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THE U.K. PANEL ON TAKEOVERS AND MERGERS: AN APPRAISAL

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INQUIRY INTO CORPORATE TAKEOVERS IN THE UNITED KINGDOM

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1990

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The David Hume Institute has been commissioned by The Joseph Rowntree Memorial Trust to conduct an Inquiry into the issues raised by Corporate Takeovers in the U.K. This paper is the seventh of a series presenting the results of research undertaken in the course of the Inquiry, and also submissions of opinion received from individuals and organisations which are thought to be of wide general interest. The Institute hopes in this way to keep the public informed of work in progress. The Final Report will appear in the late Spring of 1991.

A note on the Institute and a list of its publications appear on pp .41-43.

The Institute has no collective views on any public policy question and is not committed to the views of any of its authors.

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THE U.K. PANEL ON TAKEOVERS AND MERGERS

The present study will first describe the Panel, summarizing its history, duties, rules (the Code) and powers. It will then go on to discuss some major issues that have been raised in relation to these.

The study follows broad consultation both with those administering, and with those subject to, the Code. However the writer is solely responsible for the views expressed, and the factual statements made in the study.

I DESCRIPTION OF THE PANEL

1. History

Takeovers were not unknown, but unusual, before the Second World War. Some early elements of the present Code can be seen in the 1930's measures against share-pushing.

In the 1950's, takeovers became a good deal more common, and were often regarded as an aid to the more efficient use of company resources. Some abuses were identified, in regard to which it was realised that, whereas many different segments of industry and the City were involved, no specific remedial powers existed, either in the Companies Acts, or in other legislation. In consequence, the governor of the Bank of England formed a City Working Party, consisting of representatives of the Stock Exchange, the banks, insurance companies, issuing houses and accepting houses, which, in 1959, issued the guidance document "Notes on Amalgamations of British Businesses". This was followed in 1960, by the promulgation by the Board of Trade, of the Licensed Dealers (Conduct of Business) Rules, under the provisions of the Prevention of Fraud (Investments) Act, 1958. The rules were more detailed in some areas than the "Notes", and had statutory backing. They were, however, by no means comprehensive.

The mid-1960's saw a major resurgence of takeover activity, endorsed in large part by public opinion, which again saw in this a device for rationalising company structure and improving industrial efficiency. A major official body, the Industrial Reorganisation Corporation, was in fact set up by the Government of the day specifically to promote takeovers and mergers. However further, and in many cases new, abuses were identified, leading to the reconvening, in 1967, of the City Working Party, now strengthened by the inclusion of representatives of the Confederation of British Industry and of the National Association of Pension Funds. The City Code on Takeovers and Mergers, issued in 1968, was the result.

Simultaneously the Panel on Takeovers and Mergers was set up. The Panel consisted of a Chairman, three Deputy Chairmen, and two lay Members, appointed by the Governor of the Bank of England, and of Members drawn from bodies representative of the various sectoral interests enumerated above.

With the passing of the Financial Services Act in 1986, the significant addition was made of a number of the Self-Regulatory Organisations created by that legislation. The full membership of the panel is now the following:

The Association of British Insurers,

The Association of Investment Trust Companies,

The British Merchant Banking and Securities Houses Association,

The Committee of London and Scottish Bankers,

The Confederation of British Industry,

The Financial Intermediaries, Managers and Brokers Regulatory Association,

The Institute of Chartered Accountants in England and Wales,

The International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd.,

The Investment Management Regulatory Organisation,

The National Association of Pension Funds,

The Securities Association,

The Unit Trust Association.

The Panel is serviced, and the Code is administered on a day-to-day basis, by an Executive, headed by a Director General, normally a senior merchant banker; this Executive will normally include lawyers, accountants, stock-brokers, clearing bankers, civil servants, and personnel from the Bank of England.

2. The Mandate of the Panel

The Panel has a single and central duty: that of ensuring the observance of the rules of the Code. The rules of the Code, as will be discussed more fully below, have the single objective of ensuring fair treatment for shareholders in the course of a takeover operation.

This then is the duty of the Panel. It has no wider function. It has no remit to consider, and is not allowed to consider, any wider matters, whether they be issues of general economic, industrial, commercial or social policy. It is not required to judge whether takeovers in general, or the takeovers under examination in particular, are harmful or beneficial to the economy or to the community; or whether individual take-overs are well or ill-judged in regard to company development or financial management.

3. The Code

(A) The Nature of a Takeover

A takeover is an operation whereby one company obtains control of another. It does so by securing at least a majority of the voting rights of the company it seeks (i.e., 50 % of the voting rights, plus one share). These voting rights are

enshrined in the shares of that company. A takeover therefore consists in the acquisition by the bidding company, of shares in the possession of shareholders of the company being sought.

A takeover, of itself, does not involve the disappearance of either company. The acquiring company, by reason of its obtaining at least a controlling portion of the share capital of the company being acquired, becomes the owner of that company; the latter becomes its subsidiary and continues, at least initially, in existence. The acquisition of shares may take one of two primary forms: an outright purchase for cash, or the equivalent of cash; or the assignment, by the shareholders of the target company, of their shares to the acquiring company, in exchange for shares in that company.

Thus, in the course of a takeover offer, the target shareholders may have the option either of becoming shareholders in the new parent company or of taking a cash payment for their stake in the target company, and so departing from the scene; or of course of retaining their shares. In the last case, where the bid is successful, and where therefore the acquirer, by definition, secures a majority of the shares, such shareholders will remain as minority owners of the new subsidiary, with little say in subsequent company policy.

Many takeovers occur on an agreed, rather than contested basis, necessarily requiring less attention from the Panel. However the Code covers both contingencies and there are rules safeguarding the interests of shareholders.

It follows from all of the above that a takeover will nearly always be initiated by a company, normally in industry and outside the City, and the object of a takeover will be a company in a similar position. However it follows, equally, that a takeover is essentially a Stock Exchange transaction. It will therefore be attended by, and to a great extent transacted by, financial advisers, securities dealers and intermediaries, issuing houses, accountants, auditors and lawyers; it will also necessarily involve, in present times, those investing

institutions, such as insurance companies, pension funds, and investment and unit trusts, which are primary shareholders in U.K. companies.

(B) The Code

The Code, the purpose of which, then, is to ensure fair treatment for all shareholders, is designed to bring about two major requisites: (a) full, accurate and public information; and (b) fair method of acquisition of shares. The Code itself falls into two main compartments, the General Principles, and the Rules.

1) The General Principles

There are ten General Principles and they constitute the basic guidelines for the Panel's action. In the changing and continually evolving circumstances of take-over activity, they have paramount importance. The Rules which derive from them may be amended, enlarged, waived, or even set aside in the face of practical experience; but in all this the General Principles are a guide to the direction the Panel can take and, equally important, they are the parameters beyond which the Panel may not go. The Panel may deviate from the precise wording of the Rules; it may never deviate from the basic precepts of the General Principles. The text of the General Principles is shown in Appendix 1.

2) The Rules

The Rules, stemming in detail from the General Principles, serve to ensure the two major requisites stated above:-

a) Full, accurate and public information

It is essential that shareholders should be placed in full possession of the argument both in favour of and against the proposed takeover and that all shareholders should have access to this information. Among the rules to ensure that this should be so, are the following:

(i) Before making an offer for another, a company must assure itself that it has the ability to pursue the offer to completion.

(ii) The offer, when made, must immediately be made public; it must be circulated to all shareholders of the company under offer, (the "offeree" company), by the board of that company and must be communicated to the relevant authorities, in particular the Panel.

(iii) During the preparation of an offer, confidential information must be rigorously restricted to those who require to know and no person may deal on the basis of such information.

(iv) In the event of rumour and speculation that an offer is about to be made, the Panel may require the reputed offeror company to make a statement confirming or denying that an offer is to be made.

(v) The offer, when made, must contain a prescribed minimum of essential information, including the identity of the party making the offer (the "offeror"); the terms of the offer; the number of shares in the target company already attributable to the offeror; all other relevant shareholdings in both companies; the conditions attaching to the offer; the offerors' intentions regarding the main aspects of the target company's activities and the trading results and balance sheet data of both companies.

(vi) The board of the offeree company must seek the views of an independent financial expert on the offer and this expert's views must be circulated to all shareholders in that company.

(vii) All published material, whether this be in advertising, broadcast comment, or public pronouncements, as to the state of the negotiations, must be accurate; in addition, profit forecasts and valuations must be accurate, must conform with prescribed standards, and must be subjected to appraisal by independent experts.

(viii) In cases where an offer is favoured by the offeree board (a 'preferred offeror'), and where a second offeror materialises, the offeree board must furnish the latter with all the information provided to the preferred offeror, although only in response to specific questions from the second offeror.

b) Fair method of Acquisition of Shares

The actual accumulation of shares (voting rights) in the hands of potential or announced bidders is of course a matter of close concern to the shareholders of the company in question, and to the board, to which the shareholders look for advice. In dealing with this matter, the Panel has had two principles in mind:-

(a) The accumulation of shares should not go so fast as to overtake the ability of the shareholders and board to size up the likelihood of a bid, or the merits of an actual bid. Accordingly, the Panel has identified three important levels of shareholding, to which it has applied certain safeguards. The first of these is the obvious one of statutory majority control, i.e. 50% of the voting rights, plus one share. The second is the one which, by consensus over time, has always been recognised as that conferring on the holder effective control of the company; this is a holding of 30%. The third is a prudential limit of 15%; this is by any standard a substantial holding.

It is clearly undesirable for any party suddenly, without notice, to move from an insubstantial holding to one just below the critical level for effective control, i.e. to 29.9%; the Panel has therefore prescribed limits on the speed at which this can be done. Once at 29.9%, fundamental rules must come into play, defining first the manner in which a holder may be permitted to pass into the 30%-plus domain of effective control; and, second,the obligations which then fall upon him as an effective controller. In essence, the Panel's Rules first make access relatively easy only to uncontested bidders, i.e. to those whose

offer is acceptable to the company; they then require all who achieve the status of effective controller thereupon to become offerors, whether they have been such before or not, and moreover to make their offer available in cash to all target shareholders. The object of the last provision is to place those shareholders in a position to exercise the options referred to earlier above: that is, either to remain as minority shareholders in what is now a subsidiary company, or to break their link with the new group altogether and accept a cash offer for their shares, or to accept shares of the 30% shareholders - if the latter decides to offer them - in exchange for their own, so becoming shareholders in what is a new controlling company.

(b) The second principle requires equality of treatment in regard to the 'consideration' given for the acquisition of target company shares. The 'consideration' is the payment made for shares, which may be in cash, offeror company shares, loan notes, or indeed other forms of value.

It is worth noticing that shares are normally acquired in the course of a bid either by purchase in the market for cash or by the receipt of 'acceptances'; by the latter is meant the indication of a target shareholder - by the completion of an 'acceptance form' - of his willingness to furnish his shares to the offeror, in return for one of the considerations available; this acceptance to be taken up by the offeror only when he declares his offer 'unconditional' (see (viii) below).

The Rules devised by the Panel to serve these and other related purposes are summarised below:-

(i) A party holding less than 15% of a company's shares may advance that holding to 15% only by acquisitions which, in any space of seven days, amount to not more than 10% of the company's share capital; the same rule applies to increases in his shareholding from 15% to 29.9% of the company's voting shares. However this restriction does not apply where:

a) the acquisition is, once only in a space of seven

days, from a single shareholder - the right of any single shareholder to dispose of his property must necessarily be recognised;

b) the acquirer has announced a firm intention to make an offer for the company;

c) the acquirer has made a tender offer for shares;

d) the acquirer is on the point of announcing an offer, which the board of the target company either accepts, or recommends.

(ii) A party, not having made an offer, and holding 29.9% of the voting shares of a company, may only increase that holding to 30% and above, through the acquisition, on one occasion within the space of seven days, of shares from a single shareholder.

(iii) A party holding 29.9% of a company's voting shares, having made an offer which has not received the consent or recommendation of the target company, may only increase its stake to 30% or more, through the receipt of acceptances to its bid, or through market purchases only after the 'first closing date' (see (ix) below).

(iv) Other holders of a 29.9% stake, who have made, or who are on the point of making, an offer which has received the consent or the recommendation of the target company, are free to pass the 30% barrier.

(v) All parties, as stated above, who pass the 30% threshold must make an immediate cash offer for all shares.

This fundamental rule is subject to an exception only in the case of two classes of involuntary acquisition of shares, i.e.:-

where the acquisition is through a gift or bequest;

where the acquisition is through a new issue of shares, in return, for example, for an injection of cash into the company, in which case the shareholders may

dispense that party from the cash offer requirement (termed a 'whitewash').

Where, nevertheless, a party holding 30% or more of the shares of a company in the above circumstances, increases that shareholding by more than 2% in any period of twelve consecutive months, then that party shall make the cash offer as specified above.

(vi) The obligatory cash offer, under the fundamental rule for 30% shareholders, must remain open throughout the period of the offer, and is extended when the offeror declares his bid successful, i.e., when he declares the bid 'unconditional' (see (viii) and (ix) below).

(vii) If an offeror has purchased any target company shares during the three months immediately preceding his offer, then the offer must provide at least the same value consideration to all other target shareholders. Moreover, if, during the 12 months leading up to the offer and during the offer itself, the offeror has purchased more than 10% of any class of shares, then he must offer shareholders cash at the highest value he has paid during that period (although he need not keep that cash offer open throughout the whole offer). Finally, where, as mentioned above, an offeror has passed over the effective control threshold of 30%, the cash offer he makes must be at the highest price paid in the 12 months prior to the offer, and during the offer itself.

(viii) an offeror can only declare his offer 'unconditional as to acceptances' (i.e. that the object of his bid has been attained and that he will now buy any shares henceforth offered to him, and will take up all the acceptances he holds) when the total of shares already held, of shares bought in the market during the offer, and of valid acceptances of the offer, equal the total required under his acceptance condition; this must in

the case of a general offer equal at least 50% of the voting rights plus one share.

(ix) All offers must be held open at least until the 21st day - the 'first closing date'. This is the date at which the offeror chooses, either to abandon or to prolong his bid. If the latter, he must set a new closing date.

No offer may remain open for more than 60 days. Whenever, in the course of a bid, an offer is declared unconditional as to acceptances, an extension of at least 14 days, from the next closing date, must be given.

(x) Wherever other parties are co-operating with the offeror to acquire shares in a target company ('persons acting in concert'), this must be made known; these other parties are made equally subject to the Code, their actions being deemed to be the actions of the offeror himself.

(xi) Any party possessing 1% or more of the share capital of either company must, during an offer period, publicly report any dealings in those shares. Any party possessing 5% or more must report dealings in the shares of either company.

(xii) The board of a target company may not take any action which has the purpose of frustrating a bid, unless it has obtained the prior consent to this course of action of the shareholders.

(xiii) Where a bid is referred to the Monopolies and Mergers Commission (takeovers are the most common way in which a company can secure a dominant market position), it will normally lapse.

Contested bidders intending to make market purchases of shares after the 'first closing date', under (iii) above, must, if a reference to the Commission is under consideration, wait until the Secretary of State

has decided that no reference is to be made.

The above are the main rules. Other rules, inter alia, (a) lay certain duties on the directors of both bidding and target companies, particularly where they are themselves shareholders; (b) forbid, in normal circumstances, the renewal of a failed offer within a period of twelve months; and (c) provide for the revision of offers.

The foregoing summary of the Code is highly condensed and is no substitute, if complete knowledge of the Code is desired, for reading the full text.

4. Powers of the Panel

The modus operandi of the Panel is: to monitor the course of all takeover bids; to provide advice on the Code to participants, who are encouraged at all times to seek this; and to intervene whenever a breach of the Code appears likely.

Supervision is thus concurrent, rather than post hoc; the Panel is as intent on preventing breaches through prior consultation as it is on correcting breaches after they have occurred. Where the Panel Executive determines that the Code has been breached, and where the party concerned contests this finding, then an appeal lies to the full Panel, and thereafter if necessary to the Appeal Committee of the Panel, which can be convened at short notice. Where an adverse finding is substantiated, corrective action is taken. Then disciplinary action may follow. This may take the progressively severe forms of a private reprimand, a public censure, or a report of the offender's conduct to another regulatory authority.

The Code is not justiciable: i.e., it is not a legal text, and can be neither enforced nor contested in a Court of Law. It is of course open to any party, in this as in all other affairs, to claim that it has been treated unconstitutionally or contrary to natural justice and in this case the courts will undertake a judicial review; they have been willing to do this only after the Panel's examination and judgement of the case is complete.

It remains therefore open, in principle, for any operator to reject a ruling of the Panel and to make no change in his conduct. However, there appears to have been only one instance of this; that of the St. Piran company, in the outcome of which the offender acceded to the Panel's requirements.

Though there is little doubt that operators have on occasion concealed breaches of the rules from the Panel, and the number of such occasions is, by definition, unknown, subsequent events may expose the breach; in the case of the Guinness bid for Distillers, the former was eventually required by the Panel to pay some £100m in compensation to Distillers' shareholders.

II MAJOR ISSUES ARISING

1. A Statutory or Non-Statutory Code

The merits of a statutory system, it could be argued, are that its requirements are enforceable at law and cannot be defied; that they are precise and clearly known both to the operators and the regulators; and that they carry known and definite penalties. These characteristics must be compared with those of the Panel's surveillance.

(i) The Panel's Powers of Enforcement

It is necessary to review first what sanctions are at present available to the Panel.

a. Reputation

The first is the damage to the reputation of, and consequent to the trust placed by associates in, an operator declared by the Panel to have behaved improperly. Although standards of probity in the City are deemed by many to have declined, and certainly they suffered some deterioration in the mid-1980's, this remains a potent deterrent. In the last analysis all dealings must rely on a basis of trust between the partners. Probably a fundamental requirement of all markets, this is perhaps most true of financial dealings where, unlike their merchandise

counterpart, there is no physical, and therefore immediately verifiable, outcome of any transaction, and where the number of parties involved is invariably relatively small.

b. Powers of the Members

The Panel's Members, representing as they do the major sectoral activities involved, have committed themselves to withdraw the services of their sector from any offender against the rules. This commitment has had particular force, from the outset, in that, all takeovers being essentially a purchase of shares, the withdrawal of services by the Stock Exchange, a member of the Panel, can effectively terminate a bid. This sanction has received further force from the entry of Self Regulatory Organisations into membership of the Panel. These Organisations can declare an offender no longer to be a 'fit and proper person' to carry on in business; such a ban is enforceable by prosecution under the criminal law.

c. Trust of Offeree Shareholder

A successful takeover relies heavily on the confidence placed in the bidder by the shareholders of the target company. Criticism of that bidder by the Panel will necessarily weaken this confidence, and materially affect the bidder's prospects of success.

d. Statutory Violation

A number of the rules in the Code are in any case duplicated by statutory provisions carrying legal penalties. Such rules are those forbidding insider dealing, collusive share price manipulation, misrepresentation and undisclosed share dealing. In all such cases, the Panel can, as shown above, refer the matter to the statutory authority.

It appears, then, that although the Panel conducts its dealings informally and as between peers, there lies behind its rulings a series of increasingly severe recourses, culminating in statutory prosecution.

Against this the practical effect of statutory proceedings must be examined.

(ii) The Legal Alternative

In many countries where a legal system applies, the statutory regulator in fact relies significantly on the internal disciplines exercised by practitioner associations; such associations are the Chambre Syndicale des Agents de Change in France, the Börsenvorstand in Germany, and the New York Stock Exchange, Inc. in the United States.

It is therefore to be considered whether the additional layer of formal authority has led more fully to the suppression of illicit behaviour. The record of events does not conclusively show that this has been so. Corrupt practices appear to be, at the least, as common under statutory regulation as under the Panel: recent episodes such as the Boesky and Milken frauds are relevant.

It is a truism that the deterrent to illicit behaviour is not so much the size or clarity of the penalty, as the probability of detection and conviction. Here again, there appears no strong evidence that the latter is more certain under a legal system; and if it is not more certain, then this is in many respects a by-product of the very precision held to be an advantage. Minutely detailed definition in legal terms of a illicit act can frequently give rise, simply, to legal argument: to an 'avoidance industry'. Lawyers, accountants, and financial and company advisers, are prompted to seek out the boundaries, weak points and ambiguities in the formal text, which can then be argued out in a court which cannot rule until the charge has been substantiated in every respect. In the absence of wholly conclusive evidence, offenders can fail to be convicted.

All the above are the known and inescapable drawbacks of a fully legal system, and clearly, do not invalidate the use of such a system. However the advantages in this context of the Takeover Panel alternative should be noted.

(iii) Some advantages of the Panel method

a. Certainty

The Panel is not compelled to rely on evidence exhaustively contestable in another forum. It is itself the judge; it relies on the strong balance of evidence and there is no appeal during a takeover beyond its own procedures. Its decisions therefore are definite, leaving all parties at once clear as to the outcome of the case.

b. Speed

This is a matter of major importance. Events move rapidly in takeover situations; they require clear authorisation from one stage to another. The fate of the target company, necessarily under siege, cannot be left too long in abeyance. Under a legal system juridical argument can continue for months, or years.

c. Flexibility

As its demands for evidence and its Rules are not rigid, and as it relies heavily on prior consultation with parties to a takeover, the Panel can adapt very quickly to changes of direction in the course of a takeover contest, and can amend its rules over the passage of time as one case succeeds another, and new points, requiring rulings, emerge.

d. Compliance

The Panel acts in respect of, and with the support of its peers; acceptance of its decisions is a prior understanding of the system, and is, as shown above, normally forthcoming. This is enhanced by the certainty of the Panel's impartiality, as shown further below.

(iv) Conclusion

The balance of strengths and weaknesses outlined above, appears to favour the Takeover Panel system. That system

appears more clearly to incorporate the virtues of enforceability, precision and deterrence attributed to a statutory system, as remarked above, than would a statutory system itself. However, it should be stressed that this apparent superiority should be seen in context. The Takeover Panel seems a better instrument than a statutory body, only for the particular task which it has to discharge.

In most areas, particularly where there is a continuous stream of relatively homogeneous activity, and where this can therefore be regulated in a uniform and permanent manner, a formal system, comprising statutory rules and judicial process, will be appropriate.

However, a takeover bid is not such an activity. It is a single, once-for-all, hard-fought, swiftly changing and often intricate contest, the outcome of which, either way, is irrevocable in its consequences. It would appear difficult indeed to control this event efficiently through a set of formal enactments, construed with deliberation, and debated at length.

There is a homely parallel. A football club is an organisation regulated, in its management of its premises, its relations with its customers, its staff, and its players, by the conventional law of the land. When, however, on Saturday afternoons it sends its players onto the field for a fast-moving, frequently unpredictable, competitive event, conventional legal procedures could not possibly be applied. What is needed is an unofficial body of rules, accepted however by all participants, applied by one man having no authority but his own and making instant decisions from which there is no appeal. What is needed, and what is supplied, is a referee. The Takeover Panel is a referee.

The parallel is exact. The law of the land, where applicable, such as in a case of assault, will still be invoked in football. The player could be caught by the rules of football, and he could later be prosecuted under the criminal law. Similarly, a party dealing before an offer on the basis of confidential

information could be in breach of the Takeover Code, and could later be prosecuted under company legislation.

2. Adequacy of Self-Regulation

Where statutory control is not adopted, the alternative is to choose supervisors having direct experience and intimate knowledge of the activity concerned, who can make informed and effective judgments; in other words, the alternative is control of the industry by members of the industry. This is 'self-regulation'; this is the function of the Takeover Panel.

In all self-regulation, there is a presumption, in principle, of bias. Practitioners monitoring the conduct of other practitioners, may be tempted to leniency towards their peers, or to a course of conduct which will foster the growth of the activity in question. This possibility must be examined in the case of the Takeover Panel. Does the Panel overlook offences; does it instinctively foster the expansion of takeover activity? The Panel might reasonably feel that takeover activity reinforces shareholder rights, as discussed further below. Might the prospect of higher practitioner earnings prompt implicit encouragement of take-over activity? But can the Panel, in practice, affect the outcome of actual cases? A number of points arise for consideration.

(i) The Panel and Executive Members

Not all the members of the Panel have income which would be augmented by a growth in takeover activity. Those who have, are certainly the securities houses, issuing houses financial advisers, brokers, and accountants.

However, this is not true of other members, such as the unit trusts, investment trusts, insurers, investment managers, pension funds, and, above all, the CBI. These represent either investors and shareholders whose interest in the expansion or decline of takeovers is neutral, or companies; themselves by definition divided into advocates and antagonists of take-over

activity. Thus the Takeover Panel membership is balanced, within itself, between those to whom a vested interest might be imputed, and those to whom such an interest cannot be imputed.

It should also be noted that, of the former category, the securities houses, brokers, and advisers are represented on the Panel by Self-Regulating Organisations; these are under a duty, imposed by the Financial Services Act, to be impartial.

Secondly, the day-to-day work on monitoring and controlling take-over activity is carried on, not by the Panel's Members, but by its Executive. The Executive is headed by a Director General, in post for two years. Although experienced in take-over work, he is not for the period of his term of office, a practitioner. His staff will include lawyers, accountants, stockbrokers, civil servants, clearing bankers and personnel from the Bank of England, all seconded for a period of at least two years, and some permanent members of the Executive. Some, as will be seen have no practitioner background; others, for the period of their secondment, or for the duration of their career, are not practitioners.

(ii) Practical influence of the Panel

Such power as is available to the Panel to influence the level of takeover activities, is indirect.

Takeover activity rises and falls, not so much on the outcome of individual cases, as in response to broad economic factors and the climate of business. There will be surges of activity when demand is robust, and profitable companies are expanding. There can also be surges when economic conditions are poor, and dividends and share prices fall; strong acquisitors will then capture assets undervalued by the market. Take-over activity can be discouraged or encouraged by Government action such as restraint of dividends, or pressure for company rationalisation. On the microeconomic plane, companies will attempt a takeover, not so much in the hope of benevolent

treatment by the Panel, as on an assessment of the real value and compatibility of the assets they would so acquire.

The mandate of the Panel is such that it may not, and cannot, influence these factors. It has no locus to discuss the desirability or the undesirability of takeover activity as a whole, and it can neither encourage or discourage individual bids in advance. As is evident from the rules of the Code summarised above, the Panel enters into its functions, only when a takeover bid is in existence. Its voice is not heard, and its functions are not activated, until that occurs. Its duty, as already mentioned, is merely to ensure the correct conduct of the takeover, once it has started. Like the football referee, it does not make the fixtures; it only comes into the field when the match starts.

(iii) The Need for Consent

In all self-regulation, misuse of the rules can have a perverse effect. Self-regulation depends for its authority, on the tacit consent of all concerned. That consent rests in its turn on trust that the regulator will treat all cases on their objective merits. Should suspicion to the opposite effect arise, that trust is weakened.

Moreover, in all contested bids, whatever might be the Panel's inclination to promote success of the bid, the practical pressure in favour of impartiality is very great. There will be one party, the bidder, which seeks a favourable outcome, but another, the target company, which looks for failure; and these will also be the opposing wishes of the bankers, brokers, securities houses and advisers arrayed on each side of the contest. It follows that at any one time, a major proportion of the participants with which the Panel is dealing, would be alienated by any attempt on the part of the Panel to foster takeover activity.

(iv) The Evidence

The proof of any presumption must be in the evidence. The Panel has been accused of bias: there have been accusations,

made by the bidders, of bias in favour of the target; and by targets, of bias in favour of the bidder; the whole suggesting perhaps, a reasonable balance in the Panel's decisions. What would be conclusive, however, would be a record of complaints of conduct favouring certain bids, or higher takeover activity as a whole, from those outside the immediate arena: from academics, statutory authorities, interest associations, political parties, and, most of all, from the Government. No such complaints have been made. Indeed, it has been the complaint of the Labour Party, specifically, that the Panel has not influenced the level of takeover activity.

(v) Conclusion

The presumption of bias in self-regulatory authorities is, human nature being what it is, always legitimate. In the case of the Takeover Panel there appear to be active disincentives to such conduct, and no recorded instances of it.

3. Broader Responsibilities

There is cause for concern over many wider issues relating to takeovers. A substantial number of acquisitions, it has been found, have failed, in the mid to long term, to produce industrial or commercial benefit. The presence of takeover risk, it is said, induces companies to neglect long-term research and investment, in favour of short-term cash flow and dividend payout. Companies have been unnecessarily 'put into play'. Acquisitions have sometimes merely satisfied a company chairman's personal ambition. As against this, it has been argued that in a world of relatively greater company size, the amalgamation of British companies through takeovers should be encouraged; and moreover, that foreign companies, particularly in the EC, should be as much exposed to takeovers as are British companies. Others point out that takeovers, fought out as they are on the record of performance, effect those changes of management, to ensure which is the prime duty of company owners - the shareholders.

All of these are matters of considerable moment, but it would be to misinterpret the remit of the Takeover Panel to suggest that that body should consider them. The Panel's sole duty, as already remarked, is to fair play during the bid. Two points however arise.

(i) Postponement of a bid

It might be asked whether the Panel should defer the completion of takeover, pending consideration of these issues elsewhere. The Code does indeed require the suspension of a bid where a reference is made to the Monopolies and Mergers Commission. This is clearly necessary: if a particular acquisition is likely to create a dominant market position, then it cannot proceed until this likelihood is confirmed or eliminated.

However, the wider issues, referred to above, are not those which can be focused on individual bids; they are not to be resolved, either in the course of a particular acquisition, or, indeed, in the medium to long term. It would be impracticable to relate the timing of bids to their solution.

(ii) An Enlarged Mandate

It might, then, be advocated that the mandate of the Panel should be enlarged to admit consideration of these broader questions. This would be, however, to suggest that fora for such study do not already exist. The matters in question are sufficiently wide ranging to attract, as they have already done, examination by academics, political parties, the trade unions, the trade associations, City bodies, numerous inquiry committees, and, farther afield, international organisations, in particular the European Community.

If and when policies in respect of these issues are agreed, and whatever these policies might be, it does not seem likely that the Takeover Panel will be a suitable instrument for their application. A prime mover will necessarily be Parliament,

from which powers will issue to the Government. The most likely measures might well lie in the field of company law, where an effective vehicle for action, in the shape of the Department of Trade and Industry, already exists. The Office of Fair Trading might acquire some consequential additions to its duties, as would not doubt the Monopolies and Mergers Commission, the Stock Exchange, and all those bodies concerned with takeovers, including no doubt the Panel itself. However to place the whole responsibility of an entirely new policy on the Takeover Panel would be greatly to enlarge its mandate, and almost certainly to distort it.

(iii) Employee Participation

One area of broad policy, it has been thought, ought anyway to be brought within the Panel's remit. Rule 24.1 of the Code includes the remark that the offeror "will normally be expected" to state, in his offer document, his broad intentions regarding the future of the offeree company, including "intentions with regard to the continued employment of the employees". Proceeding from this, it has been suggested that approval of a takeover bid should be made conditional upon the consent of the workforce; or at the least, that the expressed view of the workforce should be made a material factor in that process of approval.

The concept of sharing, directly or indirectly, the power of decision with employees, immediately raises well-rehearsed issues of company governance and board accountability. The formal constitution of a company is well defined: a company comprises neither its workforce, nor its management, nor its creditors, customers and suppliers, nor indeed its shareholders.

A company is a self-standing legal entity, having its own property and debts (the company assets and liabilities) and dealing on the basis of contract, statutory and common law, with its employees, its management, its creditors, customers and suppliers, the local community, and with central and local

government, in respect of all of whom it discharges obligations and exercises powers. It has owners: the shareholders. These owners appoint representatives to manage the enterprise on their behalf: these are the directors. The directors are thus accountable to the owners: the shareholders. This accountability rules in all aspects of company activity, including a takeover; it is the task of the Takeover Panel to ensure that this accountability is duly observed. Clearly, to render acceptance of a takeover bid partly or wholly contingent on the consent of the workforce would be to have two effects: to compromise the clear and single accountability of the management, and to deprive owners of the exclusive right under the law of property, to control their property.

It should always be borne in mind that the owners' right to control the management, besides being vital to the preservation of their property, is the only right which they enjoy. Those who supply equity to a company, and thus become its owners, abandon all prescriptive rights to income from that equity, and to the recovery of that equity, except possibly in part on the liquidation of the company. All equity is risk capital; risk capital is the foundation of all private enterprise activity. If the sole right accruing to the providers of such capital is removed, then there is a danger that the capital will cease to flow. This has already occurred, for instance in the case of the State of Massachusetts, which without due consideration enacted laws giving the workforce the right of veto over management decisions. A major institutional supplier of capital then concluded that it should no longer risk its depositors' funds in that State.

Clearly there are arguable defects in the present state of company governance, and ownership. Three-quarters of all shareholders are now financial institutions, such as pension funds and insurance companies, owing their first allegiance to their depositors and policy holders, and not having, and being unable to have, an authoritative judgement of a particular company's performance; company managements have

therefore tended to assume an independent life of their own. Similarly the company structure has been cited as the last bastion against the tide of democracy: the company community, in the shape of its workforce, has no vote in the appointment of its company governance.

If these deficiencies are thought fit to be removed, then this must be done, almost certainly, by a change in the principle of company ownership.

It is possible, for instance, to envisage the removal of ownership from the shareholders, and the transformation of these into holders, for instance, of variable interest bonds redeemable, as equities are now, only at company liquidation, and the vesting of ownership in the company itself; the directors being elected by, and accountable to, the company population of employees.

Any re-ordering of company constitutions and governance would in any case require the most careful consideration, followed by fundamental legislation. Until this is done, any attempt to insert into existing structures, a stratum of alternative powers of decision in policy, would be merely to confuse what must always be undivided and clear: the accountability of management.

III POSSIBLE CHANGES IN THE RULES

Early in 1989, both the CBI and the Takeover Panel constituted working parties to determine whether useful amendments to the rules could be made. The timing of the Panel's inquiry was such that the Panel had the advantage of the CBI's conclusions. The following main issues were considered:

1. Lowering the 30% Threshold

As earlier indicated, any party attaining a 30% holding of a company's shares, must immediately make a cash offer for the remainder of the share capital.

The suggestion had been made that effective control can be secured at a lower level of shareholding; moreover a threshold of 25% is accepted as a blocking vote in respect of special resolutions; also, a holder of a 30% stake might too easily be able to advance from this to the outright controlling share of 50%.

In the event, neither the CBI, nor the Panel concluded that a change should be made, for the following reasons:

There is in fact no practical evidence of a case where a holding of less than 30% has conferred the power to control the management. The rule for special resolutions is not truly relevant, since the power to control management is the critical test. Finally, the submission regarding the speed of move from 30% to a 50% holding was not found to be borne out by experience.

2. Suspension of Listing

It had been suggested that, to prevent share price manipulation, the outcome of a bid should be decided by the level of acceptances only, market dealing being suspended during the course of the offer. The Panel felt that such a restriction might lock shareholders into their stake for a lengthy period, and would be an unreasonable curtailment of market activity. It would also remove the barometer of value - the market price - at a most critical time. However, the Panel recognised an anomaly in the fact that a bidder, having made an offer on the basis of a share exchange, could, under Rule 11, buy 15% of the share capital in the market without having to offer a cash alternative to his offer. The limit was therefore reduced, and now stands at 10%.

3. Reference to the Monopolies and Merger Commission

The Panel recognised that where a reference to the Commission was possible, but not yet announced, an acquisitor could take advantage of the uncertainty to increase his holding to a controlling level. According, Rule 5 was amended to provide that, if the decision regarding reference is not known by the first closing date of the offer - the date at which an offeror can normally advance his holding by market purchase to 30% - then the offeror must wait until the decision is made. The Rule was also amended to allow for the emergence of competing offers.

4. Reimbursement of Offeree's Costs

It was noted that an offeree will, in a contested case, be drawn involuntarily into a defensive action involving adviser and other fees, and a cost in management time, which may bear heavily on the company's finances, particularly where that company is small in size. This cost is enlarged where a company is subject to a succession of bids. It was therefore suggested by the CBI that, in the case of takeover bids under a value of £100m, the offeror should fund 50% of the offeree's costs, where the bid fails.

The Panel was doubtful whether the matter came within its remit, which is solely to ensure fair treatment for all shareholders, and also whether a proposal to limit compensation to small companies would be fair to shareholders of other companies. Moreover, the Panel was conscious that a bid normally enhanced a company's market share price, and also had the effect of stimulating management efficiency.

Furthermore, the Panel pointed out that the shareholders of any company, on incorporation, voluntarily accept exposure to the market system, and all that that entails, in return for the advantages in capital-raising and for the possible use of their own equity in pursuing takeover bids themselves.

Moreover there were cases where the obligation to refund costs would fall unfairly on the offeror, such as where a mandatory offer under Rule 9 failed through a rise in market prices, or where the offer was frustrated by an action of the offeree company, approved by the offeree shareholders; or where intervention by foreign regulatory bodies brought the bid to an unsuccessful conclusion. There was also the undoubted danger that such a scheme could lead to an escalation of offeree costs.

5. Speed of Acquisition of Shares

Various delaying factors in the run-up to the 30% barrier are incorporated in the Rules. These are intended to give the offeree management time to advise shareholders on their reaction to a possibly developing bid situation. A further safeguard has been incorporated in the recent Companies Bill, whereby all acquisitions of shares of 3% of the share capital must be disclosed within 2 business days. On consideration of certain proposals, the Panel decided that further changes, such as one requiring shareholders to disclose their stake at a certain level before proceeding further, would be counter-productive, particularly given the freedom now allowed for any one shareholder to dispose of his stake, if he so wishes, provided it is the only sale within a period of 7 days.

6. Statement of Intention by a 5% Shareholder

It had been suggested that any party obtaining 5% of the share capital of a company, should be required to state what his intentions were. The Panel noted that experience in the United States had shown that such statements tended to become stereotypes, incorporating a long list of putative options. Once the identity of the holder is known, as is obligatory, the market can in any case adequately assess that party's inclination to proceed further. Moreover, Rule 2 already requires a statement of intention where uninformed speculation arises.

7. Other Restrictions on 'Putting into Play'

The Panel felt that further restrictions would limit the right of free access to the market and would be ineffective, particularly as the mere presence on the company register of certain names is in itself sufficient to put the company 'into play'.

8. Short Selling

Restrictions on short sales would restrict market-makers in their functions, and curtail market liquidity; in any case, the administrative provisions of the Code obviate any distortion in the count of acceptances which short sales might bring about.

9. A Mandatory Prospectus from Offerors

Adequate information for the shareholders of offeree companies is already ensured under Rule 24.1, and by the obligation on directors and financial advisers to safeguard shareholder interests. The Panel agreed that offerors should add to this information voluntarily, where possible. To make mandatory the supply of further information would vitiate the competitive strength of the bid.

10. A 'Golden Share' to Company Pension Funds

In the Panel's view, this was for the shareholders themselves to decide.

11. Disenfranchisement of Shares where Ownership is not disclosed

This is already possible under the Companies Act and Stock Exchange procedures, and the Panel would welcome any strengthening of these measures.

12. A Two-Thirds Majority Consent of Offeree Shareholders to Making an Offer Unconditional

This would infringe the principle that 30% is the effective threshold for control, and that 50% is the statutory level of

control.

13. Reduction of Unsuccessful Bidder's Stake to 30%

This would be a serious penalty for failure, would depress the market share price, and possibly excite acceptances that would not otherwise be forthcoming.

14. Extension of 12-month Veto on Renewal of Offers

The present standstill on further offers from an unsuccessful bidder strikes a reasonable balance, in the Panel's view, between the interests of offerors and offeree company shareholders. Too extensive a ban might only serve the convenience of the offeree board.

15. Buy-outs

In this respect, as elsewhere, the Panel's function is not to adjudge whether leveraged or management buy-outs are a desirable form of takeover, but to ensure that these methods, when employed, do not impair the interests of shareholders.

Leveraged buy-outs, dependant as they are on substantial borrowing and risk capital, could provoke a conflict of interest between the fund management department and the corporate finance or venture capital departments within the same merchant bank, or other financial institution, which is advising the offeror. This conflict of interest may well be only implicit, since the fund management department may truly be operating independently, beyond the customary 'Chinese wall', held in place by merchant banks; this insulation one from the other will long since have been recognised by the Panel in according 'exempt fund manager' status to the fund managers. Nonetheless the financing and the strategic management of the bid may be concentrated in the same merchant bank in a way that does not happen with conventional bids, and the Panel is considering the problem closely.

Management buy-outs may create the same problem, and to this is added the peculiar difficulty that the offeror is one and the same party as the board of the offeree. The Rule of the Code that the offeree must take independent advice is most relevant in this case, and the Panel strongly emphasises the importance of this to those concerned. An important role also falls to non-executive directors in such bids, where such directors exist; some independent advisers withhold advice unless non-executive directors are in place. The Panel has now introduced a Rule to the effect that a management buy-out team must promptly supply, on the request of the independent directors or their financial advisers, all the information which they have themselves furnished to their financing syndicate. The position is also difficult where a rival bidder emerges; the latter clearly can never have the wealth of information on the target company as can the offerors. Here the Panel has decreed that the management buy-out team, as the 'preferred offeror' (see above) must supply, against specific requests from the rival offeror, all the information generated by the target company, including that generated by the buy-out team in their capacity as the management board, (but not the private conclusions they may have drawn from that) which has been passed to that team's financing syndicate. The Panel adds that the team must co-operate fully with the independent Directors of the target company in this matter.

IV THE INTERNATIONAL DIMENSION

1. Foreign Supervisory Authorities and the Panel's Response

Cross-frontier mergers and takeovers are multiplying. The consequence of this for the Panel is that supervisory authorities in other countries become involved in the same bid. Examples have been the attempted take-over of BAT by Hoylake, where the latter fell foul of U.S. State insurance regulators, with regard to the consequent change of status of Farmers. A prolonged inquiry by those regulators led to the substantial over-running

of the normal 60-day limit on U.K. offer periods. Fair treatment for BAT's shareholders dictated a waiver of the rule that a frustrated bidder may not re-bid for a further twelve months, and the Panel so decided, despite the inevitable displeasure of the BAT board. This waiver was of course subject to Hoylake's lapsing its original offer immediately, since an offeror must not be allowed to hold on to his acceptances indefinitely, so depriving the shareholders concerned of the freedom to trade their shares. For the same reason, the Panel could not allow Minorco to hold acceptances indefinitely whilst trying to discharge a U.S. court injunction and so to free itself to declare its bid for Consolidated Goldfields 'unconditional' - i.e. to take up the acceptances.

2. The European Community

The Takeover Panel cannot be viewed in national isolation. As a member of the European Community, the U.K. is subject, in takeover as in other matters, to the legislation of that body. One directive (the 3rd Company Law Directive), defining rights and obligations with respect to takeovers and mergers within the boundaries of members states, has already been adopted and translated into British company legislation, without impinging unduly on the existing situation. A further directive (the 10th Company Law Directive) is proposed for the regulation of cross-border mergers. A proposed Regulation, which, if adopted, would have immediate force, without further national legislation, would create a new type of merged company, in which strong emphasis would be placed on worker participation. A further proposal is for quasi merger in the form of an 'European Economic Interest Grouping'.

Under Article 86 of the Rome Treaty, prohibiting abuse of a dominant market position, the European Commission has powers, and has recently acted under these, to ban, where necessary, transnational takeovers producing a resultant turnover worldwide and within the Community of $5.5bn and $275m respectively, and not more than 66% of turnover is in

any one Member state.

Finally, and most important in relation to the Takeover Panel, there is the proposed 13th Company Law Directive, concerning itself with the fair conduct of a takeover bid, i.e. the subject matter of the Panel's Code. The document betrays evidence of close attention to the wording of the U.K. Code. For this reason some parts of the draft are unexceptionable in British eyes.

However the Recital of the draft includes a statement that "taking into account the social policy of the Community, it is necessary that representatives of the employees of the offeree company be informed with regard to the bid and that they should receive all the documents concerning that bid"; and a separate article to this effect is included in the text of the draft directive itself. This implies further pressure for the displacement of company board accountability discussed earlier above.

Article 6 of the draft directive states that the supervisory authority in each member state "must have all the necessary powers to ensure that this directive is put into effect" and it is generally understood that the statutory powers are envisaged in this phraseology.

The Panel and others closely associated with these matters, are known to be studying the implications of the above for British practice, and ways in which prospective ill-effects can be avoided or mitigated. However, it remains to a degree surprising that these questions have not entered into the considerable volume of public comment on takeover matters. In view of the inevitable and early onset of this European legislation, it would be reassuring to see a display of greater public interest.

Undoubtedly the provision giving cause for greatest concern is Article 6 of the draft 13th Directive requiring formal powers for the 'supervisory body'. If followed through in the way

that is expected in the Community, this would lead to a statutory body and a legal set of requirements and thus could cause considerable changes to the system of self-regulation through practitioner compliance that has been developed in the U.K. As many of the Community Members, particularly Germany and France, in most matters prefer formal legalism, there can be small expectation that the Article could be so interpreted as to provide the British system for the whole of the Community. What could be sought, is such an interpretation as would allow each country to apply its own forms, subject to it being demonstrable that the national system assures the implementation of the Directive in the way required by the Article.

The best guarantee of this outcome would be to achieve an interpretation that allows the supervisory body to remain non-statutory. Informal regulation on the British lines would flow naturally from this. If, however, the Article is read as requiring a statutory body, then a solution would have to lie in acceptance that the rules and procedures of that body would rest on consent, rather than law. This appears indeed to be the formulation preferred by the British Labour Party. It is perhaps relevant that the Financial Services Act provides for a statutory body, the Securities and Investment Board, which itself discharges its responsibilities through a range of practitioner-manned, self-regulatory organisations. A two-tier pattern of the same sort might be appropriate.

In any case, if the now well-tried British system is not to be lost, the negotiating efforts of the British delegation will be critical. It will clearly be necessary cogently to argue the particular strengths, in speed, certainty, flexibility and compliance, of the British method.

V. PRESENTATION

The Code is a document devised, from the outset, by practitioners, for the use of practitioners. It is consequently elliptical, eliding many points automatically known to

practitioners, although not self-evident to the layman and it is highly specialist in language, setting forth requirements in phraseologies immediately intelligible to practitioners, but, again, unfamiliar to the normal reader. The Code has also grown pyramidically, by amendment, emendation and amplification, in the light of successive experience and events.

As a result the Code is, to a degree, unintelligible to the non-specialist reader. This might not be considered a matter of any significance, given that the Code is in fact a manual of instruction to well-versed participants in takeovers.

However, it remains true that takeover activity, and its regulation by the Code, is a matter of interest to the outside world, and is a matter of habitual general comment. These comments made by academics, journalists, politicians, economists and others, undoubtedly affect public and political opinion regarding the Takeover Panel and the Code, and are necessarily, given the difficult readability of the code, founded to a large extent upon ignorance . The same must be true of many company chairmen contemplating the acquisition of another company.

There might therefore well be an advantage in the production of a summary of the Code, in concise but layman's English, for general use.

VI CONCLUSIONS

There are many matters of concern still to be resolved by the Panel. Takeover activity is in any case a fast-moving and developing scene, to which the Panel and its Code must adapt continuously.

Nonetheless, there is substantial evidence that within its strictly limited terms of reference, the Panel's regulation has been satisfactory and that it has provided the speed, certainty and flexibility of control that the particular activity requires. It is not without significance that this system is also less costly

than its statutory alternative.

This conclusion is borne out by the strong consensus to the same effect amongst practitioners in takeover activity. The same consensus has, it is believed, impressed the Department of Trade and Industry, when reviewing opinion on the Community's 13th Directive.

This being so, the area of greatest future concern must lie in the new form of regulation apparently proposed by the European Community.

Starting from a situation in which the majority of Community Member states have little experience of takeover bids, and still less of their regulation, the Community authorities, contemplating a system of Community supervision, might usefully have adopted the British model. Perhaps, however, the particular British form of non-litigious self-management could not have been transplanted to the cultural soil of mainland Europe; perhaps such a system would have fallen foul, in any case, of the particular requirements of the Rome Treaty. The fact remains that a very different approach has emerged in the draft 13th Directive now before the governments, and it will take strenuous and resourceful negotiations on the part of the British delegates to bring about a significant change. The final text, it should be understood, will be mandatory in the U.K. as well as elsewhere in the Community.

That a uniquely effective system of regulation, well tried in the course of some 5000 cases over twenty years, should be lost to the Community at large, is no doubt unfortunate. That it should be lost to the U.K. itself, is a matter of profound concern.

There appear to be grounds for belief that our negotiators can still argue for a form of wording in the Directive that would allow individual governments to give, or not give, according to their preference, statutory form to their supervisory bodies;

or, failing this, to allow non-statutory conduct of the rules for takeovers; in the latter case perhaps arguing on the U.K.'s behalf that the present sanctions available to the Panel are ultimately backed by statutory penalties. It can only be hoped that this can be achieved.

Commenting on a typical ruling in the United States, the Wall Street Journal recently said: "It is better to be a shareholder in Britain. It is better to be a lawyer in America." It would be a pity if, because of European legislation, British shareholders lost this distinction.

Appendix 1.

General Principles

Introduction

It is impracticable to devise rule in sufficient detail to cover all circumstances which can arise in offers. Accordingly, persons engaged in offers should be aware that the spirit as well as the precise wording of the General Principles and the ensuing Rules must be observed. Moreover, the General Principles and the spirit of the Code will apply in areas or circumstances not explicitly covered by any Rule.

While the boards of an offeror and the offeree company and their respective advisers have a duty to act in the best interests of their respective shareholders, these General Principles and the ensuing Rules will, inevitably, impinge on the freedom of action of boards and persons involved in offers; they must, therefore, accept that there are limitations in connection with offers on the manner in which the pursuit of those interests can be carried out.

Each director of an offeror and of the offeree company has a responsibility to ensure, so far as he is reasonably able, that the Code is complied with in the conduct of an offer (see Appendix 3 for Guidance Note). Financial advisers have a particular responsibility to comply with the Code and to ensure, so far as they are reasonably able, that an offeror and the offeree company, and their respective directors, are aware of their responsibilities under the Code and will comply with them. Financial advisers should ensure that the Panel is consulted whenever relevant and should co-operate fully with any enquiries made by the Panel. Financial advisers must also be mindful of conflicts of interest (see Appendix 3 for Guidance Note).

General Principles

1. All shareholders of the same class of an offeree company must be treated similarly by an offeror.
2. During the course of an offer, or when an offer is in contemplation, neither an offeror, nor the offeree company, nor any of their respective advisers may furnish information to some shareholders which is not made available to all shareholders. This principle does not apply to the furnishing of information in confidence by the offeree company to a bona fide potential offeror or vice versa.
3. An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser of the offeror.
4. Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information should be withheld from them.
5. Any document or advertisement addressed to shareholders containing information or advice from an offeror or the board of the offeree company or their respective advisers must, as is the case with a prospectus, be prepared with the highest standards of care and accuracy.
6. All parties to an offer must use every endeavour to prevent the creation of a false market in the securities of an offeror or the offeree company. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market.
7. At no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason

to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.

8. Rights of control must be exercised in good faith and the oppression of a minority is wholly unacceptable.

9. Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the companies. It is the shareholder's interests taken as a whole, together with those of employees and creditors, which should be considered when directors are giving advice to shareholders.

10. Where control of a company is acquired by a person, or persons acting in concert, a general offer to all other shareholders is normally required; a similar obligation may arise if control is consolidated. Where an acquisition is contemplated as a result of which a person may incur such an obligation, he must, before making the acquisition, ensure that he can and will continue to be able to implement such an offer.

The David Hume Institute

The David Hume Institute was registered in January 1985 as a company limited by guarantee: its registration number in Scotland is 91239. It is recognised as a Charity by the Inland Revenue.

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