

The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1982

MEMBERSHIP OF THE PANEL

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| 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 |
| I. J. Fraser | Chairman, Accepting Houses Committee |
| Lord Mark Fitzalan Howard | 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 |
| Sir Nicholas Goodison | Chairman, The Stock Exchange |
| M. V. St. Giles | Chairman, Unit Trust Association |
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| The Hon. Sir Henry Fisher | Chairman of the Appeal Committee of the Panel |

THE PANEL EXECUTIVE

| | |
|--------------------|--------------------------|
| J. M. Hignett | Director General |
| P. R. Frazer | Deputy Directors General |
| T. P. Lee | |
| G. F. Pimlott | Secretary |
| G. B. Morgan | Assistant Secretaries |
| P. J. Clokey | |
| A. G. B. Pullinger | |
| Mrs. C. M. Brown | |
| Miss S. D. Fury | |
| Mrs. J. H. O'Neill | |

FOREWORD

The year covered by the Report which follows has once again laid a heavy workload on the staff of the Panel and has also seen an above-average number of changes in the staff as secondments have reached their end and new secondments have been arranged. I should like to start this foreword therefore by expressing my thanks and those of my colleagues on the Panel for the very high standards of effort and of skill that the staff continue to maintain.

Another change during the year has been the retirement in December of Lord Cross as Chairman of the Panel's Appeal Committee, a post which he had filled since May 1976. The Panel, and a much wider circle too, are much indebted to Lord Cross for undertaking this task and we are most grateful for the helpfulness and wisdom which he has always brought to the affairs of the Panel. In his place we welcome the Hon. Sir Henry Fisher, President of Wolfson College, Oxford and formerly a High Court Judge.

As will be readily understood, only a very partial view of the workload falling on the Panel executive can be drawn from the statistics included in the Report and still less can it be assessed from the relatively few cases which attract wide press coverage. The figures given of cases of detailed consultations which did not lead on to published proposals (which it will be seen comfortably exceeded the number of cases reaching the publication stage) do however give a reminder of a side of the work which is seldom noticed but is of great importance—that of giving advice and rulings on how the provisions of the Code should be applied to the circumstances of any particular case. While such enquiries often put a substantial burden on the staff, they are very much to be welcomed in that they help to eliminate at an early stage possible misunderstandings which could otherwise cause serious difficulties at a later time. A recent Panel hearing has served to underline once more the adverse consequences that can flow from a failure to check the position where there is any scope for doubt. Given the fact that this service is always available, the Panel cannot be expected to view with any leniency instances where avoidable difficulties subsequently arise because it has not been used.

The need for such consultation naturally grows as the provisions of the Code become more complex and it is unfortunately the case that as new developments in market practice occur both the scope of the Code and the detail of its provisions tend inexorably to increase. This has been well illustrated by the new regulations it

has been necessary to make this year arising from developments in the technique of market raids; and the discussion and drafting of this material has been a substantial feature of the year's work. The Panel is very conscious of the disadvantages that flow from increasing the complexities of the Code and will strive to keep them to a minimum; but the prime consideration must be to keep the Code abreast of developing practice. I hope that the next edition of the Code will allow of the incorporation of the Council for the Securities Industry's related Rules Governing Substantial Acquisitions of Shares within the same cover, so as to end the need for reference to two separate booklets.

Looking ahead, one can see the prospect of a good deal of debate on the future regulation of the securities markets following the decision of the Department of Trade to embark on a revision of the Licensed Dealers (Conduct of Business) Rules 1960, and the commissioning by the Secretary of State for Trade of a review by Professor Gower of the statutory protection needed by investors. While these developments are at too early a stage for any comment to be made here, both have obvious relevance for the Panel; and the Panel will of course look forward to playing a full part in any new arrangements which may flow from these initiatives. The prospect that opportunity may be found in the foreseeable future (though not, it seems clear, in the life of the present Parliament) for a major revision of the Prevention of Fraud (Investments) Act is a useful reminder, for those who would wish to see a substantially greater role for statutory regulation in this area, of how infrequently Parliament is in practice able to turn its attention to such questions. The present Act, as Professor Gower notes in the discussion document that has already been published, while dating from 1958, largely reflects reactions to events which occurred in the securities markets as long ago as the early 1930s.

3rd June, 1982

REPORT ON THE YEAR ENDED 31st MARCH, 1982

STATISTICS

During the year, the Panel held two meetings to hear appeals by parties to take-over transactions against rulings by the executive, both of which were dismissed.

The Panel also met to hear one disciplinary case which was subsequently the subject of an appeal before the Appeal Committee. The appeal was dismissed.

There were 147 (*year ended 31st March, 1981-147*) published take-over or merger proposals of which 135 (*134*) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 134 (*134*) target companies of which 105 (*102*) were listed on The Stock Exchange. In 13 (*12*) cases there were one or more rival offers. 5 (*8*) opposed offers succeeded; 4 (*5*) agreed offers failed.

A further 15 (*26*) cases which were still open at 31st March, 1982 are not included in these figures. The executive was engaged in detailed consultations in another 160 (*159*) cases which either did not lead to published proposals or were transactions involving controlling blocks of shares subject to approval by shareholders.

| Category of offer documents | 1981/82 | 1980/81 |
|--|------------|------------|
| Circulated by Exempted Dealers | 83 | 85 |
| Circulated by Licensed Dealers | 12 | 6 |
| Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 | 23 | 23 |
| Circulated on the basis of specific authority from the Department of Trade | 9 | 8 |
| Schemes of Arrangement | 8 | 12 |
| | <u>135</u> | <u>134</u> |

Outcome of proposals

| | | |
|--|------------|------------|
| Successful proposals involving control (including Schemes of Arrangement) | 81 | 97 |
| Unsuccessful proposals involving control | 24 | 13 |
| Proposals withdrawn before issue of documents (including offers over-taken by higher offers) | 12 | 13 |
| Offers and Schemes of Arrangement involving minorities | 30 | 24 |
| | <u>147</u> | <u>147</u> |

The executive was also involved with numerous cases relating to the Rules Governing Substantial Acquisitions of Shares.

MARKET RAIDS

On 7th April, 1982 a revised version of the Rules Governing Substantial Acquisitions of Shares, three new Code Rules (40, 41 and 42) and a Practice Note were published, to give effect to the Statement made by the Council for the Securities Industry on 21st January, 1982. Copies of the new Code Rules and the Practice Note may be obtained from the Secretary, Issuing Houses Association, Granite House, 101 Cannon Street, London, **EC4N 5BA** (telephone number: 01-283 7334).

The purpose of these Rules is to prevent an offeror or potential offeror from obtaining or consolidating control (i.e. shares which carry 30% or more of the voting rights) of a company prior to the first closing date of its offer. The Rules do not apply to a person who has statutory control of a company (i.e. holds shares carrying over 50% of the voting rights) nor to acquisitions which immediately precede, or take place seven days after, the announcement of a recommended offer.

Where no offer has been announced, a person may not acquire shares which would give, or consolidate, control of a company, or obtain rights over such shares (e.g. by an agreement to purchase shares, or by taking options or irrevocable undertakings). Where a person has announced an offer, he may not purchase any shares, or obtain any rights over shares, for seven days, and thereafter, unless it is a recommended offer, he may not purchase shares, or obtain any rights over shares, which would give him control, or consolidate such control, until the first closing date.

One important exception to these Rules is an acquisition from a single shareholder. This exception is designed to permit the holder of a substantial block of shares to sell that block, even if the purchaser would thereby come to obtain or consolidate control. This exception has been available under the Rules Governing Substantial Acquisitions of Shares since their inception, and under those Rules allows a purchaser to exceed the prescribed rate of acquisition. Under both sets of Rules a person who makes a purchase of this nature from a single shareholder, may not do so within seven days of making any other purchase of shares or rights over shares.

In administering the Rules Governing Substantial Acquisitions of Shares the Panel has noted a number of occasions on which this seven day rule has not been observed. The Panel considers that where professional advisers are assisting their

client to make an acquisition from a single shareholder, there is a firm responsibility resting on those advisers to ensure, insofar as they are able, both that their client is familiar with the relevant Rules and that there are no surrounding circumstances which could result in a breach of them. In particular they should make enquiries to ensure that their client has not purchased, and will not purchase, any shares or rights over shares within seven days of the acquisition from the single shareholder.

As with other Rules, the Panel executive is available to answer questions on the revised Rules Governing Substantial Acquisitions, and the new Code Rules. Any person who is in doubt about the meaning or effect of any of these Rules should seek guidance from the executive rather than act upon his own interpretation.

DISCLOSURE OF INTERESTS IN SHARES

The provisions of sections 63 to 72 of the Companies Act 1981 will be brought into effect on 15th June, 1982. These sections extend the previous requirements for a person to disclose his interest in shares above a notifiable level (currently 5%) in two ways. Firstly the new provisions apply to all public companies whether or not their shares are listed on a recognised Stock Exchange. Secondly the disclosure requirement is extended to groups of persons acting together which in aggregate have interests exceeding the notifiable level.

An amendment to Rule 31 (3) is being published requiring all persons with notifiable interests to disclose any relevant event to The Stock Exchange, the Panel and the press not later than 12 noon on the dealing day following any such event. Any person in a group must also disclose the details required by section 67 (8) or (9) of the Companies Act 1981.

INDEPENDENT ADVICE TO OFFERORS

An amendment to Rule 4 and an appropriate addition to Practice Note No. 17 is also being published. This has the effect of requiring the board of an offeror company, in certain circumstances, to seek independent advice on whether its offer is in the interests of its shareholders.

There have been a few cases in recent years where, because of the unusual circumstances, for instance cross-shareholdings between the companies, it has seemed in retrospect that the interests of the offeror company's shareholders would

have been better served if independent advice on the offer had been given to them. In these circumstances the offeror company will usually need to hold a general meeting to implement the proposed offer, and shareholders will have an opportunity to consider any advice given and in the light of that advice to authorise or reject the proposed offer.

The Rule now requires the board of an offeror company to obtain competent independent advice on any offer where the offer being made is a reverse take-over or the board of the offeror company has a possible conflict of interest.

PURCHASE BY A COMPANY OF ITS OWN SHARES

The provisions of Sections 45 to 62 of the Companies Act 1981, which contain powers for companies under certain circumstances to issue redeemable shares and to purchase their own shares, will be brought into effect on 15th June, 1982.

Where the board of a company is proposing to exercise the powers of the company to redeem or purchase its own shares the matter should be discussed with the Panel executive in advance.

AREAS OF THE CODE WHICH HAVE GIVEN RISE TO DIFFICULTIES

FOR THE PARTICULAR ATTENTION OF STOCKBROKERS AND OTHERS WHO DEAL IN SECURITIES

1 Responsibility for establishing whether a client is an Associate Paragraph 5 of Practice Note No. 12

In connection with the requirements for the disclosure of dealings during an offer period this Practice Note places a general duty on brokers, banks and others who deal in the securities of companies to ensure, so far as they are able, that their client is aware of the disclosure obligations attaching to associates. This general duty obtains when the total value of dealing in any relevant security for a client during the same Stock Exchange account period is £5,000 or more.

This is a very important matter. The duty can only be satisfactorily carried out if the client is specifically asked whether he himself is an associate or is acting for an associate. It may be advisable when substantial deals are being undertaken to ask for confirmation in writing.

2 Information issued by associate brokers

Paragraph 3 of Practice Note No. 2 limits the information which may be published by associate brokers during an offer. The Panel wishes to stress that no profit forecast or estimate should be published by an associate broker, unless it is a repetition of a forecast that the company has already published.

FOR THE PARTICULAR ATTENTION OF FINANCIAL ADVISERS

3 Consequence of acquiring shares and coming within Rule 34 during the course of an offer period

Rule 22 of the Code requires that if an offer is revised it must be kept open for at least 14 days after the date of posting written notification to shareholders; as a consequence an offer may not be revised after the 46th day. The Panel considers that if an offeror purchases shares during an offer period with the result that the offer falls within the provisions of Rule 34 of the Code—i.e. the offer becomes a mandatory one—the offer is to be regarded as having been revised even though it may not be necessary to alter the type of consideration or the conditions of the offer: consequently purchases of shares having the effect of bringing Rule 34 into play must not be made after the 46th day.

4 Triggering of Rule 34 to be announced immediately

Rule 34 (5) requires an announcement to be made immediately upon the acquisition of shares which gives rise to an obligation to make a mandatory bid. It is of the greatest importance that such announcements should be delivered to the Company Announcements Office of the Quotations Department of The Stock Exchange at the same time as the acquisition is made or the put-through completed in the market.

5 *Current Cost Accounts*

Rule 15 requires that shareholders must be put in possession of all the facts necessary for the formation of an informed judgement as to the merits or demerits of an offer. Practice Note No. 5 indicates the nature of the information that should be so provided. On several occasions recently current cost accounting figures have been omitted from offer documents. Financial advisers are reminded that such figures must be included, if they have been published.

6 *Sales of shares by offerors*

Paragraph 3 of Practice Note No. 1 prevents an offeror from selling any securities in the offeree company unless it has publicly given at least 24 hours' notice that it may make such sales. This prohibition should be taken to apply not only to an offeror but also to any person acting in concert. In order to avoid the possible creation of a false market, after an offeror has publicly announced that it may sell, the Panel will not allow such an offeror to purchase any further shares during the offer period, although it may of course take in acceptances.

7 *"Whitewash" documents sent to shareholders in respect of proposals under paragraph 9 of Practice Note No. 15*

Paragraph 9 of Practice Note No. 15 provides a procedure for the approval by an independent vote at a general meeting of shareholders of an issue of shares which would otherwise cause a general offer to be made under Rule 34. In every case a waiver of Rule 34 is required from the Panel. This waiver is always conditional on the approval by shareholders of the relevant resolution, and subject to the Panel's being satisfied that the document to be sent to shareholders complies with its requirements. Although the Panel executive does not normally approve offer documents prior to their being posted, in the case of a letter to shareholders seeking their approval in accordance with that paragraph, the executive must always see and give their specific approval to the document before it is sent.

There have been a number of occasions recently where documents have been submitted to the executive only shortly before they are intended to be posted. In some instances they have required substantial amendment to comply with the Panel's requirements. Financial advisers are urged to submit proofs as early as possible to the executive so that they have adequate time to consider the document and ensure that those requirements are being met. In such cases it is not sufficient to clear the document with the Quotations Department of The Stock Exchange alone.

STAFF

Since the last Annual Report was published the Joint Secretaries of the Panel have completed their terms of secondment and have left the staff. Mr. R. A. Freeman has taken up an appointment at Charterhouse Japhet and Mr. A. C. Jeans has returned to Lazard Brothers. The Secretary of the Panel is now Mr. G. F. Pimlott from Lovell, White & King.

Miss E. G. Robinson has returned to the Bank of England and Mr. R. S. Baden-Powell is now a director of London Timeshare Properties. Their replacements are Mrs. C. M. Brown from the Bank of England and Mr. A. G. B. Pullinger from Laing & Cruickshank.

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