IRISH DISTILLERS GROUP PLC

The Issue

Over the weekend of 3/4 September 1988 Pernod Ricard SA and its subsidiary Comrie plc ("Pernod Ricard"), with the active co-operation of Irish Distillers Group plc ("Irish Distillers"), sought and obtained irrevocable commitments from shareholders of Irish Distillers prior to announcing an offer for Irish Distillers on 5 September. Pernod Ricard stated that it had received irrevocable undertakings which, together with shares already purchased by it, represented over 50% of the share capital. GC & C Brands plc ("GC & C Brands"), the rival offeror for Irish Distillers, complained that breaches of the Code had been committed in the course of obtaining these irrevocable commitments and, accordingly, submitted that shareholders should be released by Pernod Ricard from their commitments.

The Panel executive ruled there had been breaches of General Principle 4 and Note 6 on Rule 19 of the Code but referred to the full Panel consideration of the appropriate consequences of such breaches. Pernod Ricard and Irish Distillers appealed to the Panel against the ruling that breaches had been committed. GC & C Brands also appealed against the ruling of the executive,

which had rejected its complaint that there had been breaches of General Principles 7 and 9 and also certain other of GC & C Brands' contentions.

The Panel met on 11 and 14 November to hear the appeals and to hear arguments on the consequences which should follow from any breach of the Code. The submissions of the parties and the executive ran to well over a hundred pages, reflecting the detailed investigation which was necessary given the nature of the complaint, and the oral hearing canvassed the issues extensively. Inevitably this statement must be longer than we would normally wish.

Ruling

The Panel dismissed Pernod Ricard's appeal against the finding that there had been a breach of General Principle 4 but it found it unnecessary to decide whether Note 6 on Rule 19 had been breached. The Panel dismissed the cross appeal by GC & C Brands that there had also been breaches of General Principles 7 and 9 and that there were other matters which the Panel should take into account in its decision.

The Panel considered, however, that such breaches of General Principle 4 as occurred were not sufficiently serious nor of such significant effect upon shareholders of Irish Distillers as to make it appropriate to release those shareholders from their irrevocable undertakings. The Panel considered that the

institutions, which hold the majority of the shares which are the subject of irrevocable undertakings, took a business decision to accept the newly available offer rather than risking it disappearing and finding that they were left with a lower offer and the Panel did not believe that they had cause for complaint. The Panel recognised that a small number of individual shareholders might feel an element of grievance but in all the circumstances the Panel did not believe that shareholders had been seriously prejudiced and, consequently, did not consider it appropriate to release them from their irrevocable undertakings. The Panel also considered that as between GC & C Brands and the other interested parties, the competing equities did not require the position to be disturbed. The outcome is that Pernod Ricard will not be obliged to implement its promise to the Panel that, if so ordered, it would allow shareholders accepting its offer pursuant to irrevocable undertakings to withdraw.

Background

The offers for Irish Distillers have developed into a most unusual and long running saga. This has meant that the provisions of the Code have fallen to be applied on several occasions to new situations. During the course of the offers, at the instigation of one or other of the parties, consideration has been given to different issues by the European Commission, the Office of Fair Trading in the United Kingdom, the Irish Courts, the Irish Minister of Industry and Commerce and the Panel. Each has been required to fulfil a separate and distinct function.

The Panel's function is not to determine whether it is desirable that there should be an acquisition of Irish Distillers or, if so, who should be the successful offeror. It acts as the Takeover Panel for Ireland at the express request of the Irish authorities. It is concerned to ensure that there has been compliance with the Code, in order that during the contest the shareholders of Irish Distillers may be treated fairly. It is neutral as between the nationality or identity of rival offerors and as between both and the management of the offeree company.

The Irish Distillers saga began when GC & C Brands announced its original offer for Irish Distillers on 30 May 1988. Irish Distillers complained to the European Commission that this offer contravened Article 85 of the Treaty of Rome. As a result of that complaint the Commission issued a Statement of Objections and indicated its intention to seek an interim measures decision. The provisional date for hearing the objections was set for 24 August and the question whether interim measures should be imposed would probably have been discussed at that hearing. If they had been imposed, they would have prevented the bid going forward unless the Commission subsequently cleared the arrangements. A decision on this issue could have taken some months. GC & C Brands and its shareholders accordingly held discussions with the Commission and undertakings were given to the Commission pursuant to which GC & C Brands became a wholly-owned subsidiary of Gilbeys. In this way the objections which had been raised by the Commission were overcome.

In consequence of the change in its ownership, GC & C Brands sought a ruling of the Panel that it could proceed with its offer. The Panel ruled that the offer was by then sufficiently different from the initial offer to constitute a fresh offer but that a dispensation should be granted from Rule 35.1, which normally prohibits second bids from the same bidder within a period of twelve months, since it was clear that shareholders in Irish Distillers had not been given a full opportunity to consider any offer for their shareholdings. The management of Irish Distillers urged most strongly that a fresh bid would extend the uncertainty overhanging the company and its customers. The Panel, therefore, sought to ensure the extended timetable was kept to a fair minimum and ordered, with the full consent of GC & C Brands, that the offer should be a final offer, open for only 21 days and capable of being increased or extended only in the event of a competing offer.

This first Panel ruling was given on 19 August. GC & C Brands immediately announced its fresh offer, stating that it reserved the right to increase the offer in, and only in, the event of a competitive situation arising.

Shortly afterwards, there were press reports that talks were taking place between Irish Distillers and Pernod Ricard, which was said to be regarded by the management of Irish Distillers as a "friendly suitor". On Friday 2 September Pernod Ricard and Irish Distillers issued a joint statement in which they said that talks were proceeding but gave no commitment that a bid would materialise or, if so, when.

Over the weekend of 3/4 September, Pernod Ricard and Irish Distillers indicated to a large number of shareholders that Pernod Ricard would make an offer for Irish Distillers of IR450p per share if it could obtain in advance irrevocable commitments to accept its proposed offer from the holders of shares which, in addition to shares already purchased by Pernod Ricard, would represent over 50% of the shares in Irish Distillers. Shareholders were contacted on the Saturday and Sunday by representatives of both Pernod Ricard and Irish Distillers and were invited to enter into such commitments.

On Saturday 3 September GC & C Brands concluded that Pernod Ricard was seeking a 50% "shut out" and late that evening contacted the Panel executive. The executive consulted the parties and ruled on the afternoon of Sunday 4 September that the approaches to shareholders made by Pernod Ricard and Irish Distillers amounted to a competing offer and, accordingly, that GC & C Brands was free to increase its own offer. This GC & C Brands duly did on the same day, raising its offer to IR525p per share. Pernod Ricard appealed the executive's ruling to the full Panel but the appeal was dismissed on Tuesday 6 September.

In the meantime, Pernod Ricard had announced a bid for Irish Distillers of IR450p per share, contending that it had received irrevocable undertakings which, together with shares already purchased by it, represented over 50% of the share capital.

The question of whether Pernod Ricard had, in fact, received irrevocable commitments of over 50% of the share capital of Irish Distillers has been contested in two principal ways. First, there was an issue as to whether the largest shareholder, FII Fyffes plc ("FII Fyffes") had entered into an agreement either selling or committing its shareholding, which represented approximately 20% of Irish Distillers, to Pernod Ricard. This issue has been the subject of litigation in the Irish Courts and has been resolved in favour of Pernod Ricard. Secondly, GC & C Brands complained to the Panel that irrevocable commitments had been obtained in breach of the Code and that shareholders should be given the opportunity of reconsidering their commitments. This is a separate and distinct issue from whether, as a matter of law, contracts were in fact entered into. The standards of the Code are standards of behaviour expected during takeovers which in many respects go beyond what is required as a matter of legal obligation. It is perfectly possible that contracts may be binding in law but that they could have been entered into in breach of the provisions of the Code which require proper opportunity to consider a bid on a well informed and advised basis. So the Irish Courts and the Panel have separate functions.

When GC & C Brands complained to the Panel executive, it sought consent to approach shareholders in order to gather evidence in support of its complaint. The executive considered that this would be inappropriate and that any investigation should be conducted by the executive as a neutral party. Pernod Ricard and Irish Distillers were informed of the fact of the complaint

and that an investigation would be carried out. In the light of the complaint and at the request of the Panel executive, Pernod Ricard included in its offer document issued on 4 October 1988 a statement making it plain that, subject to the reservation of rights to complain to the Courts about the proceedings of the Panel, Pernod Ricard would, to the extent that the Panel might require, allow shareholders accepting the Pernod Ricard offer in accordance with irrevocable undertakings to withdraw their acceptances.

Since irrevocable commitments had been given by a large number of shareholders, the investigation which had to be undertaken in the light of the GC&C Brands complaint was very wide-ranging and thorough. Members of the Panel executive conducted extensive discussions with the various financial and other advisers involved; they made enquiries of five of the directors of Irish Distillers and its Company Secretary; they saw many of those who were involved in contacting shareholders and making arrangements for the giving of the irrevocable undertakings; and they spoke, on the basis of a selection made largely at random to the shareholders, or the spouses of shareholders, who gave 56 of the total of approximately 150 irrevocable undertakings obtained by Pernod Ricard during the weekend of 3/4 September selected largely at random. The shareholders contacted included, in addition the two largest shareholders, FII Fyffe and Irish Life Assurance plc ("Irish Life"), six institutions which gave undertakings and another four which declined to do so.

Institutions contacted were asked to set down their recollections in writing. All other shareholders were sent notes of their conversations with members of the executive for checking, signing and return. So far, 27 signed notes have been received back by the executive.

The executive also studied a transcript of the High Court hearing of the Pernod Ricard v FII Fyffes case, containing accounts of the relevant events given by many people, including some whom the executive has not interviewed.

The executive informed the Panel that it was satisfied that its enquiries had been thorough and that those enquiries had been more than sufficient to enable it to know of and understand the events relevant to the matters under consideration. The parties made some minor criticisms of certain of the facts set out in the executive's paper and some of the assessments made by the executive of the inferences to be drawn from the statements made by witnesses were challenged at the Panel hearing. No party, however, contested the thoroughness of the investigation and, at the hearing, Irish Distillers expressly accepted that the investigation had been conducted on a neutral basis.

It is necessary now to look in somewhat more detail at the facts.

The Facts

In the second half of August 1988 there had been some preliminary contact between Pernod Ricard and Irish Distillers but none of significance to the issues before the Panel. The first contact of significance was on Thursday 1 September when M. Jacquillat, Managing Director of Pernod Ricard, and his advisers J Henry Schroder Wagg & Co Ltd ("Schroders") and Societe Generale SA met representatives of Irish Distillers in Dublin. Mr McCabe, the Chairman of Irish Distillers, and Mr Burrows, the Managing Director, were present and took part in this and later meetings.

At the meeting on 1 September Pernod Ricard indicated that it was prepared to make a general offer for Irish Distillers subject to certain pre-conditions, which included receiving the support of the Irish Distillers board. Pernod Ricard said that it did not get involved in contested bids. There was also discussion about the level of support necessary before the launch of a bid. There would appear to be some confusion as to exactly what was agreed but it was understood on all sides that Pernod Ricard would need such degree of commitment from shareholders as to make success either certain or extremely probable. Pernod Ricard made it plain that it would only bid if this was so and it was in this context that the board of Irish Distillers had to consider whether to recommend the offer.

A board meeting was held early in the evening of 1 September to consider, amongst other things, the Pernod Ricard proposal. The question arose whether there was any prospect of an offer from another source but the board was advised that there was no real possibility of a higher offer. The board, therefore, unanimously agreed to accept the Pernod Ricard proposal. It resolved to give a commitment to support Pernod Ricard as the only way of getting any offer higher than GC & C's offer of 400p. The directors present at the meeting believed from then onwards that they were committed to support the Pernod Ricard offer and to recommend it, and it was their understanding that Pernod Ricard would not make an offer unless it was certain to succeed.

Following the board meeting, the directors had dinner with the Pernod Ricard party and Pernod Ricard was informed of the board's decision.

On 1 September Pernod Ricard took its stake in Irish Distillers to 5%, duly announced on the next day.

On Friday 2 September, Pernod Ricard and its advisers sought to secure the support of FII Fyffes for its offer. Meanwhile, Irish Distillers and its advisers began considering which institutions they might telephone with a view to obtaining irrevocable undertakings. These thoughts, and such contacts as followed them, were, however, of a preliminary nature.

During the same day, the Panel executive, which was concerned to establish Pernod Ricard's intentions, spoke to representatives of Schroders and to Mr Matthews of County NatWest Ltd ("County NatWest"), one of the joint financial advisers to Irish Distillers. The executive was informed that there were "major hurdles" to be overcome before a Pernod Ricard offer. It was told that these hurdles involved discussions with FII Fyffes and Irish Life and also a specific tax problem on which Counsel and the Irish Revenue had to be consulted. No indication at all was given that Pernod Ricard might seek irrevocable commitments from shareholders other than the Irish Distillers directors and the two largest shareholders. No suggestion was made that Pernod Ricard would seek a 50% "shut out" and would only bid if assured of success in advance.

On the same day the Panel executive considered an argument put forward by SG Warburg & Co Ltd ("Warburgs"), one of the joint financial advisers to GC & C Brands, that Pernod Ricard's activities constituted a "competing offer". The executive disagreed and told Mr Matthews of County NatWest that, on the basis of the information known to the executive, it did not believe that a competing offer had been made. Mr Matthews agreed and the executive advised Warburgs of its views.

The executive also informed the advisers to Pernod Ricard and Irish Distillers that, unless there was a firm announcement of Pernod Ricard's intentions on Monday 5 September, the executive would consider extending the timetable for the GC & C Brands offer.

On 2 September, Pernod Ricard and Irish Distillers put out a talks announcement. This led in turn to an announcement from GC & C Brands indicating that it would plan to increase its offer in the event of a counter-offer from Pernod Ricard. This announcement was made after consultation with the Panel executive. As indicated, the Panel executive did not know of the prospect that Pernod Ricard would seek irrevocable commitments over more than 50% of the capital, making it impossible for any further bid to succeed, and nor did GC & C Brands.

The second half of GC & C Brands' announcement of 2 September read:

> "In the event that Pernod Ricard does make an offer for Irish Distillers, GC & C Brands will be free to increase its existing offer and would plan to do so. GC & C Brands again calls on the Boards of Pernod Ricard and Irish Distillers to clarify their intentions immediately."

For some reason the words "would plan", which appeared in the version of the announcement circulated in London, were replaced in the version circulated in Dublin by the word "plans". Some, but not all, Irish and English national newspapers reported the announcement on 3 September.

Pernod Ricard and Irish Distillers saw the GC & C Brands announcement as a "spoiling" operation, designed to discourage a bid from Pernod Ricard but, so far as GC & C Brands was concerned, it was a genuine statement of intent.

On 3 September, further negotiations took place between Pernod Ricard and FIT Fyffes. These gave rise to the agreement which was the subject of the litigation in the Irish Courts and which these Courts have found to be legally binding. By late afternoon, Pernod Ricard had also obtained a commitment from Irish Life in respect of its substantial holding and had decided to seek irrevocable undertakings from other shareholders. Accordingly, the advisers to Pernod Ricard and Irish Distillers divided the institutional shareholders between them for the purposes of telephone contact.

The facts indicate that from Thursday 1 September Irish Distillers believed that Pernod Ricard would seek irrevocable commitments from the holders of at least 50% of the shares. For its part, Pernod Ricard apparently did not firmly decide to adopt this course until late on Saturday 3 September. It is, however, undisputed that by the evening of 3 September it had so decided, and, together with Irish Distillers, was seeking to secure the necessary irrevocable commitments.

The way in which the irrevocable commitments were sought and made was as follows:

(i) On 3 and 4 September the directors signed undertakings committing their shares.

(ii) On the evening of Saturday 3 September/morning of Sunday 4 September, a total of 21 institutions were contacted. All but eight agreed over the next 24 hours to commit their shares to the Pernod Ricard offer.

(iii) Irish Distillers contacted over 80 shareholders (including employees holding shares through the Employee Share Purchase Scheme). 29 were family members, of varying degrees of proximity, five were former executives or directors, 33 were other employees or ex-employees, 13 were people of varying degrees of friendship with those making the calls and 2 were customers of Irish Distillers. 14 people were involved in the calling. Most of the employees, relatives of directors and employees and friends who were contacted were contacted by directors or other management.

Although no script was used, the telephone conversations followed a pattern and, in the case of shareholders other than employees, it was explained that Pernod Ricard was proposing to offer IR450p per share, subject to obtaining irrevocable commitments in respect of more than 50% of the capital of the company. It was indicated, either expressly or by implication, that the proposal was supported by the board of Irish Distillers, both because it was IR50p higher than the GC & C Brands offer, and also because it would preserve the integrity of Irish Distillers. It was made plain, although not always in the same terms, that GC & C Brands would not be able successfully to increase its offer. The reason for this was that GC & C Brands could not

successfully increase its offer unless Pernod Ricard made an offer and Pernod Ricard would only do so if it was certain of winning. Shareholders were told that the Pernod Ricard offer would be recommended by the board.

Some shareholders were visited rather than telephoned. Some who were telephoned asked for time to think and subsequently telephoned back to make arrangements to sign. So far as we are aware, none of those contacted by telephone was invited to take any separate professional advice. It was made plain to all of them that the commitment must be given quickly and it is clear, as Irish Distillers accepted at the hearing, that it would have been impractical for many to obtain advice during the remainder of the weekend.

In some cases visits were subsequently paid to those shareholders contacted by telephone who were interested in signing and, in other cases, the shareholders came to the Irish Distillers headquarters in Dublin or its bottling plant in Cork. All were shown, before signing, the draft press release to be issued on 5 September. This press release stated, amongst many other things, that The Investment Bank of Ireland Ltd ("IBI") and County NatWest, the joint financial advisers to Irish Distillers, supported the Irish Distillers directors' recommendation of the bid. Subsequently County NatWest withdrew its support in the light of the higher bid. IBI, however, did not and has subsequently indicated that it considered itself morally, if not legally, bound to support the Pernod Ricard offer.

So far as employees were concerned, the procedure was slightly different. In their case they were simply asked to visit either the Dublin headquarters or the Cork bottling plant on Sunday 4 September in order to hear "something which might be of interest". Not surprisingly, many of the employees thought that it was concerned with the future of the company. The news was passed around and spread amongst employees with impressive speed on the bush telegraph. Almost three hundred employees turned up in either Dublin or Cork. So did other shareholders, including some who had not been contacted by telephone but to whom the news had also been passed. They came in at various times during the day.

The atmosphere at the headquarters and bottling plant appears to have been characterised by support and loyalty to Irish Distillers. Most present clearly believed that they were saving their company and preserving the Irish whiskey industry. In the case of employees, there seems to have been a feeling that they were protecting their jobs.

The proceedings were well organised. On arrival, shareholders were given a form of irrevocable undertaking and told that there were lawyers and others present who could answer questions. They were invited to take their time before making up their minds whether or not to sign. Most, however, appeared in no doubt as to the course they wished to take and consequently relatively few took the opportunity of consulting with the advisers. Indeed, when GC & C Brands' competing offer was announced on the Sunday afternoon, Pernod Ricard and Irish

Distillers informed almost all shareholders who were still considering signing of this fact but a very substantial number nevertheless went ahead and committed their shares over the next day or so. This indicates how strongly supportive many employees were of the Pernod Ricard offer. Including those who signed on 5 September, the employees who committed their shares totalled 432 in number although they represented only 0.7% of the company's share capital. Those employees who were beneficiaries of the Irish Distillers Share Purchase Scheme signed by Letters of Direction to the Trustees.

This exercise of gathering undertakings on 3/4 September yielded a total covering about 17.1% of the share capital of Irish Distillers. The effect was that Pernod Ricard, taking account of its own purchases and its negotiations with FII Fyffes and Irish Life, felt able to claim support of shareholders holding over 50% of the share capital.

It should be recorded that the operation to gather undertakings was carried out with considerable care. No pressure was put on shareholders. It was emphasised to them that it was entirely up to them whether they signed or not, and that if they wanted they should take time to consider their position. It was, however, made clear that in practice a decision was required by the end of the afternoon of 4 September. The Panel is satisfied that those conducting the exercise honestly believed that they were conveying accurate information. Those concerned recognised many of the inherent dangers of the operation. Moreover, the information available to shareholders was perhaps greater than is

normally the case in attempts to gather undertakings. Those attempts, however, usually involve a much smaller number of shareholders close to the company. Neither the parties nor the Panel executive could recall an exercise to gather undertakings which was so wide in scale or large in terms of numbers contacted.

The standard form of irrevocable undertaking taken from shareholders contained an express condition that Pernod Ricard would only be obliged to make an offer if it were publicly recommended by all the directors. The draft press announcement which was attached confirmed that shareholders were being told that GC & C's offer was final, stating:

> "Pernod Ricard's offer...is 12.5% higher than the final offer by GC & C Brands."

In the event, this statement, which had become inaccurate, was deleted from the press announcement actually issued on Monday 5 September.

The draft press announcement shown to shareholders also conveyed the recommendation of the directors in terms which did not indicate that, as described below, they had committed themselves to recommend the bid even if there was a change of circumstances. In the draft, the recommendation of the directors was based firmly on their assessment of the merits. It was accepted at the hearing that, when a recommendation is made to

shareholders, they would normally understand that it is subject to re-consideration by the board in the event of a change of circumstances.

The statements referred to in the last preceding paragraph remained unchanged in the actual press announcement issued by Pernod Ricard on 5 September. The directors of Irish Distillers also issued a statement on that day explaining that, despite the merits of the revised GC & C Brands offer, the directors felt obliged to support the Pernod Ricard offer. This reflects the fact that, on the evening of 4 September, after the increased bid from GC & C Brands, the board re-considered the question whether it should continue to recommend the lower Pernod Ricard offer. The financial advisers to Irish Distillers have indicated that, but for the board's commitment to recommend that lesser bid, they would have advised that it could no longer properly do so. The directors present, however, who felt that they spoke for their colleagues, considered that they were morally bound to Pernod Ricard. They took legal advice from Senior Counsel, Mr Raymond O'Neill, as to whether they were legally committed. We were informed in evidence that the discussion with Counsel took four hours. Mr O'Neill expressed the view that the directors were legally bound to recommend the Pernod Ricard offer. This view was subsequently confirmed in writing, and a similar view has been expressed by another Senior Counsel, Mr John Cooke.

During the weekend of 3/4 September, GC & C Brands' advisers had also contacted FII Fyffes, Irish Life and other institutions. They had informed them that they were seeking the consent of the

Panel to make a fresh bid. They had urged those shareholders not to commit their shares over the weekend. Some of these institutions may have followed that advice. Certainly when GC & C Brands later announced their increased bid three institutions sold shares to GC & C at their higher offer price.

Reasons for the Ruling

We consider first, since it is logical to do so, whether GC & C Brands are correct in their submission that the Pernod Ricard bid was flawed by a breach of General Principle 9 and General Principle 7.

General Principle 9

This provides as follows:

"9. Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the companies. It is the shareholders' interests taken as a whole together with those of employees and creditors, which should be considered when the directors are giving advice to shareholders."

GC & C Brands submits that the Irish Distillers' directors broke this Principle by recommending the Pernod Ricard bid, despite the bid from GC & C Brands itself which was IR75p higher. GC & C Brands does not accept that the directors entered into any agreement with Pernod Ricard binding the directors to recommend the Pernod Ricard offer irrespective of any change in

circumstances. GC & C Brands submits that, if there was an agreement, it would be subject to an implied term that the directors would remain subject to their normal fiduciary duty to consider a further bid on its merits. It points to the fact that this limitation on the directors' obligations was expressly included in the irrevocable undertakings given by the directors on 3 September, and submits that it is inconceivable that a responsible board of directors and their advisers would have overlooked this part of those documents. So GC & C Brands argues that the board of directors voluntarily surrendered their freedom to recommend the best course to their shareholders. It further submits, having taken oral advice from Senior Counsel, confirmed subsequently in writing, that any agreement which purported to fetter the discretion of the board to recommend to shareholders a course of action which was in their best interests would be void as contrary to public policy. It also contends that the commitment of the Irish Distillers directors led to a breach of Rule 5 (Timing Restrictions on Acquisitions) because the recommendation given by the directors should not be treated as effective for the purposes of the Code.

The Irish Distillers directors strenuously deny that there was any breach of fiduciary duty. They contend that they entered into a commitment to support the Pernod Ricard bid which was both morally and legally binding. They assert that they did so because it was the only way of securing an offer in excess of IR400p per share, and of guiding the company to the bidder whom they considered would be best for the future of Irish Distillers. The board considered the position carefully before agreeing to

make its recommendation. On 4 September, after the announcement of the increased GC & C Brands offer, a sub-committee of the board of Irish Distillers reconsidered the position. The directors present would probably have accepted that, but for the prior commitment to Pernod Ricard, the increase in price of IR75p per share would have made it impossible for the Pernod Ricard offer to be recommended. The directors, however, continued to be of the view that on moral grounds they should support the Pernod Ricard bid. They arranged an immediate consultation with Senior Counsel with the relevant specialisation, who advised that there was no justification on legal grounds to break the agreement of Thursday 1 September.

The principal objective of General Principle 9 is to ensure directors act honestly and in good faith in the interests of the shareholders as a whole. They must not have regard to their own position, either as shareholders or as directors. The Panel does not consider that the directors of Irish Distillers breached this Principle. The Panel was impressed with the conscientiousness with which the directors approached their task of deciding what advice they should give. The situation was not an easy one. Pernod Ricard only wanted to bid if they were going to win. The directors not only saw the Pernod Ricard bid as the best way, in their judgment, of providing for the future of the company, but also considered it was the only way in which an offer higher than the offer of IR400p per share by GC & C Brands could be bettered. They were throughout motivated by the intention of securing the

most promising future for the company and, in seeking a higher offer, were taking account of the interests of the shareholders as a whole.

It is not for the Panel to decide whether, in spite of their integrity of purpose, the directors inadvertently acted unlawfully. The Panel is satisfied that, whether correctly or otherwise in law, the board carefully considered whether they were legally bound to recommend the Pernod Ricard offer and concluded that they were obliged to do so. GC & C Brands recognised at the Panel hearing that any issue of Irish law as to whether the directors breached any fiduciary duty to the company or that any agreement reached by them contravened public policy or that they failed as a matter of law to act appropriately towards shareholders could only be decided in the Irish Courts. So far no proceedings raising any such contention have been commenced.

GC & C Brands raised a further submission. It said that the General Principles of the Code prohibited directors from ever fettering their discretion to recommend a subsequent offer, even if the directors had acted perfectly properly in law. It pointed to a passage in Weinberg and Blank on Take-overs and Mergers (1979) which supported this argument. The Panel, however, considers that no such absolute prohibition can be implied from the Code. Similarly, GC & C Brands argued that the recommendation of the directors should not be regarded as a proper recommendation within Rule 5.2(b), since compliance with that Rule required the directors to be free to give a recommendation on the merits. Consequently, it was submitted that the gathering of

irrevocable commitments of over more than 30% of the voting rights was improper. The irrevocable commitments were, however, gathered with the agreement of the board of the offeree company and, consequently, in any event, complied in this way with Rule 5.2(b). We do not, therefore, need to consider further Rule 5.

The Panel considers that, in essence, if the directors conscientiously and honestly acted in the best interests of all the shareholders, there was no breach of General Principle 9. The Panel has concluded that the directors did so act at all relevant times.

General Principle 7

This provides as follows:

"7. At no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits."

This raises a number of the same arguments which arose under General Principle 9. We do not summarise them all. GC & C Brands essentially contended that the directors of Irish Distillers knew that GC & C Brands would wish to increase its offer and that giving a recommendation to Pernod Ricard's 50%

"shut out" offer would effectively frustrate any such increase. Yet the directors entered into their own irrevocable undertakings and then took a prominent and enthusiastic role in the collection of irrevocable undertakings. They did not seek any ruling of the Panel as to whether a situation had developed in which, in fact, GC & C Brands was entitled to make a higher bid. They took part in an attempt to ensure that the "shut out" succeeded over the weekend.

The board of Irish Distillers argues that Pernod Ricard would not have bid unless assured of success. In consequence, the only way of obtaining a higher bid than the GC & C Brands offer of IR400p per share was for the directors to commit themselves to Pernod Ricard. They were doing so, as they saw it, to benefit their shareholders and the company as a whole. The agreement was intended to procure rather than frustrate an offer.

This was a very unusual situation. The directors of Irish Distillers undoubtedly favoured Pernod Ricard and were clearly keen for their bid to succeed. But in the period commencing 1 September they were also faced with the problem that, without a bid from Pernod Ricard, they were not able to increase the price then on offer for their company. The Panel has already indicated that the question of whether irrevocable commitments were given on a basis which bound the directors to ignore any subsequent higher offer is an issue of law for the Irish Courts. So far as the Code is concerned, the Panel considers, however, that the directors acted in the best interests of the company as they saw

them, and that their conduct cannot be characterised as frustrating an offer. Accordingly, the Panel considers that at no stage did the board of directors breach General Principle 7.

General Principle 4 and Note 6 on Rule 19

It is a fundamental principle of the Code that shareholders should have a proper opportunity to reach a decision about the merits of an offer, and that in order to do so they should be adequately informed and advised. General Principle 4 of the Code provides as follows:

"Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information should be withheld from them."

Note 6 on Rule 19 provides safeguards in respect of organised telephone campaigns during bids. It includes the following:

"Furthermore, shareholders must not be put under pressure and must be encouraged to consult their professional advisers.

Other than in exceptional circumstances, campaigns must be conducted only by staff of the financial adviser who are fully conversant with the requirements of, and their responsibilities under, the Code."

The purpose of this Note is to ensure that in normal circumstances calls are only conducted by those fully familiar with Code requirements and that in other circumstances there is protection against breaches of the Code.

Pernod Ricard argues that Note 6 on Rule 19 does not apply to conduct before a bid is launched. It points to the fact that the heading to the Rule is "Conduct during an offer". It draws attention to Rule 19.1, to which Note 6 relates, and which is intended to secure equality of information to shareholders and suggests that this cannot apply where irrevocable undertakings are sought prior to a bid.

Whilst this may be right in the case of some "shut outs", the Panel executive points out that in the present case the activities on 3/4 September constituted "a bid in all but name" and that the activity was certainly a telephone campaign.

There is force in each of these arguments, but in any event, bearing in mind our view of the competing equities (see below), we would not regard a technical breach of Note 6 on Rule 19 as a justification for a ruling that Pernod Ricard should release shareholders from their commitments. Any breach of Note 6 on Rule 19, even if applicable, could only be significant in the present case if there had also been a breach of the philosophy which underlies General Principle 4. This is designed to ensure that there is adequate time to consider a bid and that the shareholders can do so on a properly informed and advised basis. This obviously means that all information conveyed must be accurate.

We have already indicated that considerable care was taken by those who conducted the undertaking gathering operations. As the Panel executive concluded, "The information and advice made

available to shareholders was considerably greater than is normal in undertaking gathering operations." But it should be pointed out that normally undertakings are sought from a much smaller group of shareholders already closely informed about the company, such as directors and their close families. Those shareholders who came to Cork and Dublin on the Sunday morning were informed of the availability of advice but in circumstances in which they were unlikely to take advantage of that opportunity. Moreover, Saturday evening and Sunday morning, which are perhaps the most relaxed hours of the weekend, are not the most opportune at which to invite people to take an informed decision about whether to sell shares or for those shareholders to be able to obtain advice. The executive considered that considerable care was taken to ensure that shareholders were not subjected to pressure by those seeking their undertakings and were left free to make up their own minds. But the knowledge of the need to decide quickly can of itself be a pressure, and the timing of the approach can lessen the prospect of a properly informed decision. The risk of a breach in such a context must be considerable.

GC & C Brands submitted that General Principle 4 was breached in four principal respects:

(i) Shareholders were not adequately informed of the willingness of GC & C Brands to increase its offer, because GC & C Brands' announcement of Friday 2 September was not mentioned.

(ii) The possibility of GC & C Brands being able to increase its offer in the light of the action of Pernod Ricard in seeking irrevocable commitments was not mentioned. So in the light of the subsequent Panel ruling, shareholders were misled into thinking that IR450p was the highest price which could be obtained.

(iii) It was not explained to shareholders that the board considered that they had an obligation to recommend the Pernod Ricard offer, even if a higher offer was forthcoming.

(iv) Shareholders were informed that County NatWest and IBI supported the recommendation without mention being made of the commitment to Pernod Ricard felt by IBI. So, GC & C Brands submitted, shareholders were misled in relation to the position of both advisers.

Pernod Ricard submitted in response that GC & C Brands' announcement on 2 September was not entirely clear, and it received wide coverage in the press in any event. It said that those who spoke to shareholders honestly believed that GC & C Brands would not be entitled to increase its offer, and at the time they were correct in saying so, because the Panel ruling that the offer could be increased was not made until the Sunday afternoon. Irish Distillers submitted that the nature of the obligation of the directors to recommend the Pernod Ricard offer was irrelevant, and that what was important to shareholders was to know that the board in fact supported Pernod Ricard. It argued

that, at the time shareholders were contacted, County NatWest's position was supportive of the offer and only changed subsequently.

The parties also made submissions about the adequacy of the advice available to shareholders and the time they were given to consider the position. Pernod Ricard pointed to the fact that institutions are used to taking decisions with regard to their shares in a relatively short period of time, and that GC & C Brands had announced its position on 2 September and was itself in contact with some institutional shareholders. It was explained to the Panel that Pernod Ricard and Irish Distillers desired to crystallise the position speedily both because Irish Distillers' defence against the GC & C Brands bid was due on 5 September and also the Panel executive was seeking a firm announcement of intention from Pernod Ricard by then.

The Panel has already indicated its concern about the attempt to secure irrevocable undertakings on such a wide scale, within a period of 24 hours starting on a Saturday evening. There is an inherent risk that shareholders will feel pressurised and will have inadequate time for reflection and lack proper opportunity for advice and that, inadvertently, they may not receive full information which enables them to decide whether to accept. Whilst the Panel recognises that Pernod Ricard and Irish Distillers did not pressurise shareholders, that they told many of them of the availability of advisers and that they conducted the

campaign as fairly as they could, the Panel considers that in the event mistakes were made which gave rise to breaches of General Principle 4.

Pernod Ricard and Irish Distillers were aware that GC&C Brands had announced that it would plan to increase its bid if it became entitled to do so. They thus conducted a telephone campaign in the shadow of a potentially competing offer. They did not ever inform the Panel executive of their intention to seek irrevocable commitments in excess of 50%. When this was subsequently discovered and enquired into, it appeared clear both to the Panel executive and to the full Panel that there was "a competing bid in all but name". But Schroders and the other advisers apparently did not see the position in this light. In their view, however wide the scale of their action in seeking undertakings - presumably even if it had extended to all shareholders - there was no competing offer. This is a literalist interpretation which the Panel finds surprising given the knowledge which advisers have that the Code should be interpreted purposively. During the course of the hearing Mr Matthews, of County NatWest, who advised his clients throughout with conspicuous care and integrity in what became for him a delicate situation, expressed the view that the Panel executive should have been consulted before this speedy operation was set in train. We agree. The result of this not taking place was that in the event shareholders were wrongly informed that GC & C Brands would not be able successfully to increase its bid.

This breach must also be considered in conjunction with the statement that the board would recommend the bid from Pernod Ricard. In normal circumstances, this would be a protection to the shareholders. They would know that, in the event of a higher bid, the board would have to consider the position again on its merits. What was not made plain was that in the present case, however, the board would be recommending the bid whatever the change in circumstances because it felt committed to do so. So the protection which the shareholders would have expected to obtain from knowing that the bid was subject to a board recommendation was in the present case unavailable. The shareholders also knew that the offer from Pernod Ricard was to be supported by County NatWest, as advisers to Irish Distillers. This would have been a further protection for them but, in the event, County NatWest felt unable to recommend the Pernod Ricard offer once GC & C Brands had made their own fresh offer. In the normal course of events, but for their view that they were irrevocably committed, the board would probably have had to take the same course as County NatWest and withdrawn their recommendation. The shareholders who gave irrevocable commitments were not told that the board considered that it was irretrievably bound and were entitled to believe the board would be free to act in the same way as County NatWest did.

The Panel considers that, taken as a whole, these considerations mean that, in spite of the care taken, shareholders were, to an extent, misled and that there was a breach of General Principle 4. We now have to consider the extent to which this breach was serious and the consequences which should flow from it.

Consequences

In general terms, GC & C Brands submitted that those shareholders who had given commitments should be entitled to re-consider them. It suggested that otherwise parties who had breached the Code would gain an advantage; that GC & C Brands would be deprived of the opportunity to obtain control; that the shareholders in Irish Distillers would be deprived of the opportunity to consider the position between two competing offers; and that otherwise the ruling of the Panel on 6 September would, in the event, have no practical effect. It suggests that it would be to the advantage of shareholders to be freed to accept its bid. It also submitted that it would be fair to restore the parties to the position they were in at the time a competing offer had in fact developed.

Pernod Ricard argued, however, that it would be inappropriate to release shareholders. It pointed to the fact that, but for its belief that it was entitled to achieve a 50% "shut out" bid without risking a competitive bid from GC & C Brands, it would not have bid at all. In this event, shareholders would only have had the opportunity to accept a bid of IR400p per share from GC & C Brands. Pernod Ricard submitted that, if it had not inadvertently made a mistake in failing to consult, the shareholders would have been left with a lower bid, and consequently that they have not, in reality, been adversely affected by any breach. Pernod Ricard pointed to the fact that it and its advisers behaved conscientiously throughout with the intention of communicating proper information and suggested that

it would be an inappropriate penalty to order release of a substantial number of undertakings since this would swing the bid the way of GC & C Brands.

We have not found these issues easy to decide. They arise in a unique situation and call for a broad judgement made with common sense which keeps such mistakes as were made firmly in proportion.

We consider first the position of institutional investors who account for by far the largest percentage of the shares. It was pointed out to us that those investors would have been following the bid with a keen interest. It was the most important takeover bid in Ireland for many years, and was for one of the Republic's most substantial companies. The investment institutions are used to taking decisions in a relatively short space of time, and are not unsophisticated. We consider this is illustrated by the fact that a number of institutions were reluctant to accept the Pernod Ricard offer and probably were hoping that in the end GC & C Brands would be entitled to bid again. Some of those institutions who took the Pernod Ricard offer had actually been informed by GC & C Brands that they were seeking consent to bid again.

The institutions no doubt made a choice between either accepting an offer of IR450p which was IR50p higher than the existing GC & C Brands offer and thereby risking the loss of some benefit if in the event GC & C Brands were allowed to raise its offer or rejecting the IR450p offer and thereby running the risk

of being left with the original IR400p offer. GC & C Brands had not at that stage indicated the amount of any such increase. Some of the institutions were no doubt influenced by the fact that FII Fyffes was said to have made a commitment, as was Irish Life. The decision of the latter company, in particular, might have influenced the decision of the other institutions.

GC & C Brands submitted that FII Fyffes had been as much misled as had the other institutions. We find this suggestion wholly unrealistic. FII Fyffes had been seeking to obtain the highest price for its shares for a number of months, and had been playing its cards shrewdly. FII Fyffes made no allegation in the Irish Courts that any contract had been induced by misrepresentation. Nor has any other institutional investor. The Panel should not, in these circumstances, lightly intervene to disturb contracts made between a bidder and shareholders. Whilst we have decided that there were some breaches of the Code, we think that it would be a greater protection than would be appropriate to institutional investors to release them from undertakings which they gave making their own best business judgements against the background that GC & C Brands were still hoping to get back with a higher bid. We consider that the institutions, for perfectly sensible reasons, took the decision to accept the available offer rather than risk it disappearing and find that they were left with IR400p per share. In essence, they understandably and responsibly took a calculated risk.

We have had much more difficulty with regard to some of the small investors. The directors, who would also speak for their close families, clearly had an opportunity to take their decision on an informed basis or on the advice of another fully informed director. It is more doubtful whether this is true of their more distant relatives, and friends or employees. But overall, we are not satisfied that these shareholders were as a class induced to commit their shares by any misleading information. They may have been influenced by many factors: loyalty to their families, respect for the views of directors as to where the best future of the company lay and, in the case of employees, a desire to protect their jobs. We recognise that some may feel an element of grievance but we do not believe that shareholders were seriously prejudiced. Six only, of the many contacted by the Panel executive, suggested that they were prejudiced and the Panel does not consider that they have raised any issues other than those which are considered above. Viewing the situation in the round, we do not think we should release any shareholders.

GC & C Brands argued that, irrespective of whether there was a breach of the Code or prejudice to shareholders, fairness demanded that it should be restored to the position at which Pernod Ricard started to obtain the irrevocable undertaking on Saturday evening or to some earlier position otherwise the Panel ruling of 6 September would have no practical effect. The Panel considers that the ruling was potentially relevant when made. For example, FII Fyffes was disputing whether it had entered into a binding commitment. If it, or any other substantial shareholder, had been held by the Courts not to be committed, GC&C Brands' higher

offer might well have succeeded. Moreover, the Panel ruling freed GC&C Brands to buy in the market at a higher price, which it did. The fact that the ruling has not, in the event, swung the bid the way of GC&C Brands would not, in the absence of any breach of the Code, be a ground for releasing shareholders from their contractual commitments. In so far as there were breaches, the Panel has already considered the position of shareholders. Whilst the Panel accepts that the interests of the offerors were relevant to its decision, it also considers that, as between GC & C Brands and the other interested parties, the competing equities do not require the position to be disturbed. In reaching this conclusion, whilst recognising that GC & C Brands was deprived of the opportunity successfully to increase its offer for Irish Distillers, the Panel also recognises that Pernod Ricard did not set out in any way deliberately to act in breach of the Code and the irrevocable undertaking gathering exercise was conducted honestly and conscientiously. In these circumstances, either bidder would feel that it was unfortunate if the Panel decision adversely affected its position. We take into account these considerations, although our principal task must be to consider whether fairness to shareholders requires that they be given an opportunity to reconsider their decisions. For the reasons we have given, we do not think that we would be warranted in giving them such an opportunity.

We have sought to deal in this statement with the arguments which the Panel considered to be the most important. GC & C Brands argued that there were other breaches of the Code but these

were subsidiary and would not, even if established, have led to the possibility of our requiring that shareholders should be released from their undertakings.

Concluding Observations

Whilst we consider that the present bid will be unique upon its facts, there are some general points to which we would draw attention:

(i) Financial advisers have a duty to consult the Panel where any point of doubt arises. They should approach this task on the basis that the processes of consultation can resolve doubts before any harm is done, and consequently they are encouraged and expected to consult on any possible Code issue where there is not an obvious answer with a clear precedent.

(ii) The Panel considers that approaches to shareholders before an offer should reflect the same high standards which should prevail during an offer.

(iii) The Panel also considers that the gathering of irrevocable undertakings over a weekend, which is a not uncommon practice, requires particular care. There is an inherent risk of mistakes being made during a speedy operation of this kind, and particularly at this time of the week.

(iv) The Panel also considers that the greatest care should be taken in an approach to small shareholders. It is not satisfactory that they should be provided with documents at a time when they cannot receive independent advice and where some of the documents are lengthy and require explanation even to the most intelligent. Directors and financial advisers must consider very carefully how they should discharge their responsibility to see that General Principle 4 is complied with in regard to individual shareholders.

17 November 1988