

COMMITTEE ON THE FINANCIAL ASPECTS
OF CORPORATE GOVERNANCE

Minutes of the meeting held on Tuesday 7 March 1995 at the London Stock
Exchange

Present:

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| Sir Adrian Cadbury | Jonathan Charkham |
| Jim Butler | Sir Dermot de Trafford |
| Sir Sydney Lipworth | Hugh Collum |
| Nigel Macdonald | Andrew Likierman |
| Sir Andrew Hugh Smith | Mark Sheldon |
| Sarah Brown | Martin Taylor |
| Mike Sandland | Gina Cole |

Agenda Item 1

1. There were no apologies for absence.
2. The minutes of the previous meeting held on 7 December 1994 were agreed.

The Successor Body

3. The Chairman invited Sir Sydney Lipworth to bring other Committee members up to date with developments regarding the convening of the Committee's successor body. Sir Sydney advised that the Committee's existing sponsors had met and agreed that the membership should be expanded to include the NAPF and the ABI and both Ron Amy and Allan Bridgewater had responded positively to this suggestion. A second meeting of the sponsors has been arranged for 12 April, when decisions may be taken on nominees for the Chairmanship and the composition of the committee. In the interim, the sponsors are drawing up draft terms of reference. The need for a Chairman who commands widespread support was considered paramount.

4. Sir Sydney expressed concern that the successor body might not be in place by June, Hugh Collum commented that there may be advantage in the Committee not sitting while the Greenbury Committee were deliberating. Martin Taylor added that he had heard that Greenbury may well wish to report before June, and may also make proposals for which it would request the Committee's approval. Sir Sydney accepted that this was a possibility, another one being that they would recommend legislation.

5. The Chairman said that any hiatus between the Committee and its successor body could be used by the press and others to make detrimental comment, and it was important that any gap be bridged. He speculated that the current Committee may have to consider how to incorporate the Greenbury recommendations, prior to the handover to the successor body.

Agenda Item 2 - Independence of Directors

6. Jonathan Charkham advised that although he acts as a consultant to PIRC, a commercial organisation to which a number of institutional investors subscribe for analysis and advice. He is not involved in any way with the case reported in PIRC's letter to the Chairman.

7. PIRC's procedure is to form a view on a company's corporate governance, which is sent to the company in question for comment. In the current case, PIRC disagreed with the company's view on the independence of non-executive directors. The company did not object to a question of fact, but rather PIRC's right to challenge the view put forward by the board. In Jonathan Charkham's view, this represents a major point of principle, in that it centres on whether shareholders have the right to disagree with the directors' interpretation of the facts, or with something to which the directors have put their name. The disagreement could have arisen over any other point in the Code to which the directors put their name, not just the independence of NEDs. The current disagreement has taken place against the background of a take-over bid.

8. A full discussion followed, during which the following points were made:-

- the Committee should not say that the directors' determination cannot be challenged, this is a judgmental question.
- the Code is clear on the question of independence (as set out in paragraph 2.2). A situation could arise where a director was independent at one point in time and not another.
- the judgement on independence falls to the board, if that judgement is made in bad faith they cannot be complying with the Code, but *prima facie* their judgement will be

accepted unless it can be shown to be wrongly placed.

- the Committee cannot discourage any body from drawing up lists which they use as criteria for independence. However, the Committee must ensure that it does not endorse criteria which go wider than the Code.
- it would be prudent for the body to state that their judgement was made on the basis of their own criteria and not strictly on the Code. Additionally they could preface their remarks with "In our opinion".
- if PIRC were to be sued by the company, they would have to stress that their judgement was made in good faith and in their view there existed a material relationship which affected the independence of the non-executive director(s).
- it is impossible to make a comprehensive list covering all the circumstances which could affect a director's independence,

9. The Chairman quoted to the Committee an extract from his talk to the Institute of Advanced Legal Studies concerning independence:-

"The Committee has set out a simple guidelines and put the responsibility for applying it where it belongs. That is to say that it is for boards to come to their own conclusions on the matter and to carry their shareholders with them. But if shareholders are to be in a position to judge how far directors are independent, they will need a fuller account of directors' interests than the contract-based declaration laid down by the Companies Act.". He suggested that the way forward was for him and Jonathan Charkham to speak to PIRC and advise them of the Committee's views.

10. A further issue raised by PIRC, and one which the Committee might wish to address, is that it is possible to have a situation where three members of a board who are individually regarded as independent, but their independence is weakened by the fact that they all come from the same organisation (eg they could all be directors of a holding company). In the ensuing discussion Mark Sheldon pointed out that the Committee considered NEDs' independence from the company, not independence from each other. When drafting the Code, the Committee had decided against drawing up a list of certain situations which *per se* ruled out independence. Nigel Macdonald added that it might be useful for PIRC to send the Committee their criteria on independence, and it could be suggested to the successor body that they look at them. However, there was always the possibility that not all of the criteria would be commended by the Committee.

Agenda Item 3 - Monitoring Sub-Committee

11. Andrew Likierman advised that at its last meeting the Sub-Committee had considered the draft monitoring report. Among the issues which arose was the realisation that parts of the report could prove quite sensitive, in particular the notion of commentary. In view of amendments suggested at that meeting, it was decided not to submit the report to the full Committee at this meeting, but to re-draft it and circulate to Committee members for approval by correspondence.

Agenda Item 4 - Any Other Business

12. The Secretary advised that the Committee dinner was to take place on 10 May and that formal invitations would be issued shortly.

13. She requested that any Committee members with outstanding travel claims should submit them at the earliest opportunity.

Gina Cole
Secretary
30 March 1995