The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1986

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
J. F. C. Hull	Nominated by the Accepting Houses Committee
T. G. Abell	Chairman, Association of Investment Trust Companies
F. B. Corby	Chairman, Association of British Insurers
Sir Donald Barren	Chairman, Committee of London and Scottish Bankers
E. H. Bond	Nominated by The Confederation of British Industry
D. A. Boothman	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
M. V. St. Giles	Chairman, Financial Intermediaries, Managers and Brokers Regulatory Association
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

J. L. Walker-Haworth	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
A. D. Paul	Secretary
J. G. FG. Palfrey N. P. Hinton	Deputy Secretaries
R. A. Randall G. W. Woolley D. A. J. McKechnie C. C. T. Pender G. Williams Miss B. A. Muston Miss S. M. Govier R. J. Hilton	Assistant Secretaries
Miss J. M. Bamford	

FOREWORD

As anticipated in last year's Report, the work load on the Panel executive has remained at a very high level, as is underlined by the customary statistics contained in the Report which follows. This has, so far, resulted in only a very small increase in staff numbers, but has been reflected more in continuing pressure on the staff, despite the completion early in the year of the work on the revision of the Code. A noteworthy additional feature has been the appearance of a number of 'mega-bids' which have further sharpened both public (and media) interest in the take-over field and the pressure of competition amongst the rival practitioners concerned. Against this background the untiring efforts of the staff to maintain their standards of service to those involved in take-over operations deserve the praise of the Panel and, indeed, of a much wider circle.

The turn of the year saw the end of the secondment to the Panel as Director General of Mr. T. G. Barker, who for two years had filled this post, and also that of Director General of the Council for the Securities Industry, with great distinction. He has now returned to Kleinwort Benson Limited, his place being taken by Mr. J. L. Walker-Haworth of S. G. Warburg & Co. Ltd.

The new edition of the Code has amply fulfilled its early promise of proving a great convenience to users.

Over the past year, the prospective changes in the structure of the securities markets, in the grouping of the firms operating therein and in the methods of supervision to which they are to be subjected have gradually developed a rather clearer outline, with the publication of the Financial Services Bill and of the first indications from the Securities and Investments Board of the way in which it proposes to exercise the powers with which it expects to be endowed. Much important detail, however, has yet to emerge. At this stage I would only say that I greatly welcome the present indication that the basis of operation of the Panel is to be left unchanged, for I find it hard to believe that the addition of some statutory underpinning would improve the Panel system of regulation and that it would not inhibit, in important degree, the present flexibility of its response to continually changing circumstances.

It must be recognised, of course, that the Panel is often the subject of public criticism. But that is hardly a surprising fate for a body which has to make judgments between competing boards advised by strongly motivated professionals and engaged in highly costly transactions, which are often seen as vital to the future

of the companies concerned. Indeed nearly every decision made by the Panel in contested situations must cause material disappointment to one party or another.

The readiness of elements of the media to give uncritical support to the complaints voiced by those who are disappointed by Panel rulings does little to give a balanced view of the Panel's work. One unfortunate effect of such comment has probably been to add undue weight to those who suggest that it would be better to have something akin to the US Securities and Exchange Commission operating in this area. It is plausible to suppose that the more rigid rules that a body of that sort would be likely to apply might on occasion give more leverage to an attacker or a defender in a contested take-over situation; but it is not easy to see that the interests of shareholders in general, which are the Panel's primary concern, would be better served thereby. Nor does such comment seem to recognise the fundamental weakness of comparisons drawn between the Panel and the SEC, which in fact applies remarkably few constraints on take-over activities; for instance the SEC has no requirement that all shareholders shall be given the broad equality of treatment which is a cardinal aim of the UK Code. Equally the Panel's critics, and certain commentators, do not seem to give full weight to the fact that, where an appeal is made under the UK system against a ruling of the Panel executive, the circumstances of the particular case are put before what is in effect a jury of incomparable experience in the operation of the securities markets, who are able, given the emphasis of the Code upon the spirit rather than the letter of the Rules, to apply the principles of equity, as they see them, to most situations.

The demise of the CSI, which had in recent years found the finance required to meet the Panel's expenditure, has caused the Panel to review and to amend somewhat its financing arrangements. The levy on securities transactions, which was the main source of CSI finance and which (due no doubt to its very moderate scale) has provoked almost no adverse comments from those required to pay it, has been left in place; but a new feature has been added in the form of a charge, to be collected from the financial adviser to an offerer, on the issue of take-over or merger documents. The annual subscriptions paid by the bodies who are represented on the Panel form a third source of finance, the amount of the subscription having been raised modestly. This revised financing structure will be further reviewed during the course of the year, to see if additional modifications are required in the light of the changes being introduced into the organisation and the operations of the London market.

The Panel was recently strengthened by the addition of the Financial Intermediaries, Managers and Brokers Regulatory Association to its constituent bodies. It may well be that some further widening of the Panel membership will be desirable when the shape of the new associations in the securities area has become more clear. Meanwhile

a variety of new rules or modifications of old ones are being devised to deal, in particular, with the various potential 'conflicts of interest' which the new system will bring in its train. Here, however, the Panel, like everyone else, is entering uncharted territory and will need to be alert to the possibility that further detailed amendments may prove to be required as the changing scene unfolds.

11th July, 1986

REPORT ON THE YEAR ENDED 31st MARCH, 1986 STATISTICS

During the year the Panel held 9 meetings to hear appeals by parties to take-over transactions against rulings by the executive and 1 to consider a matter referred by the executive. Two of the appeals were allowed and one appeal was allowed in part. There were no cases heard by the Appeal Committee during the year. In addition to its regular quarterly meetings, the Panel held special meetings to consider the financing of the Panel and the implications of the creation of multi-service financial organisations generally and in particular in relation to market-makers.

There were 206 *(year ended 31st March, 1985 – 202)* published take-over or merger proposals of which 197 *(192)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 195 *(187)* target companies, of which 168 *(172)* were listed on The Stock Exchange; 1 *(–)* involved an offer for a private company of the kind subject to the Code. In 11 *(15)* cases there were one or more rival offers. 10 *(11)* opposed offers succeeded; 8 *(3)* agreed offers failed.

A further 42 *(31)* cases which were still open at 31st March, 1986 are not included in these figures. The executive was engaged in detailed consultations in another 167 *(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	1985/86	*1984/85*
Circulated by Exempted Dealers … … …	152	*146*
Circulated by Licensed Dealers … … …	12	*29*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	26	*7*
Scheme of Arrangement … … … …	6	*10*
Other … … … … … …	1	*–*
	197	*192*
Outcome of proposals		
Successful proposals involving control (including Schemes of Arrangement) … … … …	138	*160*
Unsuccessful proposals involving control … …	38	*25*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	9	*10*
Offers and Schemes of Arrangement involving minorities … … … … …	21	*7*
	206	*202*

Following the changes to the Rules Governing Substantial Acquisitions of Shares (the SARs) in April 1985, the executive was involved in rather fewer cases concerning the SARs than in recent years.

CHANGES TO THE CODE

Various amendments have been made to the Code following the introduction of the new format in 1985.

The major changes have been in the following areas:–

Acceptances -short sales

The Panel has been concerned with the possibility that short sales of offeree company shares to the offeror or to acceptors to the offer or to vendors of shares to the offeror might lead to a situation where an offer was declared unconditional as to acceptances although, in fact, less than a majority of shares had been assented to the offer or purchased by the offeror.

Therefore, amendments to Rule 10, and consequential amendments to other Rules, have been made, designed to ensure that acceptances and purchases of shares may only be counted towards fulfilment of an acceptance condition if certain conditions are satisfied.

Advertisements

The type of advertisement which may be published by an offeror or offeree company during a take-over is now restricted to particular categories specified in the Code. Advertisements which fall within certain of these categories, being those which the Panel regards as having a bearing on an offer, must still be cleared in advance with the Panel.

Other noteworthy changes have been made in the following areas:–

Mandatory offers - Provision of cash

An addition to note 9 on Rule 9.1 clarifies the position concerning the provision of cash when a Rule 9 offer is triggered during the course of a non-mandatory offer. If the necessary cash is to be provided by a cash underwritten alternative and a listing for the new shares is therefore necessary, it is not acceptable for the provision of cash to be conditional on that listing. Accordingly, an alternative source of cash must be available.

Responsibility statements

The qualified responsibility statement in relation to information concerning another company is intended to be applicable only in so far as that information is compiled from published sources. The permissible qualification is that responsibility need only be taken for the correctness and fairness of the reproduction or presentation of such information. Responsibility for opinions or conclusions about another company, which for example may be based on such information, may not be so qualified. The relevant note on Rule 23.3 has been clarified accordingly.

Information in offer documents

A note has been added to Rule 23 setting out some general requirements regarding information in offer documents, covering the sourcing of material and the use of quotations and pictorial representations, charts and graphs.

Statements of support

In order to reflect current practice, detailed in the 1985 Annual Report, a note has been added to Rule 20 in relation to statements made by the offeree company or its advisers about the level of support from shareholders.

Final closing time

The latest time on the final day for the offeror to take in acceptances or to purchase shares in the context of an offer becoming unconditional as to acceptances has been changed to 1pm. An announcement of the result of the offer must be made by 5pm on that day (Rule 31.6).

Various other more minor amendments to the Code have been published and incorporated into the Code since the publication of last year's Report.

PUBLICATION OF INFORMATION

The Panel remains concerned that, in accordance with General Principle 5 of the Code, great care should be taken to ensure that statements made in the context of take-overs are accurate and not presented in a misleading way. A considerable responsibility rests with practitioners to ensure that documents meet the required standard. The Panel continues to require public retraction or clarification in appropriate cases when misleading statements occur.

The Code emphasises that particular care should be taken by the parties to a take-over when giving information to the press. During the year, the Panel made clear that it regards financial advisers as responsible for guiding clients and public relations advisers regarding dealings with the media in the context of take-overs, and this is now reflected in the Code.

The Panel's concerns have found particular application to the increased use during the year of press advertisements to publicise selected facts and arguments or to criticise other parties to an offer and the inevitable strains this has imposed on adherence to the required high standards of care and accuracy. This led to the Panel's decision in March this year to amend the Code to restrict such advertisements in the manner mentioned earlier.

The tendency continues for the parties to a take-over to use the Panel for tactical purposes, not only by seeking to discredit the actions of another party on issues which are of minor significance, but also by bringing approaches to the Panel into the public arena. The Panel will, of course, deal with material complaints and take appropriate action where necessary. However, it is for practitioners to exercise properly their, discretion, in the light of the principles of the Code, in identifying and pursuing with the Panel relevant issues. It remains for a party to a take-over, through its own circulars, to expose flaws in the arguments of the other party. It is wholly inappropriate to invoke the Panel's name in the media as if it supports any particular point in such arguments.

MULTI-SERVICE FINANCIAL ORGANISATIONS

As anticipated in last year's Report, the Panel has been considering the Code implications of the creation of multi-service financial organisations, for example as a result of banks acquiring firms of stockbrokers and/or stockjobbers.

With regard to the position until 27 October 1986, when Big Bang sees the change from single to dual capacity, an approach has been adopted similar to that of The Stock Exchange. That is that the banking, broking and market-making parts of such organisations are generally presumed by the Panel to be conducting their respective businesses independently provided that appropriate undertakings have been given to the Panel by the parties concerned. Consequently, for example, in relation to market-making, when a jobber is part of the same financial organisation as the financial adviser to the offeror, that jobber is able to continue market-making in securities relevant to the take-over in question without being presumed to be acting in concert with the offeror.

In addition, neither the market-making nor the stockbroking parts in the group (assuming the stockbrokers are not acting in relation to the take-over) are regarded as associates for the purposes of disclosure under Rule 8 of the Code, when the banking side is acting for the offeror or the offeree company.

However, in relation to Rule 3 of the Code, stockbrokers are not permitted to act as financial adviser to the offeree company, when the bank which is grouped with the stockbrokers is acting as financial adviser to the offeror.

The Panel's policy with regard to the treatment of multi-service financial organisations after Big Bang, and any necessary changes to the Code, are expected to be published before, and to come into effect at, Big Bang.

TOP-UPS

Rule 16 of the Code prohibits an offeror or persons acting in concert with it from dealing or entering into arrangements to deal in shares of the offeree company, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all shareholders. One effect of this is to prohibit an offeror from buying shares in the offeree or potential offeree company and undertaking to the vendor of those shares to make good to him any difference between the price paid to the vendor and the value of any subsequent offer, ie top-up payments may not be made.

In certain tender offers falling under Rule 4 of the SARs, the person making the tender offer has been permitted by the Panel to offer a potential top-up payment to those who accept the offer. The reason for this is that the potential top-up payment is being offered to all shareholders. In such cases, the Panel's permission will normally only be granted if, inter alia, the tender offer is at a fixed price and if the person making the tender offer makes a statement regarding his future intentions.

OFFEREE COMPANY ADVISERS

The Code requires that the board of the offeree company obtains competent independent advice on any offer and makes the substance of that advice known to all shareholders. During the course of a unilateral offer, the offeree company board might procure a ‘white knight’ to make an offer which that board will recommend. The white knight will normally have its own adviser and no question of the independence of the offeree company's adviser will arise.

However, occasionally, the offeree company's adviser might be more closely involved in the white knight's offer, especially when the white knight is a consortium formed by the offeree company management to effect a buy-out. In such a case, and whenever the independence of an adviser could be questioned, the adviser should take the first opportunity to dissociate itself from the potential offeror, as it is crucial that the adviser is, and can be seen to be, totally independent from both offers.

STAFF

The following changes in the executive have taken place since the publication of the last Annual Report.

Mr. J. L. Walker-Haworth of S. G. Warburg & Co. Ltd. has been appointed Director General in succession to Mr. T G. Barker who has returned to Kleinwort Benson Limited. Mr. A. D. Paul of Allen & Overy has been appointed Secretary in place of Mr. A. D. Macaulay who has returned to Herbert Smith & Co.

Mr. J. W Bloomer has returned to Arthur Andersen & Co, Mr. P E. Mason to the Department of Trade and Industry and Mr. N. F. G. Brown to Hoare Govett Limited. Mr. G. W Woolley of Peat, Marwick Mitchell & Co, Mr. D. A. J. McKechnie of Spicer and Pegler, Mr. C. C. T. Pender of Wood Mackenzie & Co. Limited, Miss B. A. Muston of the Department of Trade and Industry, Mr. G. Williams of the Bank of England and Mr. R. J. Hilton of National Westminster Bank have joined the executive.

Mrs. J. H. O'Neill and Miss J. Lamont-Carter have returned to, and Miss J. M. Bamford has joined the executive from, the Bank of England.

FINANCE

The year to 31st March, 1986 was the last in which the Panel was financed by the Council for the Securities Industry. Expenditure for that year was as follows:–

	(£000)	
	1986	*1985*
Personnel costs	703	*540*
Accommodation costs	216	*177*
Other	256	*172*
	1,175	*889*

The Panel is now financed by members' contributions, by a levy on certain transactions in United Kingdom securities and through charges in relation to offer documents.

The basis of the levy is identical to the basis of the levy previously applied by the Council for the Securities Industry which has now been dissolved. The new offer document charges became necessary to provide the further finance required to meet increasing costs. Details of the levy and the document charges are now set out in the Code.

(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****.)*