THE REGULATION OF CORPORATION AND SECURITIES LAWS IN BRITAIN—THE BEGINNING OF THE REAL DEBATE*

In recent years, it has been increasingly common to hear the sentiment, both in Britain and perhaps, more importantly, abroad, that the major deficiency in our corporation and securities laws such as they are, lies in the question of enforcement. The need to give attention to this problem has been emphasised in recent weeks by the perhaps controversial appointment of Sir Harold Wilson to Chair a Committee to Review the Functioning of Financial Institutions,[1] and the announcement by Trade Secretary Edmund Dell of improved provisions for the supervision of the securities markets.[2] Against this background, it would be opportune to briefly examine the existing regulatory structure and its alleged deficiencies together with the present proposals for reform and an assessment of the likely developments in the short and long term.[3]

The existing regulatory structure for the enforcement of company and securities laws is a complex and somewhat confusing interrelationship of legal and non-legal sanctions administered by both official and unofficial bodies. For the sake of clarity, it will be expedient to discuss first who might be considered to be the official regulators concerned with legal enforcement.

The Department of Trade[4]

Undoubtedly the most important agency in this area is the Department of Trade, in particular, the Companies Division. As one might expect, a great proportion of the work undertaken by the Companies Division and its main subsidiaries such as the Companies Registration Office and the Official Receiver, is of a routine nature.[5] Perhaps

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1 Phime Minister's Office, Press Notice, October 7, 1976.

2 Department of Trade, Press Notice, October 21, 1976.

3 See also T. Hadden, The Securities Exchange Commission and The City, Some Thoughts on Bureaucracies Volume 1, Anglo-American Law Review 553 and H. Prins, *Protection of the Minority Shareholders in a Limited Company,* (Handelsdrukker, Lugdumim Leiden, 1972) Part Six.

4 Formerly the Board and then the Department of Trade and Industry.

5 Other sections include the Companies Innvestigation Branch, Companies Administration Branch and the Companies Policy Division. For a somewhat dated discussion of the work of the Companies Division, see R.H.W. Stacy, Company Law Administration, 58 Law Society's Gazette 485 and T. Hadden, Control of Company Fraud, Vol. XXXIV No. 503 P.E.P. 312 at 318.

the most interesting and today more relevant aspect of the Divisions work in the field of enforcement is that concerning the investigation and inspection of companies. The Board of Trade and its successors has long been empowered to investigate the affairs of a company by the appointment of inspectors.[6] More recently, the Department has been authorised to investigate on its own behalf without formally appointing inspectors. Although the utility of published inspectors reports has been questioned in the past, in the last few years this mechanism has played a significant role in the exposing of corporate and managerial scandals, particularly in the field of insider trading, loans to directors and violations of Section 54 of the Companies Act 1948.[7]

The Department has, however, been traditionally hesitant to appoint inspectors, in circumstances where such appointment would have been justified, on the ground that adverse publicity necessarily attendant upon such a course of action might do more harm than good from the standpoint of the company and its investors.[8] Consequently, the greater the reluctance of the Department, the greater the suspicion when there was in fact an appointment. In essence, the power to appoint was regarded as a threat in *terrorem*. The Cohen Committee[9] observed that "in many cases the appointment of an inspector would we hope prove unnecessary as the knowledge of the wide powers possessed by the Board of Trade might cause the directors on representations from the Board of Trade to meet the grievance of the shareholders."

Whether it be for this reason or others, arguably not so justified, the Department has been notoriously reluctant to exercise its statutory

6 See Loss, *Securities Regulations,* (Little Brown Company, 1961) at 1031 Note 654 and R.D. Fraser, Administrative Power of Investigation into Companies, 34 Mod. L. Rev. 260, and see also H. Prins, *supra,* at note (3) Part Four.

7 See, for example, D.T.I. Interim Report on the Affairs of Pergamon Press Ltd. and Report on the Affairs of International Learning Systems Corporation Ltd., by R.O.C. Stable, Q.C., and R.G. Leach, (1971) H.M.S.O., Further Interim Report on the Affairs of Pergamon Press Ltd., (1972) H.M.S.O. Report on the Affairs of Maxwell Scientific International (Distribution Services) Ltd., Robert Maxwell & Co. Ltd., and Final Report on the Affairs of Pergamon Press Ltd. (1973) H.M.S.O by the same Inspectors; D.T.I. Interim Report on the Affairs of First Re-Investment Trust Ltd., Nelson Financial Trust Ltd., English and Scottish Unit Trust Holdings Ltd., by D.C.H. Hirst, W.C. and R.N.D. Langdon (1974) H.M.S.O. and Report into the Affairs of the Australian Estates Company Ltd., First Re-Investment Trust Ltd., Nelson Financial Trust Ltd. and English and Scottish Unit Trust Holdings Ltd. by the same Inspectors, (1975) H.M.S.O., D.o.T. Report into the Affairs of John Willment Automobiles Ltd. by P.J. Millett Q.C. and M.R. Harris, (1975) H.M.S.O. Report into the Affairs of Hartley Baird by J. Hazan Q.C. and T. Harding, (1976) H.M.S.O., D.o.T Report into the Affairs of London and County Securities Group by A.P. Legatt Q.C. and D.C. Hobson, (1976) H.M.S.O., D.o.T. Report into the Affairs of Lonrho, A. Heyman Q.C. and Sir W. Slimmings, (1976) H.M.S.O.

For the relevant statutory provisions see Sections 164 to 175 of the Companies Act 1948 and Sections 35 to 42 of the Companies Act 1967 and *Core-Browne on Companies,* (Jordans) page 801 *et seq*.

8 R.J.W. Stacy, Company Law Administration, 58 Law Society's Gazette 485 at 487.

9 Cmnd. 6659 paragraph 156.

powers.[10] Indeed, even in 1928, Llewellyn Smith commented that "the Board of Trade... has been a vigilant onlooker rather than a continuous supervisor."[11] This has, perhaps understandably, resulted in considerably public disquiet and profound concern in Parliament.[12] The Department's approach was aptly summed up by Sir RJ.W. Stacy, the Under-Secretary of the Companies Division:[13] "the reason for appointing an inspector is ... to discover facts which cannot otherwise be elicited and not to intervene in management or to act as an arbiter between contending parties."

The Courts have been alert to the fact that the power of the Department to appoint inspectors has been neglected and have recently criticised openly the Department's attitude. Lord Denning M.R. in the case of *Wallensteiner* v. *Moir*[14] commented that Mr. Moir was "put off" when he applied to the Department who "suggested that he had a remedy in the courts", the inference being that the appointment of an inspector would only be made as a last resort. In the earlier proceedings in the same litigation, Scarman stated that

> "... the case illustrates the need for a profound rethinking of the processes available under our law for the investigation and determination of questions concerned with the control and use of the companies funds by directors and others in a position to influence their use."[15]

The Secretary of State for Trade and Industry, replying to a question tabled by Mr. Arthur Lewis M.P., delineated the procedure followed by the Department of Trade with regard to the appointment of inspectors. The applicant is required to submit a statement of the facts, in some cases verified by a statutory declaration, setting out fully the grounds for the application and reasons for the appointment. If the applicant consents, the statement is sent to the directors of the company for their comments, but it is probably that in all cases the directors would be approached by the Department for further information.[16] Although this obviously takes time, the Department considers it necessary to look at both sides before taking the potentially drastic step of appointing inspectors.[17] Whilst no doubt justified as a general rule of prudence, the Department has on a number of

[10] Between the years 1948 to 1958 there were some 705 applications for which only 36 were granted. It would appear from 1950 to 1966 there were 1477 applications under Sections 164 and 165 of which 60 were accepted. The proportion of acceptances to applications has significantly increased in recent years, and in the last available Department of Trade Report for 1975 it appears out of 456 applications, 177 were accepted. (Companies in 1975 H.M.S.O.) Payments to Inspectors amounted to over £759,000.

[11] The Board of Trade Whitehall Series 1928 page 168.

[12] For example, see Vol. 804, House of Commons Debates at 124, Vol. 817 at 132, Vol. 820 at 936, Vol. 822 at 4, Vol. 827 at 221 and 422, Vol. 828 at 460, Vol. 842 at 898.

[13] Company Law Administration, 58 Law Society's Gazette 485 at 487.

[14] [1975] 1 All. E.R. 849 at 856.

[15] [1974] 3 All. E.R. at 356, see also Prentice, *Wallensteiner* v. *Noir,* The Demise of the Rule in *Foss* v. *Harbottle?* 40 The Conveyancer 51 at 64.

[16] Vol. 827 House of Commons Debates at 422. See also Evidence of the Board of Trade to the Jenkins Committee, Minutes of Evidence at 157.

[17] RJ.W. Stacy, Company Law Administration, 58 Law Society Gazette 485 at 487.

occasions appeared at best to 'drag its feet.'[18] Where the request emanates from the police, the Department, at least in recent years, has been certainly more prepared to expedite matters.[19] Similarly, where the initiative is taken by a quasi-official body such as the City Panel on Take-Overs and Mergers, as in the Pergamon affair,[20] the Department seems more prepared to take action without embarking on a laborious enquiry.

The Department's somewhat tardy approach is, undoubtedly in no small part, due to its shortage of adequately trained staff, the fact that the officers concerned are administering public money and their accountability to their political superiors. Another significant factor which aggravates the delay both of the appointment and the conclusion of the inspection, is the fact that inspectors report is only evidence of the matters stated therein to the extent provided for by statute[21] — the remainder being regarded as hearsay. In variably, concurrent investigations are conducted by the police to enable them to obtain their own evidence. This is naturally wasteful both as to time and money.[22] However, a senior officer in the Companies Investigation Branch has expressed the view to the authors that there is no duplication of effort as the Department's inspection and the investigations of the police serve different purposes.[23] Whether this is true remains to be seen. Mr. Edward Heath, when Prime Minister, on answering a question put by Mr. Cant M.P., emphasised that there was concern about the divided responsibilities of the Department of Trade, the police and the Director of Public Prosecutions and "the arrangements are kept under regular review to ensure that there is no avoidable duplication of investigation."[24]

When the Department of Trade decides to appoint inspectors, it invariably appoints a Queens Counsel and senior member of the accountancy profession.[25] Given the obvious reluctance of busy 'silks' to give up their practices, even for a limited period of time, appointments are normally made on a part-time basis. This has the effect of prolonging the investigation in some cases significantly. Even if

18 In the Dollar Land Holding Affair, it appeared that the Secretary of State had received over 600 letters from investors and professional persons. He had consistently refused to meet interested persons and there was only real action when the matter was raised in Parliament.

19 Vol. 830 House of Commons Debates at 964 and see Vol. 829 at 496.

20 See B.J. Davies, Affair of the City, A Case Study, Vol. 36 Mod. L. Rev. at 474. The Council of the Stock Exchange has also recently requested the appointment of inspectors in its statement by the Special Committee of the Stock Exchange on Scottish and Universal Investments Ltd. (November 1976) para. 82.

21 See *Gore-Browne on Companies,* (Jordans) pp. 806 - 807.

22 See the Mesco Laboratories Ltd. and Mesco Consolidated case referred to in Vol. 829 House of Commons Debates at 496.

23 Of course under Section 41 of the 1967 Companies Act an Inspector can inform the Department of any matters arising without having to make an Interim Report. Inspectors are encouraged to do this and do so on an average within 8 months of their appointment. Furthermore, the police will often interview a witness immediately after the Inspectors.

24 Vol. 829 House of Commons Debates at 526.

25 The Board of Trade pointed out in its evidence to the Jenkins Committe that this was flexible and it could appoint one of its own officers. Minutes of Evidence at 1537.

it were possible to induce a sufficient number of people of the right calibre to accept full time appointments, the Department considers that the cost would be prohibitive. It is not without interest that both the Chairman of the Stock Exchange and Lord Shawcross, the Chairman of the Takeover Panel in recent open letters have advocated the appointment of solicitors as inspectors.[26] The Secretary of State for Trade, the Right Hon. Edmund Dell, in a written reply to the Chairman of the Stock Exchange, wrote,

> "I agree that there is no objection of principle to the appointment of solicitors as inspectors where appropriate. The skills of cross-examination which develop from experience at the Bar are however an important attribute for inspectors in the majority of cases. Furthermore, if major company inspections are to carry weight they must be conducted by persons of eminence in their own profession, and it will never be easy for such people to leave their normal professional work entirely on one side for a lengthy period."[27]

Lord Shawcross considers, however, that the Department may well be forced to reconsider this alternative or to take those "who are not so busy and/or whose expertise, if any, lies in irrelevant fields." Furthermore, Lord Shawcross takes the view that the pronounced tendency to prefer 'silks' to 'juniors' is a 'misconception.' Indeed, he remarks that there are "many juniors with suitable commercial experience who would be better able to conduct these enquiries than many skills."[28] Nonetheless, given these difficulties, the length of time taken by inspectors to make the necessary investigations and then to report is still considerable.[29]

Although this may not be an appropriate venue for discussing the reasonably wide powers of the inspectors, it is pertinent to point out that in the last few years there has been increasing criticism of the way in which certain Inspectors have utilised these powers.[30] Indeed, Richard Milner commented, on writing in the Sunday Times, that many lawyers consider that the process has degenerated into a "20th Century Star Chamber."[31] The Secretary of State for Trade held a conference for over 40 assorted inspectors at the end of

[26] Letter from Mr. N.P. Goodison, Chairman of the Stock Exchange to the Secretary of State for Trade, 20th July 1976, p. 3 and see Lord Shawcross's letter to the Financial Times July 28, 1976 and also that of Mr. Edgar Palamountin to the Financial Times July 10, 1976.

[27] July 27, 1976.

[28] Financial Times July 18, 1976.

[29] In 1973 the Department announced that "there are indications that new work coming to the Companies Investigation Branch is increasing in complexity and inquiries are not in all cases commenced as speedily as the Department would wish. The number of staff is being increased to improve the position." Companies in 1973, Department of Trade p. 5 H.M.S.O. Minister of Trade, Clinton Davis announced in March 1974 that the Department of Trade were examining ways of speeding up Inspections. Times 24, 1974.

[30] See *Re Pergamon Press Ltd.* [1970] 3 W.L.R. 792 and *Maxwell* v. *D.o.T.* [1974] 1 Q.B. 523 and Sir Gerald Nabarro at Vol. 823 House of Commons Debates at 360 and see also Mr. David Napley, Letter to the Times August 30, 1974, Lord Fletcher's letter to the Times, September 6, 1974 and the controversy occasioned by the Inspectors comments in the Report into the Affairs of Lonrho, see Lord Duncan Sandys letter to the Times July 13, 1976 and Lord Shawcross's suggestions in his letter to the Financial Times 28th July 1976.

[31] Sunday Times October 3, 1976, but see the letter of the Secretary of State for Trade, Mr. Edmund Dell Published on July 17, 1976.

September 1976 but concluded that the procedures were not in need of any substantial alteration. It is apparent that the Secretary for Trade is desirous of seeing a general speeding up of the conduct of inspections but on the other hand he has himself stated that "whilst I am certainly concerned to reduce the timescale of inspections... the time needed to complete inspections is materially affected by the procedures which are followed in order to be fair to witnesses."[32]

Another factor manifested by the inspection into the Pergamon Affair was that despite the powers of the inspectors, the presentation of a report can be significantly held up, particularly in cases where foreign interests are involved, by lack of cooperation and frankness on the part of the controllers of the companies concerned.

Finally, it may be of interest to note the purposes for which the Secretary of State for Trade regard inspections as serving.[33] Firstly, they are available to the Director of Public Prosecutions and other prosecuting authorities for deciding whether to bring criminal proceedings.[34] Secondly, they can be used by shareholders and creditors as the basis for civil proceedings. Thirdly, they are available to the Department of Trade when exercising its power to bring civil proceedings to recover the company's assets or to wind it up.[35] Fourthly, they can be available to investors, employees and others as evidence of the way in which the company is being managed. Fifthly, they provide the Government and the public with a basis for discusion on aspect of company law reform. The sanction effect of disclosure and adverse comment by inspectors must be considered extremely important. In this last respect, it is interesting how in recent years, and in particular with regard to Pergamon, London and County Securities and Lonrho, persons criticised in Inspectors' Reports have 'launched' a publicity campaign of self-vindication.

The Jenkins Committee Report[36] accepted the argument that there should be a power in the Department of Trade to make investigations without having to appoint inspectors. The Committee was mindful that the unnecessary appointment of inspectors may harm the company and thus the Department should have procedures open to it to enable it to act immediately and, in some cases, preliminary to such an appointment. This need was filled to some extent by section 109 of the 1967 Companies Act which granted a power to call for documents and information from companies and persons associated with them to the Department.[37] This is a most important power and is administered by the Companies Investigation Branch and not by outside inspectors. Due to the effect on companies, investigations

32 Letter, July 27, 1976 at p. 4.

33 Letter, July 27, 1976.

34 where criminal charges are being considered the Inspectors' Report is rarely published, the *Lowson* case being an interesting exception to this normal rule. The inspection into Vehicle and General Insurance Co. by T.M. Easham Q.C. and R.T.M. McPhail (H.M.S O. 1976) although completed in 1972 was delayed four years whilst the Director of Public Prosecutions considered it. In the end it was decided that there was insufficient evidence.

35 See *Gore-Brown on Companies,* (Jordans) pp. 807 - 808.

36 Cmnd. 1749 paras. 214 and 215.

37 See Magnus and Estrin, *The Companies Act 1976* (Butterworths) paras. 618 to 626.

under this provision are not made public. Indeed, as with the inspection powers proper, it would appear that these investigatory powers 'act as a deterrent' and the mere threat of it 'causes a company to put its affairs in order.'[38] An interesting example of the use of these provisions concerned the Kina affair where the Department exercised its powers under section 109, at the request of the police, and then later appointed two inspectors.[39]

The Department of Trade Investigation Branch has accountants, lawyers and investigation officers among its staff. The latter group, which numbers about 50, are mostly ex-C.I.D. men. The authors understand, from a senior official in this Branch, that whilst the presence of a foreign element in a particular enquiry does create considerable problems, there is a reasonable amount of international cooperation, at least in relation to obtaining evidence if not with regard to enforcement. Prosecutions and civil proceedings, other than those dealt with by the Insolvency Service and Official Receiver are conducted by the Registrar of Companies of the Companies Administration Branch in consultation with the Department of Trade's Solicitor.

The Department of Trade's Insurance Division administers the evergrowing body of insurance law and possesses both far reaching and significant regulatory powers of the insurance industry as well as similar powers of inspection and investigation to those referred to above. The Department alone or in conjunction with other authorities is also concerned with a host of other matters relevant to the field of company law such as accounts, licensing of brokers and other provisions under the Prevention of Frauds Investment Act 1958, the Protection of Depositors Act 1963, as recently amended, company liquidations, monopolies and restrictive practices and the general surveillance and reform of company law. In addition to these considerations, the Department has much greater and wider trade interests. There are a large number of other bodies and authorities exercising more specific regulatory functions relating to corporation law and practice and allied matters such as the Registrar of Building Societies and Friendly Societies, the Registrar of Restrictive Trade Practices and the Office of Director General of Fair Trading.[40] Other departments of government also, to a greater or lesser degree, have responsibilities in this area, in particular, the Department of Industry under the Industry Act 1975.[41] Indeed, even the Parliamentary Commissioner has increasingly become involved with matters relating to the Department of Trade's regulation of companies especially in the area of inspection.[42] It has even been contended that the Companies Court should be included in the category of 'regulators' given the

38 Companies in 1974 D.o.T. pp. 3-4 H.M.S.O.

39 Financial Times November 1975, and see also November 19, 1975, and the Times on the 20th November 1975. The use of Section 109 with regard to Canning Town Glass Works Ltd. and the involvement of the Army Minister attracted publicity.

40 Valentine Koran, The Fair Trading Act 1973 and the Functions of the Director General [1973] J.B.L. 305.

41 Alan C. Page, The Industry Act 1975, [1976] J.B.L. at p. 130.

42 David Foulkes, The Parliamentary Commissioner and Business Law [1970] J.B.L. at 266 and the Supervision of Companies, the Parliamentary Commissioners Reports, [1974] J.B.L. 23.

reasonably high proportion of essentially administrative matters that it deals with.

The Police

Prior to the Second World War, the City of London Police had established a special unit to concentrate on commercial frauds, the City for obvious reasons having a relative preponderance of such cases. After the war, due to considerations of resources, expertise and jurisdiction, it was thought preferable to create a joint section with the Metropolitan Police. Thus, in 1946, the Metropolitan and City of London Fraud Department was established.

At present, the Metropolitan and City Fraud Squad, as it is more popularly known, has about 160 officers organised in three sections each under the command of a Chief Superintendent and a Deputy Assistant Commissioner of the Metropolitan Police Force. For City of London officers this does give rise to certain problems in view of the fact that they are also responsible to the Commissioner of City of London Police. Currently, there are some 95 officers stationed at Scotland Yard and the rest in the City. The Squad is solely concerned with the investigation of company and financial frauds and closely allied matters. All sections are in a state of permanent overwork and the norm appears to be that between 65 and 75 investigations are going on at any one time.[43] The difficulty is that as the work load is for obvious reasons inconsistent and various, the Department has to at best function with only that staff which would be justified during a relatively lax period. It seems that in a context of scarce resources it would be 'unjustified' to have underworked officers. The shortage of staff is further aggravated by the often protracted nature of the investigations and the fact that in many cases officers have to be sent considerable distances outside London. For example, in one recent case two officers spent two years working on a single case in Wales and thereafter it took a further eighteen months to obtain a conviction.

A particularly difficult problem that the police have had to face is the increase in company frauds with an international or foreign flavour. Indeed, it has been estimated that the Department deals with at least 20 such investigations each month. All the officers in the Department are constantly in a state of readiness to be sent at a few months notice to virtually anywhere in the world. The average time spent travelling by these officers is the highest in the force. This difficulty is attenuated in part by a reasonable degree of co-operation from countries such as the United States of America, Canada, the Commonwealth and most European Countries but this must be set against lack of assistance in other countries which has significantly affected the officers' ability to obtain evidence let alone achieve execution. Needless to say, the formalities which must be

[43] Commissioner James Page's Report to the Court of Common Council of the City of London, April 1975 said that there had been 82 completed investigations involving some £100,000,000 during the year although his force was 22% below strength. Deputy Assistant Commissioner Crane of the Metropolitan Police estimated that there were over 90,000 reported cases of fraud annually— City Press November 14, 1975.

complied with in many foreign countries before an officer can conduct investigations in another jurisdiction does not improve matters. It would appear that the British authorities do not require similar formalised procedures but adopt a more flexible approach. The matter is in the hands of the Home Office except where extradition is concerned in which case the Director of Public Prosecutions supervises the investigations.

The officers in the Department are ordinary members of the C.I.D. and are appointed solely from its ranks. Indeed, the Department makes much of the fact that all its officers have at sometime 'trod the beat'. The Department is not very popular or attractive to new recruits although it would appear that once the officers have become members they are reluctant to transfer out of it to another Department or Squad. One serious problem is that as a general rule promotions are from outside and not within the Department. Thus, ambitious officers in the Department seeking promotion will invariably have to go outside the Company Fraud Department. Whilst this diffusion of expertise might be beneficial for the C.I.D. as a whole, it does operate to continually 'cream off' the best and most experienced officers in the Department. This is not to say that as a matter of practice there are not promotions from within.

Once transferred to the Department, the officers obtain their expertise largely from practical experience in the job. The normal approach is for a new recruit to the Department to ask brokers and other professional people that he might encounter in the conduct of his investigations to assist him. It would seem that officers often retain these initial contacts on a social and professional basis which can be a significant source of future assistance. The surprising fact is that professionals engaged in the securities industry are so prepared to assist in this way without any financial incentive the probable motive being a civic conscience or the promotion of good relations with the police. The Department of Trade does on occasion arrange special lectures for the police and there may be short courses for officers in the Metropolitan and City of London Company Fraud Department and Regional Fraud Squads which, *inter alia,* teach basic accounting and interpretation. Indeed, the Department and its officers place considerable reliance upon ordinary techniques and questioning the principle being that policemen are well acquainted with criminals and the so called 'white collar' criminals that they have to deal with are intrinsically no different. Whether this is a justifiable approach to the modern and sophisticated fraudster from the middle class remains to be seen. One might take the view that it would be perfectly reasonable for the Department to have a small core of officers specially trained in the more technical aspects of the problem but it appears that the Department, and indeed the police service as a whole seems extremely reluctant to have specially 'trained' officers on its staff such as accountants and lawyers. It goes without saying that the Department can always refer a point to an outside expert and the Department actually retains a firm of chartered accountants for this purpose. Furthermore, advice can always be obtained from the Department of Trade with which there is a considerable degree of contact. For example, in the inspection into London and Counties Securities four

officers of the fraud squad were assigned to investigate certain share dealings at the request of the Department of Trade and its Inspectors.

Although the police can and occasionally do request the Department of Trade to exercise its powers of investigation under section 109, it has been suggested that the police themselves should be allowed to seek warrants for inspection of corporate records from a magistrate as they can in the case of arrests or for searches for stolen goods where there is a reasonable suspicion that an offence has been committed.[44] The police do experience great difficulty with regard to foreign nominees but of course the Department of Trade does possess reasonably extensive powers in this respect and there are provisions in the Companies Act 1976 bearing upon this problem. Moreover, in the words of one senior officer "the Department usually gets the necessary information one way or the other."

As already pointed out, there has been criticism of the duplication of effort by the police and the Department of Trade. The police are to some extent concerned about this. In one instance the police had started to investigate the affairs of a company when, after an investigation under section 109, the Department of Trade appointed inspectors. During the course of the inspection, the police were 'asked' to discontinue or at least freeze their investigations which they did. In fact, the inspection lasted some two years, and whilst a very readable report was issued disclosing possible criminal offences, the Inspector had not taken statements from the witnesses and many of the original documents had been either lost or returned to their owners. The Director of Public Prosecutions had little choice but to direct the police to start a new investigation for the purpose of acquiring evidence of these possible criminal offences three years after the event.

The police, as does the Department of Trade, obtains most of its 'leads' from aggrieved persons and their associates. There is also a relatively high number of anonymous complaints. In other instances, reports are sent from the Department of Trade, usually through the Director of Public Prosecutions and liquidators. Added to this, there is a high degree of cooperation with the Stock Exchange and, in particular, the 'Assignees Department'. The Department encourages its officers to keep their 'ears close to the ground' and as with most police work the best leads are picked up in the City bars and through the financial press. The Department has built up an impressive library of companies and people running to well over 26,000 files with an addition of an average of 75 a month. Due to the pressure of work, the Department does not find itself able to exercise routine surveillance and its preventative role really amounts to no more than being 'known to be around.' Another problem resulting from the heavy work load is that it is unable to investigate and press new or uncertain aspects. The Director of Public Prosecutions is known by the police to be reluctant to waste time and resources in prosecuting dubious or noved

[44] T. Hadden, The Control of Company Fraud, Vol. **XXXIV** No. 503 PEP 1968 at 319, but see Section 441 of the Companies Act 1948.

causes. This has been particularly evident in relation to insider trading.[45]

Since the establishment of the Metropolitan and City Company Frauds Department the various Regional Police Forces have established their own fraud squads. There are at present some 39 Police Fraud Departments in the United Kingdom varying considerably in terms of expertise, size and responsibilities.

The Director of Public Prosecutions

The D.P.P.'s staff is divided into two Divisions, both under an Assistant Director being responsible to the Deputy Director and the Director himself. The first Division is the Metropolitan Police, which is broken down into a number of Sections dealing with the Metropolitan Police, the Central Division Research and from our point of view, more importantly, Fraud and Criminal Bankruptcy. The Second Division is concerned with the whole country dealing with all prosecutions by police authorities outside London as well as London except those relating to complaints against the police and Fraud and Criminal bankruptcies. Each section has about eight professional lawyers in it and of course the necessary clerical and secretarial assistants. The relevant section for our purposes is the Frauds and Criminal Bankruptcy section.

In cases of fraud, as soon as the police have completed their investigations the papers will be forwarded to the Section for consideration. Invariably, due mainly to the complex nature of company frauds, there will be a need for further investigations and this must be handled by the police. Contrary to popular belief the Director has no investigatory staff of his own. In certain cases he will become involved in investigating the police investigation himself where complaints have been received especially from liquidators. Where the case is exclusively a matter of company law or one involving the Prevention of Frauds (investments) Act 1958, the Director would normally although not always refer the case to the Department of Trade. On rare occasions the Director might actually receive complaints from members of the public.

It would appear from information received from the Frauds and Criminal Bankruptcy Section that in a not inconsiderable number of investigations, proceedings had to be abandoned due to the use of foreign nominees. Where this was a feature of the case, the Section considered that much would depend upon the personal contacts of the investigating officer. Of course, where there was a significant degree of political and diplomatic pressure involved, as has been the case in a number of recent investigations, other countries are usually more responsive.

It is worth noting that the D.P.P. is concerned about the length of time it takes to investigate fraud and later prosecute. The Head of the Section commented that the diffusion of time produced great

[45] The Department of Trade adopts a similar approach, see B.A.K. Rider The Regulation of Insider Trading in Hong Kong, (1975) 17 Mal. L.R. 310 at pp 321 - 327.

difficulties in relation to evidence and could be unfair on suspected persons who might in fact be quite innocent. The average period of time was two years but some cases lasted considerably longer. Given the fact that the Section usually only had six professional officers in it and had to cover prosecutions of all frauds and criminal bankruptcies in England and Wales, the Director is very conscious of the cost/benefit aspect. Indeed, the Head of the Section informed the authors that as a matter of policy, the D.P.P. would ideally like to prosecute all cases of fraud that the police refer to them but their prime concern must be with those cases which involved some public interest justifying the expense of the proceedings. Where a small amount is at stake or where there is no immediate public harm or where the person concerned is already serving a sentence, the D.P.P. might decide that it is not worth proceeding to trial. In exceptional cases, the D.P.P.'s decision might be influenced by the fact that there has been or there is the likelihood of civil proceedings.

An important factor which affects the overall enforcement process in this area of law is the often derisory maximum penalties which are provided for in statutory offences. For instance, in the Department of Trade's prosecution of Land & General Developments in February 1974 for violations of Section 54 of the Companies Act 1948, the maximum statutory fine of £100 was imposed with £200 costs though some £105,000 was involved in the transaction contravening the Section. It is hardly surprising that many involved in the enforcement process feel frustrated by this state of affairs.

Many senior and also junior officers in the police fraud squads take the view that the situation might be improved by the establishment of a special investigatory and prosecutionary authority to deal with securities and company law offences particularly if insider trading is made a criminal offence. This view is not shared by the relevant Section in the D.P.P. who does not consider that the number of cases likely to be detected would justify the expense this would necessarily involve. However, it is interesting that the D.P.P.'s Fraud and Bankruptcy Section would like to see the introduction of 'specialised officers' who had expertise in areas like accountancy. In the Head of the Sections view it was inevirable that under the present system investigations were protracted and on occasions the police officers concerned had missed the crucial point of the investigation due to sheer lack of expertise.

The 'old triangular machine' as the Department of Trade, the Fraud Squad and Director of Public Prosecutions have been described has come under increasing criticism. The main deficiency of the system, acknowledged by Mr. Edward Lyons M.P. is the scant resources available to each of these agencies.[46]

The Bank of England

The Bank of England is an extremely important regulatory authority in this area though its legal authority and responsibility might not

[46] See the debate on the investigation of fraud in Vol. 449 House of Commons Debates at 1329 to 1338 and Morris Finer Q.C. Company Fraud — The Accountant November 5, 1966 at 587 and T. Hadden, The Control of Company Fraud, Vol. XXXIV No. 503 PEP 1968 at 324.

on first sight reflect this.[47] This regulatory authority stems from historical fact and the intrinsic nature of the City. Mr. C.N.A. Oastleman, the General Manager of Hill Samuel (Australia) in giving evidence to the Senate Select Committee on Securities Exchange in Australia observed that "the Bank of England is a sort of unofficial uncle of London affair. It is accepted as such."[48] The Bank, and in particular the Governor, is in a unique position as it holds powerful counsel in the Government and Treasury,[49] whilst at the same time being intimately connected with the various facets of the financial structure of the City, often appearing as its representative or mouthpiece. The Governor has in the last decade become a powerful figure in the debate over supervision of the securities markets and has played a significant role in the City's own self-regulatory procedures. Naturally, in the field of banking and fiscal matters the authority of the Bank is even greater and it is through its powers in this area that it can put pressure on those engaged in the securities industry to accede to its desires.

Self regulation — the Primary Model

Due largely to historical development and social factors, the securities and financial industry in the City of London grew up and maintained its position on a basis of mutual trust and respect among its constituents. There was little apparent need for external regulation as everything appeared to be conducted on a gentlemanly basis conforming to a high degree of integrity. Those that violated the unwritten code of ethics of the 'club' were denied, at least in theory, the benefits of mutual trust and respect. Though it would be niave to suppose that there were no scandals, the boom in takeover and merger activity in the mid 1950's showed this in a very different light. As Professor Marley wrote,[50]

> "the bitterness and division ran deep. The network of gentility and politeness broke down completely, far from keeping in touch with each other, the opposing merchant banks indulged in personal animosity ... The worst aspect of the matter... was that the public had a ring side seat to observe that when it came down to ethics and propriety, the top figures of the City... were at each others' throats."

Under a great deal of internal as well as external pressure, the Governor of the Bank of England called together a number of leading city institutions,[51] and formed a City Working Party. The result was the Notes on Amalgamations of British Businesses, published in October of 1959. This was little more than a code of good conduct

47 Committee on the Working of the Monetary System Report Cmnd. 827 (H.M.S.O.) Chapter V, Seventh Report from the Select Committee on Nationalised Industries, The Bank of England, Commons Paper 672 (1976), Hamish McRae and Francis Caincross, *Capital City, London As a Financial Centre,* (Methuen 1975) Richard Spiegelberg, *The City — Power Without Accountability,* (Blond & Briggs 1973) Chapter 6.

48 Australian Securities Markets and Their Regulation Vol. I Report at 16.10 and Minutes of Evidence at 845.

49 Vol. 787 House of Commons Debates at 404.

50 Edward Stamp and Christopher Marley, *Accounting Principles and the City Code —The Case For Reform,* (Butterworths 1970) p. 8.

51 Issuing Houses Association, Accepting Houses Committee, Association of Investment Trusts, British Insurance Association, Committee of London Clearing Banks and the Stock Exchange.

and was self-policing. In 1962 it was revised but within a year there were a series of takeovers which made a nonsense of the rules embodies in the Notes. This gave rise to considerable public, and indeed governmental, concern. The Times, in one of many articles, commented that "the simplest solution would be joint action by interested parties … to set up a watchdog organisation on the lines of the United States Securities Exchange Commission."[52] The City reconvened 'as a matter of urgency' the City Working Party. A month or so later, it was announced that "agreement had been reached on the establishment of a Panel to supervise the operation of the Code on Amalgamations and Mergers." In March 1968, the City Code on Take-overs and Mergers was published.

The Panel, under the Chairmanship of Sir Humphrey Mynors, Deputy Governor of the Bank of England, consisted of nine persons nominated by the various constituent institutions, with a secretariat provided by the Bank of England. In the Panel's first Annual Report, for the year ending March 1969, an attempt was made to describe the Panel's role. The Report stated that "in addition to its functions as a supervisory body… the Panel will be available for consultation at the stage before a formal offer is made to a company as well as during the course of the transaction." It was also made clear that the Panel would not be passive but would intervene on its own motion where it thought it appropriate so to do. Almost immediately, the Panel was faced with a number of difficult takeovers, where it experienced less than full support from important city establishments. The Governor again intervened and in an open letter to the City stated that "the result… has been less than satisfactory. Much resentment has been aroused. The Panel's rulings have been questioned and even their general authority has not always been acknowledged. It is in no one's interest that this state of affairs should continue." This concern was echoed in government circles and it was clear that if the Panel was not strengthened the Government would take steps to introduce legislation. It is uncertain, however, whether the then Labour Government would have gone the whole way and introduced a Securities Exchange Commission. The Prime Minister, Harold Wilson, at the Lord Mayors Guildhall Banquet, specifically stated that "the Government has no desire to introduce legislation to force on the City the much tougher and more wide ranging interference which free enterprise America has devised in the form of the Securities Exchange Commission or indeed in other form for the job is far better done by the City."

The main deficiency of the Panel was that it had no sanction, having to refer matters to the various constituent institutions to take disciplinary action against their members which proved less than satisfactory in many instances. Lord Kearton, the Chairman of Courtaulds, in a television interview on the 27th June 1968, aptly pointed to this weakness in the following terms: "the cult of the gifted amateur is the new Take-over Panel's main defect. It has no teeth, no legal sanctions — in fact, to me it's all a kind of confidence trick." The Panel was completely reorganised in the early months of 1969 resulting in its present form. The Chairmanship of the Panel was

[52] Times 18th July 1967.

given to Lord Shawcross — as Richard Speigelberg in his book, *The City, Power without Accountability*,[53] puts it, "Sir Humphrey was thought to be too nice a man for the job." An Appeal Committee was established under Lord Pearce. In addition, a full time Executive was created under a Director General and Deputy Director General. Later on, this was supplemented by two Assistant Director Generals. The members of the Executive are practitioners in the securities industiy and related fields and are seconded to the Panel. This ensures a degree of topical expertise and ability which would not normally be available to a regulatory agency. Another significant development was the Panel's Statement of Policy. This affirmed the resolution of the City institutions to 'put their own house in order,' and to give the Panel the necessary authority to do this. To this end the institutions authorised the Panel to draw attention to the means it would use to enforce the 'Voluntary Code.' The Statement provides that "if there is a breach of the Code, the Panel will have recourse to private or to public censure or in a more flagrant case, to further action designed to deprive the offender temporarily or permanently of his ability to practice in the field of takeovers and mergers." However, "no finding of a breach of the Code nor any censure or further action will take place without the alleged offender having had the opportunity of a hearing and a right to appeal to a Committee of the Panel." As the City Capital Markets Committee pointed out in its Report on the Supervision of the Securities Markets, "professional reputation and goodwill are usually the most valuable assets of those who draw their livelihood from the securities markets."[54] The Statement of Policy also emphasised that the Stock Exchange would amend its rules to provide that a determination of the Panel would be automatically accepted by the Council of the Stock Exchange but that "it will be for the Council then to decide on the appropriate measures to be taken in accordance with its disciplinary rules which include the power to censure, suspend or expel a member." Furthermore, it was stated that where a licensed dealer was involved in a violation, the Panel might refer the matter to the Board of Trade with a recommendation to suspend or cancel the licence under the Prevention of Frauds (Investments) Act 1958. It was also pointed out that the Panel could ask the Stock Exchange to suspend a quotation of a listed security or to actually delist such where there was a sufficiently serious violation.

This is not an appropriate place to give an account of the performance of the Panel since 1969 as we are solely concerned with the regulatory structure. The Panel has had its failures and problems and equally noticeable successes. It must be emphasised that it does not administer law but a code of good behaviour. It has the advantages of speed, informality and flexibility. On the other hand, the Panel would be the first to admit that there have been situations where the sanctions available to it were either ignored or irrelevant

53 (Blond & Briggs 1973) at 189, Michael Blanches, The City Regulations on Mergers and Takeovers, Chapter II, *Readings on Mergers and Takeovers* edited by J.M. Samuels on behalf of the Action Society Trust, (Paul Elek Books Ltd. 1970) at 212 and I.A. Franks, The Takeover Panel and the SEC, Solicitors Journal 27th November (1970) 875 and Prentice, Takeover Bids — The City Code on Takeovers and Mergers, 18 McGill LJ. 385 at 412.

54 December 1974 para. 35.

and hence ineffective. Particular difficulties can be attributed to the Panel's lack of any legal powers in the context of investigations, but few can dispute that the impact of the Panel has been significant and salutary.

The Stock Exchange

The role and importance of the Stock Exchange in the field of corporation and securities laws is so obvious that it is hardly necessary to do more than point to a few rudimentary considerations. The impact and policy of this body on corporate disclosure and the conduct of companies through the listing agreement is highly relevant. The same applies to the regulation and control that the Stock Exchange exercises over its own membership. The Stock Exchange has recently shown its willingness to play a crucial role in the regulation of market abuses such as insider trading. The Council has in the past set up a number of ad hoc investigation Committees to examine alleged abused. The regulatory efforts of the Stock Exchange in this respect has been suspect because the Council was reluctant to publish their findings due to the threat of defamation suits. The recent publication of the Special Committee of the Stock Exchange on Scottish and Universal Investments Limited, is certainly a welcome step in the direction of allowing justice to be seen to be done. The Stock Exchange Council is faced with a fundamental dilemma, however, in that it is after all a private organisation charged with the furtherance of its members' interests. Thus the imposition of public duties and responsibilities on such an organisation augers for an uneasy marriage.

There are a host of other authorities charged with certain regulatory functions over their members such as the British Insurance Association, the National Association of Pension Funds, the Unit Trust Association, the Committee of the London Clearing Banks, the Accepting Houses Committee, the Issuing Houses Association, the Association of Investment Trust Companies, the Association of Stock and Share Dealers to name but a few. Added to this, there are a number of other organisations which are more widely based but which, nevertheless, possess their own code of ethics such as the British Institute of Management, the Institute of Directors and the Christian Association of Business Executives. The picture would not be complete without mentioning organisations such as the Confederation of British Industry and the various professional bodies in the fields of accountancy, law and journalism. It is only after taking all the facets of self-regulation into consideration that any accurate assessment of the efficiency of the system can be attempted.

Proposals for reform

In the last few years criticism of the existing system of regulation has been mounting and this has been inflamed in recent months by a steady stream of Department of Trade Inspectors' Reports revealing serious abuses in the area of corporation and securities laws which have, for some reason or other, slipped through the regulatory net. To this must be added the international scandals involving Slater Walker Securities and Sime Darby which have done little to boost confidence in the integrity of the British businessman abroad, parti-

cularly in the Far East. In countries such as Hong Kong,[55] Singapore and the Philippines, events have shown that if investor confidence is to be preserved and maintained, radical regulatory efforts are the order of the day.[56] In June 1974, the Companies Policy Division of the Department of Trade sent out a questionnaire to solicit views on the question of whether there was a need to reform the present system of regulation. A significant proportion of the responses were published by the various organisations approached which will be examined in outline. However, before we do this, it is pertinent to mention the observations made by the Jenkins Committee.

The Jenkins Committee took the view that it was not necessary to create an independent statutory body to administer corporation and securities laws.[57] However, it accepted "that in theory there is a good deal to be said for the independent statutory body" found for example in the United States of America. The difference in the nature of the British Securities markets and its geographical centralisation in one small area persuaded the Committee that the American system would not achieve better results than the existing system in Britain. The Committee were not unaware that "there is inadequate co-ordination of the experience and views of the Board of Trade and of the other bodies concerned with protection of the investor."[58] Previously, the Cohen Committee had recommended the establishment of the Companies Act Consultative Committee which was in fact done. The Jenkins Committee thought that "perhaps with wider terms of reference and meeting at regular intervals this could well provide the machinery for coordination and cooperation."[59] It is not without interest that this approach has been reaffirmed recently by Mr. Althaus, a member of the Jenkins Committee.[60]

The reply of the City Panel on Take-overs and Mergers to the Department of Trade predictably defended vehemently self regulation. The Panel's views are important not least because it has unquestionably achieved a considerable degree of success within its designated area and further it represents the most developed and sophisticated element in the self-regulatory network. The Panel pointed out, not without some justification, that it was concerned with the administration of the Code which aimed at the conduct of takeovers and mergers and this was an entirely separate question from whether substantive company law was in need of reform. The job of the Panel remained distinct even if the objectives of corporation law were altered given the movement towards 'worker participation' and the progress away from the essentially proprietary nature of British company law. The Panel affirmed that the Code would be adjusted to accommodate these changes as and when they materialised.

[55] B.A.K. Rider, The Regulation of Insider Trading in Hong Kong, (1975) 17 Mal. L.R. 310 and (1976) 18 Mal. L.R. 157.
[56] The Future of London as an International Financial Centre, I.B.R.O. commissioned by the Central Policy Review Staff and see the Stock Exchange's View of the I.B.R.O. Report, Stock Exchange Journal September 1973 at 5.
[57] Cmnd. 1749 paras. 229 and 228.
[58] Cmnd. 1749 para. 228.
[59] Cmnd. 1759 paras. 229 and 234.
[60] Letter to the Times 27th September 1974.

In response to the question of whether there are any serious gaps in the present system of regulation and enforcement, the Panel emphasised its previous recommendations that matters such as insider trading should be dealt with by legislation. It rejected the suggestion that the present regulatory system was too diverse and fragmented taking the view that in fact the Panel, whose members were the heads of the various City institutions, brought together the self-regulatory scheme. The Panel considered that there would be no advantage in establishing a statutory body with similar responsibilities to those now possessed by the Panel and furthermore thought that "a statutory code would inhibit flexibility and speed," apart from "establishing a minimum code of conduct... which everyone, because of its legal basis, would comply with but no-one would stuggle over-strenuously to surpass... anything not prohibited by the rules would very quickly come to be regarded as permissible." Though it admits experiencing difficulty on occasion in obtaining evidence the Panel takes the view that at present the duty based on frankness and honour to cooperate with it is probably no less efficient than a legal duty. This is borne out by statement by Lord Shawcross in the Panel's Report for the years ending March 1975 and 1976 that

> "... I doubt whether a power to take evidence on oath or to issue subpoenas in relation to documents would in practice greatly strengthen the Panel. Perjury and the destruction and falsification of documents are not unknown in legal proceedings where these powers exist. Occasionally, no doubt, this duty of loyalty may be disregarded but those who do so incur general disapproval, quite apart from any censure or other penalties that the regulatory bodies may impose when the facts come to light, as eventually they usually do."[62]

Indeed, Lord Shawcross has consistently affirmed the Panel's view that self-regulation is preferable in all respects, to statutory control by an official Commission or organisation.[63] However, he has spoken in favour of improving the system relating to the appointment of Department of Trade Inspectors and increasing the staff and powers of the Companies Division of the Department of Trade. What is more, in the Panel's most recent report support is given to this notion. This suggestion recognises that there are gaps or uncertain areas in the responsibility and powers of the organisations and institutions which exist at present. Lord Shawcross comments that "it may occasionally be that cases of unethical conduct occur which are not within the jurisdiction of any particular body and thus escape formal condemnation." The idea is that a City Commission or Panel should be established "with seperate divisions dealing with particular classes of matter but still as a voluntary and self-regulatory body capable of dealing with any unethical conduct in the course of transactions affecting the business of the City."

[61] Supervision of the Securities Markets — Panel on Takeovers and Mergers July 1974.

[62] The Panel on Takeovers and Mergers, Report for the years ending 31st March 1975 and 1976 p. 4.

[63] The Panel on Takeovers and Mergers, Report for the year ending 31st March 1974 at pp. 3 and 4 and see Daily Telegraph 24th May 1973 and the comments of Mr. John Hull, Director General of the Panel's Executive in the Times 26th June 1974 and see also Takeovers and the City Code, New Law Journal February 17, 1972.

[64] The Panel on Takeovers and Mergers Report for the years ending 31st March 1975 and 1976 at p. 4.

A more thorough report but similar to that of the Panel's was that published by the City Capital Markets Committee sitting under the first Director General of the Takeover Panel, who has since 'gone back to the City', Mr. I. J. Fraser.[65] The Committee considered that the degree of public confidence in the British Capital markets was no less than in other countries which could boast SECs and that whilst in theory the British system might not appear an over-efficient regulatory structure, in practice it was probably the best attainable. The Committee emphasised that it had not given "uncritical acceptance to the status quo...." It took the view that peripheral areas such as that of insider trading required legislation. The dissent of Mr. Nicholas Wilson of Slaughter & May is most interesting. Mr. Wilson thought that the Panel's sanctions were too imprecise and, where actually applied, too draconian. In his view, the Panel on Takeovers and Mergers "should have at least some statutory framework enabling it to impose direct pecuniary penalties for breach of its rules." Of course, this would bring in the question of judicial review, some thing the rest of the Committee and the Panel thought amounted to "throwing the baby out of the bath water."

The Council of the Stock Exchange, perhaps predictably, agreed with the view expressed by the Panel and City Capital Markets Committee but decided that it was desirable to publish their own report on such an important matter. The Stock Exchange emphasised once more that it was responsible only for the conduct for those for whom it was concerned; its quoted companies and members. It pointed out that it could not exercise any powers outside this area and did not wish to be given such responsibilities. In the Council's view, there was a sufficient degree of liaison between the City institutions and to impose another tier of regulation between the self-regulators and government would harm this state of affairs. The Stock Exchange also pointed out that the bulk of their investigations into alleged abuses revealed no impropriety. Of course, a cynic might argue that this depended upon what standards of propriety are utilised and this might only show that the Council's investigations are too lax and ineffective. However, notwithstanding their predictability, the Stock Exchange's arguments should carry some weight.

The Law Society takes the view that the present system works reasonably well[66] and that by making the rules statutory the overwhelming benefits of the system would be lost. However, though it thought that the present self-regulators should be allowed to continue unhindered, the Law Society wished to see their functions made more effective by ensuring that the existing statutory powers at present exercised by the Department of Trade are "exercised with practical expertise and continuity in support of their activities and that they should be and seen to be ultimately responsible to a newly created public authority." Whilst the Law Society did not consider it possible to make detailed recommendations at the time, it stated that

> "the council would support the establishment of an autonomous supervisory body, headed by a Director, with professional or business experience of appropriate standing in the securities market... and who would have general duties in relation to transactions in securities

[65] December 1974.
[66] 72 Law Society's Gazette pp. 36-38.

> similar in certain respects to those which the Director of Fair Trading has in relation to the supply of goods and services."

This Directorate would, on the Law Society's recommendation, have a small City Office staffed not by civil servants but by persons with practical experience of the industry. In addition, the Council felt that there should be an advisory committee to assist the Director appointed by the Secretary of State who would also appoint the Director. Apart from maintaining surveillance over securities transactions and recommending new legislation, the Director should exercise, either directly or by delegation to the self-regulators, certain existing statutory powers possessed by the Department of Trade. It is important to underline that the Law Society was not advocating a British SEC.[67]

The Institute of Directors held a panel discussion of company chairmen on the question of a Companies Commission. It appeared that 40 out of 55 Chairmen were opposed to the idea.[68] The Institute, in a letter to the Department of Trade, echoed the sentiments of the majority and in general opposed the extension of state regulation. On the other hand, it pointed out that there were areas which required specific legislation and that the Takeover Panel's sanctions needed strengthening. The Institute of Directors joined with the Stock Exchange[70] to recommend a Royal Commission on the question of regulation.

The Company Law Committee of Justice, the British Section of the International Commission of Jurists, also examined the problem at the request of the Department of Trade. It is probable that the Report of this Committee influenced the Law Society's Memorandum. In the Justice Report, 'A Companies Commission'[71] the view was taken that it would be wrong to change the present system unless there was positive evidence that it was deficient. Many of the criticisms directed at the regulatory authorities, in particular the Department of Trade, were thought to relate to deficiences in the substantive law. On the other hand, the continuous shadow of the parliamentary question and the structure of the civil service were both regarded as inhibiting factors which tend to stifle the appropriate course of action and initiative that would be present in for instance the Takeover Panel Executive. The Committee took the view, unanimously, that there were grey areas in both regulation and liaison between the official and unofficial regulatory authorities and these gaps should be filled. However, it emphasised that "the committee would not wish to see self-regulation superseded by direct official control." On the contrary, the Committee felt that by giving the self-regulatory bodies certain legal powers their authority and enforcement potential would be increased. Nonetheless, in the Committee's view, it would

[67] Mr. D. Higginson, Vice Chairman of the Law Society's Committee, Financial Times January 15, 1975.
[68] The Director, July 1974.
[69] 17th February 1975.
[70] See Stock Exchange News Release 17th July 1974. Mr. Harold Wilson, then Prime Minister, promised that if his Government was returned to office a Royal Commission would be appointed, February 1974.
[71] October 1974. One of the authors had the pleasure of serving on this Committee.

be constitutionally improper to grant law-making and law enforcement powers to the self-regulatory agencies directly as they were essentially private bodies. The Committee was, on the other hand "distinctly attracted... by the concept of delegating to the agencies powers nominally vested in an official body." Thus, it was thought desirable to establish a Commission, with a legal basis, which would be authorised to make legal regulations on such matters as takeovers and mergers. The crucial factor would be that the Commission would invite the present self-regulatory agencies to continue in their existing functions. In the case of takeovers, the Panel would draft takeover regulations and submit them to the Commission who would then endorse them as law. The Justice Committee considered that "enforcement powers should ... be subject to proper rights of appeal to the ordinary courts and any enforcement procedures involving penalties of a criminal or quasi-criminal nature should be reserved to the courts from the outset" — a view few would disagree with.

The terms of reference of such a Companies Commission would include not only the securities industry but also the "protection of depositors... banks, building societies and other deposit taking institutions" as well as probably insurance companies. The Office of Fair Trading and the Monopolies and Mergers Commission would remain outside its purview. Routine matters under the Companies Acts such as the filing of statements and documents would remain the responsibility of the Department of Trade. The Justice Committee considered that as investor protection was not primarily a politically controversial matter, it did not require constant Parliamentary supervision. In effect, the proposed Commission would be a bridge between the City and Whitehall and to this end "it is important to sew up and organise the Commission in such a way that it would draw its decision making staff not only from the civil service but also the city."

It was emphasised that the creation of such a Commission should not be considered a panacea as "the creation of any new structure inevitably leads to some disorganisation while the existing structure is being dismantled and the new one built.' Furthermore, in the short term, it was thought more important to remedy the substantive defects in the existing Companies legislation.

A more radical approach was adopted by the Working Group of the Labour Party Industrial Policy Sub-Committee, in their Report, the Community and the Company; referred to, somewhat anomalously, as the 'Greenpaper'.[72] In the Working Group's view,

> "the Stock Exchange and Takeover Panel over the years have shown that they have had a combination of inadequate staff to police either their members or the affairs of companies quoted on the Stock Exchange; they also clearly lack the will and determination to curb the widespread City scandals and abuses.'[73]

The Greenpaper totally rejected the argument that the primary regulatory mechanism in Britain should continue to be essentially self-regulatory. The Working Party were particularly concerned that the existing system lacked a sufficient degree of public interest. In parti-

[72] May 1974.
[73] p. 7 of the Report.

cular, the Greenpaper considered that the Stock Exchange was reluctant to initiate inquiries on its own accord due to the obvious element of self-preservation and certainly does not have the resources in terms of staff of the required quality and quantity to do so effectively. The Panel, in the Group's view, "does not possess an investigatory or crusading zeal to curb … abuses … and in this connection is very reluctant to take an initiative, particularly in respect to curbing insider trading." The Report does suffer from the fact that it is not unbiased and this has a detrimental effect on the points that it tries to make.

The Greenpaper considered that there was a paramount need for a thorough rationalisation of the regulatory structure. Like the Justice Committee, the Working Group doubted "whether a Government Department run as it must be on traditional civil service lines could act with the speed and flexibility required in an area of commercial, industrial and financial activity where circumstances rapidly change and in particular where abuses arise with great fertility." Thus, the solution proposed was the establishment of an outside Companies Commission, "having a continuing role in the control and regulation of company activities, particularly with reference to the form and frequency of disclosure of information." The Greenpaper throught that the Commission should be given extremely wide responsibilities extending to banking, finance, commodity dealing, the securities industry and supervision over all those enterprises seeking the benefits of limited liability. The vital importance of independence from constant political control and the possession of real as opposed to theoretical powers were recognised by the Working Group. Whilst the Commissioners would be selected by the Secretary of State for Trade, they would be appointed because of their practical experience and reputation.

The relationship of the new regulatory body, which would supersede the official legal regulatory agencies at present, to the self-regulatory agencies would depend upon the circumstances but in all cases the Commission would have overriding authority. Interestingly, the Group thought it would be necessary for the self-regulatory agencies to continue as at present in relation to the day to day administration. The Greenpaper also expressed the view that many of the problems regarding administration and enforcement were a direct result of legislation being too precise and detailed thus rendering the law hopelessly out of date. It was thus suggested that far greater use should be made of secondary legislation and, in particular, regulations issued by the proposed Commission.

It is not without interest that the Council of the Stock Exchange thought it necessary to publish a detailed refutation of the Greenpaper observations.[74] The Council, perhaps with some justification, replied that "the greenpaper in those parts which deal with the operation of the financial markets shows a degree of prejudice and ignorance which is alarming."[75] Apart from reiterating their earlier position, the Stock

[74] Comments on the Labour Working Party on the Reform of Company Law and its Administration, Stock Exchange Council, July 1974 and see also Stock Exchange News Release 17th July 1974.

[75] Comments, p. 15. See also the criticisms of Lord Shawcross in a letter to the Times 5th June 1974 of Mr. Loveday, the Chairman of the Stock Exchange at the Stock Exchange's Press Conference on the 29th June 1974 and of Mr. Edgar Palamountain, the Executive Chairman of the Wider Share Ownership Council in his letter to the Times on the 8th June 1974.

Exchange pointed out that the Greenpaper was too obsessed with the American approach. It is submitted that there is an element of truth in this accusation and given the vastly different historical, geographical, social and regulatory differences between the two countries it is difficult to support the Greenpaper's almost *a priori* acceptance of the controversial proposals without any real empirical evidence.

Despite this, however, there would appear to be a substantial body of opinion behind the Greenpaper's recommendations. The Labour Party has largely endorsed the report and, more recently, the Fabian Society has made an attack on the effectiveness of the Department of Trade, Stock Exchange and accountancy profession in the context of accounting principles and standards.[76] On the other hand, the bulk of informed opinion would adopt a more hesitant approach of the City institutions. The recent report of the Bar Association for Commerce, Finance and Industry on Company Law Reform is characteristic of this: "we would be strongly against the introduction of a new bureaucratic organisation with power to superimpose a new and complex body of laws and regulations on the existing system."[77] Apart from the official and quasi-official views of the City there has been a wealth of comments from interested individuals. The press, invariably ambiguous, would seem on the whole to favour some kind of new regulatory agency.[78] But on the other hand, Russel Lewis writing in the Daily Telegraph has commented that "it is a fair bet that if an SEC is set up here, it will manage in record time to become a senile Throgmorton Street poodle".[79] The academics in this field would appear, surprisingly, to favour the installation of a regulation Commission.[80] Even in the Department of Trade, views are mixed. Although it is reasonably clear from the evidence they submitted to the Jenkins Committee that they did not see the need for any new regulatory authority it

[76] Evidence of the Fabian Society to the Secretary of State for Trade Aims and Scope of Company Reports, pp. 2-3 and see also David R. Allan, *Socialising the Company,* Young Fabian Pamphlet, Number 37 at p. 26.

[77] March 1975, para. 30.

[78] Hugh Stephenson, Times December 29, 1975, Financial Times December 18, 1974, Richard Lamb, with whom one of the authors collaborated, City Press 16th January 1975, Christopher Williams Times March 8, 1974, and Times April 15, 1976.

[79] 11th September 1973 and see also the Daily Telegraph, June 1, 1973.

[80] J.A. Franks, The Takeover Panel and the SEC, Solicitors Journal 27th November 1970 at 875; B.J. Davis, An Affair of the City, A case Study in the Regulation of Takeovers and Mergers, 36 Mod. L.R. 457-477 C.M. Schmitthoff [1960] J.B.L. 151-159, 1964 at 297, 1966 at 106 and 1967 at 97. Richard Spiegelberg, *The City — Power without Accountability,* (Bland & Briggs 1973) at 252, Fogarty, *A Companies Act 1970* PEP, Gower *The Principles of Modern Company Law* (Stevens, 3rd Edition) at 310, Edward Stamp and Christopher Marley, *Accounting Principles and the City Code, the Case for Reform* (Butterworths 1970) at 62; Michael Blandies, The City Regulations on Mergers and Takeovers Chapter II, *Readings on Takeovers and Mergers* edited by J.M. Samuels, Action Society Trust, (Paul Elek Books Ltd. 1970) at 213 and see in particular the First Annual Conference of the British Accountancy and Finance Association, Edinburgh 14th and 15th September 1970, 'Does British need a SEC to Protect the Investor and Improve Financial Reporting' published in Vol. 2 Journal of Business Finance Quarterly 1970. Securities lawyers abroad often find it difficult to appreciate why there should be so much discussion of this topic; indeed Professor Louis Loss has emphasised to the present authors on more than one occasion that a British SEC is to his mind inevitable and desirable.

may be that there has been a slight change in the position of the Department since then.

Given this dichtomy of opinion, the decision of the present Government to set up a Committee to review the functioning of Financial Institutions is a welcome one. On October 7, 1976, the Government announced that it had appointed Sir Harold Wilson to chair the Committee. The terms of reference are,

> "to enquire into the role and functioning, at home and abroad, of financial institutions in the United Kingdom and their value to the economy, to review in particular the provisions of funds for industry and trade; to consider what changes are required in the existing arrangements for the supervision of these institutions, including the possible extension of the public sector and to make recommendations."

In addition, on October 21, 1976, the Secretary of State for Trade, Mr. Edmund Dell, announced in Parliament four measures for improving supervision of the securities market. Mr. Dell pointed out that the Committee under Sir Harold Wilson would be concerned with this issue but the inquiries of the Department of Trade had shown certain areas to be in need of immediate attention. To this end the Trade Secretary stated: "I have therefore decided that, without pre-empting the study to be undertaken by the Committee of Inquiry, a number of limited measures need to be taken to improve the supervision and functioning of the present system."

The measures referred to are as follows:-

1) A joint review body should be set up by the Department and the Bank of England. This would keep the working of the present system under review and bring to light any gaps in the statutory as well as non-statutory areas.[81] 2) The Bank of England should develop its surveillance of the securities industry with a view to improving the effectiveness of the existing self-regulatory machinery. This should go some way towards increasing the effectiveness of the new review body. 3) Legislation should be introduced as soon as opportunity permits to bring abuses such as insider trading within the scope of the law and to impose tighter restrictions on loans by companies to their directors. 4) Again, as soon as opportunity permits, the Prevention of Frauds (Investments) Act should be amended in order to bring up to date the Department of Trade's regulation of the statutory part of the securities system. This would include more

[81] Recently the Secretary of State for Trade, the Hon. Mr. Edmund Dell, has announced the terms of reference for the new Department of Trade-Bank of England Review Body. They are

> "to keep under review the functioning of the Securities Market and the arrangements for its supervision; to identify any gaps or any deficiencies in the combination of statutory and self-regulatory control and to make recommendations as appropriate to the Secretary of State and Governor of the Bank of England."

The Body will have a joint chairman — the appropriate department secretary from the Department of Trade and a Deputy Governor of the Bank of England. There will be four other officials, two each from the Department of Trade and the Bank of England nominated from time to time by the joint chairman. It should be emphasised that the Body will have no executive powers and will in no way alter the respective responsibilities of the Department of Trade and Bank of England, nor is it in any way calculated to pre-empt Sir Harold Wilson's Committee.

effective and flexible powers to supervise licensed dealers in securities and possibly provide for licensing of investment advisers.

Added to this, it is proposed that an independent committee be established with the cooperation of the accountancy profession to review its investigatory and disciplinary procedures. Indeed, there has been a growing concern relating to this particular area and there is little doubt that many of the recent cases advanced as exposing deficiencies in the regulatory structure were more appropriate as examples of deficiencies in disclosure and auditing techniques. It is to be hoped that this initiative coupled with the Companies Act 1976 will go some way towards alleviating these problems.

Whilst heeding, finally, the recommendations of the Jenkins Committee, the Government has delayed answering the final question of whether the present self-regulatory system should be allowed to continue, presumably, until the report of Sir Harold's Committee. Many consider this a reprieve for the present system and the City has greeted this as a last chance for them to put their house in order. Certainly the stepping up of the Stock Exchange investigations would improve the case for self-regulation.

Nonetheless, it would be naive to think that the debate has ended, more likely this will be the calm before the storm. In the light of the great divide of opinion it is certain that the issue will re-emerge in the not too distant future and it is thus necessary for us to weigh up the relative merits of the system and attempt tentative recommendations.

Advantages of self-regulation

(a) The persons concerned with self-regulation at present are by and large experts in the area, indeed often at the pinnacle of their profession. (b) From the standpoint of the taxpayer, an efficient system of self-regulation is inexpensive. Furthermore, it reflects the notion that those who use the market place should contribute to the cost of its maintenance. (c) Speed and flexibility are the hallmark of the administration of a system which can be noted for its absence of legal procedures and technical rules. (d) As the rules are non-legal they can be amended so as to accommodate developments with a minimum degree of trouble. (e) Given the status of self-regulatory norms, the spirit of the rule is more important than its literal wording. (f) The question of motivation can be considered to a far greater extent than where a tribunal is administering laws. (g) Laws must be certain to achieve a relatively high degree of definition but this is not possible with many problems such as insider trading in this area of securities law. (h) Self-regulation and responsibility encourages strong professional integrity and discipline within the profession. (i) Law is concerned with the bare minimum of conduct which is acceptable in a society whereas self-regulatory norms can operate from a higher threshold. (j) Self-regulation helps to avoid the 'them' and 'us' feeling between the regulators and those for whom they are responsible. (k) As the basis of self-regulation is consent, the impact of regulation can be extended beyond legal jurisdiction and in particular to foreigners. (1) Self-regulation is far better able to take account of general or primary policies and objectives than legal regulation. (m) As self-

regulators invariably work on an informal basis they tend to be more prepared to 'stick their necks out' and give assistance in situations where a legal agency more directly accountable to a superior would feel inhibited. (n) People are on a whole more likely to respond to requests than orders. (o) In real terms the sanctions of disapproval and damaged reputations which lie in self-regulation are far greater than any legal sanction.

Some of the alleged disadvantages

(a) Self-regulators appear to act as judge and jury in their own cause. (b) As in most cases, the remedy is based upon exclusion which is often only a threat because it is too draconian to actually impose it. The effectiveness of the regulation depends upon the determination and credibility of the regulators and the desire of the regulated to avoid exclusion from the market, profession or service. (c) As jurisdiction is based upon actual or imputed consent, it is both objectionable and impractical to try and extend it to those who are not among the constituents of the regulator. (d) There is a conflict or potential conflict between the interest of members of the self-regulatory body and those of outsiders who deal with such members, despite a certain degree of identity of interest. (e) Because the self-regulatory agencies do not generally possess a legal basis they do not possess legal powers, invariably not wishing to become possessed of such, and thus cannot adequately deal with outsiders. (f) There is uncertainty as to whether many self-regulatory agencies possess qualified privilege from liability in defamation. (g) Self-regulation can be expensive and wasteful due to unnecessary duplication and conflicting approaches. (h) Regulators may be appointed because of their social preeminance or prestige rather than for administrative qualities. (i) As the public at large inevitably benefits through public confidence in the securities markets due to increased capital investment and its implications, it is not necessary that the expense of regulating and maintaining the securities industry be borne by direct users of the market. (j) Given the lack of external accountability and surveillance it is difficult to determine whether there are very few instances of likely abuse or whether the self-regulatory agency is merely inept in detecting and exposing such. (k) Due to the framentation of authority it is difficult for an outsider or indeed official regulator at home or abroad to know with whom to deal. Furthermore, as they are essentially private bodies there is no obligation upon them to cooperate anyway. (l) Because of the vague jurisdictional basis possessed by the self-regulatory agencies there can be serious difficulties if their position is challenged in the Courts. Indeed, many of the self-regulatory agencies will not even permit legal representation of persons appearing before them. (m) There are gaps in the self-regulatory network, particularly in the area of new professions and services. (n) The present system of self-regulation has been built up on the basis of a centralised or predominant securities market in the City of London. This could be challenged by the development of a more substantial over the counter market, particularly along the lines of A.R.I.E.L. and the advent of the E.E.C. (o) A primary facet of the self-regulation of the City was the strong social and cultural bond cementing the members, in effect, the 'old boy' or 'old school tie' approach. In recent years this has

diminished considerably. (p) The vast increase of foreign interests, not necessarily sharing the same social and, indeed, moral ethics as those who have dealt with the City traditionally are over anxious to accept without question the rules of the 'establishment.' (q) Law is, at least in theory, more certain and predictable that mere self-regulation and in the climate of fierce international competition many would prefer the more certain legal rules even at a risk of sacrificing 'higher ethics'. (r) Self-regulation can co-exist with legal regulation as it does in the United States to a greater degree. The two are not mutually exclusive. (s) There is no single authoritative voice that can call for urgent legislation to deal with areas where regulation has failed. This is evident in the case of insider trading. (t) There is no clear delineation of responsibility among the existing agencies tending towards a degree of ignorance about the responsibilities and aims of each body which in turn leads to criticisms of failure to deal with matters over which they have neither jurisdiction, authority or expertise. (u) It is questionable how flexible the self-regulators actually are. Although they may well have great expertise on their own function, they may be wholly ignorant of related fields and lack co-ordination with that agency responsible for the particular area. Indeed, the different agencies may come to contradictory decisions. (v) There has been a tendency in recent years for frauds to stretch across different countries. It would thus be preferable for both foreign agencies and those concerned with the enforcement of law internally to have a central authority dealing with these matters in the United Kingdom. One may say that problems have occurred in the drafting of E.E.C. legislation as a result of this absence of a central authority in Britain.

The present authors acknowledge, with great respect and admiration, the efforts made by the various City Institutions to create and service an effective system of self-regulation, which have not been without some success, but would to some extent agree with the remark of Trade Secretary, Edmund Dell, that "our present combination of statutory and self-regulatory control, although perhaps a good deal more effective than its critics admit, could with advantage be improved...." In this regard, we welcome the appointment of the Committee of Enquiry as a step towards necessary improvements in the system. Although the appointment of Sir Harold might be viewed by some with misgivings and, no doubt, political suspicion, it is hoped that the Inquiry and the resultant Report should not be seen as politically biased. The more short term measures proposed by the Trade Secretary in relation to the creation of a joint review body are most welcome although as yet the details of its constitution and powers still have to be worked out together with the role the Bank of England will be expected to play.

It is submitted that there is a problem of co-ordination and delineation of responsibility at present and there is an element of truth in the Greenpaper's criticism that public interest is not always visible. The various Committees established by the Governor of the Bank of England and the Stock Exchange Liaison Committee are not the most effective media for day to day co-ordination and administration of the system. It has been suggested that one solution

would be the formation of a specialised Fraud Unit[82] but this only meets a small aspect of the problem. The inescapable answer would seem to be a rationalisation of the various authorities into a single centralised body or organisation. Indeed, this has been recognised by Lord Shawcross. The controversial issue appears to be the question whether this City Panel or Companies Commission, whatever its nomenclature, should have a statutory basis with legal regulatory and enforcement powers. It is unlikely that meaningful legal powers will be entrusted to a non-statutory body involving such an important topic.

The first question is whether this body should be concerned merely with detection and prosecution of fraud or with a much wider area of responsibility. It is submitted that the broader approach is to be preferred as though fraud is an important brief it would be far too narrow to restrict the new agency to this. On the other hand, it is necessary to delimit the jurisdiction of the proposed body in order that the structure does not become too unwieldy and result in another Department of trade. The larger the organisation, the more difficult it will be to foster the *esprit de corps* that is so vital, particularly in the beginning, and to attract persons of the right calibre.

The second question is whether the new agency should take over the day to day administration now in the hands of the self-regulatory bodies. It is perhaps unlikely that the present structure can be satisfactorily incorporated into a statutory regime. Persons currently engaged in self-regulation are not likely to want to continue their present role unless substantial incentives are offered. As a matter of practical economics, these would not be available. Furthermore, one of the greatest advantages of the present system is the continuous flow of personnel from practice into regulation and vise versa. One doubts whether this would continue in the context of a statutory scheme and if it did it might well give rise to problems of propriety as has been the case in the United States. Thus, it is submitted that the present structure of self-regulation is, at least in the foreseeable future, indispensible. It would, therefore, be necessary to bring the City institutions into the Government's confidence and allow them to function as at present with a sufficient degree of autonomy and independence in order to ensure that they retain their self respect and status in the City.

The Commission should be established by an Act of Parliament, a course of action which should be coupled with a comprehensive updating of company law in order to eliminate lacunae such as insider trading and make the law more effective and realistic in areas such as loans to directors and Section 54. Indeed, there is much to be said for a re-codification of corporation and securities laws. The Commission should consist of three full time members and a Chairman as well as a reasonable number of part-time members. Though it might be undesirable to allow the City institutions direct representa-

[82] T. Hadden, The Control of Company Fraud, Vol. XXXIV No. 503 PEP 1968 at 328, Nicholas Baker, *Better Company Proposals for Company Law Reform,* Bow Group pp. 24-28; see Comment in the New Law Journal February 17, 1972 at 160 and also Mr. Edward Lyons M.P. Vol. 449 House of Commons Debates at 1331.

tion, there might be grounds for a system of nomination. In any event, all appointments should be made by the Secretary of State for Trade. The personnel recruited should be eminent in their particular profession though not solely from the City, and should include at least one lawyer and accountant. Staggered terms of office would be required and there should be provisions directed towards avoiding conflict of interests of the members. It would certainly be necessary to ensure that adequate salaries and retainers are paid to the members of the Commission.

There would effectively be three strata of officers comprising the Commission. The upper tier should consist of senior executive officers, capable of acting on their own initiative with a substantial degree of independence. In the middle there should be an enclave of professional officers with practical experience in their fields. The lower tier could consist of administrative and clerical officers largely concerned with matters of routine. Obviously, sufficiently attractive salaries should be paid to officers in the top two tiers and ideally secondment from the various institutions, as with the present Panel Executive, should be used.

The Commission would ultimately have to be responsible to Parliament. Although certain of its funds will have to be provided for by Parliament control and supervision should not be so tight as to be inhibitive; the Law Commission might prove to be a useful model.

It is considered that the Commission should be concerned with the regulation of dealings in securities, corporate disclosure, the issue of securities, the general administration of the companies legislation and such securities laws as there may be as well as the detection and prosecution of fraud in these areas. The machinery would become too unwieldy if matters such as insurance, consumer credit, Fair Trading, Monopolies and Restrictive Practices and Banking were under the protective umbrella of the Commission and so should be in the hands as seperate Commissions although there should be liaison officers in each.

The Companies Investigation Branch, the Companies Registration Office, and Insolvency Service of the Department of Trade should come within the Commission's terms of reference. The Investigations Branch, unlike the other services could, with advantage, be substantially changed by the appointment of a core of full time inspectors from the senior levels of the legal and accountancy professions. Although, as discussed before, 'silks' would be unlikely to accept full time appointments, senior members of the legal profession who are solicitors would no doubt be willing. A small number of part-time Inspectors could then be appointed as and when the need arose to supplement this panel. Obviously, seven or eight inspectors, albeit full time, could not hope to conduct all inspections but most inspections do not require the constant attention of persons of such calibre and so a second tier or inspectors derived from the relevant professions could be appointed to assist the more senior inspectors.

It is submitted that a strengthening of the police fraud squads would be advantageous. Though it might be considered undesirable

to second police officers to the Commission, much can be gained by encouraging a close rapport between them and the Commission. The role of the Director of Public Prosecutions in matters within the scope of the Commissions responsibility should be transferred to the Commission. It would naturally be necessary to distinguish between persons involved in the giving of advice, the conducting of inspections and the prosecution of any given case.

It may be that the Commission should be granted judicial and quasi-judicial powers such as the licensing of broker-dealers, the disqualification of company directors and even some of the administrative functions of the Companies Court. The senior inspectors could exercise these functions re-inforced by part time Commissioners drawn possibly from the judiciary.

The most difficult question concerns the Commission's relationship with the self-regulatory organisations. It is here that the authors favour the suggestion of the Justice Committee that there should, in effect, be a delegation to these bodies by the Commission of responsibility for day to day administration. Thus a structure combining the advantages of self-regulation with those of statutory rules would be created with administration in the hands of the self-regulators who would be supported by the Commission bringing with it the benefits of co-ordination and rationalisation. It is perhaps unwise for appeals to lie to the Commission and the self-regulatory authorities should be encouraged to erect Appellate Committees such as that of the Takeover panel. A Commissioner could certainly sit on this Committee.

Where present self-regulation is weak or non-existent there would be responsibility on the Commission for this matter until such time as it was entrusted to a self-regulatory body, if at all. In all cases, there would have to be considerable mutual consultation avoiding high handed actions by the Commission and its officers. The Commission, as a matter of political and economic expedience, could not afford to antagonise the self-regulatory structure unless what was at stake was a fundamental issue. It would be interested in improving, not destroying the present structure.

The Companies Policy Division could be transferred to the Commission provided its political responsibilities were removed. It is questionable whether the Commission should be granted legislative power. It should at least have authority to recommend legislation to the Secretary of State though this procedure has not proved over satisfactory with the Director General of Fair Trading whose recommendations for urgent legislation has gone largely unheeded. The Commission should be empowered to promulgate guidelines and issue interpretative opinions and publicise decisions of the self-regulatory agencies as well as itself.

It is felt that though no structure is entirely problem-free the one proposed does seem to maximise the advantages without creating a bureaucratic frankenstein. The City would keep its power but the political and public accriminations would cease, there would be clear demarcations of responsibility and competence with a body that

can 'mop up' any shady areas which emerge, or in situations where the self-regulators cannot cope effectively. The Commission would not be a brooding presence over-shadowing the City but actually part of the present fabric drawn together under the same mushroom. Given the expense of the current official regulatory agencies and that incurred by the appointment of part-time inspectors and the like, it is submitted that the extra cost of the proposed Commission would be minimal. Of course, the self-regulatory agencies would require some assistance, for instance the substantial share of the Takeover Panel's costs which are currently borne by the Bank of England would become the responsibility of the Commission. How much would be allocated to the other bodies would depend on the attitude of the sponsoring institutions. Certainly the Stock Exchange should be encouraged to establish a greater degree of market surveillance which could perhaps be interfaced with the new TALISMAN system. Admittedly, 'online' market surveillance with the present jobbing system would be extremely difficult to construct.

Finally, it must be emphasised that the creation of such a Commission would not be a panacea. Even in countries which possess centralised regulatory agencies, frauds still persist and in practice substantial reliance has been place on the self-regulators. There is also the danger of becoming needlessly bureaucratic and of wastage of valuable resources. A paramount objective for any new body should be that of educating those for whom it is responsible, ensuring that the 'shot gun' is very much in the background. This has been the approach of the Hong Kong Commission and a number of other newly created agencies throughout the world. It is hoped that the Committee of Inquiry will proceed with great caution in an area where there is much to lose and generally little to gain.

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