

# UK TAKEOVER CODE UPDATE

## Panel Publishes Response Statement 2017/2: Statements of Intention and Related Matters

13 December 2017

On 19 September 2017, the UK Takeover Panel published Panel Consultation Paper 2017/2 (the *PCP*), which proposed amendments to the rules of the UK Takeover Code relating to statements of intention and related matters. On 11 December 2017, the Panel published Response Statement 2017/2 (the *RS*) having received responses to the PCP from 13 respondents, including the Quoted Companies Alliance, the International Corporate Governance Network, the Investment Association and the Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales. The RS summarizes the responses received by the Panel and sets out the changes to the Code that will take effect on 8 January 2018 (including in relation to ongoing bids).

If you have any questions concerning the changes to the Code, please reach out to your regular firm contact or to:

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The full text of the PCP can be accessed via this [link](#) and the RS via this [link](#).

The full text of the Takeover Code can be accessed via this [link](#).



## SUMMARY

The PCP set out the Panel's proposals to amend the rules of the Code relating to post-offer intention statements, including the rules governing when in the bid timetable such statements must be made, which specific areas of the target's business they must cover and how long the target's board, employee representatives and pension scheme trustees should have to consider and respond to them. The proposed amendments were designed to increase transparency in the bid process, including in relation to the bidder's post-offer intentions for the target's research & development (R&D) functions and the location of the target's headquarters (HQ) – two areas that have faced considerable political and media scrutiny in a number of recent, high-profile inbound UK bids (*e.g., Pfizer's lapsed bid for AstraZeneca* and *SoftBank's takeover of ARM Holdings*).

The majority of the Panel's proposals in the PCP are being adopted without amendment, although the Panel has introduced some additional language to clarify questions raised by some respondents to the PCP.

## WHAT ARE THE CHANGES?

### Summary

From 8 January 2018, bidders in UK takeovers will be required to announce their intentions for the target's business earlier in the offer timetable and will need to make specific statements about their intentions for the target's R&D functions, the balance of skills and functions of the target's employees and management, and the location of the target's HQ and HQ functions. By further tightening the rules around intention statements, the Panel is continuing the approach that was first introduced by the EU Takeovers Directive and then enhanced following Kraft's takeover of Cadbury in 2011 and the public and political fallout following the closure of Cadbury's Somerdale factory.

The Code timetable is also being amended to give target boards more time to consider and respond to unsolicited bids (although the timetable for most recommended bids will be unaffected).

The key rules of the Code affected by the amendments are *Rule 2.7* (the announcement of a firm intention to make an offer), *Rule 19.5* (post-offer undertakings), *Rule 19.6* (post-offer intention statements), *Rule 24* (offeror documents) and *Rule 25* (offeree board circulars).

### Timing of intention statements

Currently, *Rule 24.2* requires the bidder to disclose its intentions in relation to the target's business in its formal offer document or scheme document. These intention statements are not binding on the bidder, but the Panel may require an announcement if the bidder departs from its stated intentions in the 12 months following the end of the offer period.

From 8 January 2018, a bidder's intention statements must also be included in its firm offer announcement (*i.e.*, up to 28 days prior to the publication of its offer document). This change is intended to give the target's employee representatives and pension scheme trustees more time to consider the bidder's intention statements before submitting their opinion (if any) to the target board for inclusion in the offer document (in the case of a recommended bid) or defence circular (in the case of a hostile bid). However, in practice, most bidders already include the full set of intention statements in their firm offer announcement, so this change is unlikely to have a material impact on bidders or targets.

### Content of intention statements

From 8 January 2018, a bidder's firm offer announcement will need to include statements as to the bidder's intentions with regard to any R&D functions of the target company, any changes to the balance of the skills and functions of the target's employees, and the likely repercussions of the bidder's strategic plans

on the location of the target's HQ and HQ functions. As a result, the full list of topics that will need to be covered by the bidder's intention statements in the firm offer announcement will be: (i) the target company's R&D functions; (ii) the continued employment of the employees and management of the target group, including any material change in their employment conditions or in the balance of the skills and functions of employees and management; (iii) the bidder's strategic plans for the target and their likely repercussions on employment and the locations of the target's places of business, including the location of its HQ and HQ functions; (iv) employer contributions into the target's pension scheme, including the funding of any pension scheme deficit, and benefits for existing and future members of the scheme; (v) the target's fixed assets; and (vi) the maintenance of any existing trading facilities for the relevant securities of the target.

The new requirements appear to be a direct result of political and public pressure on the Panel following a number of recent, high-profile bids for UK "crown jewel" businesses by overseas bidders (e.g., *SoftBank's bid for the microchip designer ARM Holdings* and *Pfizer's bid for the pharmaceutical giant AstraZeneca*) and the associated risk of jobs, research and expertise being relocated outside the UK.

In the PCP and the RS, the Panel also noted that bidders often make intention statements that lack specificity (e.g., simply disclosing an intention to conduct a strategic review of the target's business after closing) and stated that such statements will need to be further elaborated from now on or bidders will risk being in breach of [Rule 24.2](#).

### Timing of publication of the offer document

Under the current rules, a bidder must usually publish its offer document within 28 days of making its firm offer announcement. However, there is nothing to stop the bidder from publishing its offer document sooner, e.g., immediately after making a hostile firm offer announcement (this tactic is used occasionally to reduce the amount of time available to the target board

to analyse the bid and formulate its defence, see e.g., *HarbourVest's hostile bid for SVG Group*). The target board's defence circular must usually be published within 14 days of the publication of the offer document (although, in the majority of recommended bids, the target board's circular is incorporated into the offer document).

From 8 January 2018, the Panel will impose a minimum 14-day period between the bidder's firm offer announcement and the publication of the offer document, which can be waived only with the consent of the target board. This change guarantees a period of at least 28 days between the bidder's firm offer announcement and the deadline for the target board's defence circular (unless the target has consented to a shorter period) and is intended to give the target board more time to prepare its defence to a hostile bid, in particular any profit forecasts, asset valuations or quantified financial benefits statements, which must be prepared to the standards set out in [Rules 28 and 29](#) and can therefore take a considerable amount of time to finalise.

[Rule 21.2](#) restricts targets from entering into any offer-related arrangements with a bidder when an offer is reasonably in contemplation. The Panel clarified in the RS that this restriction will prevent targets from agreeing with a bidder that the target will waive the 14-day period (e.g., in a cooperation agreement), but the Panel will permit a joint firm offer announcement to include a statement that the board had already consented to the early publication of the offer document (on which statement the bidder will then be able to rely).

The Panel also clarified in the RS that, where multiple competing bidders have announced a firm intention to make an offer, the 14-day period will apply to each of them independently (i.e., the target board could choose to waive the period for its preferred bidder, but not for the others).

As one respondent pointed out, one consequence of this change may be to dis-incentivise stakebuilding by bidders because delaying the publication of the offer document will delay the time at which a bidder can begin making market purchases that count towards the

90% statutory squeeze-out threshold (*i.e.*, because only purchases made after the offer document is published can be counted towards the threshold). This may tip the balance further in favour of target boards in hostile situations and may also prejudice target shareholders who want to sell shares early in the process.

Another potential consequence of the new 14-day period may be to extend offer periods, thereby increasing costs for bidders who are in a position to make an offer immediately after announcement, but are forced to wait by the target board.

In the RS, the Panel recognized these potential consequences, but stated that it regarded both as being outweighed by the benefits that target shareholders would be afforded from the additional time available to the target board to consider and respond to a hostile bid.

**Post-offer status updates on intention statements**

Under the current regime, the bidder (or the target, in the case of a successful defence) must notify the Panel of any departures from its stated intentions in the 12 months following the end of the offer period. If there have been, or will be, any departures, the Panel may require the relevant party to make an announcement. The Panel also makes private enquiries of the parties on the one-year anniversary of the end of the offer period to obtain private confirmations as to the parties' conduct.

From 8 January 2018, parties will be required to proactively and publicly confirm after 12 months whether or not they have acted in accordance with their stated intentions (*i.e.*, to publicize the confirmation that would normally be provided privately to the Panel).

In the RS, the Panel clarified that it would not expect the parties' financial advisers in relation to the original transaction to be involved in the confirmation process.

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