THE TAKEOVER PANEL

Report on the Year ended 31st March, 1990.

MEMBERSHIP OF THE PANEL

D. C. Calcutt 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
J. F. Goble *(Deputy Chairman)*	Nominated by the Governor of the Bank of England
Sir Austin Pearce	Nominated by the Governor of the Bank of England
Sir Adrian Cadbury	Nominated by the Governor of the Bank of England
T. J. Palmer	Chairman, Association of British Insurers
M. J. Hart	Chairman, Association of Investment Trust Companies
R. D. Broadley	Nominated by the British Merchant Banking and Securities Houses Association
I. A. N. McIntosh	Chairman, Corporate Finance Committee, British Merchant Banking and Securities Houses Association
Sir John Quinton	Chairman, Committee of London & Scottish Bankers
M. G. Taylor	Nominated by the Confederation of British Industry
Sir Gordon Downey	Chairman, Financial Intermediaries, Managers and Brokers Regulatory Association
M. G. Lickiss	President, Institute of Chartered Accountants in England and Wales
G. M. Nissen	Chairman, Investment Management Regulatory Organisation
C. M. Gilchrist	Nominated by the National Association of Pension Funds
S. M. Yassukovich	Chairman, The Securities Association
A. C. Hugh Smith	Chairman, The International Stock Exchange
J. S. Fairbairn	Chairman, Unit Trust Association
The Lord Roskill	Chairman of the Appeal Committee of the Panel
The Rt. Hon. Sir Michael Kerr	Deputy Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

G. G. F. Barnett	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
N. P. Hinton	Assistant Director General
A. S. Clark Miss S. M. Govier J. V. Sandelson	Secretaries
R. Dobson C. J. Bailey Miss C. E. Hambro A. J. Strachan T. P. Kennedy P. J. Fisher P. Mountford J. D. Hobson Mrs T. A. Scott	Assistant Secretaries

CHAIRMAN'S FOREWORD

Lord Alexander of Weedon QC gave up the Chairmanship of the Panel at the end of September 1989. During his term of office he did much to enhance the standing of the Panel. He will, perhaps, be best remembered for having brought the Guinness matter to a successful conclusion. But there is one contribution which he made supremely well. He recognised, and gave full weight to, the importance of explaining the work of the Panel not merely to the City, but also to shareholders, to industrialists and to the public.

Barely two months later, Antony Beevor's term of office, as Director General of the Panel, came to an end. This was Antony's second period of secondment to the Panel: he had earlier served the Panel as Secretary. The contribution which he was able to make to the well-being of the Panel during his time as Director General was outstanding. We wish him well on his return to Hambros and in his work there as Head of Corporate Finance.

It was perhaps not surprising, with these losses, that an article should have appeared in the financial press, speaking of autumn at the Panel; but spring was just around the corner. In December the Panel welcomed Geoffrey Barnett of Barings as Antony Beevor's successor; and Geoffrey very quickly established his authority and demonstrated his clear grasp of the problems, both short-term and long, which the Panel was then facing.

There have been three other significant appointments made by the Governor of the Bank of England since October. Sir Michael Kerr, formerly a Lord Justice of Appeal, has been appointed Deputy Chairman of the Appeal Committee. It was wrong that Lord Roskill should have to bear sole responsibility for chairing appeals to the Appeal Committee; and the Panel hopes that it will comfort Lord Roskill to know that he has back-up, if he needs it.

John Goble, formerly the senior partner of Herbert Smith, has been appointed as an additional Deputy Chairman. The chairmanship and deputy chairmanships are all part-time appointments. Other commitments may be unavoidable; conflicts of interest may arise. It seemed to me essential that we should do all we could to ensure that hearings could, if necessary, always be held at short notice.

The Governor has also appointed Sir Adrian Cadbury to be an additional independent member of the Panel. It is particularly important that all who have an interest in the work of the Panel should be adequately represented. In joining the Panel, Sir Adrian will add to Sir Austin Pearce's voice and to that of Martin Taylor, who is the member nominated by the CBI, in representing the interests of industry.

Each of these appointments has, in its different way, underpinned the strength of the Panel, and ensured that the Panel continues to command the support of all who are affected by its work, so that it can continue to discharge its regulatory responsibilities effectively.

The number of bids handled by the Executive was only slightly smaller in the year ended 31st March, 1990 than in the previous year. But the last six months of the year clearly saw an overall reduction in the value of those bids. Since October there have been few hearings before the Panel. This may, in part, be due to the reduction in the number of large bids; but I suspect that it is due more to the acceptance of the expertise of the Executive and of the fairness of its rulings.

As the Director General makes plain in his Report, the matter which has caused – and which continues to cause – the Panel the greatest concern is the prospect of a European Community Directive on Takeovers. For the reasons which the Director General gives, the Panel is determined to do all in its power to ensure that the protection which the Panel presently provides for shareholders is not lessened as a result of European legislation.

For the future, I suspect that the Panel is likely to become increasingly involved in problems which arise in an international context: the bids for Consolidated Goldfields and for BAT Industries showed the sort of problems which are likely to arise. Whether it is in connection with the European Community, the USA, the Far East or elsewhere, it seems to me that it is probably those international dimensions which are most likely to give rise to new problems, which will need to be addressed and answered.

28th June, 1990

REPORT BY THE DIRECTOR GENERAL

The single most important matter for the Panel since publication of last year's Annual Report in September has been the prospect of a European Community directive on takeovers in a form which might make it impossible for the United Kingdom to continue with its tried and tested system of non-statutory regulation. This remains a serious risk. I begin by summarising where we stand.

Proposed European Directive

In the last three months of 1989 there were lengthy negotiations between member states in Brussels on the proposed directive. Members of the Executive have assisted the United Kingdom delegation at all of the meetings of the working group of the Council of Ministers at which the draft directive has been discussed. Those meetings revealed wide differences of approach between the various member states and, in particular, have indicated that some member states have difficulty with the basic objectives of the Panel in relation to the directive.

In January, the European Parliament considered the draft directive, which then went back to the Commission for re-drafting. Meetings of the Council working group will resume once the new draft has been published.

While the Panel recognises the case for harmonising the principles of takeover regulation within the Community, it remains very concerned that the proposed directive may create a system which increases the risk of litigation during a takeover and may lack the general flexibility that the Panel finds essential in its day-to-day operations. Some progress is believed to have been made towards the incorporation of provisions which will introduce a degree of flexibility into certain parts of the directive but much more than this is required. Furthermore, serious potential problems remain outstanding, in particular relating to the avoidance of litigation during the course of takeovers and the implementation of the directive by non-statutory means in the United Kingdom.

The Panel does not consider its non-statutory status to be an end in itself; still less does it seek to impose a non-statutory regulatory system on other member states. It does, however, believe that it would be extremely difficult, perhaps impossible, to preserve within a statutory framework the features essential to the existing regulatory system, which is generally acknowledged to have worked well. In particular, if the Panel were to derive its authority from legislation and wield legal powers, there would be a greatly increased risk that its decisions would be subject to challenge in the courts. This could prevent parties from being able to rely either on consultations with the Executive or on Panel decisions and thus result in a system which was slower and provided less certainty than the existing

system. In other words, the Panel believes that there could be a serious risk that a statutory system would achieve a lower degree of shareholder protection than the existing system.

Negotiations on the proposed directive seem likely to be long and complex.

Panel Executive

In referring above to consultations with the Executive I should underline the importance of this key element of the Panel's operations. The majority of the Executive's work is concerned with giving guidance to practitioners before events rather than dealing with problems afterwards. I mention this because it is not a feature of the regulatory process of which many people other than practitioners are aware and I question whether it is a feature that could survive if the Panel lost its non-statutory status.

I believe it is also the case that the blend of experience, judgement and enthusiasm for the task that results from the Executive's combination of permanent and seconded staff is very well fitted to the task with which we are charged. The willingness of employers in the law, accounting, banking and stockbroking and of both the Bank of England and the Department of Trade and Industry to second good staff to the Executive is a vital ingredient of the Panel system. Again I question whether this feature would survive if the Panel were to be constituted by statute.

Information on Offerors

Over the past year the Executive has extended the specific scope of General Principle 4 by requiring more precise information about offerors where they are individuals or unlisted companies. A shareholder of an offeree company is entitled to be given relevant information about the offeror and its associates in order to decide whether or not he would be prepared to remain as a minority shareholder if an offer becomes unconditional, but fails to achieve the level of acceptance needed for the compulsory acquisition provisions of the Companies Act to be invoked.

Instances of consortium offers and the experience of recent cases have highlighted the need for adequate information to be given to shareholders to enable them to reach a properly informed decision. The Executive's approach to the requirements for information on offerors will shortly be published as an amendment to Rule 24.2.

House of Fraser

At the beginning of March the Inspectors' Report into the events surrounding the acquisition of House of Fraser in 1985 was published. The Report has been carefully considered to see whether the House of Fraser case reveals the need for changes in the Code or in the Panel's practices.

The Inspectors suggested that there were loopholes in the Code with regard to non-corporate owners of shelf companies and the standards of care to be applied in the preparation of offer documents.

Although it is correct that the Code in force at the time of the House of Fraser offer did not lay down specific rules of disclosure for non-corporate offerors, it did nonetheless clearly require shareholders to be given sufficient information to enable them to reach a properly informed decision and it also laid down standards of care to be applied in the preparation of such information and advice.

As indicated above the Code will in future contain more detailed requirements concerning the information to be disclosed by offerors.

As to the standards of care required in the preparation of offer documents, there has been a requirement for many years that they must be prepared with as much care as if they were prospectuses. This is clearly reflected in General Principle 5 of the Code and was similarly clearly endorsed in the General Principles in force in 1985. There appears to be no suggestion in the Report that anyone involved in the House of Fraser case was unaware of the Code requirements in relation to standards of care and accordingly the Panel does not propose making any changes to the Code in this area.

Consortium Offers

Last year's Report referred to a number of the issues raised in cases where management buyouts, leveraged buyouts and other forms of consortium offers are proposed.

Another issue in this difficult area, which concerned the Panel during the year, is how to treat an organisation, a part of which supports, with equity finance, a consortium company which makes an offer, whether through the commitment of its own funds or those of its discretionary clients. The Panel considers that an equity investment in a consortium company may create such a significant interest in the outcome of the offer that all the other parts of that organisation must be presumed to be acting in concert in connection with the offer.

The Panel recognises that this approach imposes a restriction on those engaged in a variety of financial services, particularly discretionary fund managers whose primary duty is to serve their clients' interests. It also recognises that the nature and degree of an organisation's interest in a consortium company will vary considerably. In addition to making an equity investment the same organisation may provide debt finance and/or corporate finance advice and the extent of an organisation's overall financial interest will accordingly vary.

Since there have been few consortium offers which raise these issues, they have so far been dealt with case by case, a practice which the Executive intends to continue until it has accumulated more experience. Where an organisation's interest in a consortium company and in the outcome of the offer is not significant, the Executive is prepared not to apply the presumption of concertedness to the other parts of the organisation. It remains important that financial advisers establish with the Executive at the earliest possible stage how the various interests of groups involved in the financing of consortium offers are to be treated.

Misleading Statements

Some years ago the Panel published a general statement on the quality of takeover circulars. The statement referred to a number of cases where circulars had contained inaccuracies or misleading statements and, in particular, unsatisfactory graphs and diagrams giving a distorted impression.

A problem now is not so much distorted graphs and diagrams but misleading impressions arising from inaccurate language in circulars.

This is a difficult problem with many aspects. It has been suggested that documents should be pre-vetted by the Executive but this would not solve the problem because often the fact that there is inaccuracy will only be apparent to "the other side". Another aspect of the problem is that, as arguments develop, the language used tends to become more extravagant which can lead to the creation of misleading impressions. It is not always easy to decide at what stage strongly made debating points turn into misleading statements.

Practitioners must realise that disingenuous attempts to overstate the case are bound to be challenged and may result in the Executive's requiring the publication of a correcting circular.

28th June, 1990

REPORT ON THE YEAR ENDED 31st MARCH, 1990

STATISTICS

The Panel held six meetings to hear appeals by parties to takeover transactions against rulings by the Executive, one to consider a disciplinary case and five to consider cases referred by the Executive. Two of the appeals were allowed. Three cases were heard by the Appeal Committee; none were allowed. The Panel held a special meeting to consider the report of a Working Party on Takeover Rules and Practices.

There were 230 *(year ended 31st March, 1989–253)* published takeover or merger proposals of which 224 *(246)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 211 *(224)* target companies.

A further 29 *(24)* cases, which were still open at 31st March, 1990, are not included in these figures. The Executive was engaged in detailed consultations in another 142 *(195)* 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	1989/90	*1988/89*
Successful proposals involving control (including Schemes of Arrangement) … … … …	163	*184*
Unsuccessful proposals involving control … …	36	*40*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	6	*7*
Proposals involving minorities … … …	25	*22*
	230	*253*

STAFF

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

Mr. G. G. F. Barnett of Baring Brothers & Co., Limited has been appointed Director General in succession to Mr. A. R. Beevor who has returned to Hambros Bank Limited.

Mr. J. V. Sandelson of Clifford Chance has been appointed Joint Secretary.

Mr. J. G. Doctor, Mr. R. W. Godden, Mr. J. R. St. J Miller and Mr. D. H. Spriddell have left the Executive. Mr. P. Mountford of Arthur Andersen, Mr. P. J. Fisher of BDO Binder Hamlyn and Mr. J. D. Hobson of S. G. Warburg Securities have joined the Executive.

FINANCE

During the period covered by this Report the Panel was financed by charges in relation to offer documents and a levy on certain transactions in United Kingdom securities. Details of the document charges are set out in the Code.

Expenditure for the year to 31st March, 1990 was as follows:–

	(£000)	
	1990	*1989*
Personnel costs	2,527	*1,543*
Accommodation costs	556	*658*
Other	876	*974*
	3,959	*3,175*

As noted in last year's Report the staff was increased during that year. Personnel costs in the year ended 31st March, 1990 reflect the effect of those increases for a full year together with the costs of some further increases in staff.

(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****.)*