The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1984

MEMBERSHIP OF THE PANEL

Sir Jasper Hollom (Chairman)	Nominated by the Governor of the Bank of England
M. W. Jacomb (Deputy Chairman)	Nominated by the Governor of the Bank of England
I. J. Fraser	Chairman, Accepting Houses Committee
R. P. St. G. Cazalet	Chairman, Association of Investment Trust Companies
J. J. Howard	Chairman, British Insurance Association
Sir Timothy Bevan	Chairman, Committee of London Clearing Bankers
E. H. Bond	Nominated by The Confederation of British Industry
Sir Patrick Neill	Chairman, Council for the Securities Industry
A. J. Hardcastle	President, Institute of Chartered Accountants in England and Wales
R. D. Broadley	Chairman, Issuing Houses Association
T. Heyes	Chairman, National Association of Pension Funds
Sir Nicholas Goodison	Chairman, The Stock Exchange
Miss A. Head	Chairman, Unit Trust Association
The Hon. Sir Henry Fisher	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

T. G. Barker	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
A. D. Macaulay	Secretary
J. G. FG. Palfrey J. W. Bloomer P. E. Mason N. F. G. Brown N. P. Hinton	Assistant Secretaries
Mrs. J. H. O'Neill	
Miss J. S. Lamont-Carter	

FOREWORD

Looking back over the year covered by the Report which follows, I must first refer to two important changes in the Panel hierarchy. In the first place Sir Alexander Johnston retired in July from the position of Deputy Chairman which he had filled (latterly in tandem with his Deputy Chairmanship of the CSI) since 1970. It would be hard to overstate the contribution Sir Alexander made over this long and critical period to the development of the Panel and the Code and the unflagging effort he devoted, with notable success, to every aspect of the Panel's affairs; and I have particular reason to be grateful for his unstinting support. In the second place at the end of December Mr. John Hignett, who had held the appointment of Director General since July 1981, returned to Lazard Brothers–rather later than had originally been planned since he and Lazards kindly agreed to an extension of his term to enable him to establish the additional role he took on from March 1983 as Director General of the CSI. Mr. Hignett thus not only very fully maintained the high standards and reputation built up by his predecessors as Director General, but broke new ground in widening his sphere of interest and in drawing still closer the links between the Panel and the CSI. The Panel would certainly wish to record its great appreciation of the work of both Sir Alexander and Mr. Hignett and of the conspicuous contribution they have made to the continuing success of self-regulation in the area for which the Panel has responsibility. Their respective places at the Panel have been taken by Mr. M. W. Jacomb and Mr. T. G. Barker, both as it happens of Kleinwort Benson, of which Mr. Jacomb is a Vice-Chairman.

The workload on the Panel executive has continued to be very heavy throughout the year, as is exemplified by the increase in the total number of offers shown in the Report, many of which were contested. There has also been a marked increase in the number of cases taken to the full Panel. To the pressure of current cases has been added a substantial volume of work, to which fuller reference is made in the Report, on the revision of the Code and its re-ordering into a new format, which should be of considerable benefit to users. The Panel is also very conscious of the inexorable pressure, to which reference has been made in the past, towards the introduction of new Rules or Practice Notes, which serve to make the Code a more formidable and less easily handled document. It is to be hoped that the production of the new Code will present an opportunity to simplify it to some extent; and equally, every effort will be made to keep future expansion within narrow bounds, placing full reliance on the established understanding that the Code should concentrate on broader rather than more detailed rules and that the spirit rather than the letter is the proper guide to behaviour.

Another area of activity during the past year has been the study of and contribution to the work of Professor Gower on investor protection. While the Panel is only concerned with a small part of the wide field covered by Professor Gower, it is of course anxious to make as full and as helpful a contribution as possible to this

review. On the narrower front covered by the DTI's Licensed Dealers (Conduct of Business) Rules, attention should be drawn to the statement issued by the Department in December (the text of which is appended to the Report) setting out their attitude towards the distribution of take-over documents following the introduction of the revised Rules. The statement, emphasising the Department's preference for relying on "the effectiveness and flexibility" of the Code rather than including in the Rules detailed provisions about take-overs, underlines their expectation that, so far as public companies (and any private companies covered by the Code) are concerned, those making bids will use the services of a dealer in securities authorised under the relevant Act, as a means of ensuring that such take-overs are conducted fully in accordance with the Code's requirements. It is made clear that only in exceptional circumstances will the Department be prepared to dispense with this safeguard. This recognition of and reliance on the effectiveness of the Code is of course most welcome to the Panel.

This Foreword has laid a good deal of emphasis on the weight of business falling on the executive in the past year–a load which has not been made any easier to carry by reason of a rather large number of staff changes following a year which saw none. With these circumstances especially in mind I wish to express particular thanks to the executive for the exemplary way in which its burdens have again been shouldered.

Finally brief note should be made of the fact that the year saw the closing of the St. Piran chapter. Though this was achieved later than the Panel would have wished and though it was impossible to job backwards and secure for the former shareholders of St. Piran the benefits that observance of the Panel's rulings would have given them, it is nevertheless welcome to have this demonstration of the effects that can be secured in support of the Code by denial to those who ignore its requirements of some of the services of the City.

8th June, 1984

REPORT ON THE YEAR ENDED 31st MARCH, 1984

STATISTICS

During the year the Panel held 7 meetings to hear appeals by parties to take-over transactions against rulings by the executive and 3 to consider cases referred by the executive. Of the appeals, 6 were dismissed. There were no cases heard by the Appeal Committee during the year.

There were 163 *(year ended 31st March, 1983–121)* published take-over or merger proposals of which 158 *(113)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 155 *(112)* target companies, of which 131 *(98)* were listed on The Stock Exchange; 2 involved offers for private companies of the kind now subject to the Code. In 8 *(8)* cases there were one or more rival offers. 7 *(6)* opposed offers succeeded; 11 *(4)* agreed offers failed.

A further 31 *(27)* cases which were still open at 31st March, 1984 are not included in these figures. The executive was engaged in detailed consultations in another 152 *(136)* cases which either did not lead to published proposals or were transactions, subject to approval by shareholders, involving controlling blocks of shares.

Category of offer documents	1983/84	*1982/83*
Circulated by Exempted Dealers … … …	107	*81*
Circulated by Licensed Dealers … … …	28	*13*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	13	*14*
Circulated on the basis of specific authority from the Department of Trade … … … …	–	*2*
Schemes of Arrangement … … … …	10	*3*
	158	*113*

Outcome of proposals		
Successful proposals involving control (including Schemes of Arrangement) … … … …	116	*88*
Unsuccessful proposals involving control … …	30	*16*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	5	*8*
Offers and Schemes of Arrangement involving minorities … … … … …	12	*9*
	163	*121*

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

CHANGES INTRODUCED DURING THE YEAR

On 14th October, 1983 the following amendments to the Code were published.

Purchases of shares following an offer

An amendment to Rule 35 now prevents an offeror, following the closing of a successful offer, from making a second offer or purchasing shares at a higher price than that made available under its previous offer within six months of that offer closing.

"No increase" and "shut-off" statements

Amendments to Practice Note No. 11 clarify the position relating to "no increase" statements and "shut-off notices" and introduce a further exception enabling an offeror to increase or improve its offer even if it has stated this to be "final" (or used phrases having a similar effect), provided that the board of the offeree company recommends the new increased offer for acceptance. In addition, an offeror which has made a no increase statement and declared its offer unconditional in all respects will be permitted to revise its offer to outstanding minority holders provided that it is prepared to extend the revised terms to all those who have accepted the original offer.

Revision in the last fourteen days of an offer

The existing entry in Practice Note No. 17 relating to Rules 22, 32, 33 and 34 has been expanded to explain more fully the Code's requirements in this area and to make it clear that an offeror can only make, a purchase which gives rise to a mandatory bid obligation under Rule 34 of the Code if the offer is not prevented from remaining open for at least 14 days from the time when written notification of the terms of the mandatory offer is posted to the offeree shareholders.

THE DEVELOPMENT OF THE CODE

The intention has always been that the Code should contain General Principles of conduct to be followed by parties in take-over and merger transactions together with a number of Rules resting on those Principles. Although some of the Rules govern specific matters in detail, it has been accepted that it is not practicable to write detailed Rules which would cover every set of circumstances that might arise during the course of a take-over.

Over the years a number of new Rules have been introduced but the main reason for the difference in size between the Code now and the original version issued in 1968 is that Practice Notes have been added when rulings or interpretations have been given which have a general application. A further significant addition was the extension, in 1982, of some of the concepts of the Rules Governing Substantial

Acquisitions of Shares into the area covered by the Code in the form of Rules 40 to 42. These Rules are complicated and contain a significant number of specific limitations and requirements; it was therefore thought right that they should be drafted in a detailed way and issued with comprehensive guidance notes.

The result of these changes is that the Code has become a rather complicated document. This is perhaps inevitable if the refinements to the Code arising from decisions on past cases, which are necessarily added to year by year, are to be brought to the attention of practitioners generally. There is, however, sometimes a tendency to forget that, while some subjects have had to be dealt with in detail, most points are not and it is the spirit behind each Rule which is important.

Because of the way Practice Notes have evolved over the years, the Code has become more difficult to use. For some time therefore work has been in progress on the preparation of a new format which it is hoped will be more helpful to practitioners and which will allow for amendments to be made in the future without a complete reprint or the issue of loose sheets of paper.

PRESS ADVERTISEMENTS AND INTERVIEWS

During strongly contested offers it continues to be common for advertisements to be placed in the press and for personal views to appear in press articles. These two features have often caused the Panel concern and have been the subject of both general and particular complaints.

The Code requires accuracy and fair presentation in advertisements. Advertisements must therefore be prepared with great care and the professional advisers and their principals must keep this requirement in the forefront of their minds. Under the Code the wording and format of all advertisements must be cleared with the Panel executive before publication. The executive will deal quickly with requests for such clearance, but it must be given hours rather than minutes to respond to a draft: it is also helpful if advance warning of the submission of a draft can be given.

On a number of occasions in the last year the executive has required draft advertisements to be altered in some respect in order that they should be fair and accurate. A particularly difficult area has been advertisements which contain derogatory comments about the other side. In such cases the onus upon the professional advisers to produce fair and accurate copy is very great.

From time to time there has been adverse comment about the style of certain advertisements. The Panel does not aspire to be the arbiter of good taste, but it hopes that companies and their advisers will be mindful of this aspect.

Not infrequently, directors and advisers are quoted in the press in such a way that subsequent retraction or clarification has to be made. However, it is always difficult, if not impossible, to restore the *status quo ante* and the Panel cannot overstress the care necessary when making statements that are likely to be published. Professional advisers should warn their clients at the earliest possible moment of the dangers inherent in this field and of areas of sensitivity on which comment may be best avoided.

LEAKS OF PRICE-SENSITIVE INFORMATION

Last year, as in previous years, a considerable number of offer announcements were preceded by a noticeable rise in the share price of the offeree company. Typically, the price rise may start anything up to a week or two before the announcement, although in most cases where there is a considerable rise it takes place in the forty-eight hours before the announcement.

It often appears to be the case that such a number of people are made aware of the possibility of an offer before any announcement is made that the chances of a leak, albeit inadvertent, are extremely high. The Panel appreciates that, because of the complexity and importance of a take-over, there is often a need to involve many people, including a range of professional advisers. However, it is obviously important to keep to an absolute minimum the number of people who are informed, people being informed only if and when it is absolutely necessary for them to know.

The first sentence of Rule 5(2) reads as follows:

> "In any situation which might lead to an offer being made, whether welcome or not, the board of the potential offeree company should keep a close watch on the share price; in the event of any untoward movement they should make an immediate announcement, accompanied by such comment as may be appropriate."

The Panel has always attached great importance to this Rule. It is natural for companies and their advisers to be reluctant to make a press statement before negotiations have been completed. There can therefore be an understandable conflict of objectives between the Panel, which requires that the market is properly informed, and companies and advisers who would prefer to say nothing publicly until the transaction is fully agreed.

The Panel recognises this conflict and is alive to the arguments against making announcements too early. Nevertheless, it is of paramount importance that where talks are in progress and there has been an untoward movement in the offeree company's share price an immediate announcement should be made, since the price movement demonstrates that shareholders have been exposed to the risk of being

taken advantage of in the market. By way of guidance, in the absence of special factors the Panel would consider that an announcement is required if there is an increase of 10% in the share price. If there is any doubt about whether an announcement should be made, the executive should be consulted. It is emphasised that a statement that talks which may or may not lead to an offer are taking place will normally satisfy the Code's requirements.

The Panel considers that the incidence of price rises before offer announcements would be reduced by a reduction in the number of people made aware of a potential offer and an increased willingness to make talks announcements at an earlier stage.

AREAS OF THE CODE WHICH HAVE GIVEN RISE TO DIFFICULTIES

1 Profit forecasts

Practitioners are reminded that Paragraph 4 of Practice Note No. 6 requires an adviser to check at the outset of an offer whether or not his client has a profit forecast on the record so that reporting procedures may be set in train without delay.

As noted in Paragraph 7 of the same Practice Note, "even when no particular figure is mentioned certain forms of words may constitute a profit forecast" and, as a consequence, will need to be reported upon. Advisers should consult the Panel in any case where a form of words could be interpreted as a profit forecast.

2 Whitewash documents (Paragraph 9 of Practice Note No. 15)

The executive continues to encounter problems as a result of the late submission of proof whitewash documents. These are the documents sent to shareholders as part of the procedure for the waiver of the requirement for a general offer under Rule 34. The Panel attaches the greatest importance to the requirements regarding whitewash documents, and experience suggests that this may involve the executive being asked to comment on several proofs. Unlike offer documents, which are not normally subject to approval prior to posting, whitewash documents must be specifically approved by the executive before the requisite Rule 34 waiver can be granted. Late consultation with the executive or late submission of a proof may well result in delay in the planned timetable.

3 Provision of announcements and documents

There continue to be delays in the lodging of copies of public announcements and documents which are required under Rule 20 to be lodged with the Panel at the same time that they are made or despatched. This requirement applies to every announcement (including talks announcements) released to the press (whether national or local) and every other document concerning the offer despatched by the offeror, the offeree company or their advisers during the offer period. It is not

sufficient for announcements to be lodged with the Companies Announcements Office of The Stock Exchange. A separate copy must be delivered direct to the Panel's offices on the 20th floor of The Stock Exchange Building. This procedure does not apply to Rule 31 disclosures of dealings by associates, which continue to be sent to the Panel by The Stock Exchange as described in Practice Note No. 12.

In order that take-over procedures can be fair, and shareholders properly advised, copies of documents and announcements should also be made available promptly to the advisers to all parties.

4 Statements about withdrawals of acceptances

In the later stages of a contested offer, when rights of withdrawal have come into effect, it is possible that an offeree company may wish to draw shareholders' attention to the fact that certain acceptors have lodged withdrawal notices.

The Panel considers that there can be a number of difficulties arising from such statements. References to withdrawals cannot in themselves be taken to be an indication of the progress of an offer–for that to be the case up-to-date acceptance levels also need to be available–and may therefore give a misleading impression. Moreover, an offeree company will not usually be in a position to give details of withdrawals to the standard of accuracy normally required by the Code, since even if it co-ordinates the lodging of withdrawal notices it will be unable to ensure that they are treated as valid and it will have no control over the relevant shareholders' subsequent actions. In view of these difficulties the Panel wishes to emphasise that great care should be taken with regard to statements about withdrawals. If offeree companies or their advisers wish to make any reference to withdrawals the Panel executive should be consulted in advance.

STAFF

Since the last Annual Report was published, Mr. T. G. Barker of Kleinwort Benson has become Director General in succession to Mr. J. M. Hignett who has returned to Lazard Brothers. Mr. A. D. Macaulay of Herbert Smith & Co. has been appointed Secretary in place of Mr. G. F. Pimlott who has returned to Lovell White & King. Mr. J. G. FG. Palfrey, formerly of the Bank of England, has joined the executive.

At the end of their respective terms of secondment, Mr. P. J. Clokey returned to Price Waterhouse, Mr. G. B. Morgan and Mrs. C. M. Brown returned to the Bank of England and Mr. A. G. B. Pullinger returned to Laing & Cruickshank. Their replacements are Mr. J. W. Bloomer of Arthur Andersen & Co., Mr. P. E. Mason of the Department of Trade and Industry, Mr. N. F. G. Brown of Hoare Govett and Mr. N. P. Hinton of the Bank of England.

FINANCE

The Panel is financed by the Council for the Securities Industry. Expenditure for the year to 31st March, 1984 was as follows:

	(£000)	
	1984	*1983*
Personnel costs	483	*433*
Accommodation costs	165	*119*
Other	159	*90*
	807	*642*

The increase in accommodation costs over the previous year reflects, *inter alia*, the rearrangement of the Panel's offices to accommodate additional staff. Increases in other costs are mainly attributable to expenses incurred in the preparation of the revised format of the Code referred to on page 7 and to higher expenditure on legal fees, resulting from an increase in professional advice sought.

(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****)*

APPENDIX

TAKE-OVER OFFER DOCUMENTS: STATEMENT BY THE DEPARTMENT OF TRADE AND INDUSTRY ON 13th DECEMBER, 1983

The following statement sets out the Department's approach to take-over documents following the revision of the Licensed Dealers (Conduct of Business) Rules 1983 which came into force on 1st June, 1983. There are now no detailed provisions in these statutory rules about take-overs and the following paragraphs set out the provisions as regards public companies and private companies respectively.

As regards public companies (as well as private companies which have had some kind of public involvement in the ten years before the bid) the Department considers it better to rely on the effectiveness and flexibility of the City Code on Take-overs and Mergers, which covers bids made for public companies and certain private companies which have had some past public involvement. The City Code has the support of, and can be enforced against, professional security dealers and accordingly the Department expects, as a matter of course, those making bids for public companies (and private companies covered by the Code) to use the services of a dealer in securities authorised under the Prevention of Fraud (Investments) Act 1958 (such as a stockbroker, exempt dealer, licensed dealer, or a member of a recognised association), in which case the Secretary of State's permission for the distribution of take-over documents is not required. This is seen as an important safeguard for the shareholders of the public company (of which there may be several hundreds or thousands) and as a means of ensuring that such take-overs are conducted properly and fully in accordance with the provisions of the City Code. It would only be in exceptional cases that the Secretary of State would consider removing this safeguard by granting permission under Section 14(2) of the Act for the distribution of take-over documents in these circumstances.

As far as private companies not covered by the Code are concerned the Secretary of State has issued a General Permission – No. 3 – under Section 14(2) of the Act relating to offer documents in respect of take-overs of private companies not covered by the Code. The documents must meet the conditions specified in the General Permission which are directed at ensuring full and fair disclosure. The General Permission is intended to apply only to private companies (other than those with a past public involvement) where different disclosure requirements to those of public companies seem appropriate. By complying with the terms of the General Permission anyone to whom the Permission applies is able to distribute documents without seeking the Department's specific permission. It may be that a person wishing to distribute documents cannot, for good reasons, comply with all the terms of the General Permission in which case a request for special permission would need to be made to the Department.