between the Panel and those responsible for the operation of statutory powers and controls; and explains the disappointment of the Panel that HMG were not prepared to use available statutory powers to take action in relation to Saint Piran in the way the Department of Trade's inspectors recommended or to refer the take-over of Saint Piran by Mr. Raper's company to the Monopolies and Mergers Commission. Either of these courses would have worked towards the aims that the Panel must and will pursue. The outcome here is to be seen not as a failure of the Panel and its Code in its proper field but as an example of the limitations that in practice beset the use of statutory powers.

4th August, 1981

REPORT ON THE YEAR ENDED 31st MARCH, 1981

STATISTICS

During the year, the Panel held one meeting to consider a case referred by the Director General and one to consider a disciplinary case which was subsequently the subject of an appeal before the Appeal Committee.

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 147 (*142*) published take-over or merger proposals of which 134 (*141*) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 134 (*139*) target companies of which 102 (*108*) were listed on The Stock Exchange, In 12 (*3*) cases there were one or more rival offers. 8 (*8*) opposed offers succeeded; 5 (*5*) agreed offers failed.

A further 26 (*21*) cases which were still open at 31st March, 1981 are not included in these figures. The executive was engaged in detailed consultations in another 159 (*157*) 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

	1980/81	*1979/80*
Circulated by Exempted Dealers … … …	85	*92*
Circulated by Licensed Dealers … … …	6	*11*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	23	*22*
Circulated on the basis of specific authority from the Department of Trade … … … …	8	*10*
Scheme of Arrangement … … … …	12	*6*
	134	*141*

Outcome of proposals

	1980/81	*1979/80*
Successful proposals involving control (including Schemes of Arrangement) … … … …	97	*99*
Unsuccessful proposals involving control … …	13	*17*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	13	*1*
Offers and Schemes of Arrangement involving minorities … … … … …	24	*25*
	147	*142*

REVISION OF THE CODE

The new edition of the Code, published in February 1981, followed a detailed review, in the course of which comments were sought from all members of the Council for the Securities Industry and of the Panel and from other interested parties. It takes into account the comments made and the experience of the Panel since 1976. Certain of the points made in the Panel's Annual Reports since April 1976 are also reflected in the revised Code.

In general, the alterations embodied in the revised edition do not reflect any significant changes in the scope or emphasis of the Code. The majority have been made purely for the purpose of clarification.

There is no fundamental change in the format. For ease of presentation certain provisions formerly contained in the separately bound miscellaneous Practice Note No. 9 have become Practice Notes in their own right and are bound into the main booklet. As a result, the number of Practice Notes has been increased from nine to seventeen. The miscellaneous Practice Note No. 17 is separately bound but is considerably shorter than its predecessor.

There are changes to the provisions applying to the disclosure of financial information and the making of profit forecasts. It is made clear that the Code now applies additionally to financial information published, and to profit forecasts made, on a current cost basis of accounting. The Code stresses that shareholders must recognise that only limited reliance can in the nature of things be placed on any forecast. Practice Note No. 6 also provides that any unaudited profit figures (e.g. interim or preliminary) published during an offer period by the parties to an offer should be reported on by the company's auditors or consultant accountants and by its financial advisers.

The requirements in connection with partial offers have been relaxed in certain respects and as a result Rule 27 has been considerably altered. Some detailed provisions of Rule 30 have been removed in consequence of the sections of the Companies Act 1980 relating to insider dealing. Rule 37 has been shortened and simplified.

INSIDER TRADING

In 1973 the Panel and The Stock Exchange jointly called for legislation against insider trading. On two occasions since then a change of Government has caused a

proposed bill to be dropped but in June 1980 legislation was eventually implemented.

For many years The Stock Exchange carried out investigations into dealings where it was suspected that there might have been abuse of a privileged position. Since the creation of the Panel, information obtained through these Stock Exchange investigations has, in the case of dealings carried out before the announcement of take-over bids, been passed to the Panel for further investigation. Armed with the names of the persons who dealt in the period under review, the Panel's task was to question those persons and make other enquiries in an attempt to establish whether or not there had been a breach of Rule 30 of the Code which seeks to prohibit dealings by persons who are privy to the fact that a take-over bid may be made.

This was no easy task. Although there have been such cases it is not to be expected that a director of a company wanting to make a profit through insider trading will trade in his own name: much more likely is it that he will use a nominee or some apparently unconnected person. An even more likely offence is that a director will, either deliberately or carelessly, simply pass the price-sensitive information to such an unconnected person. Either of these circumstances would be a breach of the Code by the director but not, in most cases, by the other person since the Code, being a measure of self-regulation, is not to be applied to ordinary citizens not directly connected with the companies involved in bids. Therefore the Panel's objective was to try and induce persons apparently unconnected with the companies concerned to explain their dealings and to reveal the source of any information they had received.

A number of breaches of the Code were discovered over the years and suitable sanctions taken against the offenders but the Panel was sometimes hampered in this area by the lack of legal powers. This fact, and the fact that the investigations so often meant dealing with persons who were not regularly involved in City matters, were two of the main reasons why it was felt that legislation was essential and why it is now welcomed.

Both the Panel and The Stock Exchange are now concerned to draw the attention of the authorities to cases apparently meriting further investigation under the law and thereafter to give all the assistance they can. The greater burden will be borne by The Stock Exchange and this will involve the continued collection of details of

dealings. Both bodies will, of course, continue to deal with leaks of information and the appropriate timing of public announcements to shareholders.

MARKET RAIDS

Following the issue of the Council for the Securities Industry's "Rules Governing Substantial Acquisitions of Shares", the Panel executive is now responsible, on behalf of the Council, for administering these Rules, with the exception of those directly relating to the mechanics of tender offers through The Stock Exchange which are The Stock Exchange's responsibility.

The Panel executive is available to answer questions on market raids in the same way as it answers questions on the Take-over Code.

PURCHASE BY A COMPANY OF ITS OWN SHARES

Proposals are now before Parliament which are designed to give power to companies to purchase, if authorised to do so by their Articles, their own shares.

Before the enactment of the proposed legislation, the Panel and the Council for the Securities Industry will consider the effects of the relevant clauses on the provisions of the Code and decide the extent to which the Code should be modified, whether by the alteration of existing Rules or the addition of an appropriate Practice Note.

There is no doubt that the purchase by a company of its own shares could have substantial consequences prior to, or during the course of, a take-over bid. The Panel will be considering, in particular, the effect of the reduction by a company of its own capital upon the existing percentage shareholdings. Amongst the provisions of the Code which would be likely to be particularly affected would be General Principle 4 and Rules 21, 27, 30, 31, 33, 34, and 38.

ROTHMANS INTERNATIONAL LIMITED

The Panel issued a statement on 19th May, 1981, copies of which are available on request, following the agreement between Philip Morris Inc. ("PM") and Rembrandt Group Limited ("Rembrandt") whereby PM would acquire *inter alia*, a holding of 50% of Rothmans Tobacco (Holdings) Limited ("RTH") from Rembrandt, RTH itself holding a controlling interest in Rothmans International Limited

("Rothmans"). This, combined with equal board representation without any provision for casting votes or other arrangements existing in relation to the exercise of votes, would produce a deadlock situation between the two shareholders, neither shareholder having control of RTH.

The Panel decided therefore that control of Rothmans would not alter in such a way as to give rise to a bid obligation under Rule 34 of the Code by the parties concerned.

It may be that at some future date the deadlock is broken in a way that passes control of Rothmans to one of these parties, which will then, in the absence of exceptional circumstances, have an obligation under Rule 34 to make an offer to all shareholders.

In the unique circumstances of this case, which are not specifically covered by the Rules, the Panel, taking into account the General Principles of the Code, placed on record the following:–

"Rembrandt and PM have undertaken to the Panel that, without prior discussion with the Panel, and giving the Panel the opportunity of determining the responsibilities of the parties under the Code, neither they nor RTH nor any person acting in concert with any of them will acquire or offer to acquire any further shares of Rothmans (other than as a result of offers or issues of new Rothmans' shares to all shareholders generally), nor will they convert into shares any convertible bonds. In making its determination at that time the Panel would have in mind the provisions of General Principle 8 that all shareholders should be treated similarly and would take into account all factors then relevant, including the circumstances of and the price paid in the present transaction."

RULE 13 (1) (c)

An addition was made to the Take-over Code during the year, prior to the publication of the revised Code itself, adding a third part to Rule 13 to the effect that a statement must now be made in offer documents that settlement of the offer consideration to which any shareholder is entitled will be implemented in full under the terms of the offer without regard to any lien, right of set-off, counter-claim or other analogous right.

Any claims to which an offeror may be or claim to be entitled should be made after all shareholders have been paid. However, in a case where certain offeree shareholders

have entered into an agreement with the offeror to accept its offer and such agreement contains warranties given by the shareholders, the Panel, on application by all the parties concerned, intends to allow those particular shareholders to be specifically excluded from the statement required by Rule 13 (1) (c).

THE COMMITTEE TO REVIEW THE FUNCTIONING OF FINANCIAL INSTITUTIONS

During the year the Wilson Committee produced its review of the functioning of financial institutions, which included reference to the Panel. The review acknowledged the considerable success that the Panel has had in transforming what has been described as a jungle ten or so years ago into an orderly and regulated procedure.

The Committee found no reason to question the detail of the Code itself, this being subject to continuous review, or the efficiency with which it is administered.

The review discussed at length the powers of the Panel and the alternative merits of statutory and non-statutory regulation. In particular the review commented that the Panel's authority rested on the acceptance of both full Panel and executive rulings by the general financial community and by the associations which make up its membership. The various sanctions available to the Panel were considered and although there were comments on the possible benefits of, for example, powers of subpoena, the Committee pointed out that the advantages of self-regulation such as flexibility and speed might be lost if a more formalised system was to be introduced.

STAFF

Since the last Annual Report was published, Mr. J. M. Hignett from Lazard Brothers has become Director General in succession to Mr. G. R. Walsh who has returned to Morgan Grenfell.

Miss J. E. Plumbly has returned to the Bank of England and Mr. P. A. Tedder has returned to Deloitte Haskins & Sells. Their replacements are Mr. G. B. Morgan of the Bank of England and Mr. P. J. Clokey of Price Waterhouse.

(*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.***)