



### A new approach to commitments

The Takeover Panel has introduced a new framework for the regulation of “post-offer undertakings” and “post-offer intention statements” made by bidders and targets. New Rule 19.7 deals with post-offer undertakings and new Rule 19.8 covers post-offer intention statements.

Post-offer undertakings are now subject to strict conditions including ongoing reporting to the Panel and monitoring by an independent supervisor. Bidders will approach such undertakings with caution and we expect that post-offer undertakings will be infrequent in practice. The role of a supervisor may well turn out to be very similar to the role of a “monitoring trustee” under the Enterprise Act 2002. The framework established under that Act should provide a useful reference point for any supervisor appointments which are made under Rule 19.7.

However, bidders should benefit from the flexibility introduced by the new regime for post-offer intention statements which are no longer deemed to be binding commitments.

#### What’s new?

The Takeover Code now contains a “two-tier” regime for post-offer undertakings (Rule 19.7) and post-offer intention statements (Rule 19.8) made by **bidders and targets**.

However, this regime will not apply to:

- **undertakings given to a government or governmental agency** in order to obtain an official authorisation or regulatory clearance. “Where an agency, such as the CMA or the European Commission, procures “behavioural undertakings” from an offeror in relation to anti-trust matters, the Code Committee believes that the relevant legislative provisions will provide a regime for the enforcement of those “behavioural undertakings” by that agency and that it would be inappropriate for them also to be subject to enforcement by the Panel as post-offer undertakings.” (RS 2014/2); or
- any other **post-offer commitments** made directly to, and enforceable by, one or more **identified parties**. So “where an offeror has entered into a contractual arrangement with, for example, the offeree company’s employees, pension scheme trustees or creditors, the appropriate person to enforce that contract will be the party or parties entitled to do so pursuant to the contract.” (RS 2014/2).

#### Post-offer undertakings

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| <b>What?</b>                             | A post-offer undertaking is a <b>statement</b> made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party <b>commits to take</b> , or not take, after the end of the offer period and which is <b>described by that party as a post-offer undertaking</b> .   |
| <b>Prior consultation with the Panel</b> | A party to an offer <b>must consult the Panel</b> in advance if it wishes to make a post-offer undertaking.   |
| <b>Key conditions</b>                    | <p>A post-offer undertaking must:</p> <ul style="list-style-type: none"> <li>■ state that it is a <b>post-offer undertaking</b>;</li> <li>■ <b>specify the period of time</b> for which the undertaking is made or the date by which the course of action committed to will be completed; and</li> <li>■ <b>prominently state any qualifications or conditions</b> to which the undertaking is subject.</li> </ul> <p>In addition, the terms of the undertaking must:</p> <ul style="list-style-type: none"> <li>■ be specific and precise;</li> <li>■ be readily understandable and capable of objective assessment; and</li> <li>■ not depend on subjective judgements of the party to the offer or its directors.</li> </ul> |

## Post-offer undertakings continued

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| Compliance                                    | A party to an offer <b>must comply with the terms of any post-offer undertaking</b> for the period of time specified in the undertaking and must complete any course of action committed to by the date specified in the undertaking.   |
| When will a post-offer undertaking fall away? | If: <ul style="list-style-type: none"> <li>■ a <b>qualification or condition</b> set out in the undertaking <b>applies</b>; and</li> <li>■ the bidder/target has <b>obtained the Panel's consent</b> to rely on that qualification or condition, then the relevant party to the offer <b>will be excused compliance</b> with the terms of the post-offer undertaking.</li> </ul>  |
| Reporting to the Panel?                       | Yes. A party to an offer which has made a post-offer undertaking <b>must submit written reports</b> to the Panel after the end of the offer period at such intervals and in such form as the Panel may require.   |
| Monitoring by the Panel?                      | Yes. The Panel may require a party to an offer which has made a post-offer undertaking to <b>appoint an independent supervisor</b> to: <ul style="list-style-type: none"> <li>■ <b>monitor compliance</b> by that party with that undertaking; and</li> <li>■ <b>submit written reports</b> to the Panel, at such intervals and in such form as the Panel may require, as to the compliance by that party with that undertaking,</li> </ul> <p>in accordance with arrangements made between the Panel and the supervisor. The party to the offer must comply with any obligations imposed on it in the supervisor's terms of appointment.</p> <p>The role of a supervisor may well, in practice, turn out to be very similar to the role of a "monitoring trustee" under the Enterprise Act 2002. The framework established under that Act should provide a useful reference point for any supervisor appointments which are made in connection with Rule 19.7.</p> |

## Post-offer intention statements

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|------------------------------------|---|
| What?                              | A post-offer intention statement is <b>a statement</b> made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party <b>intends to take</b> , or not take, after the end of the offer period, other than a post-offer undertaking. |
| Prior consultation with the Panel? | <b>Not required.</b> A party to an offer can make a post-offer intention statement without consulting the Panel.  |
| Key conditions                     | Any post-offer intention statement made by a party to an offer must be: <ul style="list-style-type: none"> <li>■ an <b>accurate statement</b> of that <b>party's intention</b> at the time that it is made; and</li> <li>■ made on <b>reasonable grounds</b>.</li> </ul>  |
| Reporting to the Panel?            | There is no ongoing reporting requirement.  |

## Post-offer intention statements continued

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| <b>Monitoring by the Panel/supervisor?</b>   | There is no ongoing monitoring requirement.  |
| <b>Do we need to speak to the Panel after making a post-offer intention statement?</b> | <p>Yes. 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:</p> <ul style="list-style-type: none"><li>■ to take a <b>course of action different from</b> its stated intentions; or</li><li>■ <b>not to take a course of action</b> which it had stated it intended to take, it <b>must consult the Panel</b>.</li></ul> |

## FAQs

### **FAQ 1: If a bidder makes a post-offer undertaking, will the Panel expect its financial adviser to have any continuing role in relation to that undertaking after the end of the offer?**

No. RS 2014/2 noted that: "... the Code Committee recognises that an adviser's mandate is likely to come to an end once the offer has ended and would not, therefore, expect an adviser to be responsible for ensuring, for example, that its former client complies with the terms of a post-offer undertaking after that time."

### **FAQ 2: Will the new framework apply to a post-offer undertaking made by a target company (in addition to a bidder)?**

Yes. In RS 2014/2 the Code Committee confirmed that "the new framework will apply to post-offer undertakings made by an offeree company in the same way as it will apply to undertakings made by an offeror." However a post-offer undertaking made by the target during the course of an offer would not bind a bidder which acquired the target unless that bidder had endorsed the post-offer undertaking as its own undertaking.

### **FAQ 3: Are there any restrictions on the type of commitments which can be included in a post-offer undertaking?**

Yes. Note 1(a) on Rule 19.7 makes it clear that "The Panel may decide not to permit a party to an offer to make a post-offer undertaking where the Panel determines that the proposed commitment would more appropriately be given in a different form (including, for example, a commitment to a specified person which could be included in a private contract with that person)."

### **FAQ 4: Does the new regime apply to a bidder's obligation to pay deferred or contingent consideration?**

No. The payment obligation will be a contractual commitment which will fall outside the definition of a post-offer undertaking.

### **FAQ 5: What was the previous position?**

Previously the Takeover Code did not distinguish between:

- a voluntary commitment made by a party to an offer, in which the party states what action it commits to take, or not take; and
- a statement of intention made by a party to an offer, in which the party states what action it intends to take, or not take.

This reflected the provisions of Note 3 on Rule 19.1 (Statements of intention) which previously stated that: "If a party to an offer makes a statement in any document, announcement or other information published in relation to an offer relating to any 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."

The effect of Note 3 on Rule 19.1 was to treat a statement of intention made by a party to an offer as a commitment. This included any statement made by a bidder in compliance with Rules 24.2 (a) or (b) (*Intentions of the offeror with regard to the business, employees and pension schemes*).

In addition, the Code did not contemplate bidders making voluntary commitments on a long-term basis. There was no mechanism in the Takeover Code which enabled the Panel to:

- monitor on-going compliance with any such long-term commitments; or
- take pre-emptive enforcement action prior to a contravention occurring.

## Background

In PCP 2014/2, the Code Committee of the Panel proposed to amend the Takeover Code to introduce a **new framework** for the **regulation of statements** made by bidder and target companies relating to any particular **course of action** they commit or intend to take, or not take, **after the end of the offer period**. This followed on from the possible offer by **Pfizer** for **AstraZeneca** (May 2014). **Pfizer** stated that, subject to successful completion of its combination with **AstraZeneca**, **Pfizer** would make a series of significant and tangible commitments including commitments to:

- establish the combined company's corporate and tax residence in England;
- complete the construction of the planned AstraZeneca Cambridge campus;
- base key scientific leadership in the UK;
- integrate the operations of the combined company so as to employ a minimum of 20% of the combined company's total R&D workforce in the UK going forward; and
- locate manufacturing operations of the combined company in the UK and retain substantial commercial manufacturing facilities in Macclesfield.

Pfizer made these commitments for a minimum of five years. Although no transaction was completed, the debate around the potential offer led to the publication of PCP 2014/2 and RS 2014/2.

## Contacts

If you would like any further information on post-offer undertakings or post-offer intention statements then please speak to your usual contact at Burges Salmon or:



**Dominic Davis**

Partner

+44 (0)117 902 7196

dominic.davis@burges-salmon.com



**Nick Graves**

Partner

+44 (0)117 939 2200

nick.graves@burges-salmon.com



**Chris Godfrey**

Partner

+44 (0)117939 2219

chris.godfrey@burges-salmon.com



**Rupert Weston**

Partner

+44 (0)117 939 2228

rupert.weston@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

[www.burges-salmon.com](http://www.burges-salmon.com)

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