



PCP 2014/2 POST-OFFER UNDERTAKINGS AND INTENTION STATEMENTS

ICAEW welcomes the opportunity to comment on the consultation paper *Post-offer undertakings and intention statements* published by the Code Committee of the Takeover Panel on 15 September 2014, a copy of which is available from this [link](#).

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MAJOR POINTS

1. We note the Code Committee's objective to enable parties to an offer to make informative statements of intention and understand how this underpins the proposed framework for the regulation of such statements. In relation to the enforcement aspect of the proposed framework, we wonder whether enforcement should in fact be achieved through the existing market abuse regime for false or misleading statements. We note that similar intention or undertaking statements made by an offeree or offeror outside an offer period would normally be subject to this regime in the event they are not later upheld or delivered, and that these statements would fall within the remit of these Takeover Code proposals in the event that they are repeated as part of the offer process.
2. We note the Panel's Hearings Committee is already empowered under Section 11(b) of the Introduction to the Code, to report a breach of the Code or of a ruling of the Panel to a UK or overseas regulatory authority or professional body (in this case, the Financial Conduct Authority), so that the authority or body can consider whether to take disciplinary or enforcement action. Can the Code Committee comment on whether it considered this option when reviewing enforcement?
3. Can the Code Committee clarify how enforcement of post offer undertakings and disciplinary action in relation to post offer intention statements would work in shared-jurisdiction cases.
4. It would be also be helpful if the Code Committee commented in the Response Statement on situations where it may seek to enforce an undertaking against third parties (in addition to or in place of the persons who originally gave the undertaking), for example, a purchaser of an asset or a division in relation to which undertakings or statements of intention have been made. Would such wider enforcement powers only apply in the case of post-offer undertakings and not intention statements?
5. While we welcome the establishment of a framework for undertakings we would draw attention to the likelihood of bidders being discouraged from making undertakings by the additional requirements and instead making statements of intention. Is this the Code Committee's intention?

RESPONSES TO SPECIFIC QUESTIONS

Q1 Should the new definitions of "post-offer intention statement" and "post-offer undertaking" be introduced as proposed?

6. We agree with the new definitions but we think that the drafting of the Definition of and the Note on 'post-offer undertaking' could be improved. In particular, it is not clear what the word "directly" means in this context and how it will be applied in practice. For example, would only written contractual undertakings expressed to be for the benefit of the relevant third party, fall within this exception? We understand from our meeting that it will not be possible to pre-define the situations where this note may be relevant and that the Panel will consider each matter on a case-by-case basis and that there may even be instances where the Panel will enforce alongside the identified third party – we consider that it would be helpful to include commentary to this effect in the Response Statement.
7. In the drafting of the Definition, what form does 'published' envisage? Could it include a private undertaking or discussion, in particular where such private discussions or commitments have been made public by the "beneficiary"?
8. Matters to address in the drafting of the Note:
 - What does 'given directly to' mean? Does it include a private undertaking?

- What does the Code Committee consider to be the status of pre-existing “undertakings”, made before commencement of an offer period, for example, commitments to make certain investments which are announced or published by a party prior to commencement of an offer period (whether before or after an approach has been made)?
- Does ‘one or more identified parties’ include parties such as employees, pension trustees and/or creditors? Can the Code Committee confirm that parties such as significant shareholders or other stakeholders are not included?

Q2 Should the new Rule 19.7 be introduced as proposed?

9. We agree with the introduction of Rule 19.7 but believe that certain clarifications are needed to Note 2 on Rule 19.7. It would be helpful if the Code Committee was able to clarify:
- who can be a supervisor?
 - which party to the offer must the supervisor must be independent of?
 - what are the Code Committee’s intentions regarding the frequency of the written reports? Are these only to be produced on upon request by the Panel or is the plan to agree a reporting timetable at the time of an offer’s completion? This will help clarify engagement terms;
 - what tests/ standards of independence will the Panel be applying in such cases? Does the Panel intend to apply to a supervisor the independence criteria for financial advisers in Note 1 to Rule 3.3? If so, a cross reference would be useful in Note 2 on Rule 19.7.
10. In the light of the reporting and monitoring roles set out in Rule 19.7, we would not expect the financial (or legal) adviser to be responsible for compliance with post-offer undertakings. Monitoring and review of compliance with an undertaking are best carried out internally by the bidder, as undertakings will often relate to operational or other matters over which the adviser has no oversight. It would be helpful if in its Response Statement the Code Committee
- confirms that it does not expect the financial (or legal) adviser to have an ongoing role in monitoring (although it may at its discretion agree to perform this role with its client);
 - clarifies the extent of interaction between supervisors and advisers after the latters’ mandates have come to an end or after the end of the offer period; and
 - sets out its expectations of the involvement in/ responsibility of a party’s legal and financial advisers on the bid in an investigation or action taken by the Panel if their client (or historical client) is not able or chooses not to implement undertakings.

Q3 Should the new Rule 19.8 be introduced as proposed?

11. In the final paragraph of Rule 19.8, in the context of timing of announcements, we consider that ‘promptly’ means from the point the bidder becomes aware that it will not be able to or does not intend to fulfil those intentions rather than at or near the end of the relevant period (12 months or later).
12. Consequently we suggest Rule 19.8(b) is redrafted as follows:
- ‘If a party to an offer has made a post-offer intention statement and, during the period of 12 months from the date on which the offer period ended, or such other period of time as was specified in the statement, that party decides either:
- (i) to take a course of action different from its stated intentions; or

- (ii) not to take a course of action which it had stated it intended to take,

it must consult the Panel. Except with the consent of the Panel, if such a ~~course of action is then taken or not taken (as appropriate)~~ decision is made, the party must promptly make an announcement in accordance with the requirements of Rule 2.9 describing the ~~course of action it has taken, or not taken~~ decision, and explaining its reasons for taking, or not taking, that course of action (as appropriate).'

Q4 Should Rule 19.1 be amended, and Note 2 on Rule 19.1 deleted, as proposed?

13. We agree.

Q5 Should the new Rules 24.2(d), 24.3(d)(xv), 25.2(c) and 25.7(c) be introduced, and Rules 27.2(b) and (c) amended, as proposed?

14. We would question whether new Rule 24.2(d) ought to also address mixed statements, ie ones comprising a statement of intention and undertaking, and so should also refer to Rule 19.8. We do not think that new Rule 24.2(d) is necessary and its inclusion is potentially confusing, particularly the reference to a statement 'made in accordance with Rule 24.2' as the rule does not require undertakings but, on the face of it, envisages that statements of intention (if any) will suffice. Any statement that qualifies as an undertaking, pursuant or not to Rule 24.2, should comply with Rule 19.7.
15. We agree with proposed Rules 24.3(d)(xv), 25.2(c) and 25.7(c) and amendments to Rules 27.2(b) and (c).

Q6 Do you agree with the proposed minor amendments to Rule 24.2?

16. Upon review of the minor amendments to Rule 24.2 we have considered whether the existing reference to "long term" commercial justifications is appropriate. We broadly agree with the amendments but we do not think that it is appropriate to specify a 'long-term' commercial justification. The period is up to the bidder and their justification may be short to mid-term.

OTHER COMMENTS

17. In paragraph 3.9(b) of the PCP, in the light of the ability of parties to include specific and precise events to qualify any post-offer undertaking given, even if they relate to "material changes of circumstances", it will be helpful to make it clear that the prohibition in the paragraph is a prohibition on the inclusion of "**an unspecified**" material change of circumstances? This is the same approach being taken with "force majeure".