

UK Takeover Code – Asset Sales; Statements of Intention and Post-Offer Undertakings

January 8, 2018

Introduction

The UK Takeover Panel has recently confirmed a number of amendments to the UK Takeover Code in two Response Statements to its public consultations in the second half of 2017.

On 11 December 2017, the Panel published:

- [Response Statement 2017/1](#) to its July 2017 consultation on asset sales and other matters ([PCP 2017/1](#)); and
- [Response Statement 2017/2](#) to its September 2017 consultation on statements of intention and post offer undertakings ([PCP 2017/2](#)).

The amendments set out in these Response Statements took effect on January 8, 2018. The key amendments are:

- A bidder will have to provide details on: its intentions regarding any research and development function of the target; any anticipated material change in the balance of the skills and functions of the target's employees and management; and the likely repercussions of its strategic plans on the location of the target's headquarters and headquarters functions.
- Details of the bidder's intentions (covering the additional matters above) will have to be included in the offer announcement.
- A bidder cannot publish its offer document for at least 14 days from the offer announcement unless the target's board consents.
- Whether or not a post-offer intention statement has been followed through will need to be publicly announced and notified to the Panel.
- Where a post-offer undertaking is made in the context of a takeover offer, a report on how the undertaking has been complied with must be publicly announced as well as submitted to the Panel.

Asset Sales and Other Matters (RS 2017/1)

The Panel confirmed in RS 2017/1 that it has adopted (with certain modifications) the proposed amendments in PCP 2017/1 relating to the sale of a target's assets in competition with an offer. For background to these amendments, please see our [Client Memorandum](#) dated September, 12 2017.

Preventing a bidder from circumventing the Code by purchasing a target's significant assets

To prevent a bidder from circumventing the Code by purchasing a target's significant assets, the Panel proposed a number of amendments to Rule 2.8, Rule 12.2(b)(i) and Rule 35.1 (and related notes) in PCP 2017/1 which have now been adopted in the Code (with certain modifications). In particular, the Code now provides that:

- a person who has made a Rule 2.8 “no intention to bid” statement cannot purchase, agree to purchase or make any statement which raises or confirms the possibility that it is interested in purchasing, a target’s significant assets, within six months of the date of such statement (except in certain circumstances or with the Panel’s consent);
- a bidder or its concert parties cannot purchase, agree to purchase or make any statement which raises or confirms the possibility that it is interested in purchasing, a target’s significant assets:
 - during a competition reference period (except with the Panel’s consent); or
 - where an announced offer has been withdrawn or has lapsed, within twelve months from the date on which such offer is withdrawn or lapses (except with the Panel’s consent);
- in assessing whether such assets are significant for these Rules, the Panel would consider the:
 - aggregate value of the consideration for the assets compared with the aggregate market value of all the target’s equity shares;
 - value of the assets to be purchased compared with the total assets of the target (excluding, in each case, cash and cash equivalents); and
 - the operating profit attributable to the assets to be purchased compared with that of the target.

Relative values of more than 75% will normally be regarded by the Panel as significant.

Sales of all or substantially all of the target’s assets in competition with an offer

The Panel has amended the Code to provide that, where in competition with an offer, a target announces that it has agreed terms on which it intends to sell all or substantially all of the target’s assets and to return to shareholders all or substantially all of the target’s cash balances:

- a statement made by the target’s board quantifying the cash sum expected to be paid to shareholders would be treated as a “quantified financial benefit statement”; and
- the purchaser or potential purchaser of such assets cannot acquire the target’s shares during the offer period unless the target board makes a statement quantifying the cash sum expected to be paid to shareholders, and then only to the extent that the price paid does not exceed the amount stated.

In addition, if a target company commences discussions relating to the sale of all or substantially all of its assets during an offer, the Code now requires that information given to a potential asset purchaser must, on request, be given to another offeror or bona fide potential offeror

Amendments to Rule 21.1 on frustrating action

Rule 21.1(a) prevents a target’s board from taking any action which may result in any offer being frustrated or in a target’s shareholders being denied the opportunity to decide on such offer’s merits unless shareholder approval is obtained. The Panel has confirmed the amendment of Rule 21.1 to:

- state that the Panel will normally disapply Rule 21.1(a) if:
 - the proposed action is conditional on the offer being withdrawn or lapsing;
 - the bidder consents to such action; or
 - shareholders, with more than 50% voting rights in the target, state in writing that they approve such action and would vote in favour of any resolution approving such action at a general meeting.

If the Panel disapplies Rule 21.1(a) where such action is conditional on the offer being withdrawn or lapsing, the target board must publish an announcement containing certain specified information on such action; and

- require that, where shareholder approval is sought for a proposed action under Rule 21.1, the target board must obtain competent independent advice on whether the financial terms of the proposed action are fair and reasonable, the Panel must be consulted regarding the date on which the relevant shareholder meeting is proposed to be held, and the target board must send a circular to shareholders containing certain specified information about such action as soon as practicable after the announcement of such action.

The Panel has also adopted a new note on Rule 21.1 which states that it will normally permit a target to enter into an inducement fee arrangement with a counterparty to a transaction to which Rule 21.1 applies if the aggregate value of such fee(s):

- relating to the same asset(s) is no more than 1% of the transaction value (or if there are two or more transactions in respect of the same asset(s), the transaction with the highest value); and
- in respect of all transactions to which Rule 21.1 applies is no more than 1% of the value of the target calculated by reference to the bid price at the time of the Rule 2.7 announcement.

Statements of Intention and Post-Offer Undertakings

A new framework for the regulation of statements made by parties to an offer was introduced to the Code in January 2015. For background to this framework, please see our [Client Memorandum](#) dated January 9, 2015. Specifically, this framework distinguishes between:

- **“post-offer intention statements”**, i.e. statements relating to any particular course of action that it intends to take, or not take, after the end of the offer period which must be accurate statements of its 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 it commits to take, or not take, after the end of the offer period and with which it is required to comply for a stipulated time unless an exception applies.

The Panel confirmed in RS 2017/2 that it has adopted the amendments proposed in PCP 2017/2 relating to a bidder’s plans for a target and its business and to the post-offer intention statement and undertakings regime.

Statements required in the offer document

Rule 24.2(a) of the Code requires a bidder to explain, in the offer document, the long-term commercial justification for the offer. Specifically, it must state its intentions with regard to the target’s future business, the continued employment of the target’s employees and management and its strategic plans for the target and likely repercussions on employment and the locations of the target’s places of business.

Following its September 2017 consultation, the Panel has concluded that the bidder must also state:

- its intentions for the target’s research and development functions;
- its intentions regarding any material change in the balance of the skills and functions of the target’s employees and management; and
- the likely repercussions of its strategic plans on the location of the target’s headquarters and headquarters functions.

The Panel notes that any statement made by a bidder under Rule 24.2(a) must be specific and bespoke, and reflect the bidder’s business rationale and intentions. It must also be an accurate statement of its intention at the time that it is made and made on reasonable grounds. If a bidder’s intentions for a target

should change during an offer, the Panel notes that the bidder's new intentions would have to be announced promptly.

The Panel also observed that a bidder may wish to state that they will review the target's business after completion of the offer. However, such statement will not, on its own, satisfy the Rule 24.2 requirements. The Panel notes that the bidder should disclose the scope of the review and the bidder's expectations relating to the review.

Statements required in the offer announcement

The Panel has introduced a new requirement that the bidder states, in its firm offer announcement, its intentions relating to the business, employees and pension schemes of the target and the bidder (as required by Rule 24.2 in the offer document). The purpose of this new requirement is to enable an earlier and more informed debate to be held by shareholders, employee representatives, pension scheme trustees and other stakeholders as to the offer and the bidder's intentions.

Bidder not to publish offer document for 14 days without target board consent

The Panel has amended the Code to prevent a bidder from publishing an offer document for 14 days from its firm offer announcement without the target board's consent. The purpose of this amendment is to provide the target board with more time (particularly where the bid is hostile) to formulate its opinion, reasons and views on the offer and the bidder's strategic plans for the target (as required by Rule 25.2) and prepare its defence (if any) against the offer.

The Panel notes that a bid conduct agreement or any similar agreement between the parties must not include an agreement by the target board to waive such restriction. However, it would be permissible for a firm offer announcement to state that the target board has consented to the publication of the offer document for the purposes of this new restriction.

Confirmation of post-offer intention statements

The Panel has introduced a new Rule 19.6(c) to require a bidder or a target who has made a post-offer intention statement, to provide a written confirmation to the Panel on whether it has taken, or not taken, the course of action set out in such statement at the end of 12 months from the date on which the offer period ends (or any other specified period). Such confirmation will have to be published via a RIS.

Reports on post-offer undertakings

Under Rule 19.5(h), if a bidder or a target makes a post-offer undertaking, such party must submit written reports to the Panel on such undertaking. Previously, the Panel had the discretion to determine whether such report should be published.

The Panel has now amended Rule 19.5(h) to state that such report (in whole or in part as required by the Panel) should be published in all cases. Specifically, where a post-offer undertaking is for a period longer than a year, such report will have to be published at least annually.

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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