

# THE TAKEOVER PANEL

## **GC&C BRANDS LIMITED ("GC&C BRANDS") / IRISH DISTILLERS GROUP PLC ("IRISH DISTILLERS")**

The full Panel met on 18 August to consider a matter referred to it by the Panel executive concerning the offer for Irish Distillers by GC&C Brands. The issue arose because the European Commission ("the Commission") had taken the view that the original offer infringed Article 85 of the Treaty of Rome. GC&C Brands then undertook with the Commission to restructure its offer, on the basis of which the Commission announced that its objections would be removed.

GC&C Brands asked the Panel to confirm that it could proceed with its restructured offer. Irish Distillers asked the Panel to require GC&C Brands to lapse its offer, and to prohibit GC&C Brands from making a further offer for Irish Distillers for 12 months.

The Panel decided that GC&C Brands should be permitted to proceed with this restructured offer under a shortened timetable which has the effect that, unless there is a competing offer, the last date for acceptances will be 12 September. The Panel considered that shareholders in Irish Distillers had not had a proper opportunity of considering the initial bid for the company, and that it would therefore be wrong to deprive those shareholders of the possibility of evaluating a bid from any member of the consortium for a period of twelve months. The effect of this decision is to extend the time during which Irish Distillers will be subjected to the uncertainties created by an offer for a period of 17 days more than the original timetable but the Panel considered that the disadvantages to the company of this limited extension were far outweighed by the potential prejudice to shareholders if they were deprived of the opportunity of evaluating the new bid.

## THE ORIGINAL OFFER

GC&C Brands announced its original offer for Irish Distillers on 30 May 1988. The terms of the offer were IR315p in cash for each share in Irish Distillers, valuing the company at approximately IR£200mn. FII Fyffes, which held approximately 20% of Irish Distillers had irrevocably committed to accept the offer in respect of its shareholding.

GC&C Brands was a new company, established for the purposes of the offer, and owned in equal shares by Gilbeys of Ireland Group Ltd ("Gilbeys") and Cantrell & Cochrane Group Ltd ("Cantrell & Cochrane"). Gilbeys is a wholly-owned subsidiary of IDV, which is itself a wholly-owned subsidiary of Grand Metropolitan PLC. Cantrell & Cochrane is a subsidiary of Hiram Walker-Allied Vintners, which is owned as to 50.4% by the Allied Lyons Group and as to 49.6% by the Guinness Group.

If the offer were successful, Gilbeys and Cantrell & Cochrane would share the marketing and distribution of Irish Distillers brands.

## THE EUROPEAN COMMISSION

Article 85 of the Treaty of Rome prohibits agreements or arrangements between undertakings which may affect trade between member states of the European Community and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market.

On 29 July GC&C Brands received a Statement of Objections from the Commission, following a complaint by Irish Distillers. The Statement of Objections alleged that the agreement between Allied Lyons and Grand Metropolitan to establish GC&C Brands to make a joint bid for Irish Distillers and, if the bid were successful, jointly to produce and distribute Irish Distillers' brands, breached Article 85.1 of the Treaty of Rome. It reserved its position as to Guinness' involvement in the offer; Guinness has

always maintained that its role in GC&C Brands was entirely passive. It also gave notice of the Commission's intention to make an interim measures decision against the parties.

GC&C Brands was given two weeks to respond to the Statement of Objections, and a provisional date for a hearing was set for 24 August. It is likely that the question of imposing interim measures would have been discussed at that hearing; if the proposed measures were adopted they would effectively have prevented GC&C Brands from continuing with its offer unless the Commission cleared the arrangements in question. This process could have taken some months.

GC&C Brands then tried to resolve the matter with the Commission, and also approached the executive to ask for its views as to the implications of the Commission's actions for Code purposes, and in particular what consequences there would be for the Code timetable. The matter was an important one since the last day by which, under the Code, GC&C Brands could post any revised offer document was 12 August.

By 10 August it became clear that GC&C Brands would not have resolved the matter by 12 August and so the Panel, with the agreement of GC&C Brands and Irish Distillers, agreed that the last day for posting any revised offer would be extended to 19 August. This extension would enable GC&C Brands to attempt to reach a conclusion in its discussions with the Commission and would give the parties the opportunity to raise any Code matters with the Panel.

On 17 August the Commission announced that it had decided to suspend its interim proceedings. Following negotiations between GC&C Brands and its shareholders, the Commission had obtained certain undertakings from those parties. These undertakings were to the effect that, if GC&C Brands' offer were to continue it would be restructured. GC&C Brands would cease to be owned jointly and become wholly-owned by Gilbeys. All joint venture arrangements between Gilbeys and Cantrell & Cochrane relating to Irish Distillers would cease. Any future disposal of the assets

of Irish Distillers would be subject to competitive tender and would require the approval of the Commission as would distribution arrangements relating to Irish Distillers' brands. The irrevocable commitment of FII Fyffes would be relaxed to allow it to accept higher offers. The Commission also stated that, as confirmation that the former collusive aspects had been removed, GC&C Brands could only bid if Allied Lyons and Guinness were themselves free to post an offer within 28 days of GC&C Brands' restructured offer being posted.

#### THE CODE AND ARTICLE 85

The Panel and the Code operate to ensure fairness and equality of treatment for shareholders during an offer. The Code also provides an orderly framework within which offers are conducted. It is not for the Panel to decide upon questions of public policy, such as competition issues, which are matters for governmental authorities. The function of the Commission, so far as this case is concerned, was the administration of the competition rules of the Treaty of Rome. Thus the roles of the Panel and the Commission are quite distinct - the one seeking to ensure fairness to shareholders, the other fair competition.

As regards the competition authorities in the UK, the Code timetable is structured so that the decision on whether an offer is to be referred to the Monopolies and Mergers Commission can usually be settled during the early stages of an offer, so leaving the parties, shareholders and their advisers to consider the financial merits of the offer within the normal 60 day period. Sometimes, however, this is not possible. In certain cases the Panel has, after consultation with the Office of Fair Trading, and with the agreement of the parties, agreed to a limited extension of the offer timetable. In the present case, the Panel and the Commission have worked together with a view to each being able to fulfil its particular function, and it was against this background that the Panel agreed a 7 day extension of the timetable. The Commission has now been able to secure, from GC&C Brands and its shareholders, the undertakings necessary

to satisfy the Commission that the collusive aspects of the proposed take-over have been removed and to allow it to suspend its proposals for interim measures.

Accordingly, the Commission has stated that GC&C Brands and its shareholders are free to bid for Irish Distillers. The Commission has conducted its own inquiries and negotiations speedily with a view to securing as far as possible, that any bid which went forward could do so in accordance with the Code timetable. But it remains, as the Commission recognised, for the Panel to decide under the Code whether GC&C Brands should be able to proceed with this restructured offer.

## THE ISSUES

The first issue for the Panel to decide was whether the restructured offer should be regarded, in Code terms, as a revised or a new offer. If it were a new offer then the Panel would have to decide whether Rule 35.1 should be applied so as to prevent such offer being made for a period of twelve months, or whether it should consent in the circumstances to an immediate new bid by any of the members of the original consortium. We refer subsequently to Rule 35 in more detail.

### The Restructured Offer

The question of whether it was to be regarded as a new offer was also of importance to GC&C Brands because of the irrevocable commitment it had obtained from FII Fyffes to accept the initial offer. Whilst this irrevocable commitment had been modified in certain respects following discussions with the Commission, it remained otherwise binding as to the initial offer. If, however, the restructured offer was a new offer so far as the Code was concerned then it would follow that the initial offer would lapse, and GC&C Brands would have to consider with FII Fyffes whether the irrevocable commitment to accept the initial offer applied as a matter of law to the new offer. So

GC&C Brands submitted that the restructured offer should be regarded as simply a revision of the initial offer. The Panel did not accept this. Whilst the formal identity of the offeror remained the same, the offer had been presented as being on behalf of a joint venture company and the bidder was now effectively only a single offeror. This had led to a number of changes in the form of the bid. The principal changes are, as well as the change in ownership to which we have referred, a change in the management of GC&C Brands; a change in the worldwide distribution outlets of the offeror's parent available to GC&C Brands; changes, yet to be specified, in the proposed ownership of Irish Distillers' spirits brands; the possibility of a sale of brands to non-Irish companies; modifications to the FII Fyffes irrevocables; changes in the provisions as to mutual collaboration between the parties; and a stipulation that Allied Lyons and Guinness should be free to make competing offers for Irish Distillers.

The Commission has taken the view that the restructuring of the bid is sufficiently substantial and different from the initial bid as to make a restructured bid permissible under Article 85, whereas the initial bid was challenged. We are informed that the Minister of Industry and Commerce for the Republic of Ireland will regard the new structure as a new bid for the purposes of the Mergers, Take-overs and Monopolies (Control) Act, requiring a new notification after the offer document has been posted.

Whilst it was argued for GC&C Brands that the matters to which we have referred are of less relevance because the offer is currently only a cash offer, the Panel considers that the changes in the bid are sufficiently substantial as to cause the proposed further bid to be regarded as a fresh bid. The changes relate to matters which, under the Code, are required to be dealt with in the document sent by the offeror to shareholders. The effect of the changes is so radically to restructure the offer that, in reality, it should be regarded as a new offer despite the continuance of GC&C Brands as a legal entity. So the current offer must necessarily lapse in accordance with its terms.

## Rule 35.1

The Panel accordingly had to consider whether or not to grant consent to such a new bid being made within a twelve month period. Rule 35.1 provides as follows:-

### "DELAY OF 12 MONTHS BEFORE SUBSEQUENT OFFER

Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-

- (a) make an offer for the offeree company; or
- (b) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer."

The Rule prevents a company from being subject to a fresh bid soon after the expiry of a bid which had run its full course but been rejected by offeree company shareholders. The purpose of this Rule is to avoid a prolonged attack which would have the effect of distracting the management for an unreasonable time from the conduct of its company's business and would create general uncertainty adversely affecting its development. This would be to the disadvantage of its shareholders. So the Rule is designed to serve the interests of offeree company shareholders but is nonetheless an exception to the concept that shareholders should generally be free at all times to receive and consider offers made to them. An inflexible application of the Rule could, therefore, operate against the interests of shareholders. So Rule 35.1 provides that the Panel may grant

dispensations. One example of a situation where dispensations are granted is where a previous offer has lapsed on a reference to the Monopolies and Mergers Commission.

Thus the questions which have to be considered by the Panel include the following:

- Did the shareholders have a full and proper opportunity to consider the initial bid?
- If not, how long would be the duration of the further siege?

It is necessary to adopt this approach if the interests of shareholders are to be fairly taken into account.

Irish Distillers submitted that no dispensation should be granted, on two grounds. First, it was argued that the Commission had formed the view that GC&C Brands had contravened Article 85.1 by making its initial offer, and that it would be wrong to permit the offeror in such circumstances to put forward a fresh offer. Secondly, it was argued that the effect of a new bid would be to prolong the distraction of management, increase the costs of defending the bid and continue the general uncertainty with adverse consequences for the business. We deal separately with these arguments.

As to the first, the Panel did not consider that the history of the bid, and the view of the Commission as to the contravention of Article 85, should preclude the offeror from making a new offer. Irish Distillers referred to General Principle 3 of the Code which provides as follows:

"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 to the offerer."

It was suggested that GC&C Brands had broken this General Principle, in that it ought to have been plain to them that the offer would involve a contravention of Article 85.1.

GC&C Brands informed the Panel, as did their solicitors, Slaughter and May, that legal advice had been taken upon this issue and that the view had been formed that the making of the bid did not, of itself, in the current state of European law contravene Article 85.1. Whilst the point made by Irish Distillers might have had force if there had been a high degree of culpability or recklessness on the part of the offeror company, the Panel was satisfied that GC&C Brands had sought legal advice of properly qualified advisers even though, in the event, the Commission had thought it right to intervene.

Through its intervention the Commission had alleged that the agreement to make a joint bid for Irish Distillers and, if the bid were successful, jointly to distribute Irish Distillers' brands, gave rise to breaches of Article 85.1. The Commission also gave notice of its intention to take the novel step of making an interim measures decision against the bidders. The views of the Commission in this regard were subject to the responses of the companies concerned. So the position was that no final decision had been reached upon whether or not there had been a breach of Article 85, but the Commission had clearly raised a serious question which might, but for the restructuring of the bid, have fallen to be determined. Once discussions took place with the Commission as to potential restructuring, the Commission itself did not take the view that any initial contravention of Article 85 should prevent a new bid from going forward. So the very authority which had raised the complaint under Article 85 considered that its views on the original bid did not constitute a bar to a fresh bid. The Panel agrees.

The more difficult question was whether the offeror should be allowed to put forward a bid which would prolong the pressures upon management and uncertainties upon the business. Irish Distillers cogently drew attention to the problems of their relationships with customers, distributors and others if it remained unclear as to whether or not GC&C Brands, or some other bidder, would acquire control of the company. They suggested that shareholders had been given ample opportunity to consider the initial bid before the intervention of the Commission, and that the small level of acceptances (excluding FII Fyffes) indicated that the shareholders were against the bid.

It is obviously important that uncertainties with regard to the future of Irish Distillers should be resolved as soon as possible. The Panel did not, however, agree with the view of Irish Distillers that shareholders had been given a full opportunity to consider the original offer. The intervention of the Commission had been rumoured since early July, and the Statement of Objections had been delivered on 29 July. The last time by which the offeree company had to release critical financial information had not passed, nor had the time by which an offeror would usually be expected to make its final and increased offer. Moreover, no circular had been issued by either side since 12 July. The small percentage of acceptances received by GC&C Brands should not therefore be regarded as in any way indicative of the outcome of the bid. The Panel considered that the shareholders in Irish Distillers had not in the circumstances had a proper opportunity to consider a bid, and that this outweighed the disadvantage to management of a limited bid timetable.

The Panel was, however, concerned to ensure that the prolonged timetable was kept to a minimum consistent with shareholders having a proper opportunity to consider the new bid and defending management to present their arguments to shareholders. So the Panel after debating the issues with the parties, determined that the shortened timetable should be as follows:

- 1 GC&C Brands is to post any new offer on Monday 22 August. The offer is to be a cash offer, possibly with the alternative of a loan note.
- 2 The first and, subject to paragraph 3, final closing date is to be 21 days thereafter.
- 3 The offer is to be a final offer, capable of being increased or extended only in the event of a competing offer (and only to the extent that the offeror reserves the right to do so).
- 4 Irish Distillers should post its circular advising its shareholders of the board's views on the offer within 14 days of posting of the offer document.

The overall effect, in the absence of competing bids, is to extend the offer timetable by a total of only 17 days.

In the event of a competing bid by Allied Lyons or Guinness then the following will apply:

- 5 The competing offeror is to announce any offer within 14 days of posting of the GC&C Brands offer document.
- 6 The competing offeror is to have 28 days from the date of posting of the GC&C Brands offer document in which to post its own offer document, as agreed with the Commission.
- 7 Paragraphs 2, 3 and 4 would apply to any such competing offer.
- 8 In the event of the announcement of a competing offer, whether by Allied Lyons, Guinness or an independent third party, the timetables for any of the above offers would, in accordance with Rule 31.6, transfer to the timetable established by the posting of the competing offer document.

In order to give effect to the agreement reached with the Commission, the following would also apply:

- 9 GC&C Brands may not declare its offer unconditional within 14 days after the posting of its offer document (the last day by which Allied Lyons or Guinness may announce a competing offer).
- 10 In the event of an announcement of a competing offer by Allied Lyons or Guinness, GC&C Brands would be prevented from declaring its offer unconditional until seven days after the posting of the competing offer document.
- 11 Withdrawal rights should run throughout.

In view of the interest and importance attached to this case the Panel would stress a number of points. First, as already indicated, the Commission and the Panel have separate and distinct roles. The initial intervention by the Commission was in respect of a competition issue under Article 85 which is not within the jurisdiction of the Panel. But it gave rise to subsequent considerations as to the timetable for any bid which did fall for determination under the Code. Each of the regulatory authorities concerned has sought to fulfil its functions with full regard to the role of the other. Secondly, it is important that the future of Irish Distillers should be resolved as soon as is reasonably possible. But in order to achieve this, shareholders must be given an opportunity to consider whether or not to accept the bid from GC&C Brands. They have not yet had a proper opportunity to do so, and in the circumstances it is right that they should be given that opportunity. The Panel has set a short timetable in order to minimise the extension of the uncertainty surrounding Irish Distillers, but yet to achieve the objective of allowing shareholders to determine the future of their company.

19 August 1988