The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1985

MEMBERSHIP OF THE PANEL

Sir Jasper Hollom (Chairman)	Nominated by the Governor of the Bank of England
R. A. Stormonth-Darling (Deputy Chairman)	Nominated by the Governor of the Bank of England
I. J. Fraser	Chairman, Accepting Houses Committee
R. P. St. G. Cazalet	Chairman, Association of Investment Trust Companies
R. K. Bishop	Chairman, British Insurance Association
Sir Timothy Bevan	Chairman, Committee of London Clearing Bankers
E. H. Bond	Nominated by The Confederation of British Industry
Sir Patrick Neill	Chairman, Council for the Securities Industry
A. J. Hardcastle	President, Institute of Chartered Accountants in England and Wales
G. R. Walsh	Chairman, Issuing Houses Association
C. D. Lever	Chairman, National Association of Pension Funds
Sir Nicholas Goodison	Chairman, The Stock Exchange
C. A. K. Fenn-Smith	Chairman, Unit Trust Association
The Hon. Sir Henry Fisher	Chairman of the Appeal Committee of the Panel

THE PANEL EXECUTIVE

T. G. Barker	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
A. D. Macaulay	Secretary
J. G. FG. Palfrey J. W. Bloomer P. E. Mason N. F. G. Brown N. P. Hinton R. A. Randall	Assistant Secretaries
Mrs. J. H. O'Neill	
Mrs. S. M. Govier	

FOREWORD

In introducing this year's Report, I must first refer to an event which in fact fell after our year end–the resignation of Mr. M. W. Jacomb from the post of Deputy Chairman of the Panel. Mr. Jacomb was in effect the subject of a take-over bid under which he is to become Deputy Chairman of the proposed Securities and Investments Board and he is already working on that Board's structure and constitution. Though Mr. Jacomb's term of service with the Panel was thus rather a short one (he was appointed in July 1983) he made in it a notable contribution to every aspect of the Panel's work and we shall greatly miss him. Our consolation is the equally powerful and far-sighted input which he will undoubtedly make to the new organisation. In his place we are glad to welcome Mr. R. A. Stormonth-Darling, Chairman of Laing & Cruickshank and of The Stock Exchange Quotations Committee.

The workload of the Panel executive has grown sharply over the past year, from an already high base level. In part this was a reflection of the increased number of take-over transactions which is well demonstrated by the statistics incorporated in the Report. A second substantial factor was the final stages of the work on the revision of the Code which resulted in the publication in April, just after the Panel's year end, of the new loose-leaf version. A third factor was the need to devote considerable time to the implications for the Panel and for the Code of all the changes which are being made or foreshadowed in the structure and control of the Securities Industry in the UK. The Panel prides itself on remaining a remarkably slim organisation, despite the level and speed of service which it provides to practitioners, and it managed with the addition of only one Assistant Secretary to its staff. It seems certain, however, that some further reinforcement of the executive will soon be unavoidable. Once again, I wish to pay tribute to the unstinting efforts and the long hours which all the members of the executive have contributed throughout the year to maintain its standards of prompt and high quality service.

The new edition of the Code has already gained recognition as a great improvement on its forerunners and the gathering together of all material on one subject in one place, which is one of its outstanding features, is undoubtedly proving of great benefit to all users of the Code. It also illustrates very clearly how much detail has been built up by precedent over the years. Many of the Notes on the various Rules are guidance which will indicate how the Panel is likely to interpret a particular set of facts or a set somewhat similar to those with which the guidance deals. It is most important, however, that users of the Code always keep in mind that these detailed Notes must be construed in the light of the General Principles and of the spirit of the Code–and that in cases of doubt reference should be made to the executive.

One undesirable by-product of the increased pace of take-over transactions and of the ever sharpening competition among practitioners in this field has been a tendency

on the part of a small number of financial advisers to push their pressure on the Panel executive for favourable interpretations of the Code, or on the other hand for condemnation of their opponent's tactics, some way beyond the limits of the reasonable. The executive will not, of course, allow such pressure to affect its judgement as to the proper interpretation of the Code and it will be given every support by the full Panel in the case of any appeal arising out of such pressure.

The year ahead will, undoubtedly, again be a heavy one for the executive, and indeed for the full Panel, with much thought being devoted to such questions as the future position of the Panel, given the new structure of control to be established for the Securities Industry, and the new areas of potential conflict of interests in take-over matters, which are opening up with the formation of alliances between firms in the securities markets which have, hitherto, kept to relatively segregated activities. On the future of the Panel, my own conviction is that the success it has gained over the years and the esteem it has earned are powerful arguments for keeping change in its structure and constitution to the minimum.

7th June, 1985

REPORT ON THE YEAR ENDED 31st MARCH, 1985 STATISTICS

During the year the Panel held 2 meetings to hear appeals by parties to take-over transactions against rulings by the executive and 2 to consider matters referred by the executive. Neither of the appeals was allowed. There were no cases heard by the Appeal Committee during the year.

There were 202 *(year ended 31st March, 1984–163)* published take-over or merger proposals of which 192 *(158)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 187 *(155)* target companies, of which 172 *(131)* were listed on The Stock Exchange; none *(2)* involved offers for private companies of the kind now subject to the Code. In 15 *(8)* cases there were one or more rival offers. 11 *(7)* opposed offers succeeded; 3 *(11)* agreed offers failed.

A further 33 *(31)* cases which were still open at 31st March, 1985 are not included in these figures. The executive was engaged in detailed consultations in another 154 *(152)* cases which either did not lead to published proposals or were transactions, subject to approval by shareholders, involving controlling blocks of shares.

Category of offer documents	1984/85	*1983/84*
Circulated by Exempted Dealers … … …	146	*107*
Circulated by Licensed Dealers … … …	29	*28*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	7	*13*
Circulated on the basis of specific authority from the Department of Trade … … … …	–	–
Schemes of Arrangement … … … …	10	*10*
	192	*158*

Outcome of proposals		
Successful proposals involving control (including Schemes of Arrangement) … … … …	160	*116*
Unsuccessful proposals involving control … …	25	*30*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	10	*5*
Offers and Schemes of Arrangement involving minorities … … … … …	7	*12*
	202	*163*

The executive was also involved with numerous cases relating to the Rules Governing Substantial Acquisitions of Shares.

PUBLICATION OF THE REVISED CODE AND OTHER CHANGES INTRODUCED DURING THE YEAR

A revised edition of the Code and the Rules Governing Substantial Acquisitions of Shares (SARs) was published on 19th April and became effective on 29th April, 1985.

The new edition is in a completely revised loose-leaf format with all material on one subject collected together so that the requirements are easier to follow and amendments may be made more conveniently. As part of the re-ordering, there has been a general effort to clarify difficult areas and some additional Rules and guidance Notes have been added.

The major changes have been in the following two areas:–

The acquisition of shares and rights over shares

The Rules restricting the speed of acquisition of shares and rights over shares (old Rules 40–41) just before and during an offer have been simplified. The provision that no shares might be acquired by an offeror for seven days after the firm announcement of an offer has been dropped, as has the ban (old Rule 42) on stating, until after the first closing date of an offer, that the offer will not be revised. With the same exceptions as in the previous Rules, the new Rule essentially prohibits a unilateral offeror from taking its holding of shares and rights over shares to 30% or more until after the first closing date. In the related area of the SARs, the maximum acquisition of shares carrying voting rights or rights over such shares permitted in any seven day period has been increased from 5% to 10%.

The revision and extension of offers

Several amendments, in addition to general clarification of the requirements, have been made to the sections of the Code dealing with time periods, revision and extension of offers and alternative offers. Offerors will be held to statements regarding the finality of the closing date or the level of consideration unless the right to vary the terms of the offer in particular circumstances has been specifically and prominently reserved. Thus, without such reservation, a recommendation of the offeree company board will not be sufficient to allow an offeror to set such statements aside. Except in the case of a cash alternative offer provided as to over 50% by third parties, an offerer will not be allowed to shut-off an offer or alternative after the offer is unconditional as to acceptances until a further 14 days have elapsed.

Some other significant changes have been made in the following areas:–

Sale of offeree company shares

The provisions covering the sale by an offeror of offeree company shares have been expanded and the various consequential restrictions clarified.

Purchases of offeror shares prior to purchases of offeree company shares

A new Rule has been incorporated to ensure that there is adequate time for purchases of offeror company shares by persons acting in concert with the offeror to become public knowledge before offeree company shares may be purchased.

Appropriate offers for convertibles etc

With regard to the Code's requirement, following the change of control of a company, for the making of appropriate offers for convertible securities, options or subscription rights, experience has shown that a see-through equivalent of the value of the offer for the underlying equity usually produces an offer which can be regarded as appropriate and that it is difficult to arrive at a generally accepted basis for time value: the latter concept has, therefore, been dropped.

Profit forecasts

When a forecast is made, it is now mandatory to include forecasts of taxation, extraordinary items and minority interests where these are expected to be significant.

Whitewashes and formula offers

Appendices have been introduced to give guidance on the application of the Code to cases where an independent vote of shareholders on the issue of new securities is sought and to formula offers for investment trusts.

Former Rule 37

This Rule had the effect of applying particular restrictions to dealings in shares of an offeror or the offeree company by a person, other than the offeror and its associates, where there was, for example, an existing significant trading arrangement between that person and the offeree company. Experience has shown that the Rule could only be applied in a very selective way and it has, therefore, been deleted. Such persons will now be subject to no more restrictions than apply to any person under the Code and the SARs.

The following amendments to the Code were published during the year and have been incorporated in the revised Code.

Offeree company announcements after day 39

The Code now prohibits an offeree from announcing significant new information, eg profit forecasts, dividends and/or trading results, after day 39 of an offer without the consent of the Panel. If it is not possible to bring forward any such announcement, and the Panel's consent is given to publication after day 39, the Panel will normally grant the offeror an extension of the 60 day period.

Statements by parties during the course of the offer

A new Rule has been added warning that parties to a take-over should take care not to issue statements which may mislead shareholders and the market or create uncertainty. Statements to the effect that an offeror is considering its position may be made, but such statements must not remain unclarified for more than a limited time.

Organised telephone campaigns

The notes concerning equality of information have been expanded to include guidance on the conduct of organised telephone campaigns.

Property valuations

The notes on the valuation of property have been expanded to cover circumstances in which it is not possible for a valuer to complete a full valuation of every property.

Announcements which may increase the value of an offer

A note has been added to the Rule on revision of offers prohibiting an offeror from making announcements which may increase the value of a paper offer, eg proposals for dividend payments, after it is precluded from revising its offer.

Responsibility statements

As a result of changes in the form of the directors' responsibility statement required by The Stock Exchange's "Admission of Securities to Listing" rules, consequential amendments were made to that required by the Code.

THE DISSEMINATION OF INFORMATION TO SHAREHOLDERS

General Principle 4 requires that shareholders must be given sufficient information and advice in good time to reach a properly informed decision and that no relevant information should be withheld from them. General Principle 5 requires that documents must, as is the case with a prospectus, be prepared with the highest standards of care and accuracy.

Take-over documents are not prospectuses but that does not diminish the importance or the force of General Principle 5. Companies and advisers will always highlight those arguments which best serve their cause and it is to be expected that each side in a unilateral offer will argue its case strongly. However, it is not acceptable for the arguments to be presented in a misleading way. Examples of misleading presentation include: statements of opinion presented as fact ("their share price will fall if our offer lapses"); drawing comparisons which misrepresent the true position ("our gearing declined from 70% to 40% last year whilst theirs declined only 5%" when the first company had a rights issue and the second company's gearing was only 10% in the first place); presenting out-of-date facts as

current ("their accounts were qualified" when the qualification took place ten years previously and there have been no subsequent qualifications); and statements about the other side which have not been adequately verified ("they are doing so badly that their main factory was shut down for two weeks last month" when the company always shuts its factory at that time for the two week annual holiday).

A feature of many of these statements is that it is not possible for a third party to determine whether they are misleading without access to full information. Pre-vetting by the Panel executive is, therefore, not a solution. The onus is on practitioners to ensure that documents meet the required standard of fair presentation of facts and arguments. Where they are found wanting, the Panel will require some form of correction or retraction. During the later stages of an offer, when argument is most heated, there is often little time for effective correcting statements to be made and, accordingly, the Panel may be forced to take draconian action against the offending party.

No purpose, however, is served by a succession of complaints to the Panel about minutiae. Further, statements which taken in isolation would appear offensive to the Code will very often be acceptable when read in their proper context. In addition, whilst there can be no excuse for inaccuracies, the Panel will not require a correcting circular where the matter complained of is trivial.

Problems can also be caused by the presentation to shareholders of complicated financial information in an over-simplified form. Information should be presented in a way which is understandable to an intelligent lay reader. Relevant detail should not be omitted. For example, in the case of an asset valuation, the description by the valuers of what they have done and how they have arrived at their valuation should always be clearly stated. In addition, before presenting complex statistical information, practitioners should consider carefully whether a take-over circular is the appropriate place for material which can easily be misunderstood unless it is explained at great length.

When parties to offers give interviews to journalists or have private discussions with analysts, institutional investors etc, there is a risk of misreporting or misinterpretation. Therefore, before any such discussion takes place, company directors and their advisers should consider very carefully their responsibilities under the Code. In all cases where an incorrect or misleading statement has gained currency, the Panel will regard the person speaking to the press or, for example, to an investment analyst as being wholly responsible for the clarification of any misreported statements that may ensue.

ACTING IN CONCERT AND FAN CLUBS

The Panel issued a statement on 24th October, 1984 concerning "fan clubs" (where certain investors purchase shares because they respect the investment or commercial abilities of another investor but without there being any agreement or understanding between them) to the effect that it had asked the Panel executive to consider whether any change of rule or practice was required in relation to the definition of acting in concert and the way in which that definition is applied.

After considering the executive's recommendations, the Panel has decided that, where persons acquire shares without any agreement or understanding amongst themselves to obtain or consolidate control, it would be wrong to impute motives to them and treat them as a group acting in concert to obtain or consolidate control of a company. Accordingly, the Panel has decided that there should be no change to the definition of acting in concert or to the way in which that definition is applied. It will, therefore, continue to be the case that a concert party will be regarded as established where the Panel is satisfied that there is an agreement or understanding for the acquisition or consolidation of control of a company. However, as in the past, the Panel will be concerned to ensure that concert parties do not operate in the guise of fan clubs.

CLAIMS OF SUPPORT FOR AN OFFER OR FOR THE DEFENDING BOARD

Practitioners are reminded that statements and comments concerning levels of support claimed by parties to an offer may, if unsubstantiated or incorrect, have the effect of misleading shareholders and creating a false market in the shares of the offeror or offeree company. Such statements must, therefore, be based on an up-to-date check with the shareholders concerned to establish their intentions clearly and beyond any reasonable doubt.

If, after enquiry, an unsubstantiated or incorrect claim is found to have been made, the Panel will normally require an immediate correcting statement to be published and, if the claim has been made on behalf of an offeror following the posting of the offer documents, the publication of a Rule 17 announcement.

CONFIDENTIALITY OF CONSULTATIONS WITH THE PANEL

On a number of occasions in recent months advisers have informed the press that they were complaining to the Panel about alleged breaches of the Code. Although discussions between advisers and the Panel take place on a confidential basis, it is accepted that it is up to the party concerned whether to publicise the fact that it

has approached the Panel. However, advisers must appreciate that where they make such disclosures, and the complaint is not upheld, the Panel may feel obliged to make that fact public also.

THE FUTURE OF THE PANEL

Following the publication of the White Paper "Financial Services in the United Kingdom" containing proposals for the establishment of a Securities and Investments Board, it is clear that there are to be considerable changes to the current arrangements for supervision of investment businesses. Although the Panel is identified closely with investment businesses in general, it should be noted that the City Code on Take-overs and Mergers applies to a wider range of organisations and individuals than those to be authorised under the new regulatory system.

The Panel believes that shareholders are well protected in a take-over by the Code and the fact that it can be interpreted in a flexible way. The Panel is, therefore, in discussion with the Bank of England and the Department of Trade and Industry with a view to ensuring that the present standard of shareholder protection is maintained.

THE CODE AND MULTI-SERVICE FINANCIAL ORGANISATIONS

The abolition of single capacity on The Stock Exchange and the creation of integrated multi-service financial groups will, inevitably, bring considerable changes to the environment in which the Panel must operate. Although the precise form of this new environment is still far from clear, there is little doubt that the Code, which was written against a background of single capacity, will need to address some new questions. Most significant among these are the rules to be applied when an adviser to an offeror or offeree company is dealing as a principal either in a market-making or broker-dealer capacity.

It is recognised that practitioners are keen to have some guidance on the framework within which they will have to operate and the Panel will be considering the available options in the near future.

STAFF

Since the last Annual Report was published, Mr. R. A. Randall, of Barclays Bank PLC, has joined the executive. There have been no other changes during the year.

FINANCE

The Panel is financed by the Council for the Securities Industry. Expenditure for the year to 31st March, 1985 was as follows:

	(£000)	
	1985	*1984*
Personnel costs	540	*483*
Accommodation costs	177	*165*
Other	172	*159*
	889	*807*

(Further copies of the Report may be obtained from the Secretary, Panel on Take-overs and Mergers, P O Box No 226, The Stock Exchange Building, London, ***EC2P 2JX.****)*