

THE TAKEOVER PANEL

IRISH DISTILLERS GROUP PLC ("IRISH DISTILLERS")

On 6 September 1988 the full Panel met to hear an appeal by Pernod-Ricard S.A. ("Pernod-Ricard") against a ruling by the executive. The executive had ruled that a competing offer had been made by Pernod-Ricard, which entitled GC&C Brands plc ("GC&C Brands") to exercise the right it had reserved to increase its otherwise final offer for Irish Distillers. The Panel dismissed the appeal.

On 19 August the Panel had ruled that GC&C Brands could immediately make a fresh bid for Irish Distillers after the European Commission had indicated that the initial bid contravened Article 85 of the Treaty of Rome. At that hearing Irish Distillers had argued that a fresh bid should not be allowed since it would extend the time during which there was uncertainty as to the future of Irish Distillers and during which its management was occupied with contesting the bid. The Panel considered, however, that in the light of the intervention of the Commission, shareholders in Irish Distillers had not been given any proper opportunity to consider the initial bid by GC&C Brands. The Panel therefore exercised its discretion to permit a new bid to be made by GC&C Brands without waiting for the normal 12 month period.

During the hearing on 18 August, the Panel discussed the timetable for the new bid with the parties. It did so in order to keep the time during which uncertainty surrounded Irish Distillers to the minimum. It was recognised that a somewhat shorter timetable would be possible if this offer were to be treated as final in the absence of any competitive offer. Accordingly, in order that a short timetable might be fixed, GC&C Brands suggested, and the Panel subsequently ruled, that the new bid should be final in the absence of a competing offer.

But if a competing offer emerged, GC&C Brands was to be free to increase its offer so that shareholders could have an opportunity of considering which offer for their company was most acceptable.

Shortly after the Panel ruling of 19 August, there were press reports that talks were taking place between Irish Distillers and Pernod-Ricard, which was said to be regarded by the management of Irish Distillers as a friendly suitor. Last Friday, 2 September, Pernod-Ricard and Irish Distillers issued a joint statement in which they said that talks were proceeding but gave no commitment that a bid would materialise or, if so, when. Over the weekend of 3/4 September, however, Pernod-Ricard indicated to certain shareholders that it would make an offer for Irish Distillers of IR450p per share if it could obtain in advance irrevocable commitments to accept its proposed offer from the holders of shares which, together with those shares already held by it, would represent over 50% of the shares in the company. Shareholders were contacted on the Saturday and Sunday by representatives of both Pernod-Ricard and Irish Distillers and invited to enter into such commitments. GC&C Brands, who had issued a statement on 2 September that, if permitted to do so, it would increase its bid for Irish Distillers, contended that these approaches amounted to a competing offer allowing it to increase its own offer.

The Panel executive were contacted late on 3 September and considered the position in detail throughout 4 September. The executive ruled on the afternoon of 4 September that the approaches to shareholders made by Pernod-Ricard amounted to a competing offer, and that accordingly GC&C Brands was free to increase its own offer. This it duly did on the same day by raising its own offer to IR525p per share. Pernod-Ricard appealed this ruling to the full Panel.

Then, on 5 September, Pernod-Ricard announced a bid for Irish Distillers and contended that it had received irrevocable undertakings which, together with shares already held by it, represented over 50% of the share capital. The validity, however, of some of these commitments is uncertain. The

commitment from FII Fyffes, representing 20% of the share capital of Irish Distillers, is under challenge in the Irish Courts and Pernod-Ricard have obtained an ex parte injunction to prevent FII Fyffes from accepting any other bid for its holding. The commitment of Irish Life (9.7%) is conditional. The Panel is not concerned to rule whether these commitments are binding but we were informed that there will be a further hearing of the action involving FII Fyffes during this week, and that a speedy decision on the issue is expected. This decision will have a critical effect on the outcome of the rival bids for Irish Distillers and thus on the practical consequences of the Panel's decision.

The Panel agrees with the ruling of the executive. Pernod-Ricard's position was that, in the absence of irrevocable commitments from more than 50% of the shareholders, no competing offer from Pernod-Ricard would materialise. Since GC&C Brands could only increase its offer if such a competing offer did materialise, the effect of these proposals would, if successful, be to place Pernod-Ricard in a position where it was able to bid for the shares in Irish Distillers without risk of a competitive bid from GC&C Brands. This, as representations to the Panel showed, placed the shareholders to whom the approaches were made in a dilemma, and required them to resolve that dilemma within a very short time. Moreover, if Pernod-Ricard had secured over 50% of the shares in Irish Distillers, the other shareholders, including small shareholders, would receive the Pernod-Ricard offer only after control had already passed and without any opportunity of a competitive bid from GC&C Brands.

The Panel ruling of 19 August had made it plain that GC&C Brands could reserve the right (as it did), in the event of a competitive offer, to put a higher offer to shareholders. This intention would be circumvented by the scheme devised by Pernod-Ricard. The Panel interprets the Code purposively and flexibly so as to ensure that parties cannot devise ways round the letter of its rulings in order to avoid compliance with commonsense and the principles upon which the ruling was based. The Pernod-Ricard arrangement would have precluded shareholders

in the company from considering any competing offers. This would be contrary to the interests of shareholders and to the spirit of the Panel ruling of 19 August. The executive were right to treat the Pernod-Ricard proposal - under which they would have secured control of the company before launching their formal bid - as being a bid in all but name. The appeal is dismissed.

6 September 1988