

UK Takeover Code – Post-Offer Statements and Miscellaneous Changes

January 9, 2015

The UK Takeover Panel has confirmed a number of changes to the UK takeover regime in a series of Panel Statements released in late December and early January.

On 23 December 2014, the Panel published a response ([RS 2014/2](#)) to its September consultation on statements made by parties to an offer relating to a particular course of action that they commit to or intend to take after the end of an offer period. Respondents to the consultation were, in general, supportive of the changes and the Panel has decided to adopt them with minor modifications with effect from 12 January 2015.

[Panel Statement 2015/1](#) released on 2 January 2015 confirmed various changes to Practice Statements and Disclosure Forms to reflect a number of miscellaneous amendments to the Takeover Code which came into effect on 1 January 2015, details of which were set out in our [Client Memorandum](#) dated 27 November 2014.

Finally, [Panel Statement 2015/2](#) released on 5 January 2015 introduces a new dispensation from Rule 9 in connection with the use of bank recovery tools with effect from 10 January 2015.

Post-Offer Undertakings and Intention Statements (RS 2014/2)

RS 2014/2 confirmed the Panel's adoption of a new framework for the regulation of statements made by the parties to an offer relating to a particular course of action that they commit to or intend to take after the end of an offer period. The proposals aim to clarify the status of statements made by the parties to an offer for the benefit of target shareholders, as well as increase the effectiveness of the enforcement tools available to the Takeover Panel where parties to an offer choose to make voluntary commitments. For background to the proposals, please see our [Client Memorandum](#) dated 18 September 2014.

The new rules distinguish between:

- **“post-offer undertakings”**, i.e. statements made by a party to an offer relating to any particular course of action that the party commits to take, or not take, after the end of the offer period and with which it will be required to comply for the period of time specified in the undertaking, unless a qualification or condition set out in the undertaking applies; and
- **“post-offer intention statements”**, i.e. statements made by a party to an offer relating to any particular course of action that such party intends to take, or not take, after the end of the offer period, which will be required to be accurate statements of the party's intentions at the time that they are made and based on reasonable grounds.

The changes will take effect on 12 January 2015, and will apply to statements made on or after this date.

Post-Offer Undertakings

The new regime for post-offer undertakings will operate as follows:

- **Treatment of post-offer undertakings.** If a party to an offer wishes to make a post-offer undertaking, it will be required to consult the Panel in advance on its terms (including any qualifications or conditions). If the undertaking is subsequently made, the Takeover Code would require the party to comply with the terms for the period of time specified in the undertaking, and

to complete any course of action it committed to take by the specified date (an absolute obligation) unless a qualification or condition specified in the undertaking applies. The Panel must also consent to the party's reliance on the qualification or condition.

- **Qualifications or conditions.** Any qualification or condition (and the undertaking itself) must be specific and precise, and be capable of objective assessment – it cannot depend on the subjective judgments of the party to the offer or its directors. In the [September consultation](#), the Panel commented that “a material change of circumstances”, “directors’ fiduciary duties” or “force majeure” would not meet this standard. In RS 2014/2, the Panel noted that a number of respondents have suggested that the Code should allow post-offer undertakings to include “force majeure” qualifications or conditions. In response, the Panel has stated that a party can include a qualification or condition which:
 - provides that if the Panel determines that the party is unable to comply with a post-offer undertaking as a result of an event, act or circumstance outside the control of that party, the undertaking would not apply. The Panel has added that an event, act or circumstance which has the effect of making compliance with the post-offer undertaking more difficult but still capable of being performed would not trigger the relevant qualification or condition; or
 - refers to the financial effect of events on the relevant party or its assets. The Panel notes that the relevant party would be required to provide details on how the relevant financial measure would be calculated.
- **Monitoring.** The Panel will have the power to require periodic written reports on the status of the relevant party's implementation of post-offer undertakings and the appointment of an independent supervisor to monitor compliance with such undertakings. The Panel has modified the September proposals to make clear that it has the discretion to require the report to be published “in whole or in part” to address circumstances where it would be inappropriate to publish the report in full. The Panel has also clarified that a supervisor will not be required if the Panel is satisfied that it is capable of monitoring compliance with the undertaking. If a supervisor is required, it will normally be appointed by the party (and approved by the Panel) during the consultation with the Panel on the proposed undertaking. The Panel will require evidence as to the independence of the supervisor.
- **Role of advisers.** The Panel expects an adviser to a party to an offer (including financial advisers) to provide competent advice to its client on the requirements for, and consequences, of making a post-offer undertaking at the time that it is made. Beyond this, the Panel would not normally expect an adviser to be responsible for ensuring that the party complies with the terms of a post-offer undertaking, since the adviser's mandate is likely to have ended once the offer has ended. The Panel also does not expect the adviser to have any on-going relationship with any supervisor. The above applies equally to post-offer intention statements.

Post-Offer Intention Statements

RS 2014/2 confirmed that post-offer intention statements need to be a genuine reflection of the party's intention at the time (a subjective test) and be made on reasonable grounds (an objective test). If during a 12 month period from the end of the offer period, the party subsequently decides to act in a manner which is contrary to the statement, it must consult the Panel so that the Panel can consider, first, whether to require the party to announce its reasons for such decision and, secondly, whether the party's decision indicates that the statement when made was not prepared to the standards required by the Code. If this were to be the case, the Panel could take disciplinary action under Code against the party and/or its advisers. Beyond this, however, the Panel's consent to a party acting or not acting in a way which is different from its intentions in the post-offer intention statement would not be necessary.

Impact of the changes in practice

With effect from 12 January 2015, a bidder can choose whether the statements it makes in relation to the target business are commitments or intention statements. It is likely that most bidders will choose to continue to make statements of intention only, with the Panel's disciplinary powers being sufficient incentive to act in accordance with those statements. However, the new regime may well make it easier for a target board to extract post-offer undertakings from a bidder in return for its recommendation of the offer, thus strengthening a target board's position in transactions where particular concern exists regarding a bidder's future plans for the target's business.

Miscellaneous changes to Practice Statements (PS 2015/1)

In PS 2015/1, the Panel confirmed that it has withdrawn Practice Statements Nos. 8 ("Timetable extensions in potentially competitive situations") and 16 ("Note 5 on the definition of acting in concert – standstill agreements") as a result of the miscellaneous changes to the Code introduced on 1 January 2015.

The Panel has also amended the following Practice Statements:

- **Practice Statement No. 12: Relief for principal traders from Rule 9.** The amendment reflects a change to Note 16 on Rule 9.1, so that the relief from the 30% mandatory bid threshold in Rule 9.1 for principal traders within a financial organisation, who are normally permitted to hold up to an additional 3% of a company's shares without triggering an obligation to make a mandatory bid, applies only to shares which are acquired and held by the principal trader in a client-serving capacity.
- **Practice Statement No. 20: Potential bidders not publicly identified.** The amendments reflect changes to Note 4 on Rule 2.2, which tighten the rules applicable to potential bidders who have ceased active consideration of an offer and have been granted a dispensation by the Panel from having to make a "possible offer" announcement. If, despite the dispensation, the Panel nevertheless requires an announcement to be made as a result of rumour or speculation or to correct a false market, the Practice Statement clarifies that the six month "restriction period" will run from the date on which the dispensation was granted or (if the announcement contains a "no intention to bid statement") the date of the announcement itself.
- **Practice Statement No. 22: Disclosure of irrevocable commitments.** The amendments reflect the changes made to the Code in relation to the disclosure of irrevocable commitments. These include the requirement to disclose any irrevocable commitment procured prior to an offer period by no later than 12 noon on the business day following the identification of the bidder.
- **Practice Statement No. 28: Entering into talks during a restricted period.** The amendments reflect those made to Note 4 on Rule 2.2 (as referred to above) and Note 2 on Rule 2.8. As regards the latter, the Practice Statement now provides that, where a potential competing bidder has released a "no intention to bid" statement but continues to acquire interests in target shares prior to the third party offer being withdrawn or lapsing, it will forfeit its ability to have its "no intention to bid" statement set aside.

As a result of the changes to the Code on 1 January 2015, the Panel has also updated the Disclosure Forms on its website. The new Disclosure Forms should be used with immediate effect.

Rule 9 dispensation in connection with the use of bank recovery tools (PS 2015/2)

In PS 2015/2, the Panel announced the introduction of a new Note 19 to Rule 9.1 of the Code, prompted by the introduction of new rules for the recovery and resolution of banks, building societies and investment firms.

The new Note 19 provides that, in the case of a Code-governed company, the mandatory bid requirement in Rule 9.1 will not apply in relation to any change in interests in shares or other transaction caused by the use of resolution tools, powers and mechanisms under the bank recovery regime. These include the exercise by the Bank of England or the Treasury of a stabilisation power and the application by the Treasury of a public equity support tool. The amendment will come into effect on 10 January 2015.

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