

CLIENT UPDATE

UK TAKEOVER REGULATOR CONSULTS ON RULE CHANGES PROMPTED BY THE PFIZER/ASTRAZENECA BID APPROACH

LONDON

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On 15 September 2014, the UK Takeover Panel (the "Panel") published a consultation paper on proposed changes to the Takeover Code in relation to post-offer undertakings and intention statements.

These changes have been proposed in response to the public and media debate which occurred in relation to certain public commitments voluntarily made by Pfizer Inc. during its possible offer for AstraZeneca plc earlier this year. As the Panel consultation paper notes, Pfizer had committed (in an open letter to David Cameron), *inter alia*, to base key scientific leadership in the UK and to employ a minimum of 20% of the combined group's total research and development workforce in the UK, for a minimum period of five years.

Under the existing regime, Rule 24.2(a) of the Takeover Code requires a bidder to include in the offer document a statement in relation to, *inter alia*, its intentions with regard to the future business and employees of the target as well as the bidder's strategic plans for the target and their likely repercussions on employment and the locations of the target's places of business. In addition, Note 3 to Rule 19.1 provides that, if a party to an offer makes a statement in relation to an offer relating to a particular course of action it intends to take, or not take, after the end of the offer period, that party will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such

other period of time as is specified in the statement, unless there has been a material change of circumstances.

At the same time, the Takeover Code does not currently distinguish between statements made by parties to an offer relating to any particular course of action they *commit* to take, or not take, after the end of the offer period ("post-offer undertakings") and statements relating to any particular course of action they *intend* to take, or not take, after the end of the offer period ("post-offer intention statements"). The proposed changes would introduce this distinction into the rules of the Takeover Code.

The declared objectives of the proposed new rules are to:

- provide clarity for shareholders and other stakeholders as to the status of any post-offer statements;
- increase the effectiveness of the enforcement tools available to the Panel when parties to an offer choose to make post-offer statements; and
- enable the parties to an offer to make informative intention statements.

In summary, the proposed changes would:

- distinguish between post-offer undertakings and post-offer intention statements;
- require a party to consult the Panel before making a post-offer undertaking;
- require a party to comply with any post-offer undertaking it has given, for the time period specified in the undertaking, unless a qualification or condition set out in the undertaking applies (and the Panel consents to it being relied upon);
- require the party making a post-offer undertaking to (i) expressly state that it is making a post-offer undertaking, (ii) specify the period for which the undertaking is being made or the date by which the relevant course of action will be completed and (iii) state any qualifications or conditions to which the undertaking is subject;
- require that the terms of any post-offer undertaking, and any related qualifications or conditions, be specific and precise, capable of objective assessment and not dependent on subjective judgements of the party making the undertaking or its directors;
- require a party making a post-offer undertaking to submit written reports to the Panel on the status of the performance of the undertaking during the period of the undertaking; the Panel would be able to require such reports to be publicly disclosed;

- allow the Panel to require a party making a post-offer undertaking to appoint an independent supervisor, at the expense of such party, who would monitor compliance with the undertaking and would report back to the Panel; and
- require any post-offer intention statements to be (i) made with due care, (ii) an accurate statement of that party's intentions at the time of making the statement and (iii) made on reasonable grounds.

The Panel's existing powers enable it to take a range of actions in order to enforce provisions of the Takeover Code, including giving directions to secure compliance with the rules and applying to Court for an order to secure such compliance. In the opinion of the Panel, the proposed changes will make it easier for the Panel to secure compliance with post-offer undertakings and post-offer intention statements on a pre-emptive basis, which the Panel considers to be more effective than any attempts to enforce the rules once a breach has occurred.

The Panel has invited comments on the proposed changes, to be provided by no later than 24 October 2014.

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Please do not hesitate to contact us with any questions.

16 September 2014