THE TAKEOVER PANEL

Report on the Year ended 31st March 1988

MEMBERSHIP OF THE PANEL

The Lord Alexander of Weedon QC (Chairman)	Nominated by the Governor of the Bank of England
J. F. C. Hull (Deputy Chairman)	Nominated by the Governor of the Bank of England
Sir Philip Shelbourne (Deputy Chairman)	Nominated by the Governor of the Bank of England
Sir Austin Pearce	Nominated by the Governor of the Bank of England
P. R. Dugdale	Chairman, Association of British Insurers
C. H. Black	Chairman, Association of Investment Trust Companies
The Hon. T. J. Manners	Nominated by the British Merchant Banking and Securities Houses Association
The Lord Rockley	Chairman, British Merchant Banking and Securities Houses Association, Corporate Finance Committee
The Lord Boardman	Chairman, Committee of London and Scottish Bankers
M. G. Taylor	Nominated by the Confederation of British Industry
The Lord Elton	Chairman, Financial Intermediaries, Managers and Brokers Regulatory Association
F. E. Worsley	President, Institute of Chartered Accountants in England and Wales
The Hon. Sir Henry Fisher	Chairman, Investment Management Regulatory Organisation
D. H. Brydon	Nominated by the National Association of Pension Funds
S. M. Yassukovich	Chairman, The Securities Association
Sir Nicholas Goodison	Chairman, The Stock Exchange
W. R. Stuttaford	Chairman, Unit Trust Association
The Lord Roskill	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

A. R. Beevor	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
P. D. Kennerley N. P. Hinton R.W. Godden	Secretaries
Miss S. M. Govier R. J. Hilton B. C. K. Timbrell S. A. Atkinson A. M. Keir W. J. Morgan J. R. St. J. Miller D. H. Spriddell R. Dobson Mrs. J. M. Taylor Mrs. T. A. Scott Miss J. Bayford	Assistant Secretaries

CHAIRMAN'S FOREWORD

In last year's Annual Report I set out, as a very new Chairman, my own belief in the importance of the work of the Panel and the contribution it makes to the regulatory system and the fair protection of shareholders. With the benefit of a little more experience, I was able to expand on the theme earlier this year in the Denning Lecture.

So it seems appropriate this year that the bulk of the Report should come from the Director General, Antony Beevor. Antony succeeded John Walker-Haworth, whose skill, flair and determination saw the Panel through a period when its full effectiveness in the modern City climate was under scrutiny. We owe him a considerable debt. It is one of the benefits of disciplined self-regulation that the City accepts the responsibility to provide successive Directors General of high quality to ensure that our work continues to be guided by someone who has contemporary experience of financial advisory work and is held in respect within the community. Antony Beevor continues this tradition. The system of secondment of merchant bankers, accountants, solicitors, commercial bankers and stockbrokers from large firms to the Panel contributes crucially to our work. I would like to acknowledge the help of all those firms who support our work in this way. By doing so they accept a measure of self-sacrifice which is crucial if successful regulation of City activities is to be maintained.

There is another reason why it is right that the Director General's report should have prominence. The bulk of the work of the Panel is done by the executive. Its ruling is accepted on most issues which are brought forward during the course of a takeover, and in only a small number of cases is there an appeal to the full Panel. This in itself is a tribute to the thoroughness with which the executive goes about its work, the sensible approach it tries to take to problems, and the way in which it seeks to explain what it is doing to the parties and their advisers. But inevitably this work does not attract great public attention, so it is only those who deal with the Panel who are normally able to appreciate the way in which the great bulk of our service is given. I am glad that in his report Antony Beevor highlights some of the aspects of our work which have struck him as particularly important during the first part of his time as Director General.

I would only add two further comments. The permanent staff give to the executive the backing not only of skill but also of continuity of experience. This year Peter Frazer has completed twenty years with the Panel. Much appreciation of his work has been expressed from those who deal with the Panel, and I would simply add here our gratitude. Secondly, whilst we believe that the service offered by the Panel is generally effective in monitoring the fair conduct of takeovers, we are continually vigilant both to try to improve the service we give, to adapt where necessary to changing conditions, and to respond to constructive suggestions. These remain challenging times for all involved in financial regulation, and we shall keep our own standards constantly under review.

10th August, 1988

REPORT BY THE DIRECTOR GENERAL

1987/88 was a busy and critical period in the Panel's history. It started with the comprehensive review of takeover regulation, in conjunction with the DTI; the Guinness case continued through most of it, and the turn of the year saw some challenging cases. A new edition of the Code was published in January 1988, reflecting a number of developments during previous months. Robert Alexander's appointment as Chairman has brought the Panel great benefit and we congratulate him on his recent peerage. The year also marked twenty years of the work of the Panel and of the Code.

Guinness' offer for The Distillers Company

The Department of Trade and Industry appointed Inspectors to investigate the affairs of Guinness plc on 1st December, 1986. On 30th January, 1987 the Panel made a public statement indicating that it seemed likely to the Panel from the information which had so far emerged that there had been material, and perhaps in some cases deliberate, breaches of the Code. Further, if there had been undisclosed purchases of shares by persons acting in concert with Guinness there would have been significant Code consequences for the Guinness offer. The Panel also explained in that statement that, since Inspectors had been appointed, and legal consequences could flow from their work, the Panel felt that it should await the outcome of the Inspectors' inquiries before publishing any findings or judgments of its own.

By May 1987 it became clear to the Panel executive that the Inspectors' Report would take substantially longer than had originally been thought, and the executive reconsidered the position. In particular, the executive turned its attention to the purchase, on 17th April, 1986, of some 10.6 million Distillers shares by Pipetec AG. The issue raised by that purchase was a narrow one focussed on a Code question, and was not one which at that stage involved any question of criminal or civil law. It was solely whether there was any arrangement or understanding within the meaning of "acting in concert" under the Code between Pipetec AG and Guinness and, if so, what the Code consequences should be.

The executive's investigations resulted in hearings of the full Panel held on 25th August and 2nd September, 1987, at which the Panel determined that Pipetec had been acting in concert with Guinness. Consideration of the question of the resulting

Code consequences was left over to allow discussions between Guinness and the executive to take place. On 28th October Guinness commenced legal proceedings against the Panel in order to have the decisions made by the Panel at those hearings quashed through the process of judicial review on the basis, Guinness alleged, that the Panel had acted unfairly to Guinness by deciding to go ahead with its investigations. The Divisional Court decided that the Panel had not acted unfairly and upheld the right of the Panel to reach its decision. Guinness, however, appealed to the Court of Appeal on the issue; the matter was heard by the Court of Appeal during July 1988 and Guinness' appeal was dismissed.

The consequences of the Panel's decision of 2nd September, 1987 are still to be determined. Subject to any further rights of appeal that Guinness may pursue, the executive will be seeking discussions with Guinness and its advisers to establish those consequences. Since it is possible that some former Distillers shareholders may become entitled to some payment from Guinness it is important that they should retain evidence of those transactions, referred to in the Panel's statement of 18th November, 1987.

Market surveillance

The Panel's last Annual Report described the new disclosure requirements and monitoring systems introduced during the early part of 1987. The executive has now had a full year to evaluate these areas, and I am pleased that they seem to be working well.

The enhanced disclosure requirements included, in Rule 8.3, the obligation on persons to disclose their dealings if they owned or controlled 1 per cent. or more of the securities of companies involved in an offer. In addition, the new categories of exempt market-maker and exempt fund manager were obliged to make appropriate disclosures.

Observance of disclosure requirements such as these has been significantly helped by the Panel's own dealings monitoring unit. This works closely with The Stock Exchange, utilising The Stock Exchange's computerised dealing and monitoring systems, and has been assisted, recently, by staff seconded from the Exchange.

Inevitably, the new requirements have imposed a greater burden on investors, particularly those who are part of a large group, who may have a number of fund management divisions, often in addition to market-makers and corporate finance advisory work.

The role of the compliance officer is critical in this area and the Panel acknowledges the hard work that many have undertaken to ensure that their various colleagues comply with their respective obligations. It is the compliance officer's responsibility to ensure that no abuse arises from community of interest within multi-service financial organisations, and also that proper disclosure of dealings is made. Inevitably, some minor errors have been discovered through the executive's monitoring system; these can usually be rectified with little adverse effect. But in some cases the executive has detected failures in compliance, the consequences of which have had serious repercussions, both for the houses involved and also for their clients. So the need to maintain compliance systems of the highest effectiveness is paramount.

Announcements

An area that has caused the executive some concern over the last year relates to the timing and quality of information released relating to an offer. It is amongst the more important tasks of the Panel to ensure that information is made available equally to all shareholders, and also that the parties to an offer use every endeavour to prevent the creation of a false market in the securities of the companies concerned throughout the offer. Accordingly, although this is not a new problem and was the subject of a Panel statement last September, its importance is such that it is worth repeating here.

There has on several occasions been a considerable amount of speculation concerning a possible offer; in some cases it has been well founded but in others it has not. But, whenever there is such speculation, the companies and their advisers must consider whether an announcement is required under Rule 2.2 of the Code.

In particular, Rule 2.2(d) imposes an obligation on the potential offeror to make an announcement when, before an approach has been made, the offeree company is the subject of rumour and speculation, or there is an untoward movement in its share price, and there are reasonable grounds for concluding that it is the potential offeror's actions which have led to the situation.

The Rule can sometimes pose difficulties for an offeror, particularly when he is in the process of finalising his plans. So there may be a reluctance to make an announcement, leading the offeror to accept, perhaps too readily, alternative explanations as to why there is speculation or an untoward price movement, rather than the most likely one, which is that his security is inadequate. But the Code requires that where there is speculation or an untoward price movement, but the offeror and his advisers do not propose to make an immediate announcement, the Panel should be consulted.

The same considerations apply after an approach to the board of the offeree company has been made, but with two differences. First, the primary responsibility for making an announcement will normally rest with the board of the offeree company, and second, an announcement must be made whether or not there are reasonable grounds for concluding that it is the offeror's actions which have led to the speculation or price movement.

Statements of intention

Often a major shareholder is suggested as a potential offeror, perhaps after disclosing a substantial shareholding. If it is not actually contemplating an offer, then, under the Code, it has no obligation to make an announcement, but it may wish to clarify its current position. The announcement will usually be intended to have, and in practice nearly always will have, an important influence on the market, and for this reason no statement should be made which may mislead shareholders and the market or create uncertainty. It should be as clear and unambiguous as possible–in particular, if the party making the announcement is indicating that its current intention is not to make an offer, it should set out clearly those changes of circumstances which might lead it to change its position; wherever practicable the Panel's views should be sought in advance.

The Panel will give any announcement of this nature its plain and natural meaning, and will hold the party making it to the terms of its announcement. It is acceptable for the person who makes the announcement to state that it will not make an offer for a given period of time, although it does not have to do so. It appears that some practitioners may be under the impression that, where a shareholder announces that it has no present intention of making an offer, then it will be prevented from making an offer for three months, but released thereafter. This would be wrong; in the absence of a stated period, the Panel would not regard such a person as being bound for any particular length of time. If, however, it were to change its position too soon after the statement, the Panel would need to be satisfied that in making its original statement the person making it had used its best endeavours not to mislead the market.

Information during an offer

If all shareholders are to receive information at the same time, it follows that no material new information should be given to the media before it is otherwise publicly available. A tendency has developed recently for selected journalists to be briefed in advance of a press release, or for parties to give selected newspapers (and particularly Sunday newspapers) details of proposed documents before despatch, with the result that newspapers often carry the story before the document is actually posted.

Whilst the desire to obtain additional publicity by this means is understandable, the practice creates difficulties. It means that the information to the shareholder, and the speed at which he acquires it, is dependent upon the newspaper he reads. Although this may only be a temporary problem, resolved by the issue of the document, the practice breaches Rule 19, which requires information to be made equally available to all shareholders as nearly as possible at the same time and in the same manner. Moreover, Rule 19.3 provides for copies of all documents and announcements, including any material released to the press, to be lodged with the Panel at the time of issue and made available promptly to the advisers to the other parties involved.

EC Directive

During the year, a number of meetings were held with the staff of the European Commission and representatives of other member states about a possible Directive on the conduct of takeovers. At the time of writing, a proposal for such a Directive is still expected but has not yet been published by the Commission.

The expected scope of the Directive is narrower than that of the Code, and it is unlikely that any of its provisions would be inconsistent with the Code's general principles. However, a Directive which had to be implemented in the normal way through legislation would have major implications for the Panel's own non-statutory system for regulating takeovers.

The Panel has, in conjunction with the Department of Trade and Industry, with whom a very close liaison on the subject has been maintained throughout, sought to ensure that the Commission takes full account of the possible implications of the Directive for the status of the Panel. Commission officials have made it clear that they respect the Panel's system for regulating takeovers and they have been sympathetic to our concerns.

Panel executive

A vital element of the Panel system is the readiness of the executive to give rulings or advice to practitioners and their clients on the interpretation of the Code. Such a service is essential if the Panel is to insist, as it does, that the spirit and not just the letter, of the Code be observed. It also has the important advantage of enabling the Panel to anticipate and correct possible breaches of the Code before they occur, rather than being restricted to awarding compensation or taking disciplinary measures after the event. The executive's consultancy service therefore lies at the heart of the non-statutory system of regulation operated by the Panel.

In providing this service the executive naturally develops, and receives much assistance from, a close working relationship with the principal practitioners in the takeover business. The executive well recognises that the Panel system can only succeed if the executive maintains the confidence of those with whom it deals.

The core of the executive team is the nine Assistant Secretaries who deal with the daily flow of telephone enquiries and are responsible for detailed monitoring of all takeovers subject to the Code. With one exception these are seconded to the Panel for periods of two years, as are two of the three Secretaries at the Panel, both being City solicitors. This system helps to ensure that the Panel team is of the highest calibre; we believe the experience is of benefit both to the individuals concerned and also to their employers.

Throughout the year the Panel team gave my predecessor and myself the kind of service well beyond the call of duty, which it has been doing for so long now as to be in danger of being taken for granted. I have already mentioned the valuable role played by those on short term secondment, but they would lack essential guidance were it not for the wisdom and dedication of the permanent members of the team. Of those, Peter Frazer completed twenty years' service with the Panel on 1st June, 1988. .He has been with it virtually since its inception. He has succeeded in making his own particular blend of humour and common sense the essential ethos of the Panel. This is largely why it is in such good heart today.

10th August, 1988.

REPORT ON THE YEAR ENDED 31st MARCH, 1988

STATISTICS

During the year the Panel held 10 meetings to hear appeals by parties to takeover transactions against rulings by the executive and two to consider matters referred by the executive. Two of the appeals were allowed. No cases were heard by the Appeal Committee during the year.

There were 237 *(year ended 31st March, 1987– 280)* published takeover or merger proposals of which 222 *(275)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 210 *(265)* target companies.

A further 22 *(37)* cases, which were still open at 31st March, 1988, are not included in these figures. The executive was engaged in detailed consultations in another 186 *(153)* cases which either did not lead to published proposals or were transactions, subject to approval by shareholders, involving controlling blocks of shares.

Outcome of proposals	1987/88	*1986/85*
Successful proposals involving control (including Schemes of Arrangement)	171	*211*
Unsuccessful proposals involving control	20	*50*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) ..	15	*5*
Proposals involving minorities	31	*14*
	237	*280*

STAFF

The following changes in the executive have taken place since the publication of the last Annual Report.

Mr. A. R. Beevor of Hambros Bank Limited has been appointed Director General in succession to Mr. J. L. Walker-Haworth who has returned to S. G. Warburg & Co. Ltd.

Mr. N. P. Hinton, previously Deputy Secretary, and Mr. R. W. Godden of Linklaters & Paines, have been appointed Secretaries.

Mr. A. D. Paul, Mr. D. A. J. McKechnie, Mr. C. C. T. Pender and Miss B. A. Muston have left the executive. Mr. W. J. Morgan of Coopers & Lybrand, Mr. J. R. St. J. Miller of James Capel & Co., Mr. D. H. Spriddell of Deloitte Haskins & Sells, Mr. R. Dobson of The Stock Exchange and Miss J. Bayford of the Bank of England have joined the executive.

FINANCE

The Panel is financed by charges in relation to offer documents, a fee which is agreed with The Stock Exchange, and Panel members' contributions. Details of the document charges are set out in the Code.

Expenditure for the year to 31st March, 1988 was as follows:–

	(£000)	
	1988	*1987*
Personnel costs	1,381	*1,007*
Accommodation costs	276	*387*
Other	791	*427*
	2,448	*1,821*

The increase in personnel costs over the previous year reflects increases both in the Panel's staff and in average remuneration per member of staff.

The increase in other costs over 1987 represents both legal costs incurred in defending the action brought in the Divisional Court by Guinness against decisions of the Panel and printing and distribution costs relating to the major revision of the Code published on 26th January, 1988.

(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****.)*

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