

UK Takeover Code – Miscellaneous Changes and Practice Statement 28

November 27, 2014

Introduction

On 14 November 2014, the UK Takeover Panel published a response statement ([RS 2014/1](#)) to its July consultation on miscellaneous changes to the Takeover Code ([PCP 2014/1](#)). The consultation paper proposed a series of minor changes to the Code which largely reflect the development of market practice and, in some instances, tighten the operation of the rules. The response statement confirms that substantially all of the changes proposed in July will be adopted.

At the same time, the Takeover Panel published [Practice Statement 28](#), dealing with the circumstances in which a bidder may approach a target in order to open or reopen takeover talks where the bidder would otherwise be prohibited under the Takeover Code from doing so – for example because the bidder has previously made a “no intention to bid statement” or its offer has lapsed or been withdrawn.

RS 2014/1 – Miscellaneous Changes

Some of the more significant changes to the Takeover Code confirmed by RS 2014/1 are as follows:

- **Clearer rules on the date by which a potential competing bidder must clarify its position.** As proposed, the Panel has amended Rule 2.6 so that a potential competing bidder who has been the subject of a “possible offer” announcement under Rule 2.4 must clarify whether it will launch a competing offer by 5.00 p.m. on the 53rd day after the publication of the original bidder’s offer document. Previously this date was flexible and determined by the Panel on a case-by-case basis. Where the original bidder’s offer is proceeding by way of a scheme of arrangement, the deadline will usually be the 7th day prior to the target shareholder meetings to approve the scheme, but the Panel has decided to preserve a wider discretion to specify a later date in the case of a scheme in order to accommodate varying scheme timetables.
- **Acquisitions of interests in shares by former competing bidders.** Where a potential competing bidder has released a “no intention to bid” statement but continues to acquire interests in target shares after Day 53 of the original bidder’s offer timetable, it will forfeit the ability to have its “no intention to bid” statement set aside, even if can secure the agreement of the target company. Note 2 to Rule 2.8 will be amended to reflect this change.
- **Potential bidders not publicly identified.** Tighter rules will apply to a potential bidder who has ceased active consideration of an offer for the target company and has been granted a dispensation by the Panel from having to make a “possible offer” announcement. Rule 2.2 will be amended to prevent the potential bidder from approaching the board of the target or making market purchases of target shares for the following three months. More lenient restrictions will apply for a further three months. The Panel has confirmed in the response statement that it believes a stricter approach is appropriate for a potential bidder who has not been publicly identified because it is no longer actively considering an offer, as opposed to one who has been identified and subsequently made a “no intention to bid” statement. The Panel has decided not to proceed with proposals that would have made it more likely that the potential bidder would be identified if there was further rumour or speculation surrounding the target.

- **Clearer procedures for resolving competitive situations.** The Panel's default auction procedures used to resolve competitive bid situations will be incorporated into the Code as a new Appendix 8. The default auction procedures dictate that an auction process should have a maximum of five rounds and take place over five consecutive business days. The parties will still be able to agree their own procedures if they wish.
- **Disclosure of irrevocable commitments, letters of intent and interests in relevant securities.** The Panel has made a number of amendments to the disclosure requirements for irrevocable commitments, letters of intent and interests in relevant securities. Among others, this includes an amendment to Rule 2.11(b) so to require any irrevocable commitment or letter of intent procured prior to an offer period to be disclosed by no later than 12 noon on the following business day following the identification of the bidder. The requirement for a bidder to disclose details of their interests and short positions in the relevant securities of the target company (and those interests or short positions held by concert parties) in the firm offer announcement has been reinstated (following its deletion in 2010). As a result, irrevocable commitments and letters of intent will not need to be disclosed in an Opening Position Disclosure if they have been disclosed in a firm offer announcement or under Rule 2.11.
- **Tighter rules surrounding “no increase” or “no extension” statements.** The Panel has amended Note 2 on Rule 32.2 and Note 2 on Rule 31.5 so as to require a bidder to consult the Panel if it wishes to include a reservation its “no increase” or “no extension” statement. Bidders cannot include reservations which depend solely on subjective judgments of the bidder or its directors or the fulfilment of which is in their hands.
- **Clarification on the nature of the independent advice provided to the target board.** Rule 3.1 and Note 3 to Rule 3.1 have been amended to clarify that the principal role of the independent adviser is to advise the board of the target company as to whether the financial terms of the offer (including any alternative offers) are “fair and reasonable”.

The amendments to the Code introduced as a result of RS 2014/1 will take effect on 1 January 2015.

Practice Statement 28 – Entering into talks during a restricted period

Practice Statements are issued by the Panel to provide informal guidance to companies involved in takeovers as to how the Panel normally interprets and applies relevant provisions of the Takeover Code. New Practice Statement 28 deals with the circumstances in which a bidder may approach a target in order to open or reopen takeover talks where the bidder would otherwise be prohibited under the Takeover Code from doing so. It will apply with immediate effect.

Approaches following a no intention to bid statement

A bidder making a statement that it does not intend to make an offer for a target company will usually be bound by that statement for a period of six months and may not take any steps in connection with a possible offer for the target company (including an approach to the target company) during that restricted period except in certain limited circumstances or with the consent of the Panel (Rule 2.8). This rule is frequently seen in operation after a bidder's approach has been rejected by the target and the bidder is forced to clarify its intentions by the end of the 28 day “put up or shut up” deadline – notably the recent rejection by AstraZeneca of Pfizer's approach.

Existing Takeover Code rules provide that the restrictions may be set aside with the consent of the Panel if the board of the target company agrees. Practice Statement 28 explains that the Panel will normally allow the bidder to make a single confidential approach to the board of the target during the restricted period in order to ascertain whether the target would be interested in opening or reopening talks. If this approach is rejected, the bidder will not be able make any further approach, and the restrictions will continue for the remainder of the six month period. If on the other hand the target is receptive to the bidder's approach, the restrictions will be lifted for as long as talks between the parties continue; a put up or shut up deadline is not necessary as the target can end the talks at any time. If the talks continue

beyond the six months, a put up or shut up deadline will be imposed which will expire on the 28th day following the end of the restricted period.

Third party involvement

Stricter rules will apply if the bidder has made its no intention to bid statement after a third party has launched an offer. In these circumstances, the Panel will only allow a single confidential approach to the target if the third party's offer has been withdrawn or lapsed.

Before a bidder has been identified

If a target company is the subject of rumour or speculation concerning a takeover offer as a result of actions by a potential bidder, that bidder may nonetheless be excused from making a public statement clarifying its intentions where it can persuade the Panel that it has ceased actively to consider an offer. In these circumstances, the bidder will be subject to the same six month restrictions described above. The Practice Statement notes that the Panel will not normally consent to the restrictions being set aside in the first three months, but will normally allow a single confidential approach in the second three month period.

Lapsed or withdrawn offers

Where a bidder has proceeded to make an offer, but the offer lapses or is withdrawn (for example because the necessary conditions have not been satisfied), Rule 35.1 prevents the failed bidder from making another takeover attempt by imposing substantially the same restrictions on the bidder as described above, but for a 12 month period. The Practice Statement confirms that the Panel will adopt the same approach in these circumstances, and will normally allow a single confidential approach to be made to the board of the target company to ascertain whether the target wishes to enter into talks regarding a new possible offer.

Post-offer Undertakings and Intention Statements

The Panel's second consultation of 2014 in relation to post-offer undertakings and intention statement closed on 24 October 2014 ([PCP 2014/2](#)). For more information on the proposals see our [Client Memorandum dated 18 September 2014](#).

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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