

UK Takeover Panel proposals to amend the Takeover Code

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Recent market activity

The UK Takeover Panel recently published its [Annual Report for 2013/14](#). The Director General of the Panel noted that activity in 2013 was “subdued”, and that the level of public takeovers in the UK has shown a year on year decline for seven consecutive years. For example, 61 offeree companies went into an offer period in 2013/14, compared with 81 in 2012/13.

However, as acknowledged by the Director General and evidenced by market activity, there has been a pick-up in 2014. The first half of the year has seen an increase in public M&A activity on the main market of the London Stock Exchange and a corresponding increase in deal value, compared to the same period in 2013. The majority of the offers were recommended - hostile offers continue to be rare - and there were no competing offers for target companies during that period.

Put up or shut up in action

Two notable bids in the first half of 2014 were Pfizer Inc’s failed bid for AstraZeneca plc and the more recent, recommended offer for Shire plc by AbbVie Inc. Both bids involved US bidders in the pharmaceutical sector proposing a tax inversion structure, whereby the bidder would redomicile in the UK for tax purposes. Pfizer made its proposals conditional upon a recommendation from the AstraZeneca board, but when it became clear that a recommendation would not be forthcoming, it was obliged by UK Takeover Code rules to make an announcement that it did not intend to proceed with an offer (known as the “put up or shut up” regime). Pfizer will be bound by this statement for a period of six months. Meanwhile, the AbbVie/Shire combination is expected to be completed in the fourth quarter of 2014.

AstraZeneca’s robust position was helped by a number of significant changes made to the Takeover Code in September 2011, partly in response to criticism in the wake of the Kraft/Cadbury bid that the rules were weighted too heavily in favour of bidders. Amongst other changes, the put up or shut up regime was strengthened so that a bidder has a fixed period of 28 days following the date on which it is first identified to either announce a firm intention to make an offer, or announce that it does not intend to make an offer. Extensions to that deadline can only be made at the request of the target company and with the Takeover Panel’s consent.

Consultation Paper (PCP 2014/1)

The Takeover Panel has kept changes to the Code to a minimum in order to assess the effect of the September 2011 reforms, which it believes are working satisfactorily. It has now published a number of further, minor, changes to the Code which largely reflect the development of market practice and further tighten the operation of the rules in some cases ([PCP 2014/1](#)). Some of the more significant changes are as follows:

- **Increased restrictions on unidentified potential bidders who withdraw from a deal.** A potential offeror who has ceased active consideration of an offer and is therefore not publicly identified will be prevented from approaching the board or making market purchases of target shares for the following three months. Further rumour or speculation surrounding the target is also now more likely to result in that potential bidder being identified.
- **Clearer procedures for resolving competitive situations.** The Panel’s default auction procedures used to resolve competitive bid situations will now be incorporated into the Code, with some

modifications. Broadly, this will involve a maximum of five rounds of bidding, taking place over five business days in the latter stages of the offer period.

- **Tighter rules surrounding “no increase” or “no extension” statements.** Bidders are now more likely to need to consult the Panel over the content of these statements, and cannot include reservations which depend solely on subjective judgments of the bidder or its directors or the fulfilment of which is in their hands.
- **Clearer rules on the date by which a potential competing offeror must clarify its position.** The Panel is proposing that a potential competing offer must clarify its position as to whether it will launch a competing bid for the target company by a fixed deadline of 5.00 pm on the 53rd day after the publication of the original bidder’s offer document, in order to provide target shareholders with more certainty. In the case of a scheme of arrangement, this deadline will usually be 5.00 p.m. on the seventh day prior to the date of the target shareholder meetings to approve the scheme.
- **Restrictions on the competing bidder’s ability to have a “no intention to bid” statement set aside.** If a competing bidder confirms on Day 53 that it will not launch a bid, it will not be able to have this statement set aside in the event that the original bidder’s offer lapses, even with the agreement of the target board, if it has made market purchases of target shares in the intervening period. This reflects the current market practice of the Panel.
- **Disclosure of irrevocable commitments, letters of intent and interests in securities.** Changes are proposed to the way in which irrevocable commitments, letters of intent and interests in securities of parties to an offer are disclosed, with certain consequential changes to the disclosure forms.
- **Clarification of the nature of the independent advice to the target board.** The changes make it clear that the principal role of the independent financial adviser is to advise the target board as to whether the financial terms of the offer are fair and reasonable, with the board considering all other relevant factors.

A number of other minor changes are also proposed to the Code – many of which represent existing, unwritten market practice. Whilst there is no overall theme to the Panel’s proposals, many of them are designed to further regulate the conduct of a bidder and in particular to ensure certainty for target shareholders. The consultation closes on 12 September 2014.

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