The Panel on Take-overs and Mergers

Report on the Year ended 31st March 1969

Membership of the Panel

The Panel consists of a Chairman and a representative of each of the eight organisations which constituted the City Working Party, reconvened in September 1967 to prepare the City Code. The members of the Panel since its inception have been:–

Sir Humphrey Mynors, Bt. (Chairman)	Nominated by the Governor of the Bank of England
Mr. Michael Bucks	Chairman, Issuing Houses Association
Mr. P. R. Cahill, O.B.E.	Chairman, British Insurance Association
Mr. R. H. Hensman, O.B.E.	Chairman, National Association of Pension Funds
Mr. Angus Mackinnon, D.S.O., M.C.	Chairman, Accepting Houses Committee
Mr. P. T. Menzies	Nominated by the Confederation of British Industry
Mr. E. W. Phillips, M.B.E.	Chairman, Association of Investment Trust Companies
Mr. D. J. Robarts*	Chairman, Committee of London Clearing Bankers
Mr. R. F. M. Wilkinson	Chairman of the Council of the London Stock Exchange

*
Mr. Robarts succeeded Mr. D. A. Stirling as Chairman of the Committee of London Clearing Bankers and a member of the Panel in April 1968.

Foreword

The Panel came into operation on 27th March 1968, the date of publication of the City Code on Take-overs and Mergers. At the end of its first year of operation, the Panel judges it appropriate to report on its work to the members of those associations on whose continuing support the effectiveness of the City Code on Take-overs and Mergers must inevitably depend. At the same time this report is being made generally available, in view of public interest in take-over bids and in the working of the Code and the Panel.

The report may be left to speak for itself. It should be made clear, however, at the outset, that it is not concerned to explain, let alone to defend, any action or ruling of the Panel in any particular case. Rather the object is to describe how it has approached its task; and to illustrate the range of problems that can arise in this field from day to day, only a very small number of which ever catch the public eye. This will serve a useful purpose if it fortifies among those involved in take-overs and mergers that general desire to make the Code effective of which the Panel has been gratefully conscious during its first, developmental year.

In submitting this report, the Panel wishes to record its cordial appreciation of the work of its Secretary, Mr. W. P. Cooke of the Bank of England, and his staff who have admirably discharged the fearsome task of getting the Panel organised in an unprecedentedly active year for take-overs and mergers.

April 1969 Chairman

Report on the Year ended 31st March 1969

The Role of the Panel

Active or Passive?

The Introduction to the Code emphasises that "in addition to its function as a supervisory body in regard to all take-over and merger transactions, the Panel will be available for consultation at any stage before a formal offer is made to a company as well as during the course of a transaction". Reference is made later in this report to the extent of consultation: but at the outset a further decision on the supervisory function of the Panel was necessary. Should it intervene on its own initiative in the course of a bid, whenever the letter or the spirit of the Code appeared to be at risk? Or should it confine itself to enquiry after the event, with or without public comment on the conduct under examination?

The former course was chosen as best promoting the efficient operation of the Code: but it brings certain risks. Firstly, in the course of a bid the timetable is tight, perhaps already rendered inflexible by publication in a formal document. Speed is essential to the effectiveness of any intervention. This may allow less time for discussion and reflection than would be ideal, with an increased risk of misjudgment. This risk can be reduced only by accumulating experience, and by a continued willingness to consult the Panel, while there is time, on any point which might lead to difficulty later. Nevertheless, there can be cases where it is both possible and desirable to organise some delay, in order to forestall a situation developing which could be to the detriment of shareholders, or to allow more time for the parties, as well as the Panel, to consider further the implications of a certain course of action.

Secondly, if the Panel is active in an opposed or contested bid, there is a risk that it may appear to be taking sides and not behaving in that quasi-judicial capacity to which some commentators appear to give almost exclusive importance. In the closing, and sometimes embittered, stages of a contest it must recognise that anything it has said may be raked over for ammunition.

Another, and allied, risk is that the Panel may appear to be implying a view on the relative merits of the cases put forward; particularly a risk vis-à-vis the public, who may not be aware of the concluding sentence of the Introduction to the Code: "The Panel cannot be expected to pronounce on the merits or demerits of any individual offer". The code sets out to improve the conditions in which the shareholder, with such aid as he may choose, can judge the merits for himself, if he so wishes.

Intervention of the kind just discussed poses a problem of organisation. In general the members of the Panel are ex officio the chairmen of the bodies represented on the City Working Party which was responsible for the Code. In view of the other claims on their time, and the possibility of an occasional conflict of interest, it has been arranged that a member may nominate another representative of his association to act as his alternate. It has thus been possible to call a meeting of the Panel when the need arises, even at less than 24 hours notice, to deal with particular problems. Meetings have been frequent but not regular. Very much the larger part of the day-to-day work, however, has been conducted without formal meetings; if an opinion is required as a matter of urgency, members are consulted on the telephone. Speed of decision has frequently been of the essence, and the Panel has ensured that when parties have needed to consult on urgent matters their representations have been attended to with the minimum of delay.

Publicity: Specific

The nature of the Panel's activities bears on the publicity to be given to its specific opinions. Where the Code expressly enjoins or recommends consultation with the Panel, the party may well be entitled to say, for his own protection, that the Panel has been consulted, and has not objected to what might otherwise appear to be at variance with the Code. Normally, however, if the Panel is intervening with one of the parties, it is most reluctant to discuss the case with anyone else. There may prove to be no ground for criticism: or if there is, the reason may well be ignorance or carelessness or misdirection rather than conscious impropriety. If the necessary correction can then be made by the party, without the nature of the Panel's intervention being publicised, so much the better. This attitude should and does encourage co-operation over enquiries made on behalf of the Panel. In reserve is the sanction of announcing that a ruling of the Panel in relation to the Code has not been observed.

More generally, there have been requests that it may be stated in the documents that the Panel has been consulted and has approved some form of statement or some proposed action, even when the interpretation of the Code was not really in doubt, nor any exception sought. Naturally, this was more common in the early months, when the Code was novel: but, throughout, agreement to quote the approval of the Panel has been restricted as far as practicable to the occasional real difficulty of interpretation or to exceptional circumstances, where without such an acknowledgment the parties' action might be subject to criticism. It is primarily the responsibility of the parties, and particularly of their financial advisers, to ensure the observance of the Code. Were the practice to spread of quoting the approval of the Panel without good reason, it might become general: the Panel might then appear to be assuming the primary responsibility.

It is, therefore, a fundamental assumption of the Panel that all its communications with the parties are confidential and it expects its approval to be obtained before its name is used or mentioned in documents.

This has some practical disadvantage. If rulings by the Panel are published on its initiative only and, as hitherto, very seldom, other practitioners may not know that a particular difficulty has been the subject of an interpretation. In the absence of "case law" difficulty may thus persist. The analogy with "case law" must not, however, be overstressed. Rulings are given in particular contexts: and if the context is not also sufficiently set out, as in a reported legal judgment, the ruling may be an uncertain guide on a similar, but hardly ever identical, occasion.

To some extent this state of affairs will be overtaken by detailed clarifications and revisions in the new edition of the Code; but the problem remains. The Panel has considered the possibility of issuing from time to time "practice notes", setting out interpretations of fairly general validity. These should not be of such a character as to constitute a running revision of the Code, thus causing uncertainty as to its terms at any point of time. The need to gain experience and the impending revision of the Code have precluded any action being taken so far: but the subject may well be worth further thought as the work of the Panel develops.

Publicity: General

The Panel's attitude to specific publicity derives from practical considerations, not from any theoretical preference for anonymity: but it has doubtless affected the general publicity afforded to the operations of the Panel. While there has been constructive as well as destructive criticism, notice has mainly been taken of those few cases – five bids out of some 500 – where the Panel has issued formal statements for publication. Naturally these have far more immediate news-value, if not intrinsic importance for the proper conduct of take-over bids, than rulings which have been given to and accepted by the parties, rulings often of a technical character. There is, therefore, no ground for complaint in this: but it can easily lead to a false inference, that the only test of the Panel is whether the Inspector gets his Man.

As the Code itself recognises, the interests of shareholders cannot be fully protected by a set of rules applicable to every situation, with forfeits when the rules are broken. Hence the limited application of any analogy with a policing function, real though the analogy may be: and the unlimited importance of co-operation in working out where the interests of shareholders can be held to lie, without denying the rights of the majority.

The past year should be judged in this wider context. It is not possible to measure the extent to which the existence of the Code and the Panel has improved the general standards of practice: but some notorious techniques employed in the take-

overs of earlier years have undoubtedly been barred by the provisions of the Code and the presence of the Panel. The Panel's task, however, is to supervise the working of the Code, not to philosophise about it. The impact of the new system can perhaps best be judged from a brief review of the year's operations.

The Operations of the Panel

Vetting of Documents

A key part of the Panel's work is the vetting of formal offer documents and related papers, which are the basic materials of the Panel's day-to-day operations. Take-over documents are not, however, required to be submitted in advance. This means that anything contained in them which the Panel feels to be either misleading or incomplete (in terms of information which the shareholders could reasonably expect) can only be corrected by further circulars or announcements. It is a measure of the high degree of co-operation which the Panel has received from City institutions and the high standard of care in drawing up these documents that there have been very few occasions when it has been necessary to suggest the publication of corrections or additional information.

In practice a large number of companies and their advisers do submit draft documents to the Panel in advance in order to clear some unusual feature. The Panel welcomes this in cases where there is doubt in the mind of advisers whether some aspect of the document or the proposals contained in it is in conformity with the Code. But the Panel does not generally encourage advance copies of documents where these are not expected to give rise to any problems.

Responsibility for documents rests particularly with the merchant banks but a good deal of the credit for their quality must also go to members of the Stock Exchange, and of the accountancy and legal professions involved in bid situations as advisers. The Quotations Department of the Stock Exchange have played a part in that, unlike the Panel, they require to see certain take-over documents in advance of publication, and bear in mind in commenting on them the requirements of the Code. This is an example of the close and helpful contacts which from the outset have been maintained with the Quotations Department, particularly in matters relating to market dealings and Stock Exchange practice.

Panel Rulings

The Panel's activities, of course, range more widely than merely dealing with points that arise from documents submitted to it. The Panel stands ready to give rulings on specific problems of interpretation of the Code, both before a bid is made and during

the period it is open for acceptance. Where it feels action on its part is required, the Panel will also frequently take up with the parties concerned matters relating to the conduct of a bid.

Such are the variety of conditions surrounding take-over operations and the unique characteristics of every company's own circumstances that many hundreds of rulings have been sought and given – some straightforward, others arising out of situations of considerable complexity. A number of these arose, particularly in the early stages, from general questions prompted by inexperience in the operation of the Code and inevitably as time passed and procedures became better established these have tended to diminish in number. Some have arisen from a set of circumstances in a bid situation not specifically provided for by the Code. Some related to problems arising from the unusual capital structure of a company or the distribution of shareholdings. Enquiries may arise at any stage and some measure of their volume is given in the next section of this report.

It should be recorded that in all cases where the Panel was consulted in advance of any particular action being taken, the Panel ruling or advice was followed. The few occasions when the Panel felt it necessary to object to action taken by the parties in a bid situation were all cases where prior clearance had not been sought in specific terms. In three of the five bids in which the Panel intervened publicly the statements published did not criticise the conduct of any of the parties concerned; but were made rather to report action taken by the Panel in order to establish the appropriate framework within which the bid should proceed. Rulings of this kind may always be required from time to time. Their publication should not be regarded as necessarily implying censure, any more than the absence of such statements implies approval of all which has not been publicly reported upon.

Facts and Figures

In the course of the 12 months to the end of March 1969 the Panel has handled some 575 cases. Of these, 420 were completed take-over operations which have been processed and followed through their course. A further 75 were take-over bids or mergers still active at the end of the period. There have also been some 80 major cases in which the Panel has become involved where, for a variety of reasons, no formal offer has eventuated. In addition there have been a very large number of minor matters, running into many hundreds, which have required the Panel's attention, involving hypothetical questions and general questions of interpretation of the Code, letters of enquiry and complaint from members of the public and investigations of situations where it was thought that the Panel might have had a role to play.

The amount of work involved in any particular bid naturally varied greatly. Many bids were properly documented, agreed between the parties, and carried through

without incident to a successful conclusion; very many more, however, were not. Of the 420 completed bids a very high proportion – over 70% – have required action from the Panel, on the initiative either of the Panel or of the parties concerned. In over 25% of the bids, it has been necessary to take up technical points on documentation submitted. In well over half of the total bids the Panel has needed to take up procedural points with the parties, involving such matters as timing, market dealings and bid tactics. The number of times problems of this kind were brought to the Panel for guidance by the parties concerned was approximately equal to the number of occasions the Panel took the initiative. Many bids gave rise in their course to a series of different problems and some involved the sustained attention of the Panel over a considerable period. In a very large number of cases – a little under half the bids – the parties or their advisers consulted the Panel in advance for advice, for clearance of certain details required in the documentation, or to discuss certain procedures or courses of action on which some interpretation of the Code was necessary.

Although it has been possible to handle a considerable proportion of the work administratively, the Panel at its formal meetings has considered over 200 specific issues. Two-thirds of these arose out of some 80 different bids: the remainder related to general matters of interpretation, or hypothetical questions raised concerning possible bids.

In almost 20% of all bids the Panel has been involved in discussions with the parties on major points of interpretation and in a number of these the Panel has had to concern itself closely with the evolution of the bid at the tactical level and intervene, generally privately, with the parties concerned. These major cases have, of course, involved issues of varying degrees of complexity and importance: some have been dealt with over a period of a few days; others, and not only those which have been in the public eye, remained active and provoked problems over periods of weeks and even months. In only five bids have any public announcements been considered necessary or appropriate.

Of the 420 bids completed approximately three-quarters were agreed between the parties or were offers for minority holdings. Many of these were initially opposed – often strongly – but were later recommended after some improvement to the original terms of the offer. Of the bids that were contested, in only 32 cases was the stage reached where more than one set of offer documents circulated. Twenty-four bids in respect of which offer documents were issued were opposed to the end by the offeree board: of these 9 succeeded in spite of their opposition and 15 failed. On only 12 occasions has the offeror been an overseas company – in most cases from the United States.

Some Difficulties of Interpretation

It is not possible within the brief span of this report to examine in detail the problems which faced the Panel in interpreting the provisions of the Code in particular circumstances. But it is perhaps worthwhile to indicate particular areas of difficulty, partly by way of report and partly to highlight, to those concerned in these operations, areas where problems are likely to arise and where particular care is needed to ensure that the letter and spirit of the Code are followed.

In a particular case, it may be difficult to reconcile different provisions of the Code. The outstanding example is the first sentence of Rule 29 – "It is considered undesirable to fetter the market" – which may on occasion conflict with the restraints on the freedom to deal implied in other parts of the Code, particularly Rules 30 – 33 which put restraints on dealings by those who have access to privileged information or who seek to promote particular interests.

Difficulties can also arise in reconciling the need to provide full information to shareholders as soon as possible and the need to be sure of the accuracy of that information and thus the reliability of the advice tendered on the basis of it. This problem is latent in all profit forecasts and has arisen in a particularly acute form over revaluation of assets – particularly of property and land companies. A sensible course has had to be steered on these occasions between the risk on the one hand of presenting shareholders with information inadequately authenticated and the risk on the other hand of depriving shareholders of information necessary to make a proper judgment on the merits of the offer.

Another general area of difficulty has been where questions have arisen on the commercial considerations involved in making a judgment on a particular Rule. The Panel, it may be repeated, is not concerned with the merits of any particular take-over or merger, only with the manner in which it is effected. It is not the Panel's role to pronounce upon the relevant merits of different types of paper being offered, the value attributed to the assets of the company or the economic justification for the operation.

This leads, however, to considerable difficulties when the Panel is called upon to adjudicate on particular aspects of the Code. For example, Rule 34 forbids disposal of assets of material amount during a bid except in the normal course of business. Judgment on material amount and the normal course of business may entail an assessment of the circumstances of a particular industry. Rule 11, which requires any information given to a preferred suitor to be furnished to any other bona fide suitor, poses similar problems. The Panel has been faced on a number of occasions with having to adjudicate on the bona fides of a potential suitor. It has also had to adjudicate, given the bona fides, on whether an offeree could reasonably withhold information

from one bidder on the grounds that there could be permanent damage to its commercial interests in the event of the bid failing and the bidder remaining a competitor. In cases which arise under Rule 9 when Directors do not recommend what appears to be a financially advantageous bid, the Panel can again find itself in the position of having to make a judgment based partly on commercial grounds. Judgment on cases involving Rule 33, which is concerned with the effect of associates' dealings on the outcome of a bid, also tends to become involved with the commercial merits of the bid.

Another awkward area where Panel rulings are frequently sought arises over the purchase and sale of large blocks of shares in companies by other companies as trade investments. The Code, particularly Rules 10 and 26, can have the effect of prohibiting a sizeable participation by one company in another unless the purchaser undertakes to make a general offer for all the shares of that company. The requirement that a general offer should be made if effective control passes as a result of such a transaction can thus, in certain circumstances, frustrate what may appear to be a perfectly sensible trade association between two companies to the mutual advantage of those companies and their shareholders. The Panel, in such cases, has to weigh up the proposals in the light of the shareholders' best interests but it is again difficult to reach a decision without forming some kind of view on the commercial arguments involved.

Perhaps the most difficult area of all is where ultimately judgment is concerned with motives or states of mind. Rule 30 in particular has presented problems. Exactly when, for example, can it be said with certainty that "there is reason to suppose that an approach or an offer will be made", at which point companies are precluded from further market operations until the bid is announced? A similar difficulty arises over Rule 5 concerning the announcement of talks where there have been approaches which may or may not lead to an offer. The definition of associates may also raise problems which in the end require for their solution an assessment of states of mind.

All this emphasises – if emphasis were needed – the difficulty of devising formal rules which can apply to and cover all the variations in each take-over operation: and the consequent desirability of a body whose judgment in matters of doubt is accepted. A general desire that take-overs may be properly conducted cannot find expression without some such arrangement: and in turn the effectiveness of the arrangement depends on a general desire that it should be effective.

But to be effective the system cannot be static and inflexible and from time to time its revision will be necessary in the light of experience. This became clear in the very

early days of the Code and after a few months moves were already under way to examine areas where the Code could be improved and strengthened. A full scale revision of the Code, incorporating suggestions made by the Panel based on practical experience of its operation, has recently been completed and is now being published.

At the same time the changes in the composition of the Panel which were announced by the Governor of the Bank of England at the end of February 1969 will become effective. Lord Shawcross will become non-executive Chairman, succeeding Sir Humphrey Mynors who will continue for a year in the new office of Deputy Chairman. The work of the Panel will be in the hands of a full-time Director-General, in the person of Mr. I. J. Fraser, M.C., seconded for a period from his directorship of S. G. Warburg & Co. Ltd. He will have the support as Deputy Director-General of Mr. W. S. Wareham, O.B.E., seconded for a year from his position as Head of the Quotations Department of the London Stock Exchange.

The Panel welcomes these developments and will enter its second year of operation more efficiently equipped and organised to fulfil its role.

Copies of this Report may be obtained from the offices of the Panel on Take-overs and Mergers, Bank of England Building, New Change, London, **E.C.4.**

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