The Panel on Take-overs and Mergers

Report on the Year ended 31st March, 1983

MEMBERSHIP OF THE PANEL

Sir Jasper Hollom (Chairman)	Nominated by the Governor of the Bank of England
Sir Alexander Johnston (Deputy Chairman)	Nominated by the Governor of the Bank of England
I. J. Fraser	Chairman, Accepting Houses Committee
Lord Mark Fitzalan Howard	Chairman, Association of Investment Trust Companies
P. W. Sharman	Chairman, British Insurance Association
T. H. Bevan	Chairman, Committee of London Clearing Bankers
E. H. Bond	Nominated by The Confederation of British Industry
F. P. Neill	Chairman, Council for The Securities Industry
E. E. Ray	President, Institute of Chartered Accountants in England and Wales
R. D. Broadley	Chairman, Issuing Houses Association
M. H. Oldfield	Chairman, National Association of Pension Funds
Sir Nicholas Goodison	Chairman, The Stock Exchange
M. V. St. Giles	Chairman, Unit Trust Association
The Hon. Sir Henry Fisher	Chairman of The Appeal Committee of the Panel

THE PANEL EXECUTIVE

J. M. Hignett	Director General
P. R. Frazer T. P. Lee	Deputy Directors General
G. F. Pimlott	Secretary
G. B. Morgan P. J. Clokey A. G. B. Pullinger Mrs. C. M. Brown	Assistant Secretaries
Mrs. J. H. O'Neill	
Miss J. S. Lamont-Carter	

FOREWORD

The pressure of work on the Panel executive has again been heavy and recently the number of contested bids has probably been higher than for many years. Whatever the pressure, the executive takes pride in maintaining the "on demand" service, not only in relation to current bids but dealing also with preliminary enquiries concerning possible future bids, that is so essential to the efficient conduct of merger and take-over business; and once again I take pleasure in paying tribute to their efforts and to their record of achievement.

A notable event in the Panel's year has been the appointment of Mr John Hignett, who has been Director General of the Panel since July 1981, to hold also the newly established post of Director General of the Council for the Securities Industry. This move will bring the Panel and the Council (already next-door neighbours and already linked at Deputy Chairman level) into a still closer working relationship. The Panel hopes to retain Mr Hignett's services rather beyond the usual term of a secondment such as his in order to give him adequate time to run together the two Chief Executive posts.

The main part of the Report which follows provides a record of, and some commentary on, decisions and points of more general interest which have arisen in the course of the Panel's year. These need little elaboration in this foreword but it would be right to add particular weight to what is said on the ever-present problem of the timing of announcements of bids. The reluctance of principals and their advisers to depart from planned timetables in such operations is very understandable; but the importance of avoiding a false or disorderly market must be accepted as an overriding consideration and a clear responsibility rests on all concerned to take every precaution against such developments. Principals and their advisers should always have at hand an announcement that can be made immediately on the need arising, and should watch the movement of prices with this point particularly in mind.

For those who believe that a more formal mechanism, based directly upon statute, is to be preferred to the self-regulatory type of control of which the Panel is an example, it may perhaps be permissible to draw a contrast between the flexibly developing approach of the Panel, as illustrated in its Annual Reports, in its issues of Practice Notes and in the regular revisions of the Code, and the recently published revision of the Licensed Dealers (Conduct of Business) Rules issued by the Department of Trade. This is the first revision of those Rules in some 23 years,

despite a rather general recognition of how far out of tune they had become over the years with developments in the market place, and the revision itself appears to have been under consideration by the Department for some six years. Some of the delay was no doubt due to an attempt to translate the Code into statutory form. In the event, however, the new rules contain no detailed provisions about take-overs and mergers, the Department accepting that it was better to rely on the Code as it stands as an effective and satisfactory instrument in this area.

1st June, 1983

REPORT ON THE YEAR ENDED 31st MARCH, 1983

STATISTICS

During the year the Panel held three meetings to hear appeals by parties to take-over transactions against rulings by the executive and one to consider a case referred by the executive. There were no cases heard by the Appeal Committee during the year.

There were 121 *(year ended 31st March, 1982–147)* published take-over or merger proposals of which 113 *(135)* reached the stage where formal documents were sent to shareholders. These proposals were in respect of 112 *(134)* target companies of which 98 *(105)* were listed on The Stock Exchange. In 8 *(13)* cases there were one or more rival offers. 6 *(5)* opposed offers succeeded; 4 *(4)* agreed offers failed.

A further 27 *(15)* cases which were still open at 31st March, 1983 are not included in these figures. The executive was engaged in detailed consultations in another 136 *(160)* cases which either did not lead to published proposals or were transactions involving controlling blocks of shares subject to approval by shareholders.

Category of offer documents	1982/83	*1981/82*
Circulated by Exempted Dealers … … …	81	*83*
Circulated by Licensed Dealers … … …	13	*12*
Circulated by others exempted under the Prevention of Fraud (Investments) Act 1958 … … …	14	*23*
Circulated on the basis of specific authority from the Department of Trade … … … …	2	*9*
Schemes of Arrangement … … … …	3	*8*
	113	*135*

Outcome of proposals		
Successful proposals involving control (including Schemes of Arrangement) … … … …	88	*81*
Unsuccessful proposals involving control … …	16	*24*
Proposals withdrawn before issue of documents (including offers overtaken by higher offers) … …	8	*12*
Offers and Schemes of Arrangement involving minorities … … … … …	9	*30*
	121	*147*

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

APPLICATION OF THE CODE TO SOME PRIVATE COMPANIES AND TO IRISH COMPANIES TRADED UNDER RULE 163(3)

As a result of the Companies Act 1980, which re-classified public and private companies, a number of former public companies, to which the Code used to apply, have re-registered as private companies. Since a private company is no longer restricted in the number of its shareholders, many such companies will still have a wide range of shareholders and any acquisition of the shares of such a company may well be effected by way of an offer.

Following recent discussions between the Department of Trade ("DOT"), the Council for the Securities Industry and the Take-over Panel about the revision of the rules for licensed dealers in securities and the regulation of take-overs, it has been agreed that the Code should in future apply not only to public companies, but also to certain types of private company. From 1st June, 1983 the Code will apply to any private company which has had some kind of public involvement in the ten years prior to the announcement of an offer for it or the occurrence of some other event relating to the company which is relevant under the Code, for example the acquisition of control.

The detailed provisions about take-overs which applied to licensed dealers have been replaced by general requirements in new rules recently published by the DOT. The DOT has also published a general permission to issue offer documents in respect of certain private companies not covered by the enlarged scope of the Code, provided that the documents meet the conditions specified in the permission.

The Panel appreciates that the provisions of the Code may not be appropriate in the case of every private company now brought within its scope and will therefore apply the Code with a degree of flexibility in order to ensure that unduly onerous obligations are minimised so long as this does not conflict with the spirit and principles of the Code. Any party or his adviser, who is in any doubt as to the application of the Code to any transaction involving such a private company, should refer to the Panel.

Following consultation with the Irish Securities Industry Panel it has been agreed that the Code will apply in future not only to offers for companies resident in the Irish Republic and listed on The Stock Exchange or traded on its Unlisted Securities Market, but also to companies so resident traded under Stock Exchange Rule 163(3).

An amendment to the Introduction to the Code is being published today to give effect to these changes.

INDEPENDENT ADVICE

Rule 4 requires the board of an offeree company to obtain competent independent advice on any offer and to make the substance of such advice available to its shareholders. Since June 1982 the board of an offeror has had a similar obligation where the offer being made is a reverse take-over or where the board is faced with a conflict of interest. Rule 10(1) requires the board of the offeree company to circulate its own views on any offer at the same time as or as soon as practicable after publication of the offer document.

In most cases the independent advisers are closely involved in the preparation of the document containing the board's views and advice on an offer, and the advisers' association with that advice is clearly demonstrated. The independent advisers play a very important part in assisting the board in presenting its views and should ensure that the board circulates full information and reasoned arguments to its shareholders.

Where there is any divergence of view between the board and its independent advisers as to the merits of an offer, or as to any recommendation being made, it is important that shareholders should be aware of this and be given some explanation for it. The Panel should be consulted in advance with a view to discussing the explanation to be given in the relevant document.

Furthermore, the Panel believes that, in the circumstances set out below, additional steps need to be taken to ensure that shareholders are properly advised:–

(i) where there is a significant area of uncertainty in the most recently published accounts or interim figures of an offeree company (eg a qualified audit report, a material provision or contingent liability, or doubt over the real value of a substantial asset including a subsidiary company) the directors and independent advisers should inform shareholders of the significance which they have attached to such matters in coming to their conclusions;

(ii) where the board or the advisers are unable to form a view on the merits of an offer or to give a firm recommendation to shareholders they should set out fully the arguments for acceptance and rejection and emphasise all relevant factors.

WAIVER OF THE REQUIREMENT FOR 50% ACCEPTANCES TO AN OFFER

There have been a number of cases in the past two years where a type of offer has been made to shareholders in a public company (most notably investment trusts)

which was designed not to obtain control of the company but to afford shareholders an opportunity to realise their investment following a major change in the nature of the company or its management. Such offers have usually been made on behalf of a number of unconnected persons or institutions, and the result is similar to a placing of the shares of selling shareholders with new but equally independent investors.

It has been a feature of such offers that they follow the exercise by shareholders of their voting rights (eg by scheme of arrangement or in a general meeting) to effect a change in management policy or the structure of the company. Sometimes a change in the composition of the board is also involved and these changes are often promoted by a group of shareholders.

In these circumstances the Panel has allowed such offers to be made without requiring them to be subject to a 50% acceptance condition, as would normally be the case under Rule 21 of the Code. This enables any shareholder who puts in an acceptance to realise his investment. Since acceptances do not increase the level of "control" of those promoting the change there is no disadvantage to those shareholders who do not wish to sell.

The Panel will only give such a dispensation if the board of the offeree company is in favour of the proposal and the financial adviser to the offeree company approves of it.

Anyone who is considering a proposal of this nature should consult the Panel at an early stage. If the proposal is appropriate, the Panel will agree to the dispensation on certain conditions and will require all relevant documentation to be submitted for approval to ensure that it complies with the relevant provisions of the Code.

COMPANIES BUYING THEIR OWN SHARES

Since the executive has been asked a number of questions over the past year on this subject, it seems right to give some guidance as to the areas of difficulty and the principles which are likely to be applied.

The main area of concern is where a shareholder will, as a result of a purchase or redemption by a company of its own shares, come to hold shares which carry 30% or more of the voting rights of that company, or to have increased the percentage of his holding by more than 2% in twelve months if he holds 30% or more. The Panel does not consider that such a shareholder triggers a mandatory bid by reason only that he votes in favour of a resolution authorising the board of the company to exercise the company's powers to redeem or buy in. However when the board actually exercises the power, the Panel will examine the relationship between the board and the shareholder concerned.

If the shareholder is represented on the board or has an agreement or understanding with the board relating to the exercise of the power to redeem or buy in shares, the executive would expect the increase in the controlling position of the shareholder to be approved in a general meeting of shareholders on lines similar to those set out in paragraph 9 of Practice Note No. 15, with the shareholder himself and any other interested parties, including possibly the board, being disenfranchised, and independent advice being given to the other shareholders. If the increase is not approved in this way, the shareholder will be required to make a mandatory bid under Rule 34.

Where the shareholder has no agreement or understanding with the board relating to the exercise of its powers, so that he unwittingly crosses a threshold, he will not be required to make a mandatory offer, but he will be unable to acquire any further voting shares without being required so to do.

The Panel executive should also be consulted if an offeree company, or an offeror which is offering securities, proposes to redeem or purchase its own shares during an offer period. The Panel would generally not consider it appropriate for an offeror or offeree company to buy in its shares during an offer period.

CHANGES INTRODUCED DURING THE YEAR

AMENDMENTS OF DIRECTORS' SERVICE CONTRACTS

On 13th October, 1982 the Panel issued a statement explaining that, under Rule 19 of the Code, it would regard as the amendment of a service contract any case where the remuneration of an offeree company director (with a service contract with more than 12 months to run) is increased within 6 months of the date of the document. Therefore the fact of the increase must be disclosed in the document and the current and previous levels of remuneration stated.

The Panel also stated that in the context of Rule 38 it would regard amending or entering into a service contract with, or creating or varying terms of employment of, a director as entering into a contract "otherwise than in the ordinary course of business" if the new or amended contract or terms constituted an abnormal increase in his emoluments or a significant improvement in his terms of service. Entering into such a contract would, under Rule 38, be permissible only with the approval of shareholders in general meeting. Any such increase or improvement

resulting from a genuine promotion or new appointment may be introduced without shareholders' approval, but the Panel should be consulted in advance in such cases.

Additions to Practice Notes Nos. 10 and 17 are being published today.

DEFINITION OF VOTING RIGHTS

On 7th March, 1983 the CSI issued a Press Statement reflecting its decision that where shares of a company carry voting rights which are currently exercisable at a general meeting, this fact should be recognised under the Code and the Rules Governing Substantial Acquisitions of Shares, regardless of the possibility that such rights could cease at some time in the future. Previously the expression "voting rights" included voting rights exercisable in restricted circumstances only if those rights had been exercisable at general meetings for a long period of time.

Appropriate amendments to the Definitions section of the Code and to the Rules Governing Substantial Acquisitions of Shares are being published today.

AREAS OF THE CODE WHICH HAVE GIVEN RISE TO DIFFICULTIES

1 The making of announcements (Rule 5)

In previous Annual Reports the Panel has expressed concern about secrecy and about the timing of announcements. It now considers that it must again draw attention to Rule 7, which stresses the vital importance of absolute secrecy during the time when an offer is being planned, and to the requirements of Rule 5.

There have been a number of cases where there has been an untoward movement in the price of the offeree company's shares shortly before the announcement of an offer or possible offer. The Panel wishes to emphasise that in any case where there is such an untoward movement the provisions of Rule 5 must be observed. The Panel does not regard tactical considerations as an acceptable reason for any delay in the fulfilment of announcement obligations under this Rule. In any case where the adviser is not certain of the right course to pursue, the Panel should be consulted.

It should also be noted that Rule 5(3) places important obligations on a potential offeror in respect of announcements. The Panel does not consider that once an offeror has approached an offeree he ceases to have any duties under this Rule: the offeror has a continuing obligation to make an announcement if the circumstances demand it.

2 Provision of announcements and documents to the Panel

Practitioners are reminded that a copy of every announcement (including a "talks" announcement) released to the press (whether national or local) and every other document despatched by the offeror, the offeree or any associate of either of them during the offer period must be sent to the Panel at the time of publication. This is necessary to enable the Panel to carry out its job as effectively as possible.

Copies of announcements lodged with the Companies Announcements Office of The Stock Exchange are **not** passed to the Panel; a separate copy should therefore be delivered to the Panel. Announcements of dealings by associates under Rule 31 will continue to be sent to the Panel by The Stock Exchange as described in Practice Note No. 12.

3 Consortium bids

In the last year there have been a number of offers made by consortia. This comparatively new development has had some implications for the Panel. It is often very difficult, because of the number of people by necessity involved, for such proposed transactions to be kept secret. This leads on to difficulties about the timing of any announcement under Rule 5. A further area which may cause problems is the extent to which the make-up of the consortium and the arrangements between its members need to be publicly disclosed. Because of these and other areas of concern, the Panel urges any person who is considering organising or making a consortium bid to consult the executive at an early moment in the planning stage.

4 Offers after a reference to the Monopolies and Mergers Commission

Under Rule 35 an offeror whose offer is withdrawn or lapses may not make another offer for the same company for 12 months, except with the consent of the Panel. If an offer is referred to the Monopolies and Mergers Commission it must lapse in accordance with Rule 9(1). The Panel would normally grant the offeror a dispensation from the provisions of Rule 35 if, after consideration by the Commission, the Secretary of State for Trade allows the offer to proceed. Nevertheless the Panel would generally expect the offeror, if he wishes to proceed, to announce his offer within three weeks from the date of clearance. If the offeror does not announce an offer within this time, the Panel would apply Rule 35, and would not allow him to announce a further offer until 12 months from the date that his original offer lapsed on reference to the Commission.

5 Guidance note on the preparation of "whitewash" documents and treatment of private company shareholders

Paragraph 9 of Practice Note No. 15 provides a procedure for the approval by an independent vote at a general meeting of shareholders of an issue of shares which would otherwise cause a general offer to be made under Rule 34. In every case a waiver of Rule 34 is required from the Panel. Application for such waiver should be made at the earliest possible moment. For many years the executive has given to applicants for a waiver a copy of a guidance note to help them with the preparation of the document. This note, which brings together the various parts of the Code which may be applicable to such transactions, has been revised from time to time and the latest revision of it has just been completed.

Pre-requisites of the Panel's consent to such a waiver are that at the relevant meeting the prospective controller, those acting in concert with him and any other interested party should be disenfranchised, and also that the maximum potential level of control of such a party is set out in the relevant circular. In this context, if a private company is being sold to a public company in exchange for the issue of shares, the Panel will usually presume that all the shareholders of the private company are acting in concert one with another with regard to the public company when they receive the consideration shares. Such presumption may, however, be rebutted by the facts of a particular case.

Thus cases where no one shareholder in the private company would come to hold 30% or more of the public company may nevertheless give rise to a mandatory bid obligation if the private company shareholders will receive shares amounting to 30% or more in the aggregate, unless the "whitewash" procedure is followed. The executive should, therefore, be consulted in any such case so that the true nature of the relationship between the private company shareholders can be established at the outset.

6 Acting in concert

For the purposes of the Code a person is presumed to be acting in concert with any investment company, unit trust or other fund whose investments such person manages on a discretionary basis. The Panel wishes to underline the fact that, therefore, where a bank holds shares in a company for its own account there is a presumption that that holding is acting in concert with, and therefore must be aggregated with, any holding purchased by the bank for its discretionary clients. This may have particular relevance in respect of Rules 33 and 34.

7 Open-ended offshore currency funds

The Code applies to all public companies resident in the U.K., Channel Islands or Isle of Man. During the past two or three years a number of open-ended currency funds have been incorporated in the Channel Islands, and in two particular cases the Panel has been asked to consider whether the provisions of the Code should apply. In both cases the Panel has taken the view that it would be inappropriate for the particular fund to be covered by the Code. If an adviser or company is in any doubt as to whether the Code or the Rules Governing Substantial Acquisitions of Shares apply to a currency fund or any other type of offshore fund, the Panel should be consulted.

STAFF

Since the last Annual Report was published there have been no staff changes.

(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****)*