

UK Takeover Panel Consultation on Post-Offer Undertakings and Statements of Intention

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The UK Takeover Panel is consulting on 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 ([PCP 2014/2](#)).

The proposed amendments have been prompted by the recent possible offer by Pfizer for AstraZeneca and, specifically, the five year commitments which Pfizer proposed to give (regarding AstraZeneca's research and development operations and the location of its facilities) in the event that its offer was successful. They also respond to concerns raised by the UK Business Secretary, Vince Cable, in the aftermath of the Pfizer approach.

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.

Lessons from Pfizer/AstraZeneca

In the course of Pfizer's attempt to secure a deal with AstraZeneca, its chief executive was called to appear before House of Commons Business Committee and give assurances that it would protect jobs and investment in pharmaceutical research and development in the UK. The day before the appearance, Pfizer circulated a 23 point statement that it proposed to present to the committee setting out what it described as 'legally binding' commitments. This sparked the beginning of a public debate on how the Takeover Panel could practically hold a bidder to its statements of intention and whether the law should be reformed to provide regulators with greater powers to pursue potential non-compliance.

Currently, a bidder is required under Rule 24.2 of the Takeover Code to make various statements of intention as regards the future business of the target company, and it will be regarded under the Takeover Code as being committed to those statements for a period of 12 months following the offer, unless there is a 'material change of circumstances'. The Takeover Panel has no specific powers to monitor compliance, but if the requirements were subsequently found to have been breached, the Panel could seek a court order under the UK Companies Act obliging the party to comply with its stated intentions. However, given that this would be likely to require action already taken to be unwound, a court order might, in the circumstances of a particular case, be impractical. In those circumstances, it might be the case that the only action which could be taken by the Panel in practice would be to exercise its disciplinary powers. There is no power for the court to award damages in the event of a contravention.

The Takeover Panel has therefore concluded that it needs enhanced capabilities to monitor and enforce commitments of the nature made by Pfizer. However, it believes that it would not be appropriate to apply these enhanced measures in all cases where statements are made as to the future conduct of a party to an offer. The proposed new framework will therefore distinguish between:

- **"post-offer intention statements"**, i.e. statements relating to any particular course of action that a party to an offer 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; and
- **"post-offer undertakings"**, i.e. statements relating to any particular course of action that a party to an offer 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.

The proposals as currently drafted allow a bidder to choose whether the statements it makes in relation to the target business under Rule 24.2 are commitments or intention statements.

Post-Offer Intention Statements

Under the proposed new rules, post-offer intention statements will 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). The current provision that deems a party to be committed to statements of intention for a period of 12 months from the end of the offer period will be removed. However, if during that 12 month 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 make an announcement explaining its 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 the Code against the party and/or its advisers.

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.

Post-Offer Undertakings

If a party to an offer chooses to make a post-offer undertaking, the Takeover Code would require it to comply with the terms of the undertaking for the period of time specified in the undertaking, and to complete any course of action it committed to take by the specified date. Any qualification or condition which the party wishes to impose (and the undertaking itself) must be specific and precise, and be capable of objective assessment – it cannot depend on the subjective judgments of party to the offer or its directors (in particular the Panel comments that “a material change of circumstances”, “directors’ fiduciary duties” or “force majeure” will not meet this standard). In order to monitor and enforce the undertakings, the Panel is proposing new powers to require periodic written reports and the appointment of a supervisor (much like the monitoring trustees appointing by competition regulators in the UK). The costs of this will need to be borne by the person making the undertaking, and so a party considering whether to make a post-offer undertaking in order to improve its chances of a successful outcome will need to weigh these costs against the benefits of making the undertaking.

If the Panel considers, with the help of its new monitoring powers, that there is a risk of the bidder/target breaching the undertaking, it can use its existing powers to seek an order from the court to prevent this from happening (breach of which would be a contempt of court).

Impact of the Proposals

The Panel has so far not had cause to seek enforcement of the Code through the courts, and one of the perceived strengths of the UK takeover regime is the speed at which the Panel can resolve disputes without recourse to litigation. These proposals therefore represent a significant development in the UK takeover regime, and are certainly a robust response to the concerns raised by the Pfizer commitments. In particular, the monitoring powers will enable the Panel to take early action prior to a contravention occurring, which is a weakness of the Code in its current form. The distinction between post-offer intention statements and post-offer commitments will enable shareholders to attach appropriate weight to statements made by the bidder or target, and hopefully lead to greater transparency and accountability.

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