

THE TAKEOVER PANEL

Report on the Year ended 31st March 1991.

MEMBERSHIP OF THE PANEL (*as at 1st July 1991*)

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| Sir David Calcutt QC (<i>Chairman</i>) | Nominated by the Governor of the Bank of England |
| J. F. C. Hull (<i>Deputy Chairman</i>) | Nominated by the Governor of the Bank of England |
| J. F. Goble (<i>Deputy Chairman</i>) | Nominated by the Governor of the Bank of England |
| Sir Austin Pearce | Nominated by the Governor of the Bank of England |
| Sir Adrian Cadbury | Nominated by the Governor of the Bank of England |
| I. L. Rushton | Chairman, Association of British Insurers |
| M. J. Hart | Chairman, Association of Investment Trust Companies |
| Sir Nicholas Goodison | President, British Bankers' Association |
| R. D. Broadley | Nominated by the British Merchant Banking and Securities Houses Association |
| M. A. Smith | Chairman, Corporate Finance Committee, British Merchant Banking and Securities Houses Association |
| M. G. Taylor | Nominated by the Confederation of British Industry |
| I. R. McNeil | President, Institute of Chartered Accountants in England and Wales |
| G. M. Nissen | Chairman, Investment Management Regulatory Organisation |
| A. C. Hugh Smith | Chairman, London Stock Exchange |
| C. M. Gilchrist | Nominated by the National Association of Pension Funds |
| R. H. Lawson | Chairman, Securities and Futures Authority |
| B. R. J. Bateman | Chairman, Unit Trust Association |

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| The Lord Roskill | Chairman of the Appeal Committee of the Panel |
| The Rt. Hon. Sir Michael Kerr | Deputy Chairman of the Appeal Committee of the Panel |

THE PANEL EXECUTIVE (*as at 1st July 1991*)

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| G. G. F. Barnett | Director General |
| P. R. Frazer | } Deputy Directors General |
| T. P. Lee | |
| N. P. Hinton | |
| Miss S. M. Govier | } Secretaries |
| J. V. Sandelson | |
| D. Graham | |
| A. G. B. Pullinger | } Assistant Secretaries |
| T. P. Kennedy | |
| P. J. Fisher | |
| P. Mountford | |
| J. D. Hobson | |
| D. A. McCorquodale | |
| G. Gardner | |
| C. J. Yeo | |
| Mrs T. A. Scott | |

CHAIRMAN'S FOREWORD

The last 18 months have seen a downturn in the number and size of bids. It is, as yet, too early to predict whether this represents any kind of sea-change. There have been quiet periods before; and there have been some signs during the last few months that bid activity may once again be on the increase. But none of this means that the Panel has been idle. As the Report of the Director General makes plain, the Panel and its Executive have had to tackle much difficult and time-consuming work.

The downturn in bid activity has had an immediate impact on Panel funding. The Panel must always scrutinize with the greatest care its call for and use of funds; but if the Panel is to do its job properly, it must be adequately funded. It is obviously right that the financial burden of the Panel should be distributed equitably and the Panel believes that this is achieved by levying charges not only on those who make bids but also on investors generally because they too benefit from the Panel's non-statutory regulatory regime.

The downturn has probably been the cause, at least in part, of fewer appeals being made from the Executive to the Panel itself. But I believe this is also due to the expertise of the Executive and, perhaps more importantly, to the recognition and acceptance of that expertise. In the year ended March 1991 the Panel saw no reason to differ from the view taken by the Executive in any of the appeals coming before it.

It is important that, when the Panel has to meet to hear an appeal, all organisations and interests represented on the Panel should, so far as possible, be present at the hearing. As I reported last year, the Governor of the Bank of England has already strengthened the representation of industry on the Panel, by appointing an additional independent member. This year, in order to ensure adequate representation of industry at hearings (which usually have to be arranged at short notice), the Governor agreed that a small group of senior industrialists should be formed, who would be available to act as alternates for the two independent members, should one or other of them be unavailable. Accordingly, the Panel has been able to welcome Mr. Alan Clements, Chairman of David S. Smith (Holdings) and formerly finance director of ICI, Mr. Antony Hichens, Chairman of MB-Caradon and of Y.J. Lovell (Holdings) and Mr. David Hubbard, Chairman of Powell Duffryn, as alternates for Sir Austin Pearce and Sir Adrian Cadbury.

The principal concern of the Panel this year has continued to be the proposed European Takeover Directive. Since any Directive may need to be implemented in the U.K. by statute, the very fact of a Directive must at least put at risk the Panel's present relationship with the courts, which, in turn, must put at risk the Panel's

attributes of flexibility, certainty and speed. Implementation of the European Directive in its current form could lead to less effective regulation, to the detriment of shareholders. It may be that a time will come in the development of the European Community when each of the member states has sufficient takeover experience for harmonisation to make good sense, but that time has not yet come.

The Panel welcomed the opportunity to give both written and oral evidence to the Trade and Industry Committee Inquiry into Government Policy on Takeovers and Mergers and it looks forward to the Committee's Report in due course. The Panel's only regret was that, in oral evidence, little time was spent on the proposed European Takeover Directive, which, as I have already indicated, the Panel believes to be the most significant matter presently concerning the proper regulation of bids.

Finally, I would wish to thank all those whose time at the Panel has come to an end. The Panel, both in its membership and in its Executive, depends heavily on attracting persons of high calibre. Were it ever unable to do this, the Panel's days would quickly be numbered; but I see no sign of this happening. I would wish to thank particularly Sir Philip Shelbourne who has recently retired as a Deputy Chairman. His experience and wise counsel have stood not only the Panel but also my predecessor, Lord Alexander of Weedon QC, and myself in good stead.

1st July 1991

REPORT BY THE DIRECTOR GENERAL

The most striking feature of the year to 31st March is, as set out on page 10, that there were only 132 published takeover or merger proposals compared with 230 the previous year. This statistic reflects a significant drop in bid activity which lasted from about August 1990 until the early part of 1991. Falling interest rates and increasing equity prices, particularly since the end of the Gulf war, have resulted in a revival of activity.

It has been the Executive's experience in previous recessions, and the current recession is proving no exception, that the volume of enquiries, where guidance on the Code implications of possible takeover proposals or shareholding switches is called for, rises substantially and many such enquiries absorb a considerable amount of time, although they make little impact on the Executive's statistics. Detailed consultations, which either did not lead to published proposals or were transactions involving controlling blocks of shares, numbered 136 compared with 142 in the previous year.

In response to the lighter work-load in the second half of the year the Executive did not replace the two Assistant Secretaries whose periods of secondment came to an end in October and December. It has in addition been possible to reduce by two the number employed in support functions. Accordingly, at the date of this Report, the Executive comprised 30 staff.

Funding

It became clear to the Finance Committee in August that, in the light of fewer takeovers and mergers and consequently declining revenue from charges on offer documents, it would become necessary both to increase document charges for the first time since their introduction in 1986 and to increase the levy on contract notes above £5,000 in value for the first time since it was introduced in 1978. At the same time the Finance Committee examined the Panel's costs and confirmed its agreement with the expenditure budget for the year in progress, which it had formally approved earlier in the year. This budget included provision for the occupation and fitting out of that part of the 20th floor of the Stock Exchange Building which the Panel did not already occupy. This was the fulfilment of a long term aim. The Panel had been waiting for some years for the opportunity to obtain much needed additional space adjacent to its existing premises and it would have been wrong not to take that opportunity when it arose.

After appropriate consultation with all the bodies represented on the Panel, document charges were increased from 1st September 1990 and the contract note levy was increased to £2 from 2nd April 1991.

Proposed European Directive

As I reported in last year's Annual Report, the European Parliament considered the draft directive in January 1990 and the directive then went back to the European Commission for re-drafting. On 10th September 1990 the Commission published its amended proposal designed to take account of the European Parliament's Opinion and the discussions in the Council working group during the second half of 1989. Meetings of the Council working group did not, however, resume until January 1991 under the Luxembourg Presidency.

The Panel was disappointed by the amended proposal. Many, if not all, of the United Kingdom's major concerns remain and the new proposal has done little, if anything, to alleviate those concerns which are still as set out in last year's Annual Report. This year's Council working group meetings have again exposed fundamental differences of philosophy and expectation between the member states in the area of takeover regulation and have revealed further difficult technical issues which seem nowhere near being resolved. Particular stumbling blocks include Article 4 and Article 8 of the amended proposal which deal respectively with the requirement to make a mandatory bid and restrictions on the ability of the board of an offeree company to frustrate an offer. The United Kingdom regards provisions dealing with such matters as an integral part of any harmonised regulatory regime in Europe.

The Panel remains determined to protect the essential features of the United Kingdom's tried and tested system – speed and flexibility of response and certainty of effect, including the avoidance of tactical litigation. The Panel believes that it will only become possible to achieve harmonisation of takeover regulation within the Community in the light of member states' increasing practical experience of takeover activity. The Panel questions whether this is the time for a detailed directive of the type currently proposed and accordingly welcomed the statement by the Minister for Corporate Affairs on 22nd February 1991 which underlined the ways in which the Commission's proposal threatens the features which have made the United Kingdom's system work successfully for more than twenty years. The Minister confirmed the Government's support for the principles on which the Code is based and for the non-statutory Panel.

Amendments to the Code

In October 1990 a revised edition of the Code was issued. A large number of changes were involved and it was considered that it would be more convenient for users of the Code for these to be incorporated in a new edition rather than by the issue of amended pages.

Many of the changes were made to clarify, or re-order, existing material or were minor additions to deal with detailed special points. Major changes covered:

- 1 Information on offerors (Rule 24.2). The main changes here required more information to be given where an offer is being made by an unlisted company or by an individual and information on the financing of cash offers.
- 2 Provision for European Council Regulation (EEC) 4064/89. The coming into force of this Regulation covering concentrations with Community dimensions required amendments to several Rules of the Code.

The Mandatory Bid Threshold

The Code has for many years required that, when a person or group of persons acting in concert acquires shares carrying 30% or more of the voting rights of a company, a general offer at the highest price paid for shares by that person or group in the previous 12 months should be made to all the shareholders. The figure of 30% was chosen because it was considered that, in most cases, this would represent effective control: experience has generally confirmed this to be so.

The philosophy underlying the Rule is that, if effective control of a company is obtained by the acquisition of shares, the principle of equality of treatment for shareholders requires that all shareholders should have the opportunity to obtain the price per share paid for that control (it will usually be a premium price) and that they should have the opportunity to get out of the company if they do not like what has happened.

There have been, and continue to be, suggestions that the mandatory bid threshold should be set at a lower level. The philosophy behind these suggestions is not that effective control of a company passes at some lower level. It has to do with a belief that the influence which a large, but less than 30%, shareholder can exercise is unacceptably disruptive to the management of the company in question. This is a different point and not one which the Code addresses. The Panel was set up to make sure that shareholders are treated fairly in bid situations or where effective control has passed through the acquisition of shares. On this criterion the Panel did not consider that there was a case for a change to the mandatory bid threshold when it last formally considered the matter in 1989.

Cash Confirmation

In a cash offer Rule 24.7 requires the offer document to contain confirmation, normally by the offeror's bank or financial adviser, that there are resources available to the offeror sufficient to satisfy full acceptance of the offer. If accepting shareholders are not paid and the Panel considers that the party giving the cash confirmation did not act responsibly and did not take all reasonable steps to assure itself that the cash was available, the Panel may look to the party giving the confirmation to produce the cash itself.

It is a matter of judgement, in each case, for the party giving the cash confirmation to satisfy itself that there will be funds available to meet the offer. In making that judgement, the party giving the cash confirmation will be influenced by a variety of matters such as the standing of the offeror, the extent and nature of its relationship with the offeror and the size of the offer. In the rare event of cash not subsequently being made available to accepting shareholders, the Executive will investigate what steps were taken by the party giving the cash confirmation.

In a recent case an offeror failed to pay certain of the accepting shareholders and the Executive found that the adviser that gave the cash confirmation in the offer document had not exercised adequate care in ensuring that cash would be available to the offeror. The Executive ruled that the adviser concerned should pay the consideration that was due under the offer and the outstanding payments were duly made.

US Shareholders in UK Companies

In June 1990 the Securities and Exchange Commission published a Concept Release on Multinational Tender and Exchange Offers. The SEC was anxious to find a basis on which offerors for non-US companies would extend their offers formally to US shareholders in those companies by posting an offer document to them. In general, this does not happen at the moment, partly because of the extra costs and difficulties imposed by US requirements and partly because offerors have been unwilling to increase the risk of litigation by posting offer documents into the US.

The Panel submitted a response to the Release, having discussed the subject with the Department of Trade and Industry, the Securities and Investments Board, the London Stock Exchange, the British Merchant Banking and Securities Houses Association and the City of London Law Society Company Law Sub-Committee.

In its response the Panel expressed the hope that a system could be agreed whereby United Kingdom offer documents might be posted into the US. However, until some resolution of the litigation problem can be achieved, the Panel seeks to establish a position where United Kingdom offer documents may be posted to US shareholders with the minimum observance of US formalities and on a voluntary basis, at the discretion of the offeror, leaving it to each offeror to assess the risks of litigation. The Panel considers that United Kingdom regulatory requirements are such as to give appropriate protection to US shareholders and hopes that the SEC will share this view.

The Panel believes that the facility envisaged by the Concept Release should be available irrespective of the percentage of shares held by US shareholders, at least up to 20% of the class sought. Where a considerable percentage is held by US holders, the Panel accepts that a US offer would normally be required. This was the case in the offer by Ford for Jaguar in November 1989 where nearly 30% of the capital of Jaguar was held by US shareholders. Following that case the Panel and the SEC held discussions to formalise the procedures for conducting dual cash offers under US provisions and the Code. The issues under review related to the freedom of offerors to purchase shares during an offer, the timing of the posting of offer documents, methods of acceptance to ensure no double counting and the right to withdraw acceptances. In a release dated 5th June 1991 the SEC has published for comment proposed procedures dealing with these matters.

1st July 1991

REPORT ON THE YEAR ENDED 31ST MARCH 1991

Statistics

The Panel held three meetings to hear appeals by parties to takeover transactions against rulings by the Executive. None of the appeals was allowed. In addition the Panel met to consider one disciplinary case and held three meetings to consider matters referred by the Executive. No cases were heard by the Appeal Committee during the year.

There were 132 (*year ended 31st March 1990-230*) published takeover or merger proposals of which 131 (*224*) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 130 (*211*) target companies.

A further 14 (*29*) cases, which were still open at 31st March 1991, are not included in these figures. The Executive was engaged in detailed consultations in another 136 (*142*) cases which either did not lead to published proposals or were transactions, subject to approval by shareholders, involving controlling blocks of shares.

Outcome of proposals

| | 1990/91 | 1989/90 |
|--|------------|------------|
| Successful proposals involving control (including Schemes of Arrangement) | 102 | 163 |
| Unsuccessful proposals involving control | 11 | 36 |
| Proposals withdrawn before issue of documents (including offers overtaken by higher offers) | 1 | 6 |
| Proposals involving minorities | 18 | 25 |
| | <u>132</u> | <u>230</u> |

Staff

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

Mr. N. P. Hinton, previously Assistant Director General, has been appointed a Deputy Director General.

Mr. A. G. B. Pullinger, formerly of Credit Lyonnais Laing, and Mr. D. Graham of Freshfields have been appointed Secretaries.

Mr. A. S. Clark, Mr. C. J. Bailey, Mr. A. J. Strachan, Miss C. E. Hambro and Mr. R. Dobson have left the Executive. Mr. D. A. McCorquodale of KPMG Peat Marwick McLintock, Mr. G. Gardner of Bank of Scotland and Mr. C. J. Yeo of the London Stock Exchange have joined the Executive.

Finance

The Panel is financed by charges in relation to offer documents and a levy on certain transactions in United Kingdom securities. Details of the document charges are set out in the Code.

Expenditure for the year to 31st March 1991 was as follows:-

| | (£000) | |
|-----------------------------|--------------|--------------|
| | 1991 | 1990 |
| Personnel costs | 2,420 | 2,527 |
| Accommodation costs | 1,038 | 556 |
| Professional fees | 585 | 329 |
| Other | 522 | 547 |
| | <u>4,565</u> | <u>3,959</u> |

Costs of £401,000 relating to alterations to premises and the equipping of additional office space are included in accommodation costs. The major element of professional fees is legal costs. The release in 1990 of substantial provisions for legal costs which were no longer required means that the figure for professional fees for that year is not comparable with that for 1991.

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