THE TAKEOVER PANEL

TAKEOVER PANEL REQUIRES GUINNESS TO MAKE PAYMENTS TO FORMER DISTILLERS SHAREHOLDERS

The Takeover Panel today (*14 July 1989*) announced that Guinness must make payments to some former Distillers shareholders to remedy certain breaches of the Takeover Code by Guinness during its 1986 bid for Distillers.

The approach of the Panel has been to seek to put shareholders, so far as possible, in the same position as if Rule 11 of the Takeover Code (See Note to Editors 1) had been complied with.

Guinness has informed the Panel that the remedy is likely to cost it up to £85 million (including interest).

History of the case

The Panel concluded in *September 1987* that Guinness had breached the Code by failing to treat all Distillers shareholders similarly, in that it had in *April 1986,* during the closing stages of its bid, breached Rule 11 of the Code. The Panel ruled that - contrary to assurances given to it at the time (See Note to Editors 2) - Pipetec AG, a subsidiary of Bank Leu, was acting in concert with Guinness when it bought 10.6 million shares in Distillers. The ruling was based on evidence that included a letter recording an arrangement whereby Guinness agreed to indemnify Pipetec for any loss arising out of the purchase. Accordingly, under Rule 11 Pipetec's purchase should not have been made unless Guinness was prepared and able to increase its 630.3p cash alternative offer to the highest price it had paid (731p) for Distillers shares during the bid and the preceding year.

Discussions between the Panel executive and Guinness on the consequences of this Code breach had to be suspended when, in *October 1987,* Guinness commenced proceedings for judicial review of the Panel's decision. These proceedings were decided in favour of the Panel at all stages, with Guinness finally being refused leave to appeal to the House of Lords in *November 1988.*

In *January 1989,* the Secretary of State for Trade and Industry made available to the Panel executive an interim report from Department of Trade and Industry inspectors appointed to investigate Guinness. Permission was given for a limited number of senior executives of Guinness and selected advisers to be shown relevant extracts of that report. Having considered this material, Guinness withdrew its appeal against the Panel's finding of breach. This appeal had already been the subject of a preliminary hearing before the Panel's Appeal Committee in *December 1988.*

The inspectors' report referred to other purchases of Distillers shares (not considered by the Panel in *September 1987).* The inspectors formed the view that the purchasers should probably be considered to have been acting in concert with Guinness, in which event Rule 11 would have been breached by Guinness before the Pipetec purchase. With the support of Guinness, which was concerned to see that all known Rule 11 breaches were dealt with, these purchases were, therefore, taken into account in resumed discussions between the Panel executive and Guinness on the consequences of the Code breaches.

The Panel executive and Guinness were unable to reach agreement on some aspects of the required remedy. Panel meetings, under the chairmanship of Lord Alexander of Weedon QC, were held on *12 and 20 April* this year to finalise the appropriate remedy. Guinness appealed aspects of the Panel's decisions on this, but its appeal was rejected on *13 June* by the Panel's Appeal Committee, chaired by Lord Roskill.

The Appeal Committee concluded: "It is the Panel's duty to be even-handed. They have in our view sought to be even-handed in a most unusual, unprecedented and complex set of circumstances. With all respect to the arguments of which we have had the benefit, we think the Panel has succeeded in its task and we think it right to say that the charge of unfairness cannot be substantiated. The Appeal is therefore dismissed in its entirety."

The Panel understands that Guinness will comply with the Panel's ruling. Guinness will be making a statement shortly and will in due course be issuing guidelines as to how claims should be made.

The remedy

The terms of the Guinness offer were essentially that Distillers shareholders should receive five new Guinness stock units and 516p in cash for every three Distillers shares or a cash alternative at 630.3p per Distillers share. The highest price paid by Guinness or any of its concert parties for Distillers shares during the period relevant for Rule 11 was 731p.

The Panel considered it highly likely that, if such a cash offer had been available, some of those Distillers shareholders who accepted the basic share exchange offer would have opted for cash at 731p. For the Guinness share exchange offer to be worth this price it was necessary for Guinness shares to be worth 335.4p per share. The Panel considered that the period beginning *21 August 1986* was the first time it was reasonably possible to obtain 335.4p per Guinness share in the market; Rule 11 was first triggered by Guinness on *14 April 1986.*

Accordingly, Guinness is required to pay to former Distillers shareholders:

★ to those who accepted the Guinness cash offer - 100.7p per Distillers share.

★ to those who owned Distillers shares on *15 April 1986* and who accepted the Guinness share exchange offer and sold the Guinness shares so arising at less than 335.4p on or before *21 August 1986* - the difference between their sale price and 335.4p per share.

★ to those who owned Distillers shares on *15 April 1986* and who sold those shares between that date and *21 August 1986* - the difference between their sale price and 731p per share.

In addition, Guinness is required to pay interest at the rate of 10% per annum (in each case until the date of payment):

★ to those who accepted the cash alternative - from the date when they received their cash consideration; and

★ to others - from *21 August 1986.*

The Panel's views on key Guinness arguments

Guinness raised a number of key arguments at the Panel's *April 1989* meetings. The Panel's views on these arguments are as follows:

1. End date

   Whilst the Panel considered that the period beginning *21 August 1986* was the first time it was reasonably possible to obtain 335.4p per Guinness share in the market, Guinness submitted that such an opportunity existed on *10 or 11 July* of that year. However, the Panel concluded that it would be adopting too rigorous an approach, especially to small investors, to take the view that this brief period constituted a reasonable opportunity to obtain 335.4p.

2. Discount

Guinness submitted that some discount should be applied to the Panel's calculation of remedy on the grounds of various uncertainties to which any attempt to define the relevant class of shareholders must be subject. The Panel rejected this since - although there was no certainty, for example, that all those who sold during the period between *15 April and 21 August* would have accepted the cash alternative - any discount could be unfair to all such shareholders who would have been highly likely to do so.

3. Argyll

As significant shareholders in Distillers at the relevant time, Argyll and those acting in concert with it will be entitled to a large part of the total remedy.

Guinness submitted that Argyll should be treated differently from other Distillers shareholders because it was contemplating a claim against Guinness arising out of the failure of its competitive offer for Distillers. However, the Panel considered that Argyll should be compensated like all other shareholders for the absence of a higher cash offer.

4. <u>Legal release</u>

Guinness submitted that the Panel should allow Guinness to make it a pre-condition that, before receiving a payment under the Panel settlement, former Distillers shareholders should execute a legal release of any claims against Guinness in respect of the Distillers takeover which those shareholders might have. The shareholder most likely to be affected by any such settlement was Argyll, the competing bidder for Distillers. The Panel concluded that Guinness <u>should</u> be entitled to require shareholders accepting payment in their capacity as shareholders to give such a release in respect of claims arising out of the absence of a higher cash offer as a result of the breaches of Rule 11 considered by the Panel. However, the Panel also concluded that shareholders <u>should not</u> be required to forego any claims in respect of other categories of loss arising out of breaches of the Code (including Rule 11) or of law in relation to the Distillers transaction.

5. <u>Contribution</u>

Guinness submitted that the Panel should consider whether it was able to require part of the cost of compliance to be imposed on Guinness' advisers. The Panel was satisfied that the primary liability to remedy the breach rested on

Guinness and that it would be wrong for any payment in remedy to be deferred because of the possibility that Guinness might have a claim against others. No decision as to whether any such claim might be appropriate in this case was made.

There is published with this press summary:

1. The Panel's reasons for its conclusion, following the hearings on *25 August and 2 September 1987,* that Guinness had breached the Code.

2. The Panel's reasons for its conclusions, following the hearings on *12 and 20 April 1989,* as to the remedial action that Guinness is required to take.

3. The reasons of the Panel's Appeal Committee, following its meeting on *13 June 1989,* for rejecting an appeal by Guinness against aspects of the required remedy.

Some of this material will be of interest only to a minority but in view of the importance of this case and the variety of the considerations that it raised, it is considered appropriate that full details should be publicly available.

ENDS

Notes to Editors (overleaf)

<u>Notes to Editors</u>

1. Rule 11 (As at 1986)

11.1 WHEN A CASH OFFER IS REQUIRED

Except with the consent of the Panel in cases falling under (a), where:-

(a) the shares of any class under offer in the offeree company purchased for cash by an offeror and any persons acting in concert with it during the offer period and within 12 months prior to its commencement carry 15% or more of the voting rights currently exercisable at a class meeting of that class; or

(b) in the view of the Panel there are circumstances which render such a course necessary in order to give effect to General Principle 1,

then the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any persons acting in concert with it for shares of that class during the offer period and within 12 months prior to its commencement.

2. In a letter of *17 April 1986,* to the Panel executive signed by Mr Olivier Roux (the then Director of Financial Strategy and Development) on behalf of Guinness, assurances were given in the following terms:

"Dear Sir

<u>Distillers</u>

'You have asked us to write to you with respect to the reported purchase today of approximately 10 million shares in Distillers through Cazenove & Co. We have spoken to Cazenoves and can confirm that the purchaser is not a subsidiary or associated company of Guinness, that such shares were not bought for our account and that we have made no financial arrangements with the purchaser with respect to such shares (including any arrangement linked to the sale of Distillers' listed investments).

Yours faithfully

Olivier Roux
For and on behalf of
Guinness PLC"

<u>For further information please contact:</u>
Antony Beevor on 020886 3308 or 01-382 9026

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REASONS FOR DECISIONS OF THE PANEL

The substantive issue

1 The issue before the Panel, which came before it on a reference by the Executive, is of considerable importance. It arises out of the successful offer in 1986 by Guinness, in competition with Argyll, for all the shares in Distillers. The issue is whether at a critical stage of the bid, Pipetec AG, a subsidiary of Bank Leu, in purchasing approximately 10.6mn Distillers shares which were subsequently assented to the Guinness offer, was acting in concert with Guinness. The purchase at a total price of some £76 million was made on 17 April 1986, at which time Guinness, and persons declared to be acting in concert with Guinness, already held 14.99% of Distillers shares acquired during the offer and within twelve months prior to its commencement. Accordingly, if the purchase by Pipetec was made in concert, such purchase should not have been made and serious consequences would have arisen under the Code.

Relevant aspects of the Code

2 One of the cardinal requirements of the Code stated in General Principle 1 is as follows:

> "All shareholders of the same class of an offeree company must be treated similarly by an offeror"

It is in order to give effect to this principle that Rule 11.1 provides:

"Except with the consent of the Panel in cases falling under (a), where:-

(a) the shares of any class under offer in the offeree company purchased for cash by the offeror and any person acting in concert with it during the offer period and within 12 months prior to its commencement carry 15% or more of the voting rights currently exercisable at a class meeting of that class; or

(b) in the view of the Panel there are circumstances which render such a course necessary in order to give effect to General Principle 1,

then the offer for that class shall be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for shares of that class during the offer period and within 12 months prior to its commencement."

3 The reason why the Rule applies to persons acting in concert with the offeror is that, if such persons were free to make share purchases and yet to be regarded as independent of the offeror, the Rule, and consequently the General Principle, could be easily and completely circumvented. The Code contains a definition of acting in concert. It provides:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined in the Code) of that company."

This definition is supplemented by a statement of certain situations where a presumption arises that parties are acting in concert unless the contrary is established. There follows a non-exhaustive description of the application of the concept of acting in concert in practice.

4 The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to co-operation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a "nod or a wink". Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and commonsense to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other. In a typical concert party case, both the offeror and the person alleged to be acting in concert with it are declaring that, notwithstanding the circumstances, they have no understanding or agreement. The Panel has to be prepared realistically to recognise that business men may not require much by way of formal expression to create such an understanding. It is unnecessary for the Panel to know everything that actually passed between the parties in a take-over. In addition, the judgment required in an acting in concert issue must usually be made in the context of the assertions and arguments of persons whose interests will not be served by a finding of acting in concert - this is because such a finding inevitably entails consequences under the Code, often to the benefit of offeree company shareholders, which is the object of the concept, with a cost to the offeror.

5 It is common in the course of a bid for a broker acting for the offeror to seek to persuade a third party to acquire shares in the offeree company and assent them to the bid. It is perfectly legitimate, provided that any persuasion by the broker is limited to encouraging the purchase on investment grounds and no other form of incentive or hint of future co-operation is given. Where the contact between the offeror and the potential purchaser goes beyond such orthodox persuasion by brokers, the circumstances must be examined with great care.

Since there is a variety of ways in which parties may act in concert, no one circumstance will necessarily be determinative. Relevant factors will be whether the offeror himself makes direct contact with the proposed purchaser and, if so, why; whether there is any pre-existing relationship between the offeror and the purchaser and, if so, its nature; what is the relationship, in working and personal terms, between persons on the offeror side and the potential purchaser; whether there is any form of inducement, or assistance, or hint of future benefits other than by way of shareholder benefits if the bid succeeds or fails, which might contribute to the decision to purchase. In order to reflect reality, the Panel does not hesitate to draw inferences where it can reasonably do so where the offeror and purchaser deal otherwise than through the normal channels whereby a purchaser would customarily make an investment. The Panel in making its judgments on the facts is not acting as a court of law but is applying the combined experience of its members to evidence which is almost invariably circumstantial.

6 There are other provisions of the Code which, in the light of the timing of the purchase with which the Panel is concerned, should be referred to. The last date for the Guinness offer (and the Argyll offer) to be successful or to lapse was 18 April 1986. It therefore followed, from Rule 32.1, which requires that a revised offer must be kept open for 14 days, that the last day on which the revision of any offer by Guinness (or Argyll) could be posted was 4 April. However, where a party has made a statement that an offer is final and will not be increased, the Panel requires such a statement to be adhered to. Guinness had made such a "no increase" statement on 3 April 1986. It follows that, if the purchase by Pipetec on 17 April was made in concert with Guinness and this had been ascertained at the time, the question would have arisen as to whether Guinness would have been allowed to comply with the terms of Rule 11 by increasing the cash offer; or whether the Panel would have ensured that the Guinness offer lapsed. This is now an academic question.

Background facts

7 We turn to the facts which provide the background to the issue to be decided. Competitive offers for Distillers gave rise to one of the most highly publicised, and hotly contested, take-over bids which has been seen in this country. We do not think it necessary to set out in detail the early history. The initial Argyll offer was made on 2 December 1985. On 20 January 1986 Guinness also announced an offer for Distillers, which was recommended by the board of Distillers. On 6 February 1986 Argyll increased its offer for Distillers. On 14 February 1986, prior to the posting of the Guinness offer document, the Secretary of State for Trade and Industry announced that the Guinness offer was to be referred to the Monopolies and Mergers Commission. Guinness thereupon committed itself to a disposal of certain assets of Distillers, if it succeeded in acquiring control, and withdrew its initial offer; the investigation by the Monopolies and Mergers Commission was then dropped.

On 20 February 1986 Guinness announced a new offer for Distillers, also recommended by the board of Distillers, which is the offer from which the present issue arises. Its essential terms were that, for every three Distillers Ordinary Shares Guinness offered five new Guinness Ordinary Stock Units and 516p in cash. There was a right for shareholders to elect to take Convertible Preference Shares in Guinness or further Ordinary Stock Units in place of the cash element. A full cash underwritten alternative at 630.3p per Distillers share was available. The offer document was posted on 3 March 1986.

8 On 21 March 1986 Argyll announced a final increased offer. The terms were that, for every 100 Distillers shares, 125 new Argyll Ordinary Shares, 100 new B Convertible Preferences shares and £162.75 in cash would be offered. A full underwritten cash alternative of 660p per Distillers share was included.

9 On 3 April 1986 Guinness announced that its offer was final and would not be increased. On 17 April 1986, the day of the purchase which falls to be considered by the Panel, an announcement on behalf of Guinness showed that the level of purchases made by Guinness and persons acting in concert with it totalled just under 15% of Distillers shares: thus Guinness and persons acting in concert with it could purchase no more Distillers shares.

10 On 17 April 1986, Samuel Montagu & Co Ltd, as advisers to Argyll, informed the Executive that they understood that Cazenove & Co, as brokers to Guinness, had purchased some 10 million Distillers shares at £7 a share in the stock market that morning. They asked the Executive to investigate this purchase. The Executive spoke to Mr Mayhew of Cazenove. Mr Mayhew said that the order had been received from Bank Leu in Switzerland, but he thought that they were acting as agents rather than principals in the deal. The Executive accordingly telephoned Bank Leu in Zurich, and were informed that Pipetec, an investment company and a client of Bank Leu, had agreed to buy the shares. The Executive sought to speak to a representative of Pipetec, and was informed in the morning of the following day (ie 18 April 1986) by telephone by Dr Frey, speaking on behalf of Pipetec, that Pipetec had no connection with Guinness, Distillers or Argyll. Dr Frey expressed the view that the shares were a good investment as a potential way into Guinness. As the Guinness shares on 17 April stood at about 330p, and the terms of the Guinness offer translated a Distillers price of 700p to a Guinness price of approximately 317p, such an investment decision could not be regarded by the Executive as impossible. The Executive, however, sought from Guinness, through its merchant bankers Morgan Grenfell, formal assurances that there were no arrangements which might give rise to any form of acting in concert between Guinness and Pipetec. Such an assurance was given to the Executive in a letter of 17 April 1986, signed by Mr Roux on behalf of Guinness in the following terms:

"Dear Sir

<u>Distillers</u>

You have asked us to write to you with respect to the reported purchase today of approximately 10 million shares in Distillers through Cazenove & Co. We have spoken to Cazenoves and can confirm that the purchaser is not a subsidiary or associated company of Guinness, that such shares were not bought for our account and that we have made no financial arrangements with the purchaser with respect to such shares (including any arrangement linked to the sale of Distillers' listed investments).

Yours faithfully,

Olivier Roux
For and on behalf of
Guinness PLC"

11 It will be apparent from this history that the Executive was not informed by anyone in response to their enquiries that, as is now known and revealed by Bank Leu, Pipetec is a subsidiary company of Bank Leu. Mr Mayhew of Cazenove told the Panel that, if he had known this, he would have made further enquiries since Dr Furer was a director of Bank Leu and also of Guinness.

The Executive was also not informed that, as has now become clear, at short notice on 17 April 1986 Guinness provided Cazenove with £76 million to cover the purchase of the shares in case funds were not remitted by the purchaser that day. Clearly these facts, if known at the time, would have called for further investigation.

12 On 18 April, Mercury Warburg Investment Management Limited, as a seller of the 10.6 million shares on behalf of discretionary investment clients, made a normal disclosure of that sale to the Panel. In the event, the price was 705p per share and not £7.

13 It is public knowledge that on 1 December 1986, Inspectors were appointed under Sections 432 and 442 of the Companies Act 1985 to report on Guinness. The Panel issued a statement on 30 January 1987, indicating that it considered it appropriate to

await the outcome of the enquiries of the Inspectors before publishing any findings or judgments of its own. The Executive has, however, kept the position regularly under review, and in the light of developing events considered it appropriate to refer the present issue to the Panel. It became apparent that the report of the Inspectors was unlikely to be published until considerably later than the Panel had first supposed. In addition, there were statements made by Guinness to its shareholders, which specifically referred to purchases of shares in Distillers by a subsidiary of Bank Leu under an agreement with Guinness. This posed a question as to whether there had been a breach of the Code and whether the former shareholders in Distillers had been treated equitably. This appeared to be a distinct, single issue, which required consideration in fairness to those shareholders, and did not have to involve any form of disciplinary investigation. The Executive accordingly took the view that the issue should properly be brought before the Panel as soon as enough material was available to enable a decision to be made. It pursued its enquiries, and became satisfied that there was evidence suggesting that the purchase of Distillers shares by Pipetec had been made in concert with Guinness. In the light of the importance of the issue, the Executive referred it to the full Panel rather than following its general practice of giving a ruling of its own in the first instance.

14 Enquiries by the Executive included enquiries of Guinness. These were first made informally on 17 June 1987, through its advisers, and were followed by a meeting on 25 June. At that meeting, between the Executive and Lazards and Herbert Smith, as merchant bankers and solicitors to Guinness respectively, the Executive stated its intention to pursue enquiries relating to this purchase, and, if appropriate, raise the issue before the Panel. It was informed by Herbert Smith that under the present circumstances it seemed unlikely that Guinness would be able to co-operate with the enquiries of the Executive and that communications with Guinness should be made through Herbert Smith. Herbert Smith were invited by the Executive to set out their view in detail, and did so by letter of 23 July. On 31

July, the Director-General informed Herbert Smith that the Executive would continue its enquiries and that the potential date for the Panel hearing was 2 September. Other correspondence ensued, in which Guinness suggested that debating the issue at the hearing on 2 September would be premature and inappropriate; the Executive in fairness to Guinness took the unusual step of arranging a separate preliminary hearing on 25 August for the Panel to consider an application by Guinness to adjourn the substantive hearing.

<u>Preliminary Hearing on 25 August - should 2 September hearing be - adjourned?</u>

15 At the hearing on 25 August, Guinness, through its solicitors, submitted that this was not a case where the Panel were seeking to give a ruling during the course of a take-over and that, accordingly, it was appropriate to defer consideration of the issue until all information bearing on all matters being investigated by the Inspectors, being considerably wider than the one purchase relevant to the issue, became available. It submitted that procedures and standards of evidence applied during a take-over should be different, in fairness and in the light of the needs of the time, to those applicable in a case such as this.

16 Guinness drew attention to the fact that the Inspectors had not yet completed their enquiries, and might well obtain more evidence than was available to the Panel, and also that civil litigation was threatened by Argyll against Guinness. Herbert Smith pointed to the serious consequences to Guinness which could flow from a Panel finding that there was action in concert. It was submitted that, in the absence of certain witnesses such as Mr Ward, who would not attend on 2 September, it was impossible for the Panel to determine whether Pipetec was acting in concert with Guinness. It was also suggested that further information might be necessary in order to enable the Panel to consider the seriousness of any breach of the Code and, accordingly, what would be the appropriate consequences. It was suggested that

the issue could not be decided in isolation from other transactions affecting the course of the acquisition of Distillers by Guinness and that, at the very least, the hearing should be deferred until after publication of the report of the Inspectors. The essential submission underlying these arguments was that there would be a serious risk of injustice to Guinness and that there was a danger of the Panel reaching an incorrect conclusion unless the issue was deferred until a considerably later date when some further information might be available.

17 The Panel wholly accepted that there could be serious consequences for Guinness if a decision was reached that there had been action in concert. The Panel recognised that, while seeking to ensure that the former shareholders in Distillers were treated equitably, it was also important to be fair to Guinness. The Panel had regard to the fact that there was no suggestion that the present executive directors of Guinness had been involved in any conduct giving rise to a breach of the Code. The Panel took account of the view expressed that the fact that there was no current take-over in progress made speed unnecessary.

18 The Panel considered, however, that there were considerations which pointed strongly towards holding the hearing on 2 September. The issue which had been raised was not concerned with the taking of disciplinary action by the Panel, but rather with ensuring fair treatment of the former shareholders in Distillers. If Pipetec had been acting in concert with Guinness, then this should have been disclosed as early as 17 April 1986. If the fact that Guinness had provided cover of £76 million for the purchase of the shares on 17 April 1986 had been disclosed at the time, this would have led to further investigation by the Panel. Moreover, depending upon the consequences which the Panel might decide should flow from a finding of acting in concert, in addition to the obvious need that Distillers shareholders should receive any further payment promptly rather than at an undetermined date, it might be more difficult as time passed to identify those former shareholders in Distillers who would be entitled to any further payment. The

Panel was mindful of its duty to Distillers shareholders and the prejudice that might be inflicted on them if the issue was deferred.

19 The Panel endorsed the view of the Executive that, insofar as any disciplinary proceedings are concerned, it would be inappropriate to anticipate the findings of the Inspectors. There might be a number of persons subject to such proceedings, and it would be sensible to consider the position in the round. Disciplinary action is of no consequence to Distillers shareholders. The present case was not concerned with making criticisms of individuals or Guinness, but rather of considering whether persons acting in concert with Guinness had made purchases that resulted in inequality to Distillers' shareholders and, if so, what consequences should follow. It was a single issue, which the Panel considered could be dealt with separately from other wide-ranging issues which were the subject of the enquiries of the Inspectors and from which criminal or civil proceedings might arise.

20 The Panel would nevertheless have adjourned the hearing if it had taken the view that there was any substantial risk of injustice to Guinness. The material to be before the Panel on 2 September for consideration, which is referred to later in this decision, suggested clearly upon its face that there was a case to be enquired into as to whether there was action in concert between Pipetec and Guinness. Whilst Guinness had suggested that facts might not be capable of full investigation, it had provided no material to the Panel to indicate the nature of any answer to the suggestion that there had been action in concert. Yet it asked the Panel to defer a hearing for a substantial time, and at least until after the publication of the report of the Inspectors, which may not be until all criminal proceedings that may arise are finally completed.

21 The Panel accordingly refused the application for an adjournment of the hearing fixed for 2 September. The Panel indicated that it would bear in mind the submission which had

been made on behalf of Guinness during the hearing of 25 August. If it emerged in consideration of the substantive issue on 2 September that there was a genuine risk of injustice to Guinness, the Panel stated that it would be willing to reconsider the position as to an adjournment notwithstanding the length of time which was involved. Moreover, the Panel indicated that, if a finding was made against Guinness on 2 September, it would grant leave to appeal to the Appeal Committee against its ruling that the Panel could properly and fairly consider the case prior to publication of the Inspectors report.

The Panel considered that, in the event that the substantive decision went against Guinness, serious hardship could arise and that, accordingly, it was right and in accordance with the provisions of the Code that Guinness should be entitled to have the Appeal Committee consider whether the Panel in deciding on 25 August to hear the case without granting the adjournment sought was unfair to Guinness in the circumstances.

Further application for adjournment

22 On 2 September, before the commencement of the hearing Guinness made a further application for an adjournment. The grounds were set out in a letter of 1 September 1987, to which the Executive responded on the same day. Guinness alleged that it had had insufficient time to prepare. The Panel essentially took the view that, whilst Guinness had only had the final statement by the Executive relatively shortly before the hearing, it had been given ample notice of the nature of the issue, the evidence and the nature of the possible consequences, from communications with the Executive, including a draft paper setting out the facts relied on and the general approach of the Executive to consequences as well as having these explained in meetings; and from Guinness' own investigations it should have known clearly the issues it had to address. Indeed, by a very late change in the stance which it had taken consistently since 25 June, Guinness decided to co-operate with the Panel by making a submission on the facts of the case. It did not suggest during the course of the hearing that, if the case was further

adjourned for a few days, Guinness would be able to put any further material before the Panel. The essential submission made by Guinness at the hearing, to which we refer subsequently, is similar to that which it made on the application for an adjournment on 25 August. Guinness, in its written submission and in oral argument, accepted that it was unable to assert that there was no concert party in respect of the purchase of the shares. It submitted, however, that it was premature for the Panel to reach such a decision, which should be deferred until further material became available in the light of the report of the Inspectors. The Panel refused the application for adjournment.

Analysis of evidence

23 We turn to the facts relied upon by the Executive in support of the submission that there was action in concert. We have already commented that the very essence of acting in concert makes it necessary in most cases to draw inferences from circumstantial evidence. In the present case, however, there was a considerable body of evidence put before the Executive, all of which was considered, and a number of elements are dealt with in detail below. We will outline first the general circumstances of the transaction.

24 The block of shares in Distillers was offered for sale by Mercury Warburg Investment Management Limited through the stock market to the highest bidder. The block amounted to some 3% of Distillers shares in issue. It was important to Guinness and its advisers that a purchaser of the shares should be found who would assent them to the Guinness bid. There was potential competition from Argyll to secure the shares. Argyll could have paid up to 660p per share. There was extremely little scope left for the purchase by institutional investors of a very large block of shares involving an outlay of some £76 million. It is normally the function of the broker to seek out a purchaser of shares, and Mr Mayhew of Cazenoves considered it would be impossible for his firm to find a purchaser. Mr Seelig, of

Morgan Grenfell, also thought that it would be very difficult to find a purchaser for a block of shares of this size on investment grounds. The availability of the shares was reported to Guinness, and Mr Mayhew was very shortly thereafter informed that Guinness had found a purchaser. He was informed later that day, by Mr Roux of Guinness, that it was Mr Ward of Guinness who had actually found the purchaser. Guinness was therefore able to find a purchaser of this very large block of shares at short notice in a way which experienced stockbrokers themselves felt quite unable to do. This suggests the unlikelihood that such an investor should buy a large block of shares on purely investment grounds and without some form of comfort or reassurance from Guinness, as the offeror which had a vital interest in the shares being purchased by a favourable party.

25 The approach to Bank Leu, the Panel considered, reflected the close relationships that existed between certain personalities in the two companies. Dr Furer, then Chairman of Bank Leu, was apparently well known to both Mr Saunders, then Chief Executive of Guinness, and Mr Ward, then a director of Guinness, from previous business dealings. Dr Furer had relatively recently been brought onto the board of Guinness. In the course of its submission Guinness indicated that Bank Leu had disclosed letters suggesting that a subsidiary of Bank Leu, other than Pipetec, had already invested in shares in Guinness, on a basis which would suggest it was acting in close association with Guinness. During the hearing, however, Guinness indicated it did not accept that the documents evidencing these transactions were genuine. The Panel has made no investigation of these transactions and, accordingly places no reliance upon them as evidence of a close relationship between Bank Leu and Guinness. It is, however, clear that by 7 January 1987 Bank Leu held 41,080,599 shares in Guinness. The Panel considered this would be an investment far beyond the size which would normally be held by a commercial bank for its own account as an investment. This, coupled with the close relationship between the individuals to whom we have referred, tends to suggest that Guinness turned to Bank Leu

because, in the absence of other investors, it felt that the nature of the relationship was such that it could obtain help from Bank Leu at the critical time in April 1986.

26 The Panel further considered that the willingness of Guinness to provide some £76 million to Cazenove to cover the purchase on 17 April 1986 was consistent with the existence of a special approach on the part of Guinness to this purchase. The purchase which was concluded in the late morning was for immediate settlement that day against the delivery of the share certificates. Cazenove paid out the £76 million in settlement but given the size of the transaction would be vulnerable, or at least embarrassed, if funds were not received into its bank account on that day. Concerned at the possibility of this, Mr Mayhew asked Mr Seelig of Morgan Grenfell if Morgan Grenfell would be able to help with an overnight loan if necessary. This proved to be impossible, but it was arranged that Guinness drew down available bank lines and paid the £76 million into Cazenove's account. In the event the £76 million arrived in Cazenove's account from Bank Leu by telex transfer a few hours after the purchase; but it was too late to stop the advance from Guinness to Cazenove being made. This advance remained in Cazenove's account overnight from 17 to 18 April 1986 and was repaid to Guinness on 18 April. The advance from Guinness to Cazenove was recorded in the records of Guinness' dealing room as "in respect of Distillers share purchases". These were unusual settlement arrangements and acknowledged as such by Mr Mayhew.

27 We have not, as Guinness observed, heard evidence from Mr Ward. He may or may not give evidence to the Inspectors, but there is no reason for assuming that he would ever be willing to give evidence to the Panel. He declined to do so on this occasion though he was asked. The Panel has, however, been provided with a photocopy of a letter from Pipetec to Mr Ward, as a Director of Guinness, and countersigned by Mr Ward. This letter, of which the present management of Guinness have known since January 1987, only became known to the Executive on 7 August 1987. By a Statutory Instrument made in May 1987 it was

ordered, in summary, that the DTI should be able to disclose to the Panel, for the purposes of the Panel's functions, information obtained by Inspectors, which disclosure would otherwise be prohibited. Pursuant to this power, the DTI have made available to the Panel, subject to certain undertakings, a copy of the Pipetec letter. The DTI have also informed the Panel in a letter dated 7 August 1987 that no evidence had been given to the Inspectors which contradicts the Pipetec letter.

28 The terms of the Pipetec letter are of such importance that we set out a photocopy of the letter on the following page.

Photocopy of the "Pipetec letter" referred to on page 16

PIPETEC AG
Murbacherstrasse 3

6003 Luzern

Lucarne. April 18, 1986

Private and Confidential
MR. Thomas E. Ward
Director
GUINNESS PLC
Office of the Chief Executive
39 Portman Square

London W1H 9HB

Dear Mr. Ward,

We are pleased to confirm our yesterday's telephone conversation with Mr. W. Frey as follows:

We. Pipetec AG, Luzern/Switzerland, have upon respective instructions received from yourself bought Distillers Shares on the London Stock Exchange in an aggregate value of 75'612'149.38 pound sterling.

Guinness Plc, London, on the other hand undertakes to

a) To pay to us an up front arrangement fee of 47'250.—pound Sterling

b) Repurchase from us the shares bought as per above (or the respective securities issued by Guinness Plc upon conversion, as the case may be) within 60 days at a price determined by adding (I) the original purchase price, (II) commissions, fees and other costs charged in London in connections with such purchase (III) the taxes levied in Switzerland for securities transactions of 0,33 % flat (i.e. 0,165 % each for purchase and sale of the shares), (IV) our commission of 0,1 % flat calculated on the purchase price and (V) our refinancing cost for the period from the purchase of the shares to their sale on the basis of our actual funding cost plus a margin of 1/8 % p.a.

We ask you to kindly confirm your agreement with the above by returning to us the enclosed duplicate of this letter duly signed on behalf of Guinness Plc.

Yours faithfully,
PIPETEC AG

Dr. F. Burger

29 Guinness, no doubt after seeing this letter, made a statement to shareholders on 16 January 1987. Insofar as relevant, it reads as follows:-

> "In particular, it has been established that substantial purchases of both Guinness and Distillers shares were made by wholly-owned subsidiaries of Bank Leu AG on the strength of Guinness' agreement, signed on its behalf by Mr Ward or Mr Roux, to repurchase the shares at cost plus carrying charges - an agreement which, at least as regards its own shares, Guinness could not lawfully have fulfilled."

Guinness modified this statement in a further circular to shareholders on 1 May 1987 where it was said:-

> "You may recall that Bank Leu, through two of its subsidiary companies, made purchases of Guinness and Distillers shares, on the basis of purported agreements for Guinness to repurchase these shares within a given period. Guinness subsequently deposited £50 million with a Bank Leu subsidiary, which the Bank regarded as security. Guinness maintains that the supposed agreements with the Bank Leu subsidiaries are null and void, and has sought the return of the deposit. Bank Leu disputes this interpretation, but both parties are currently discussing how best to resolve their differences."

30 Guinness informed the Panel that its first statement was made at a time when it had no reason to doubt the Pipetec letter, but it no longer stood by that statement. The Panel does not, accordingly, give weight in reaching its decision to the terms of the Guinness circular to shareholders of 16 January. The Panel considers, however, that there are a number of factors which entitle it to rely on the Pipetec letter. That letter accurately records the purchase price of the shares. It contains a warehousing arrangement which, but for its

consequences under the Code, would be a satisfactory financial arrangement from the point of view of Pipetec and would be of value to Guinness insofar as it secured support for the bid.

Bank Leu made a separate written statement to the Panel which is set out on the following page.

Copy of the Bank Leu statement referred to on page 18

"The question of Bank Leu buying Distillers shares was first raised on the morning of 17th April 1986 when Tom Ward, a Guinness director, telephoned Dr. Werner Frey (a senior vice president of the Bank and deputy head of its trading division) at the Bank's offices in Zurich. Mr. Ward explained that approximately £75m worth of Distillers shares was being offered for sale and asked whether the Bank would be in a position to make an immediate purchase of these shares for cash settlement that same day. After Dr. Frey had first consulted with members of the Bank's board of management and reverted to Mr. Ward, he spoke (at the suggestion of Mr. Ward) to David Mayhew of Cazenove, Guinness' brokers, and confirmed the purchase of a total of 10,598,826 shares for the account of Pipetec AG, an investment company which was a sub-subsidiary of the Bank. The price was £7.0544 per share (exclusive of commission and stamp duty). The Bank's efforts to secure the necessary funds at short notice were successful and Cazenove duly received payment of the inclusive purchase price of £75,612,149.38 during the afternoon of 17th April. (The Bank has no knowledge whatever of any funds being advanced, temporarily or otherwise, by Guinness in connection with the transaction).

Following the purchase, on 17/18th April, both Mr. Kurt Baumann (in charge of the foreign stock exchange department within the Bank's trading division and responsible to Dr. Frey for processing the transaction) and Dr. Frey himself received telephone calls from Mr. Hinton of the Take-over Panel. Mr. Hinton was primarily concerned to know whether Pipetec had any connection with either Guinness, Distillers or Argyll. There being no shareholding relationship between Pipetec and any of those companies, Mr. Baumann and Dr. Frey confirmed in separate conversations that Pipetec had no such connection.

The arrangements agreed between Mr. Ward and Dr. Frey for the purchase of the Distillers shares were subsequently confirmed in a letter from Pipetec to Mr. Ward dated 18th April 1986, of which the Panel apparently has a copy, supplied (it is understood) by the DTI. This letter sets out the arrangements for an up-front fee and the repurchase of the shares (or the Guinness shares representing them) within a 60 day period. The fee was not in fact paid nor were the shares repurchased.

The Distillers shares were purchased by Pipetec in non-assented form and registered in the name of Cazenove Nominees. They were subsequently accepted to the Guinness offer for a mix of Guinness ordinary and convertible preference shares.

The £50m was not deposited by Guinness with the Bank until some weeks after the Distillers share purchase: no such security was in contemplation at the time of the purchase.

To the best of the Bank's knowledge, no other Distillers shares were bought for the account of the Bank or any of its subsidiaries in connection with the Guinness bid, either before or after 17th April 1986."

This statement by Bank Leu is, of course, a clear admission by Bank Leu of its acting in concert with Guinness in respect of the purchase.

31 We consider that further support is derived from the subsequent payment by G & C Moore, a subsidiary of Guinness, of £50 million on deposit to Bank Leu. At that time Bank Leu had made no loans to Guinness and, accordingly, such a deposit could not be explained by such a pre-existing loan. The Panel considers that it was probably arranged in a manner to ensure maximum confidentiality within Guinness. As the Guinness submission discloses, the apparent reason that it was made by G and C Moore was to preserve confidentiality. Guinness did not have a previous history of placing funds on deposit with Bank Leu. The terms offered by Bank Leu are not suggested to have been in any way commercially more advantageous than other forms of bank deposits. Moreover, the requirement of confidentiality within a very limited number of people within Guinness also suggests that there were some dealings with Bank Leu which Guinness were concerned to conceal. It points to a close relationship, and is fully consistent with Guinness having acted in concert with Bank Leu along the lines described in the Pipetec letter.

32 The Panel considered carefully the grounds advanced by Guinness for suggesting that it was premature to place reliance on the Pipetec letter. It was suggested that Mr Ward had not hesitated to produce documents which described transactions in an artificial or misleading way. We were given examples, but all of them can be explained on the basis that Mr Ward had an intelligible motive, either for personal benefit or for the benefit of Guinness, for disguising the true nature of the transactions. We are not in a position to pass judgment on whether he did disguise transactions, but, if he did, his actions can therefore be explained. In the present case, however, Guinness was unable to suggest any motive why Mr Ward should sign the Pipetec letter unless the contents were accurate. He would have had no motive for entering into such an agreement unless

Guinness and Bank Leu had an understanding underlying the purchase. By contrast Mr Ward, who was concerned to secure the success of the Guinness bid and who may well have had a substantial personal stake in its outcome, had every incentive to enter into an agreement which ensured that a purchaser bought this crucial block of shares and assented to the Guinness bid. Given such incentive, it is not suggested by Guinness that Mr Ward would have been scrupulous to avoid committing a breach of the Code.

33 The Panel had regard to the suggestion that it may be established, as a result of the Inspectors' report in due course, that the Guinness director responsible for the arrangement with Pipetec, perhaps Mr Ward, was acting totally alone, quite apart from the rest of the Guinness side involved in the offer. The Panel considered that nevertheless Pipetec would have to be regarded as having acted in concert with Guinness: the arrangement was made by a person with charge of the conduct of the offer for Guinness in material ways; the purchase was very significant in enabling Guinness to succeed in the offer; such success would be to the detriment of Distillers shareholders with disregard for the equality of treatment principle.

34 Guinness also relied on the fact that the transaction as now described by Bank Leu differed from the terms in which it was put to the Panel Executive in April 1986. In particular, at that time it was suggested to the Executive that Pipetec was a client of Bank Leu, and it was denied that there was any connection between Pipetec and Guinness. As to the latter point, Bank Leu said in their statement of 27 August 1987:

> "There being no shareholding relationship between Pipetec and any of those companies, Mr Baumann and Dr Frey confirmed in separate conversations with the Executive that Pipetec had no such connection."

Whether this explains a misunderstanding at the time or not, there was obvious reason for Bank Leu, Pipetec and Guinness to gloss the true nature of the transaction in their dealings with the Executive on 17 and 18 April 1986. This does not, in our view, cast doubt on the true nature of the transaction.

35 Nor does the fact, relied upon by Guinness, that neither the up front fee arrangements nor the re-purchase arrangements described in the Pipetec letter were implemented cast doubt on the true nature of the transaction. There would have been difficulties of implementation, in the sense that the creation of the necessary records in Guinness would have drawn attention (whether to accountants or otherwise) of the existence of an arrangement which could have been in breach of the Code. We find it understandable that the arrangements were not implemented. It may well be that the £50 million deposit was made in recognition of the fact that the transaction would ultimately have to be resolved in some different way.

36 It was urged by Guinness that, however much the available material pointed to a concert party, it would be wrong to make such a finding before the report of the Inspectors was available. Whilst it was accepted that the Inspectors had heard evidence from the Bank Leu witnesses, it was pointed out that they had not yet heard from Mr Ward. Possibly they have not heard from other witnesses. The Panel gave careful consideration to this submission, but took the view that there was clear material on the basis of which it could and should properly make a judgment now on the issue of whether there was a concert party. If the material now available had been put before the Panel in April 1986, it would have demonstrated a strong case for a concert party. It continues to do so and the Panel considered that there was no doubt on the totality of the evidence that Guinness acted in concert with Pipetec/Bank Leu.

Summary of conclusions

37 Whatever the nuances of dealings between Mr Ward, or any other representative of Guinness, and Bank Leu, the Panel was in no doubt that the material demonstrated that there was clearly an understanding leading to co-operation between Bank Leu/Pipetec and Guinness in the terms of acting in concert for the purposes of the Code. The combination of circumstances including the difficulty of dealing with the 10.6 million shares in a normal way, the close relationship between personalities involved in Bank Leu and Guinness, the size of the investment made by Bank Leu so speedily, and the subsequent deposit of £50 million, and the willingness of Guinness to advance funds to Cazenove to cover the purchase and describe that advance in its own records as being "in respect of Distillers share purchases" all point to acting in concert. In the view of the Panel, the Pipetec letter is given support by these factors and can properly be relied upon. Even if, however, the letter is disregarded, the Panel considers that the other factors all demonstrate acting in concert.

The Panel takes the view that there is no doubt that Guinness and Pipetec, as a subsidiary of Bank Leu, were acting in concert and that it would be contrary to reality to defer such a decision on the ground that it was premature. The Panel did not consider such a finding would be unfair to Guinness; it did, however, consider that to defer it could well be unfair to Distillers shareholders, with whose interests the Code is principally concerned. The Panel accordingly concludes the existence of the concert party has been established.

September 1987

GUINNESS PLC ("GUINNESS")
THE DISTILLERS COMPANY PLC ("DISTILLERS")
PANEL HEARINGS ON 12 AND 20 APRIL 1989
REASONS FOR THE DECISIONS OF THE PANEL

Introduction

1 On 2 September 1987 the Panel determined that Guinness was acting in concert with Pipetec AG in the purchase by Pipetec of approximately 10.6mn Distillers shares on 17 April 1986. This purchase, which represented around 3% of Distillers, was made at a critical stage of the bid by Guinness for Distillers, and the shares were subsequently assented to the Guinness offer. The purchase was made at a time when Guinness, and persons declared to be acting in concert with Guinness, already held 14.99% of Distillers shares acquired either during the offer or within 12 months prior to its commencement. So, if the fact that Guinness had been acting in concert with Pipetec had been disclosed at the time, serious consequences would have arisen under Rule 11 of the Code which (broadly) requires a cash offer from an offeror which, with persons acting in concert, acquires more than 15% of the offeree company for cash.

2 The Panel then adjourned the hearing as to the consequences which should follow from its decision ("Consequences"), so as to enable discussions to take place between the Executive and the advisers to Guinness, and so that further submissions could be made. We prepared draft reasons for our finding that a concert party existed, and intended to incorporate those reasons as part of our decision at the end of the hearing on Consequences. It had been made clear to Guinness that it would be entitled to appeal all issues to the Appeal Committee of the Panel.

3 In the event, although some discussions on Consequences took place as contemplated between the Executive and the advisers to Guinness, proceedings for judicial review of the Panel's decision of 2 September were commenced by Guinness on 28 October. This meant that a Panel hearing to consider Consequences, which was due to have taken place on 12 November 1987, had to be adjourned until the legal proceedings were decided. Proceedings for judicial review were decided in favour of the Panel at all stages, although Guinness exercised its right to pursue proceedings as far as the House of Lords, which refused Guinness' petition for leave to appeal in November 1988. Guinness then initiated and prepared for an appeal to the Appeal Committee of the Panel and, after consideration of procedural issues, a substantive hearing was fixed for 9 February 1989.

4 In January 1989, however, the Executive received the interim report of the DTI Inspectors, who had been investigating the affairs of Guinness since November 1986. With the consent of the DTI, a limited number of senior executives of Guinness and selected advisers were shown that part of the report which dealt with the Pipetec transaction. Guinness then informed the Executive that, in the light of the contents of the report, it no longer wished to pursue any appeal against the 2 September 1987 finding of breach of the Code. Accordingly, the Executive and Guinness resumed discussions to consider the extent to which a common position could be reached on the extent to which former shareholders in Distillers should be compensated for the breach.

5 Whilst proceedings before the Panel were adjourned pending the outcome of the judicial review action, two former advisers of Guinness were charged with criminal offences concerning the Pipetec purchase. They are Mr David Mayhew, of Cazenove, and Mr Roger Seelig, formerly of Morgan Grenfell. It is not expected that the trial of these charges will commence before late 1989.

6 We do not propose to repeat here the facts on the basis of which the Panel concluded that there was a breach of the Code. These have received substantial publicity in the course of the judicial review proceedings, and it is sufficient if we include a copy of the reasons for our decisions of 25 August and 2 September 1987 as Appendix A to this statement. **(See previous document in this folder)**

7 The interim report of the Inspectors also refers to other purchases of shares in Distillers which were not considered by the Panel on 2 September. The Inspectors formed the view that the purchasers should probably be considered to have been acting in concert with Guinness, in which event Rule 11 would have been breached by Guinness prior to the Pipetec purchase. On the basis of the facts disclosed by the interim report, the Executive agreed with this view. Again, the relevant parts of the report have, with the consent of the DTI, been released to Guinness on the same basis as the Pipetec chapter.

8 Guinness first raised a number of arguments with regard to the principles on which the Panel should approach the issue of Consequences. It requested that these issues be heard prior to any consideration by the Panel of the approach to, and the computation of, the actual quantum of any remedy. The issues raised were, as Guinness agreed at the hearing, conveniently summarised in the Executive's submission as follows:-

(a) whether the Panel has the power to make a "compensatory money order" after the completion of an offer ("Jurisdiction");

(b) whether the Panel has the power to order advisers or others to make or contribute to any payments ordered by the Panel ("Contribution");

(c) whether the Panel can confirm that any order made by the Panel against Guinness should take into account all breaches of the Code by Guinness which are referred to in the interim report prepared by the DTI Inspectors ("Other Code Breaches"); and

(d) whether the Panel should permit Guinness to make it a precondition that, prior to receiving a payment under the Panel settlement in respect of Consequences, former Distillers shareholders execute a legal release in favour of Guinness of any claims against Guinness which those shareholders might have ("Legal Release").

On 12 April 1989 the Panel considered written submissions on those issues from the Executive and from Guinness, and heard oral argument which was presented on behalf of Guinness by Mr Walker-Arnott of Herbert Smith & Co. We heard further argument on the issue of Legal Release on 20 April. Also on 20 April we heard argument from Mr Marcus Agius of Lazard Brothers & Co Limited on the proper approach to the computation of the remedy. We deal with each of the issues separately.

<u>Jurisdiction</u>

9 The Panel is confronted with an unusual situation. The relationship between Pipetec and Guinness was not disclosed, as it ought to have been, at the time of the purchase. The Executive made enquiries of Guinness and its advisers as to the circumstances of the purchase, but in the event was misled. In the case of the earlier concert party purchases, the relationship between the purchaser and Guinness was only established following the receipt by the Executive in January 1989 of the Inspectors' interim report. At the time of the purchases which triggered Rule 11 Guinness had already made a "no increase" statement. Moreover the offer was in its final 14 days. Both these factors would have meant that, in normal circumstances, Guinness would not have been allowed to

fulfil what would otherwise have been the requirements of the Code that it should increase its cash offer to 731p per Distillers share, as the highest price paid by any of the Guinness concert parties. It would have been necessary, however, to hear submissions from all interested parties before reaching any conclusion on the issue. It is not now possible, as Guinness and the Executive accepted, to determine with certainty what would have happened had the breach of the Code been disclosed or discovered as soon as it occurred.

10 The Panel therefore has to consider the position as it exists today. This position is that Guinness acquired Distillers in breach of the Code, and enjoyed, and continues to enjoy, the benefit of that acquisition. It did not, however, comply with the obligation to afford shareholders similarity of treatment, which is contained in General Principle 1 and given effect, in part, through Rule 11.

11 In this situation, the Executive submitted that Guinness was and remained in breach of the Code and therefore came within paragraph l(c) of the Introduction to the Code, which requires parties to conduct themselves in takeovers in accordance with best business standards, including compliance with the Code. This paragraph reminds parties that, if they do not do so, the sanction may be that the facilities of the securities markets are withheld from them. The Executive submitted that the Panel would be entitled under the Code to seek to have the facilities of the securities markets withheld from Guinness. If such penalties are not to be sought, Guinness ought to be required, as far as possible, to remedy its breach of Rule 11 in a way which is acceptable to the Panel and accords with Code principles.

12 Guinness submitted that the Panel had no jurisdiction to make any compensatory money order after completion of the takeover. It reminded us that our powers derive from our constitution, and that we should not act outside the

boundaries of our constitution. It was submitted that whilst the Panel had considerable latitude in interpreting its own Rules, its decisions must be founded upon the terms of the Code as drafted at the relevant time. The need for the Panel to have flexibility during the course of a bid did not extend to imposing retrospective sanctions which were never envisaged by the Rules. The Panel had no specific power to award compensation if a takeover had been successfully completed in breach of the Rules. Whilst the Code contemplates disciplinary proceedings in respect of past breaches, it says nothing about a compensatory order. Any breaches of the Code might give rise to rights and remedies at law, and claims have been threatened against Guinness on a number of grounds. The Panel would, accordingly, be adjudicating on claims which might subsequently arise at law. In essence, Guinness submitted that the power of the Panel to ensure fairness to shareholders, and to require a breach to be remedied, did not exist once a takeover had been completed.

13 It is true, and an essential aim of the Panel system, that its duty to secure fairness to shareholders is normally discharged during the course of a takeover. The present case is exceptional because Guinness concealed from the Panel that its purchases were made in concert. The purpose of Rule 11 of the Code is to give effect to the important principle that shareholders of the same class should receive similar treatment. This is set out in General Principle 1 in the following terms:

"All shareholders of the same class of an offeree company must be treated similarly by an offeror."

The only way in which the Panel can secure compliance with this principle now is to require Guinness to remedy its breach by paying an appropriate sum to those former shareholders in Distillers who would probably have accepted the higher cash offer. We have to have regard to the fact that, in the event, Guinness did acquire control of Distillers. The choice is between allowing Guinness to retain control of Distillers without having complied with General Principle 1 or Rule 11, or requiring the company to make compliance at this late stage. We consider that our duty to ensure fairness to offeree shareholders admits of only one answer. Guinness should redress their breach, and so belatedly make compliance with the Code. We consider that this is the only way which is now possible of achieving fairness between Guinness and former shareholders in Distillers. We would add that to hold otherwise would allow Guinness to take unfair advantage of, and indeed would put a premium upon, the concealment of conduct which gave rise under the Code to a potential liability to shareholders.

14 We also consider that this approach accords with the general practice of the Panel. Whilst we agree that it is highly unusual to have to require a party to remedy a breach after the completion of a takeover, the principle that a breach must be remedied is one which is regularly applied by the Panel in its ordinary work. For example, the Panel may sometimes require a party which has bought shares in inadvertent breach of the Code or the Substantial Acquisition Rules to remedy the breach by selling down the shares in the market. Similarly parties are frequently required to issue circulars correcting previously published inaccurate or inadequately justified information. Because the party is prepared to remedy its breach, the Panel is often able to take the view that it is unnecessary to seek to have the sanctions at its disposal imposed upon that party. The Panel considers that the position is, in principle, essentially the same in the present case, despite the fact that the takeover has been completed. We therefore are satisfied that we can properly make an order requiring Guinness to remedy the breach after completion of the takeover.

Contribution

15 Guinness submitted that the Code was intended to regulate the behaviour of advisers as well as parties, and that such advisers were subject to the jurisdiction of the Panel. It submitted that there could be circumstances in which it would be unjust to require a party to incur the expense of remedying a breach without imposing some part of the cost upon the advisers. Guinness gave examples in its written submission of circumstances in which it was suggested that an order might be made against advisers. It was submitted that the Panel should not simply take the view that the party who had acquired the benefit of the acquisition should pay. Such a view would mean ignoring questions of culpability and also the fact that there might be limitations on the price a bidder was prepared to pay which, Guinness submitted, should not be overturned by the actions of an adviser taken without the bidder's knowledge or authority. It was further observed that, if the Panel left Guinness to any remedy it might have in the courts against its advisers, the payment might not be recoverable from those advisers since it had been made "voluntarily".

16 The Executive accepted that persons other than an offeror or an offeree, if involved in a breach of the Code, could be liable in appropriate circumstances. Two illustrations were given in the Executive's written submission. The Executive pointed out, however, that by its decision on 2 September, against which Guinness has now withdrawn its appeal, the Panel concluded that Guinness was aware of, and involved in, the event which gave rise to a breach of Rule 11. It is clear that at the time Guinness, through at least one of its directors, Mr Thomas Ward, played a prominent part in securing the acquisition of the shares by Pipetec in breach of the Code, as part of an arrangement between Guinness and Pipetec.

17 We have already observed that Mr Mayhew of Cazenove and Mr Seelig, formerly of Morgan Grenfell, are awaiting prosecution on charges which relate to the Pipetec transaction. In such circumstances it would be inappropriate for the Panel to seek to explore at present in more detail than we did on 2 September the involvement of either of them in the arrangements which led to a breach of the Code.

18 It is possible that any claim which Guinness may have against its advisers may more appropriately lie in the courts than by claim for contribution before the Panel. We cannot evaluate whether as a matter of law any suggestion that the payment was "voluntary" would avail any such advisers. We consider, however, that in such proceedings Guinness would be entitled to point to the fact that, if it failed to comply with the ruling of the Panel, the Panel would have no alternative but to seek against Guinness some or all of the sanctions which are available to it. These could include an application to The Stock Exchange that the shares of Guinness should be de-listed, or that no listing should be granted for any new shares, or an invitation to the statutory regulatory authorities to require that the financial advisers under their jurisdiction must "cold shoulder" Guinness. So, in practice, it would seem commercially unrealistic to describe any such payment as voluntary.

19 We nevertheless accept the submission for Guinness that it might be possible for it, after full evaluation of the facts, to establish a claim that the advisers should be required by the Panel to make a contribution. If, at the conclusion of the criminal prosecutions, Guinness chooses to raise this matter further, we will consider it on its merits.

20 We are, however, satisfied that the primary liability to remedy the breach rests upon Guinness, and that it should make redress without any further delay. Guinness argued that this was not justified merely by the fact that it had

received the benefits of the acquisition. Such a course would leave it with only an uncertain prospect of recompense at a later stage and would prevent the conduct of the advisers being taken into consideration in fixing the nature of any remedy. Guinness also submitted that it was unfair on advisers who might later be required to contribute not to be represented at the hearing which fixed the overall quantum of any payment. However we are wholly convinced that it would be wrong for any such payment to be deferred because of the possibility that Guinness might have a claim for contribution against others. Whilst this might be appropriate in the highly theoretical case where an offeror was wholly in ignorance of a breach which had been committed, the Panel must consider all the circumstances, including the interests of the Distillers shareholders for whose benefit the remedy is being provided.

Having regard to Guinness' own involvement in the breach of the Code, the Panel considers that it is undoubtedly right to look to Guinness directly and immediately to remedy its breach of the Code. As we have said, it is clear from our reasons for the decision of 2 September that Mr Ward, acting as a director of Guinness, was instrumental in bringing about the arrangement which gave rise to the breach. Moreover it is Guinness which has enjoyed the benefit of ownership of Distillers. We can see nothing unfair in requiring Guinness, as the company which has benefited from its own actions taken in breach of the Code, to remedy the breach now and thus belatedly ensure fairness to shareholders. Whatever rights Guinness may have against advisers, Guinness should make redress without delay to those shareholders who are entitled to a further payment. It is true that the advisers might subsequently suggest that the remedy should not have been as great as we order. Guinness has, however, the same legitimate interest as advisers in keeping the amount paid as low as is fairly possible and it has made very full submissions on this issue. This should ensure against any overpayment. The further delay implicit in postponing consideration of Consequences until Guinness' former advisers could be present would, in the Panel's view, not be fair to shareholders and not acceptable as a remedy for the breach of Rule 11. As it is, the mechanics of the claims procedure will, as we subsequently indicate, mean that it may be up to a year from now before all claims have been paid.

Other Code Breaches

21 In its submission, Guinness drew attention to a number of reasons why the calculation of a remedy should be made on a general and not an individual basis. Guinness submitted that it would be impossible to determine on a case by case basis what an acceptor might have done if Guinness had been required to make a higher cash offer in consequence of the purchase made in concert with Pipetec. Guinness also submitted that dealing with claims on an individual basis, requiring proof of what a shareholder would actually have done in the event of a higher cash offer, would impose an enormous burden on individual shareholders, Guinness and the Panel and would be impractical. Guinness suggested, and the Executive agreed, that any compensatory order would have to be made on a general basis. The Panel also agrees.

22 Guinness submitted that the Panel should take account of any other breaches of the Code committed during the takeover of Distillers. Guinness strongly urged that it would be inappropriate for it to have to face piecemeal hearings with possible further compensation orders. It considered that breaches of one particular rule of the Code might affect the appropriateness of a remedy ordered in respect of another breach. It pointed to the costs of administering a compensatory money order, and highlighted that subsequent orders could give rise to duplication of both cost and effort.

23 The Panel has considerable sympathy with these submissions. It is clearly desirable as far as possible to deal with all breaches which can be considered at the present time. The Executive has indicated that, on the basis of its knowledge at present, which includes the Inspectors' interim report, it does not expect to take any action against Guinness seeking remedies for breaches of the Code during its offer for Distillers, except for breaches of Rule 11. The breach which would most call for consideration is alleged "share ramping" of Guinness shares during the offer period in breach of General Principle 6 and subsequent failure to disclose in breach of the disclosure obligations in Rule 8 of the Code. The reasons why the Executive considers it should not seek further remedies in regard to "share ramping" can be summarised as follows.

The Panel has made no ruling with regard to the question of share manipulation. In any event, assuming share manipulation were to be established, it is not a breach of the Code which would lead to any monetary remedy, unlike a breach of Rule 11. Moreover, it is impossible to say now with any precision what the value of the Guinness securities offer would have been if there had been no manipulation or if Rule 8 had been complied with, so that it would be difficult for the Panel reliably to calculate the effect of the breaches or establish a remedy for them. It is also arguable that the only Distillers shareholders who might have suffered a loss would be those who took Guinness shares and then sold them at prices less than the highest price which Guinness shares reached during the offer. If they did not sell, they did not suffer any loss in practice. If they sold at less than 335p per Guinness share prior to the appropriate cut-off date, they will receive some recompense under the Panel's Rule 11 ruling, as we subsequently explain. The highest price reached during the offer period was 353p, so that the only Distillers shareholders who might have suffered a loss which will not be recompensed will be those who sold for between 335p and 353p or those who sold at less than 353p after the chosen cut-off date for the Rule 11 ruling. Since it is impossible to determine to what extent the effect of any manipulation was responsible for the share price reaching 353p the Executive submitted that a solution in which sellers up to 335p are recompensed would be reasonable. The Panel considers, in the light of these arguments, that it can endorse the approach taken by the Executive. We would therefore not propose of our own initiative to raise an issue as to whether Guinness should make redress to any shareholders for breach of the disclosure obligations in Rule 8.

24 This approach must, however, be subject to a number of qualifications:-

(a) the Executive must remain entitled at the appropriate time to take disciplinary proceedings against any of those involved with the offer; and

(b) the Executive should not be prevented from considering any Code issues which may arise in the light of any facts which subsequently appear, but are as yet not revealed.

With these provisos, which the Executive itself made, we agree with the reasons given as to why no further action should be taken against Guinness either by the Executive or on the initiative of the Panel itself.

25 We should add, however, that the Panel does not consider it can bind itself to deny a third party an opportunity to present claims that there have been breaches of the Code without hearing evidence or argument on the merits of such claims. In regard to any breaches other than those of Rule 11 referred to in the Inspectors' interim report, albeit that the Executive may have cogent reasons for making no complaint, we cannot shut out a shareholder from raising a complaint before us. In such event, we would have to take

account of all arguments which might be advanced. We would have to reconsider those factors which led the Executive to conclude that it would not be appropriate to make any payment in respect of Rule 8 breaches. We are not in any way encouraging shareholders to put forward such a claim, but simply indicating that they are not precluded from doing so.

26 In regard to Rule 11 breaches, the Panel has not separately conducted any enquiry into the allegations of acting in concert which concern the undisclosed concert parties other than Pipetec. So, without the consent of Guinness, the Panel could not be dealing with those breaches as part of the present hearing. Guinness indicated during the course of the hearing that in determining the Consequences issue the Panel should take account of all known breaches of Rule 11. In the light of our general approach, we would not, in the absence of new facts, consider any further complaints by shareholders in regard to any breach of Rule 11.

Legal Release

27 Guinness submitted that, in consequence of a decision by the Panel on a general basis, former Distillers shareholders could either accept the payment on that basis or alternatively might decide that a better claim could be made at law against Guinness. This claim could be on some basis other than that determined by the Panel. So Guinness suggested that, where a shareholder felt that there was a better claim to be made at law, that shareholder should not be entitled to take the payment under the Panel remedy. Otherwise Guinness might be exposed to paying too much to any former Distillers shareholder whose claim at law was for less than the amount payable on the basis of the ruling of the Panel, whilst leaving Guinness at risk of paying more to those shareholders whose claim might be greater than such amounts. Guinness submitted that it should not be exposed to the risk of proliferation of claims, nor to the risk of being required to pay shareholders twice in respect of the

same matter. So it was contended that Guinness should be entitled to require that any shareholder who accepted the Panel remedy should acknowledge that no further claim in respect of the Distillers takeover lay against Guinness.

28 The Executive sought advice from Leading Counsel on this question. In regard to the suggestion that shareholders should each sign an acknowledgment giving up any legal claims against Guinness which otherwise might be available to them, Counsel advised:-

"It is not for the Panel to adjudicate on third party claims arising at law, even if such claims arise out of matters which would otherwise fall within the Panel's jurisdiction."

Whilst this does not prevent the Panel from requiring shareholders to elect between a Panel remedy and any legal claims, we consider we should be slow to require a party to surrender any legal rights.

29 In regard to the concern expressed by Guinness that a shareholder who accepted the payment might achieve double recovery in court proceedings, Counsel indicated that the High Court would strive to avoid any such double recovery. The courts are unlikely to permit shareholders to recover twice for the same loss. Thus a shareholder could be expected to be required to give credit in court proceedings for any sum received under the Panel ruling. However, the position might be different where a claimant could show an additional category of loss entitling him to compensation, even if that additional loss flowed from the same breach.

30 Guinness acknowledged that the shareholder most likely to be affected by any requirement for a legal release is Argyll. Argyll has indicated a possibility that, at some stage in the future, it might pursue a legal claim against Guinness for damages for having been prevented from acquiring Distillers. The requirement of a general legal release would therefore

force Argyll to choose between a payment now under the Rule 11 scheme and the prospect of receiving at some time in the future, subject to a complex and perhaps novel legal action, a greater sum. Guinness suggested that no differentiation should be made between Argyll and any other shareholder. All should be put to their election, even though only some of them might have a further category of loss. This, says Guinness, is reasonable, since the Panel is granting a general remedy to shareholders irrespective of the fact that, if the breach had been discovered at the time, Guinness might well not have been permitted to increase its alternative cash offer because the breach might have been dealt with in some other way.

31 The Panel concludes:-

(a) Guinness should be entitled to require shareholders accepting payment in their capacity as shareholders to give a legal release in respect of claims arising out of their failure to receive a higher cash offer as a result of the breaches of Rule 11 considered in this case. It is clearly proper to put shareholders to their election to this extent. These breaches have been fully taken into account by the Panel remedy.

(b) Shareholders should not be required to forego any claims in respect of other categories of loss arising out of breaches of the Code (including Rule 11) or of law in relation to the Distillers transaction. These claims have not been the subject of any proceedings before the Panel, nor does our order relate to them. In some cases, the facts supporting a claim may be as yet unknown to shareholders even if they may know of various allegations through general reports. Nor should Argyll be required as a condition of accepting its remedy to forego any claim it may have as a competitive offeror who failed to acquire Distillers. Insofar as Argyll has indicated an intention to pursue such a claim, any such condition would be treating Argyll differently from, and not equally to, other shareholders since it would be deprived of any rights which stemmed from its unique position as competitive bidder.

32 The discussion on this issue has highlighted one further point. It is important that Guinness, in informing shareholders of the payment offer pursuant to the ruling of the Panel, should invite all those who are considering the possibility of legal action against Guinness to consult their legal advisers before accepting any such payment. This is so that shareholders should satisfy themselves that acceptance of the payment will not adversely affect any such claim.

Computation of Remedy

33 We begin with the question of actual computation of the remedy on the basis that our approach should be a general one, and we should seek to put shareholders, so far as possible, in the same position as if Rule 11 had been complied with. This involves considering the terms of the Guinness offer. These were essentially that Distillers shareholders should receive five new Guinness stock units and 516p in cash for every three Distillers shares, or a cash alternative at 630.3p per Distillers share.

34 The highest price paid by Guinness or any of its concert parties for Distillers shares during the period relevant for Rule 11 was 731p. The cash alternative under the offer thus fell short of that which would have been required by Rule 11 by 100.7p per Distillers share.

35 There is no problem in providing a remedy for the Distillers shareholders who in fact accepted the cash alternative offered by Guinness. These amounted to holders of 0.49% of the Distillers shares. It is clearly reasonable to infer

that they would have accepted a higher cash alternative of 731p. All those shareholders should consequently receive 100.7p extra for every share.

36 The position is necessarily more difficult in regard to those shareholders in Distillers who accepted the basic Guinness offer of new shares plus cash. They did not have the opportunity of a cash offer of 731p per Distillers share. It is highly likely that, if such an offer had been available, some would have opted for cash at 731p rather than the basic securities exchange offer. In ordering a remedy in such cases the Panel necessarily is compensating such shareholders for not being offered 731p in cash without being able to be categorical as to whether they would have accepted this sum or would still have decided to take new Guinness shares.

37 The Panel agreed with the Executive's proposal, which was accepted by Guinness, that the proper approach to deciding which shareholders would probably have accepted a cash offer of 731p per Distillers share should be broadly as follows:-

(a) first, to establish the value which each Guinness share would have to possess to make the basic offer worth 731p per Distillers share. On this basis the Guinness shares would each have needed to be worth 335.4p;

(b) secondly, to go on to consider which former shareholders in Distillers sold their new Guinness shares before the first time when a price of 335.4p, or higher, reasonably became available;

(c) to the extent that they have done so, it is reasonable to infer that had 731p in cash been available, these shareholders would have accepted such an offer.

38 We consider that the approach we intend to adopt is further justified by considering separately the position of the following categories of shareholder:-

(a) A Distillers shareholder who still retains the Guinness shares received under the offer. In such a case there have been numerous opportunities to realise in excess of 335.4p per Guinness share by selling in the market, but these opportunities have not been taken. Such shareholders have not in the event been deprived permanently of the opportunity of receiving an equivalent of 731p per Distillers share.

(b) A person who received Guinness shares under the offer but sold at a price in excess of 335.4p per share. In the same way, these shareholders have in the event realised more than the equivalent of 731p per share.

(c) Those shareholders who did not take the first reasonable opportunity to sell their Guinness shares at a price which was the equivalent of 731p or more per Distillers share. It could be suggested that they should receive the difference between 335.4p per Guinness share and the lesser amount at which the shares were sold. However, such shareholders will have ignored an opportunity to sell at 335.4p (or more) at a time when such a price was reasonably available in the market. In such a case, it cannot be said, with confidence, that those shareholders would have accepted a cash alternative of 731p per share because, when the opportunity to obtain the equivalent first arose, they decided not to do so. It would therefore be difficult to say that such shareholders have suffered from the breach.

(d) Those shareholders in Distillers who sold Guinness shares which they received under the offer at less than 335.4p at a time before it was first reasonably possible to receive 335.4p per Guinness share in the market. We consider it right to take the view that those shareholders would probably have accepted the equivalent of 731p per Distillers share, and therefore that

Guinness should offer them the difference between 335.4p per Guinness share and the price at which they actually sold those shares.

39 We turn next to consider the period during which sales by shareholders for less than 335.4p per share demonstrate, on the basis described above, that they would have accepted 731p per share. The table appended as Appendix B shows that, on the basis of mid-market prices, the Guinness share price did not reach 335p between 18 April (being the date upon which the offer went unconditional as to acceptances) and 10 July. For two days, on 10 and 11 July, it rose to 340p or above. It then dropped to below 335p and did not rise above that level until 21 August, after which it remained higher for a period of over a fortnight. We consider that it would be adopting too rigorous an approach, especially to small investors, to conclude that they had a reasonable opportunity to sell in the very short period in July when the price of 335p was exceeded. We regard it as fairer to all shareholders that the remedy should be granted to those shareholders who sold on or before 21 August. Any who sold in the next fortnight when the price was steadily above 335p would have suffered no loss. In this computation, we have ignored the fact that those who remained shareholders in Guinness after 30 June 1986 received an interim dividend of 2.24p net per Guinness share. It is possible that an alternative investment would similarly have yielded them some income, and we do not think that this should be taken into account in comparison of the sale proceeds. We have, however, taken note of the fact that 335p was the middle market price and will on average be higher than the price achievable by sellers.

40 We should refer, for the sake of completeness, to the fact that the Guinness basic offer, which included an element of 516p in cash, gave Distillers shareholders the option to receive further Guinness stock units or new Guinness convertible preference shares in lieu of that cash element.

We do not consider that any such elections should be regarded as eligible for payment. They replaced the opportunity to have 516p in cash for every three Distillers shares. Electors therefore can be regarded as having received their 516p in cash, satisfied by securities. This position is not affected by the fact that, if Guinness had complied with Rule 11, the cash alternative offer would have been 731p instead of 630.3p.

41 The commencement date for eligibility is to be the morning of 15 April 1986, the day after Rule 11 was triggered. We do not think it appropriate to include those who sold their shares between 3 April, the date on which Guinness announced it would not increase its second offer, and the subsequent triggering of Rule 11. Whilst those sellers would have believed that neither the Guinness offer nor the Argyll offer could be increased, and so might not have sold at the time had they known the facts now before the Panel, there had been no breach of the Code before 14 April and, accordingly, we consider that any such sale should be ignored. We do, however, consider that those Distillers shareholders who sold in the market at less than 731p per share from the morning of 15 April onwards should be entitled to receive the difference between their sale price and 731p. This is because, on the assumption that there had been compliance with Rule 11, Guinness would have announced its 731p cash offer immediately after triggering the Rule on the previous day. The market price would have responded accordingly and such sellers have in this way suffered from Guinness' breach.

42 We have considered whether any remedy should extend to include holders of Distillers traded options. The Executive submitted and we agreed that, although options are securities whose value is derived from the value of the underlying shares, traded options are market instruments not issued by the company concerned and not required to be the subject of an offer under Rules 14 or 15 of the Code. Therefore they do

not fall within the provisions of Rule 11. Therefore the remedy for the breach of Rule 11 should not extend to holders of Distillers traded options. We agree.

43 So the Panel considers that the following categories of shareholders in Distillers, who owned shares at the opening of business on 15 April, should be compensated:-

(a) those who sold their Distillers shares at less than 731p between 15 April and 21 August 1986 (although most who had not sold by or soon after 21 April, when the offer went unconditional, would have accepted it);

(b) those who accepted the Guinness cash alternative; and

(c) those who received Guinness shares under the offer and sold those shares on or before 21 August 1986.

In each case, the claimant should receive such sum as equals the difference between their sale proceeds and those proceeds calculated on the basis of 335.4p per Guinness share (or 731p per Distillers share).

The remedy does not apply in respect of the following categories:-

(a) Guinness shares acquired otherwise than by acceptance of the offer;

(b) Guinness shares acquired by acceptance of the offer but in respect of Distillers shares acquired on or after 15 April 1986;

(c) Distillers shares acquired on or after 15 April 1986 (including, for this purpose, Distillers shares sold "short" and covered by purchases made on or after 15 April 1986);

(d) Distillers shares sold on 14 April 1986 by way of "early bargains" for 15 April.

Categories (b) and (c) have been excluded because the shares in question were in each case acquired at a time when the market was not reflecting the increased offer that Guinness should have announced (if Rule 11 was to be complied with) and the purchase price paid will have been lower accordingly. By contrast the persons from whom such shares were purchased will be entitled to claim. On this basis Guinness is protected against paying twice in respect of the same holding.

44 We exclude from this remedy any former shareholders in Distillers who acted in concert with Guinness. Guinness has informed the Executive that it is not aware of any undisclosed concert parties who purchased Distillers shares other than those referred to at the hearing on 12 April. In the event that any other party may reasonably appear to Guinness as an undisclosed concert party in the future, Guinness should be entitled to reject a claim from such shareholders. Any such shareholder who claimed not to be a concert party would have a right of appeal to the Panel. Similarly if it appeared that there were any undisclosed concert parties whose purchases had the effect of triggering Rule 11 earlier than 14 April, the Executive would be entitled to apply to the Panel to substitute an earlier date for the commencement of the period during which shareholders who sold are entitled to a remedy. No such purchases are, however, disclosed in the Inspectors' interim report.

45 There remains for consideration one important issue raised by Guinness. Guinness has co-operated constructively with the Executive in seeking to establish the proper basis for a remedy. It accepts, as Mr Agius put it, that there should be a fair and pragmatic solution to an anomalous and highly unusual problem. It accepts that in attempting to arrive at an equitable solution it is sensible to start with the price

of 731p per Distillers share. It also accepts the basic approach of the Panel towards determining which shareholders should be compensated, although it submitted that the period should end in July 1986. Guinness does, however, submit that there should be a discount in calculating the amount of the payment because it cannot be certain that those who sold shares in the market during that period would necessarily have accepted the price of 731p. Guinness suggests that there is uncertainty as to the following factors:-

(a) as to what would have happened if the breach of Rule 11 had been discovered during the course of the offer;

(b) as to the reasons why each particular shareholder may have accepted the basic Guinness offer and may have sold during the relevant period; and

(c) as to the extent to which each particular shareholder may have been disadvantaged by the breach.

46 We deal briefly with the first of these suggestions. We have already indicated that we cannot now determine what the Panel would have ordered in the event that Guinness had disclosed details of the undisclosed concert party purchases. The Panel can now only achieve fairness to shareholders by requiring Guinness to make such payment as can provide a remedy to shareholders for not having received the higher cash alternative offer. This is the only way of achieving the equality of treatment required by the Code.

47 Guinness also submits that the position of former Distillers shareholders who sold their shares before the date on which the Guinness offer was declared wholly unconditional, 21 April 1986, was different from that of shareholders who sold subsequently. Before 21 April there could be no certainty that the Guinness offers would be declared wholly unconditional. Even if the higher cash alternative had been offered, the Distillers shares might still have stood at a

discount from that offer to reflect the uncertainty which existed at that time. Accordingly there could be no guarantee that the shareholders who sold would have achieved a full cash alternative of 731p.

48 The Panel does not consider that it should speculate as to whether, if a higher cash alternative had been available, the Distillers price would have stood at a discount. There were competing offers, and in such a situation the price may well stand at, or at only a slight discount to, the bid price.

49 Guinness also submits that it is impossible now to be certain that all shareholders who sold at a level of 335.4p or less during the relevant period would necessarily have accepted the cash alternative. Guinness points to the fact that the market price of shares was below that level for a period of several months after the completion of the takeover. It contends that some shareholders might during that period have changed their investment attitude to the merits of holding Guinness shares as distinct from cash or some other form of investment. Thus it is argued that this subsequent sale of shares does not necessarily mean that the sellers would have accepted an earlier cash offer of 731p.

50 We recognise that it cannot be categorically assumed that all those who sold during the period between 14 April and 21 August would, as a matter of certainty, have accepted the cash alternative. There must be a possibility that some of them might have accepted the Guinness share offer but then subsequently sold after forming a different view of the investment merits. We do not consider, however, that this should be regarded as a strong possibility, and are concerned that any discount could be unfair to all those shareholders who would have been highly likely to accept the cash alternative. It is, after all, equally possible that there are some who would have taken a higher cash offer, but nevertheless subsequently changed their investment stance and chose not to sell in the market, thus disqualifying them from

participating in the Panel remedy. We do not think it right to make any discount. There is no way we can achieve certainty as to what would have happened. We can only sensibly act on the probabilities and, as is agreed, on a general basis.

51 The Panel also considers that, as Guinness always recognised might well be appropriate, interest should accrue on the sums outstanding for any former shareholder in Distillers until the date of payment. The rate of interest agreed between the Executive and Guinness is 10% (gross) per annum, approximately reflecting grossed up average Building Society deposit rates for large amounts over the relevant period. The commencement date for the payment of interest will be as follows:-

(a) for those shareholders who accepted the cash alternative, the date when they received their cash consideration; and

(b) for those who sold their shares, 21 August 1986.

We are conscious that, strictly speaking, there is an argument in the latter case for awarding interest from the actual date of sale. It leaves those shareholders who sold before 21 August with some slight lack of redress, but we believe this decision is fair, taking everything into account. As we have already indicated, there was a possibility that some shareholders who sold at below 335.4p per Guinness share might not necessarily have accepted the cash alternative of 731p per Distillers share and our whole approach to remedy has to be based on probabilities and not certainties. So we think that, taking the position as a whole, it is not unfair to fix one commencement date for the payment of interest in the case of those who sold shares.

52 During the course of the hearing, Guinness indicated that, following an order of the Panel, it intended to proceed by way of a letter to shareholders seeking authority to make payment on the basis of a recommendation from its Board. The Executive indicated that, in the exceptional circumstances of this case, it was understandable that the directors should take this view rather than, as is usual, simply complying with the order of the Panel. The Panel wishes, however, to make it plain that our order is simply that Guinness should remedy the breach of the Code in accordance with this ruling. If, for any reason, including the refusal of its shareholders to grant the authority sought of them, Guinness failed to do so, the Panel would have no alternative but to seek the sanctions of the market for non-compliance with its ruling. Any letter to shareholders should make this point. Any such letter should be submitted in draft form to the Executive for its comment. References in the letter to the Panel will need the approval of the Executive.

53 With regard to the mechanics of payment. Guinness and the Executive have co-operated to devise a system for receiving, evaluating and quantifying the claims of former Distillers shareholders. In doing so, they will be assisted by Price Waterhouse on behalf of Guinness and, if necessary, by Ernst & Whinney on behalf of the Panel. We wish to record the co-operation which Lazards, and the management of Guinness, have given in the establishment of a mechanism for dealing with this complicated operation.

54 On the question of the appropriate timetable to be followed by Guinness in implementing the settlement, Guinness indicated to us that it would use its best endeavours to complete the procedures as soon as practicable. Indeed, Mr Dowling of Guinness informed us that Guinness wants this resolved as quickly as possible. Even so the entire process might take a year. In response to our request, Guinness undertook to review this timetable with Price Waterhouse and to submit to the Executive an indication as to what might be

the minimum feasible timescale. We anticipate that the Executive and Guinness will be able to resolve any timetable between themselves, without coming back to the full Panel. The essential point of principle is that, whilst the procedures to be followed are undoubtedly complex, they should be completed as quickly as possible, consistent with a balance of fairness to Guinness and Distillers shareholders. As regards the period which shareholders should have within which to make claims, Guinness submitted that 3 months would be reasonable. We agree that some limitation would be appropriate, but consider that 6 months would be more acceptable.

55 Guinness submitted that the Panel should bear the costs of Ernst & Whinney, whose role would be to investigate any queries by Distillers shareholders about the operation of the settlement arrangements. Whilst we do not question the efficiency and scrupulousness with which Guinness and Price Waterhouse will operate the system and which will reduce the number of those who might otherwise have queries, the Panel does consider that there is a need for Ernst & Whinney to be involved in resolving queries, if for no other reason than that the Executive does not have the resources to commit the time which may be necessary. The need to involve Ernst & Whinney flows directly from the breach of the Code committed by Guinness. Therefore the costs should not be borne by the Panel, and thus indirectly by other users of the Panel and of the market, but should be borne by Guinness.

56 In the course of its submissions, Guinness several times observed that the majority of its shareholders were former shareholders in Distillers. It was pointed out that much of the burden of making payment to other former shareholders of Distillers would fall on those who had themselves once held shares in that company. We have already explained why we consider it appropriate that the only former shareholders in Distillers who should be compensated are those who accepted the cash alternative or who sold their shares during the

relevant period, and who therefore could have been expected to accept the cash alternative. It is those former shareholders in Distillers, and only those, who have suffered from the breach and are therefore entitled to remedy. The fact that part of the cost of this remedy will be borne by those other former shareholders in Distillers, who have not themselves suffered from the breach but chose to continue as Guinness shareholders and thus to enjoy the benefit of the acquisition of their company by Guinness, in no way renders it unfair to compensate those who by contrast have suffered from the breach.

57 It was also suggested by Guinness during the course of argument that it might be difficult for Guinness' Board to accept that any payment should be made to Argyll, because Argyll was contemplating a claim against Guinness arising out of the failure of its competitive offer. We have already sought to explain that the remedy we provide to Argyll is solely because, as a former shareholder of Distillers, it is entitled to a remedy reflecting the failure to achieve a higher cash alternative. The fact that Argyll may have a claim in law as a competitive bidder does not prevent its being entitled now to the same remedy as other shareholders in regard to the failure to make the higher cash offer. Whether such payment should fall to be taken into account in any proceedings at law which Argyll brings would be for the courts to decide. We are satisfied that, on usual principles, courts will be vigilant to avoid any double counting.

58 We understand the instinctive reluctance of the Board of Guinness to make a payment to Argyll. We have considered carefully the concerns of the Board which were expressed to us by Guinness. We are satisfied, however, that fairness and a rational approach do not support the Board's concerns. As part of the remedy for the breach of Rule 11, Argyll should be compensated like all other shareholders for their failure to receive a higher cash offer. Argyll is as much

entitled to a fair remedy for failure to receive a higher offer as is any other shareholder. This is illustrated by taking one possibility in regard to Argyll's potential litigation. If the Argyll claim in the courts turns out to be misconceived and therefore fails, it would be wrong for Argyll not to have received the same Panel remedy as other former Distillers shareholders.

59 The Panel therefore rules that:-

(a) it is entitled to order Guinness to remedy its breach by making payment to former shareholders in Distillers;

(b) such payment should be made by Guinness without delay, and without regard to any liability of any advisers to contribute to any such payment whether at law or otherwise;

(c) the order should take into account all breaches of Rule 11 by Guinness referred to in the interim report of the Inspectors, and neither the Executive nor the Panel will initiate any claims for remedy of any other breaches of the Code arising out of any facts presently known to them. The Panel cannot, however, bind itself not to hear and determine any claims by third parties arising out of any other breaches of the Code;

(d) except as regards losses flowing from failure to receive a higher cash offer as a result of the breaches of Rule 11 considered by the Panel, Guinness should not be permitted to require Distillers shareholders to execute a legal release as a condition of payment;

(e) all Distillers shareholders who accepted the Guinness cash alternative should be paid 100.7p per share by Guinness;

(f) all Distillers shareholders who owned Distillers shares at the opening of business on 15 April and who accepted the Guinness securities offer and then sold their Guinness shares at less than 335.4p per share on or before 21 August 1986 should be paid by Guinness the difference between their sale price and 335.4p;

(g) all Distillers shareholders who owned Distillers shares at the opening of business on 15 April and who sold Distillers shares from the commencement of business on 15 April 1986 until 21 August 1986 at less than 731p per share should be paid by Guinness the difference between their sale price and 731p;

(h) interest at the rate of 10% (gross) per annum should be paid by Guinness as follows (in each case until the date of payment) :-

(i) for those who accepted the cash alternative, from the date when they received their cash consideration;

(ii) for others, from 21 August 1986;

(i) Distillers shareholders who acted in concert with Guinness should not be entitled to make any claim;

(j) no account should be taken of elections made under the offer by accepting Distillers shareholders;

(k) no claim should be available in respect of Distillers traded options;

(l) Distillers shareholders who accepted Guinness shares but sold after 21 August 1986, or retain those shares, have suffered no loss as a result of the breach (or have not taken an opportunity to avoid any loss by selling in the market)and so should receive no payment;

(m) the costs of Ernst & Whinney should be borne by Guinness.

5 May 1989

APPENDIX A

(See previous document in this folder)

APPENDIX B

TABLE OF MID-MARKET PRICES OF
GUINNESS ORDINARY STOCK OF 25P
FROM 4 APRIL 1986 TO 26 AUGUST 1987
(ALL NUMBERS EXPRESSED IN PENCE PER SHARE)

Week ending	Monday	Tuesday	Wednesday	Thursday	Friday
1986					
4 April	-	-	-	-	351
11 April	348	346	340	351	353
18 April	351	342	336	336	320
25 April	306	308	305	300	298
2 May	296	313	315	308	315
9 May	315	313	308	310	310
16 May	313	316	313	310	298
23 May	298	300	300	300	298
30 May	298	295	310	306	303
6 June	301	301	301	303	301
13 June	301	298	296	298	300
20 June	303	306	316	321	325
27 June	323	321	326	328	333
4 July	333	333	331	331	331
11 July	335	326	333	343	340
18 July	333	330	331	326	310
25 July	303	305	313	313	313
1 August	313	310	311	310	310
8 August	308	310	306	303	301
15 August	308	313	331	328	328
22 August	330	330	335	340	343
29 August	343	346	346	343	345
5 September	350	346	343	343	338
12 September	331	336	336	336	331
19 September	333	325	328	333	328
26 September	328	326	323	318	316

Week ending		Monday	Tuesday	Wednesday	Thursday	Friday
3	October	308	313	320	316	311
10	October	313	318	315	316	318
17	October	316	316	318	316	318
24	October	313	311	308	306	308
31	October	315	318	325	333	337
7	November	337	334	328	335	345
14	November	345	343	338	335	343
21	November	333	327	327	320	326
28	November	327	320	329	327	330
5	December	298	287	278	285	298
12	December	287	289	289	298	298
19	December	298	295	297	280	285
26	December	280	282	282	282	282
1987						
2	January	290	294	290	290	297
9	January	295	298	294	297	307
16	January	300	295	288	288	271
23	January	268	263	266	270	278
30	January	277	289	288	286	292
6	February	294	290	290	288	297
13	February	297	290	308	301	298
20	February	304	306	304	308	314
27	February	308	304	315	323	337
6	March	329	327	325	318	325
13	March	319	318	317	327	320
20	March	315	320	315	321	331
27	March	330	337	333	333	330
3	April	317	319	317	322	320
10	April	320	317	318	312	313
17	April	314	323	318	323	323
24	April	323	319	324	330	322
1	May	321	323	325	325	330
8	May	330	327	326	326	329

Week ending	Monday	Tuesday	Wednesday	Thursday	Friday
15 May	333	332	339	338	345
22 May	345	359	359	355	358
29 May	358	358	355	355	356
5 June	357	356	368	365	365
12 June	365	377	375	377	388
19 June	386	385	380	373	362
26 June	357	360	371	367	365
3 July	362	363	360	365	367
10 July	370	367	362	365	365
17 July	360	365	370	378	378
24 July	366	368	363	367	372
31 July	364	368	375	375	374
7 August	366	360	358	353	342
14 August	344	353	347	350	355
21 August	354	347	342	337	344
28 August	350	356	356		

Source: Datastream from The Stock Exchange Daily Official List

The reasons of the Appeal Committee of the Takeover Panel (The Right Honourable The Lord Roskill, Chairman, Sir Martin Jacomb and Mr Ian Butler) for its decisions after the hearing of the appeal by Guinness plc ("Guinness") from the decisions of the Takeover Panel dated 5 May 1989 after hearings before the Panel on 12 and 20 April 1989.

1 Guinness, being dissatisfied with certain of the decisions of the Panel on 5 May 1989, with the leave of the Panel, appealed to the Appeal Committee. The hearing of the appeal took place on 13 June 1989. The Panel in its reasons dealt with five matters. Guinness accepted the decisions on two of those five. But they appealed on the remaining three which can conveniently be dealt with under three separate headings: Contribution, Computation of Remedy and Legal Release. Under the last of these headings we shall deal with a related matter which arises in connection with the suggested special position of Argyll Group plc ("Argyll"). In this connection Guinness made a new submission to us which was not advanced before the Panel, and upon which therefore we have not had the benefit of the Panel's view. For brevity we shall call that new point "the escrow point".

2 It is not necessary for us to relate the long-running history of this dispute. It has been related more than once in previous decisions of the Panel, of the High Court and of the Court of Appeal. It is related yet again in the opening paragraphs of the reasons for the decisions against which this appeal is brought. Our reasons for our determination of this appeal must be read in conjunction with the relevant reasons for the Panel's decisions of which complaint is made. This should avoid unnecessary repetition. Suffice it to say that Guinness no longer disputes the finding of the Panel on 2 September 1987 that there had been a breach by them of Rule 11 of the Takeover

Code. The remaining question was as to the manner in which former shareholders in the Distillers Company plc ("Distillers") should be compensated for the now-admitted breach.

3 As the Panel stated, and as was repeated on behalf of Guinness before us, the situation which faced the Panel was unusual for the reasons given in paragraph 9 of its reasons. The breach was only discovered after the takeover of Distillers by Guinness had been completed. Indeed, the breach was only finally acknowledged very much later. Guinness and their concert parties ought not to have bought shares at a price above the cash alternative, Guinness having, as stated by the Panel, already made a "no increase" statement. Guinness having done this, in breach of the Code, the Distillers' shareholders ought to have been, but were not, given the benefit of a cash offer of 731p for each Distillers share as the highest price paid by any of the Guinness concert parties. It is now impossible to determine with absolute certainty what would have happened, and in particular what action shareholders in Distillers would or might have taken had the requirements of the Code been complied with, or had the now-admitted breach of the Code been disclosed or discovered as soon as it had taken place.

4 The initial submission by Guinness that the Panel had no jurisdiction to make any order for compensation after the completion of the takeover was rejected by the Panel. That submission was not repeated before us. It was however said that Rule 11 was directed to a current bid, and was applicable only at the time of an offer capable of acceptance. In one sense, this is of course correct. But the problem is how, when an admitted breach of Rule 11 is revealed only after the takeover has been completed, the consequences of that breach are to be dealt with. It seems to us clear, as it seemed to the Panel, that, in order to secure fairness, those injured by the breach must

be duly compensated for the benefit of which they have been unjustly deprived. It was said before us that the Panel had sought to resolve the problem in a "simplistic and mechanistic way" with resulting unfairness to Guinness. Fairness to both sides was, it was said, essential, since any compensation would fall upon the present shareholders of Guinness, some of whom were former shareholders in Distillers.

5 We unhesitatingly agree that, so far as is now humanly possible, a result which is fair to all concerned must be sought even in difficult circumstances which, it must be said, were of the making of Guinness and not of the shareholders whom it is now sought to compensate. In support of the complaint that the Panel had been unfair, it was said that, as a result of the compensation which the Panel ordered, some former Distillers shareholders would or at least might recover compensation for a loss which in truth they might not or indeed would not have suffered.

6 Guinness put in the forefront of their submissions that though they now accepted that some compensation should be paid, a full evaluation of Guinness' responsibility and thus of the extent of their individual responsibility could not be made and determined until the extent of any involvement by any of Guinness' advisers had also been determined, so that the respective alleged responsibilities of each had been made known. It was said that unless and until this step was taken the extent of Guinness' own individual involvement could not properly or fairly be determined.

7 The Panel rejected the submission. We have no hesitation in agreeing with the Panel. It was the breach of the Code which gave rise to the obligation on Guinness to make a higher cash offer. That obligation was not fulfilled. The resultant liability falls directly on Guinness. We

agree with the Panel that the primary liability is of Guinness. The redress should be given by Guinness without further delay. We express no view as to any further recovery by Guinness against any of its advisers or as to any forum in which such recovery, if due, might be effected. We therefore uphold the relevant part of the conclusions in paragraph 59(a) and (b) of the Panel's reasons and dismiss that part of the appeal.

8 We now turn to consider the question of the computation of the remedy. The Panel ordered payment of compensation on the various bases set out in paragraph 59(e) (f) and (g) of its reasons. The gravamen of the attack on the Panel's decision was that the Panel had allowed no discount on the sums ordered to be paid as compensation in respect of what were called "the uncertainties". It was suggested that it was uncertain if there ever would have been a higher cash offer, or if there were, whether any such higher cash offer would or might have been accepted. Which sales should be used to determine which Distillers shareholders would probably have accepted the higher offer were also extremely uncertain.

9 Guinness relied on the well-established legal principle that courts, in assessing damages, whether for breaches of contract or for tort, will resolve questions of future uncertainties by making an allowance or discount for the possibility that certain events anticipated at the time of the assessment of damages might not ultimately take place. A contract broken by a defendant might, if not so broken, have subsequently failed in performance for some extraneous and quite unforeseeable reason. An injured passenger in a car accident claiming damages for loss of future earnings might, had the accident not taken place, not have attained his then expectation as to his future for some wholly extraneous reason. By parity of reasoning, it was argued that the Panel ought to have

allowed a discount, as much it was suggested as 50% or even 60% in order to compensate for the uncertainties of the various kinds which were put before us in argument.

10 This approach has obvious attractions, and it was, if we may say so, attractively advanced. But we think that the suggested analogy is imperfect. It does not truly reflect the nature of the exercise in which the Panel was engaging and in which we now have once again to engage. Our concern, like the Panel's, is to compensate for a failure in performance of an obligation which, had Rule 11 not been broken, should have resulted in a higher cash offer. It seems to us therefore, that purely as a business proposition, the most effective way to secure proper compensation is to assume that such an offer had been made and at least to put the injured non-recipient of that offer in the nearest possible position to that which he would have achieved had the offer been so made. Subject therefore to the question of dates, we think that in principle the Panel's conclusion in paragraph 59(e) (f) and (g) was correct on the facts of this particular case.

11 As regards dates, the Panel took 21 August 1986 as the cut-off date. Guinness had sought an earlier cut-off date. The 10th and 11th July 1986 were canvassed as possible alternative cut-off dates. Complaint was made that the Panel had ignored that the Executive had at one time accepted the July cut-off date. But we accept that this proposal was part of a without-prejudice negotiation for an overall settlement of the dispute, and we reject this part of Guinness' submission. The Panel rejected the argument for 10 or 11 July, saying it would involve "adopting too rigorous an approach, especially to small investors". See paragraph 39 of the Panel's reasons. Guinness also complained that the Panel had ignored the effect of the interim dividend of 2.24p per share net after 30 June 1986. It was suggested that adding this dividend to the price would have meant that between

27 June and 14 July 1986 there was a good chance of a sale at as high a price as prevailed after 21 August. In our view the Panel were right to ignore the dividend. We have given much consideration to this part of Guinness' complaint, but our ultimate conclusion is that overall fairness demands the adoption of the 21 August 1986 cut-off date. In the result, we dismiss the appeal against the conclusions in paragraph 59(e) (f) and (g) of the Panel's views.

12 We now turn to the last question - what legal release should be demanded from all the shareholders who have to be compensated? It is understandable that Guinness should seek as wide a release as they can obtain from those shareholders whom it becomes their duty to compensate. They do not want to comply with the Panel's decision only to be faced with further actions in the courts by aggrieved shareholders who may think, rightly or wrongly, that they may receive further sums and thus expose Guinness to a possible risk of double-payment. But the Panel was and we are dealing only with remedies under the Code for the breach of Rule 11. We do not think it right to use the necessity for Guinness to compensate for that breach as a means of obtaining a release from other claims not necessarily arising from this breach of the Code. We of course sympathise with Guinness' anxiety to avoid paying twice. But we have difficulty in accepting that a payment made by order of the Panel affirmed on appeal can really be regarded as a "voluntary" payment having regard to the drastic and damaging sanctions which can be applied for non-compliance with rulings of the Panel. Moreover the courts have always leaned heavily against double-recovery, and we do not find it easy to envisage a situation in which the courts would allow what in effect, whatever the legal technicalities, would be compensation to be extracted twice over.

13 Subject therefore to the separate question of the position of Argyll, we agree with the conclusions reached by the Panel in paragraph 31(a) and (b) of its reasons and with the ruling in paragraph 59(d). We do not read paragraph 31 (a) as dictating the precise language of any release, but rather as stating the limitations upon the scope of such release. The wording of any proposed release should be agreed between Guinness and the Executive.

14 We now turn to consider the special position of Argyll. Like the Panel, we understand Guinness' reluctance to make payments to Argyll and members of their concert party. See paragraph 58 of the reasons of the Panel. We fully appreciate the point made in paragraph 21 of Guinness' submissions as to the magnitude of the sums involved of which they gave us details. But Argyll was at the relevant time a shareholder. So were the members of Argyll's concert party. In principle, we feel unable, as did the Panel, to distinguish between Argyll and their concert party on the one hand, and all other shareholders on the other. If Argyll have some other claim which they believe they can enforce, we do not see how they can properly be required to abandon such other claim as the price of obtaining the compensation to which they, in common with other shareholders, are entitled in that capacity. We do not think that the conclusion expressed in paragraph 58 of the Panel's reasons can be faulted.

15 It was no doubt for this reason that Guinness raised "the escrow point" before us. We of course see the attractions of this proposal from Guinness' point of view. But with great respect to its ingenuity, we think it is misconceived. If Argyll and their concert party are to be treated in the same way as all other shareholders as the Panel have held and as we have agreed, we cannot accept that it is right to impose this additional restrictive condition upon any payment otherwise due to them. Moreover, to make the Panel one of the ultimate arbiters

of the release of money which is to be held in escrow would be to involve the Panel in matters well outside the Panel's normal role. We reject the escrow proposal. It follows that we are unable to regard Argyll and their concert party as in any different position from any other relevant former shareholder, and we therefore uphold the rulings in paragraph 59(b) and (d) of the Panel's reasons in their entirety. That part of the appeal is accordingly also dismissed.

16 We have naturally anxiously considered the allegation of "serious unfairness" to Guinness made in paragraph 30 of Guinness' submission. It is the Panel's duty to be even-handed. They have in our view sought to be even-handed in a most unusual, unprecedented and complex set of circumstances. With all respect to the arguments of which we have had the benefit, we think the Panel has succeeded in its task and we think it right to say that the charge of unfairness cannot be substantiated. The appeal is therefore dismissed in its entirety.

30 June 1989