

THE TAKEOVER PANEL

THE WHYTE & MACKAY GROUP PLC ("WHYTE & MACKAY") INVERGORDON DISTILLERS GROUP PLC ("INVERGORDON")

The Panel met on 17 September 1991 to hear an appeal by Invergordon, advised by Robert Fleming & Co. Ltd ("Flemings"), against a ruling by the Executive that, in view of the fact that the decision of the Secretary of State as to whether or not to refer the offer by Whyte & Mackay for Invergordon to the Monopolies and Mergers Commission ("MMC") has been further delayed, "day 39", "day 46" and "day 60"* of the offer should be extended.

Background

On 6 August 1991, Whyte & Mackay, a wholly-owned subsidiary of Gallaher Ltd (itself a wholly-owned subsidiary of American Brands, Inc), announced a unilateral cash offer (the "Offer") for Invergordon. The offer document was posted on the same day. The original timetable for the Offer, therefore, so far as relevant, was as follows:

"Day 39" Saturday 14 September

"Day 46" Saturday 21 September

"Day 60" Saturday 5 October

On 7 August, Whyte & Mackay submitted a merger notice under Section 75A of the Fair Trading Act 1973 to the Director General of Fair Trading ("DGFT") seeking clearance of the Offer. The initial 20 working day period for consideration of the matters raised by this notice was due to expire on 5 September. On 21 August, the DGFT announced an extension of the period for consideration by 10 working days until 19 September ("day 44" of the Offer) and, on 12 September,

announced a further (and final) extension of the period for consideration by 15 working days until 10 October ("day 65" of the Offer).

On 11 September, Invergordon published its interim results, together with profit and dividend forecasts. The profit and dividend forecasts were, therefore, made before the DGFT's announcement of the further delay in the MMC reference decision.

On 13 September, Kleinwort Benson Limited, on behalf of Whyte & Mackay, approached the Executive and requested an extension to the timetable so as to ensure that "day 46" of the Offer would be deemed to occur after the MMC reference decision. The Executive heard arguments from both sides as to whether such an extension should be granted and decided, in the circumstances, to permit such an extension and ruled as stated above.

Panel's Ruling

After hearing the Director General on behalf of the Executive and arguments on behalf of Invergordon and Whyte & Mackay, the Panel decided to dismiss the appeal and ruled that the offer period should be extended so that "day 39" would be deemed to be 2 days after the MMC reference decision is announced with consequent extensions to "day 46" and "day 60". The principal reasons for the decision are as follows:

- (a) The interest of offeree shareholders in receiving the highest possible offer for their shares might not be met if Whyte & Mackay were required to announce its final offer at a time when the MMC reference decision had not been announced. Such a decision might well be material to the level of a final offer.
- (b) It would not be appropriate to extend "day 46" with no consequent amendment to "day 39" or "day 60". The last

21 days of an offer are crucial to the outcome of an offer and, if an extension was to be granted, it should be to all three dates so as to maintain the relationship between them.

- (c) The arguments advanced on behalf of Invergordon that such an extension would unduly prolong the period of the Offer and would adversely affect its business were, in the Panel's view, outweighed by the arguments in paragraphs (a) and (b) above.

After the Panel had informed the parties of its decision, Invergordon requested that the extensions should be subject to the condition that Invergordon should not release any further information under Rule 31.9, and that Whyte & Mackay should not announce any revised offer, until after the MMC reference decision. After hearing further argument, the Panel decided that the interests of all parties would best be served by attaching no conditions to the extensions.

17 September 1991

* **Note:** Days 39, 46 and 60 are the 39th, 46th and 60th days after the initial offer document is posted.

Their significance under the Code is as follows:

- (i) in the normal course, an offeree company may not, after the 39th day, publish material new information such as profit forecasts or asset valuations;
- (ii) the 46th day is the last date on which an offeror may post a revised offer document;
- (iii) in the normal course, the 60th day is the final date on which an offer may become unconditional as to acceptances.