PCP 2017/2: Another round in policing intention statements

September 2017

On 19 September 2017, the Takeover Panel published its public consultation paper (PCP 2017/2) on statements of intention and related matters. The Panel has been concerned for some time about the quality of disclosures by a bidder in relation to its intentions for the target business, believing that, in many cases, they do not provide the target board and other stakeholders (particularly employees and pension scheme trustees) with sufficient specific information to make a meaningful assessment of a bid.

Summary of key proposals

The proposals would, if implemented:

- **require more specific "social and employment disclosures" by bidders;**
- **require those disclosures to be made in the Rule 2.7 (firm offer) announcement;**
- **prohibit the bidder from publishing the offer document within 14 days of the Rule 2.7 announcement except with the consent of the target; and**
- **require the party which has made any post-offer undertakings or post-offer intention statements to publish its confirmation or report required to be given to the Panel.**

The area of intention statements has now been consulted on a number of times, firstly following Kraft's takeover of Cadbury, and subsequently following Pfizer's possible bid for AstraZeneca. The consultation paper has attracted a fair amount of press comment[1], with commentators suggesting that some of the proposed changes have been driven by the prime minister's comments ahead of the general election campaign that bidders would have to be clear about their intentions, partly in response to Kraft Heinz's aborted takeover approach for Unilever plc in February 2017 and concerns on the effects of such a bid on UK employees.

This briefing considers some of the proposals set out in the consultation paper to address this issue and other related matters.

[1] See FT article dated 19 September 2017 (at https://www.ft.com/content/334758ca-9d54-11e7-9a86-4d5a475ba4c5), as well as articles on the same date in the Guardian (https://www.theguardian.com/business/2017/sep/19/takeover-panel-kraft-unilever-bid) and the Daily Telegraph (http://www.telegraph.co.uk/business/2017/09/19/foreign-bidders-face-new-hurdles-british-takeovers/)

Statements of Intention – scope and timing of disclosures

The Panel's concern that disclosures required to be made by bidders with regards to their strategic plans for the business, employees and pension schemes have been generic has been well documented. In its 2012 annual review of the substantial amendments made to the Takeover Code in 2011 following the takeover of Cadbury plc by Kraft (which, among other things, included certain amendments aimed at improving the quality of disclosure by bidders and targets, particularly in relation to the bidder's intentions regarding the target's employees), the Panel's Code Committee expressed its disappointment that disclosures have been general and not specific, including, in some instances, bidders simply saying that they intend to undertake a review of the target's business post-completion. The Committee also noted at that time that any statement of intention should be as detailed as it is possible on the basis of the information that is known to the bidder at the time it is made.

The proposals under PCP 2017/2 would, if implemented, **widen the scope of "social and employment disclosures" (disclosures relating to effects of the offer on the target's management, employees and places of business) by bidders from the current regime.** In particular, the Panel is requiring specific disclosures to cover:

- the impact on the target's research and development (R&D) function
- any material change to the balance of skills and functions of [the target's] employees and management. It is not entirely clear how this would be interpreted and there is little guidance in the consultation paper. It would seem that what is envisaged here are disclosures relating, for example, to material changes in the relative proportion of technical employees involved in R&D functions to "non-technical" employees.
- the location of the target's HQ and HQ functions

It is notable that the proposed changes require specific disclosures on the effects of the offer on the balance of skills of the target's workforce and/or on its R&D functions, suggesting that certain sectors which tend to employ highly skilled workforces and/or have major R&D operations (such as pharmaceuticals or technology) are in view. More generally, the Panel also expressed the view in the consultation paper that bidders should avoid references to their "current" or "present" intentions as a means to qualify their statements of intention.

These changes are, presumably, intended to make generic disclosures harder. Any statements of intention made by a party to the offer are subject to the regime under Rule 19.6 requiring the relevant party to consult the Panel if there are any changes to its stated intentions post-offer. Requiring more specific disclosures should give the Panel more ability to interrogate whether the bidder has actually complied with its stated intentions following completion of the offer. It is fair to say that disclosures in this area can tend towards to the formulaic and the proposals, if nothing else, may signal the Panel's willingness to take a tougher approach towards statements made by bidders when outlining their plans for the target business, and in holding them to those statements. Nonetheless, some bidders will, for good reason, be unable to provide more detail on their specific plans until after completion of the offer. The Code also requires statements to be accurate at the time they were made and it may be that the only "accurate" statements a bidder can make at the time are necessarily high level. It remains to be seen the extent to which the Panel will police such disclosures and the approach it will take in assessing whether a disclosure is sufficiently specific or detailed, bearing in mind that the Panel is unlikely to want to delve too deeply into a bidder's post-offer integration plans.

In any event, statements of intention are, in contrast to "post-offer undertakings", not legally binding, although the requirement on parties to the offer to publicly announce any changes to their stated intentions (to which, see below) may have significant reputational implications. Nonetheless, the requirements for increased and earlier disclosure may encourage politicians and trade unions to push for certain statements of intention made at the time of announcement to be converted into legally binding post-offer undertakings, especially in larger, more politically sensitive deals (such as Softbank's takeover of ARM Holdings or Kraft's attempted bid for Unilever).

Statements of Intention – timing of disclosures

It is also proposed that the disclosures regarding the target business, employees and pension schemes (including the additional specific disclosures required under the new proposals) be made at an earlier point in the offer timetable. This would be at the time of the Rule 2.7 (firm offer) announcement rather than, as is the case currently, just in the offer document. This front-loads the disclosures so that a bidder must disclose its intentions by the time it makes the announcement of its actual offer (i.e. up to a 28 days' acceleration of the information).

The proposed change, together with the extended timeline for publishing the offer document (see below), is meant to give more information and time for the employee representatives or pension scheme trustees to properly consider the bidder's intentions so as to exercise their right to prepare and have their opinions appended to the offer document. The opinion(s) may also inform the board's view of the effects of the offer and the Panel hopes the proposal would facilitate earlier and better engagement between the board and these stakeholders. One of the Panel's concerns is that if the firm offer announcement does not include the relevant information, employees or pension scheme trustees would not have the information required to prepare a meaningful opinion on the effects of the offer on time to be appended to the offer document. While the target is obliged to publish on a website any opinion received subsequent to publication of the offer document, it was thought that this is generally a less effective means of communication.

These proposals would require bidders to firm up their plans for the target business at an earlier stage. Nonetheless, the Panel considers that this imposes little additional burden on bidders. As the circumstances in which a bidder can withdraw from a bid following a Rule 2.7 (firm offer) announcement are very limited, it should be the case that bidders would have formulated, at least in broad terms, its plans to integrate the target post-completion by the time the announcement is made.

However, whether these proposals change anything in practice is debatable. Most bidders already voluntarily include disclosures on their intentions for the target management, employees and location of business, which are then largely replicated in the offer document. It would appear that the current level of engagement in particular by stakeholders of companies subject to takeovers (such as employees) is in any case very low[2]. As the proposal simply formalises something that is already largely market practice, it

[2] In a sample of 14 takeovers with a value above £100 million where firm offers were announced in 2017, only 1 firm offer announcement did **not** include disclosures by the bidder relating the management, employees and locations of the target business. Of these 14 takeovers, only 3 had opinions from either employee representatives or pension scheme trustees.

seems unlikely to change this situation. Arguably, a more fundamental cultural change is required to push stakeholders towards more meaningful engagement. Nonetheless, taken as a whole, the proposals should at least, in theory, provide the means for improved engagement at an earlier stage by those stakeholders.

While the Panel does not vet documents pre-publication (nor is the Panel's approval required for publication), one possible result of the proposal, coupled with the requirement for more specific disclosures, is to enable the Panel an opportunity to push the bidder, in the intervening period between the firm offer announcement and publication of the offer document, to improve the quality of its disclosures in this area in the offer document if it has any concerns once it reviews the disclosures in the firm offer announcement. One related issue that may arise is the Panel's approach towards pre-conditional offers or offers requiring long regulatory clearances, where there is a long period between the firm offer announcement and the publication of the offer document. In that case, presumably the Panel may have to accept that the relevant disclosures would have to be significantly refreshed in the offer document and allow a much higher level disclosure at the time of the firm offer announcement.

Timing of publication of offer document

The bidder will be prohibited under the new proposals from publishing the offer document within 14 days of the Rule 2.7 announcement except with the consent of the target.

The main impact of this proposal is on hostile offers as this would mean the bidder cannot launch a hostile offer and put pressure on the target to rush out its defence document by immediately publishing the offer document. A target has 14 days after publication of the initial offer document to publish its defence document. In a situation where the target may need accountants and other advisers to produce financial and other reports to mount a proper defence, it was thought that the current timetable puts too much pressure on the target. This new requirement gives the target at least 28 days to respond to a hostile offer, although in practice, it is likely that the target will issue some form of response prior to that date, and indeed within the 14 day period under the current regime, especially where the shareholder register might start to change following the firm offer announcement. Employee representatives and pension scheme trustees should also have more time to consider their own responses.

There are number of other implications on the timetable of a hostile offer:

- the bidder is unable to acquire an interest of 30% or more in the target for at least 35 days from the date of the firm offer announcement given the restrictions under Rules 5.1 and 5.2 of the Code prohibiting the bidder from acquiring interests in shares carrying 30% or more of the voting rights in the target until after the "first closing date" of the offer (which must be at least 21 days after publication of the offer document, and together with the 14 days during which the offer document could not be published under the new proposal, would make 35 days).

- A target cannot release material new information (including trading results and profit forecasts) which may be relevant in its defence after the 39th day after the publication of the initial offer document ("Day 39"). The proposal ensures "Day 39" cannot occur until at least 53 days after publication of the firm offer announcement so that the target has, in effect, more time both to prepare its initial response as well as its final response. This, of course, does also mean that, for the bidder, the last day on which its offer must be declared unconditional as to acceptances (60 days after publication of the offer document or "Day 60") would be extended.

In a recommended offer, the target is normally involved in the production of the (combined) offer document and can, of course, consent to earlier publication.

Post-offer reporting requirements

The Panel is also proposing to impose additional requirements on the party which has made any post-offer undertakings or post-offer intention statements. This would require that party:

- in relation to any post-offer undertakings, to publish the reports that it is currently required to submit to the Panel in relation to its compliance with those undertakings. Currently, publication is only required at the Panel's discretion. The reports must be produced and published at least on an annual basis (where the undertaking is for a period longer than a year).

- in relation to post-offer intention statements, to confirm in writing to the Panel whether it has taken, or not taken, the course of action described in the statement at the end of the 12 months following the end of the offer period (or such other period specified in the statement) which must be published/announced via an RIS. Current practice only requires a private confirmation to be made to the Panel at the end of the period.

The only change proposed here is therefore the requirement that the confirmation (in relation to post-offer intention statements) or the reports (in relation to post-offer undertakings) given to the Panel be made public as a matter of course (except with the consent of the Panel). This proposal may be more onerous than would appear at first glance, especially in relation to post-offer intention statements. Circumstances may change following completion of the offer. Whilst it should be easier to tell whether a post-offer undertaking (which, by its nature, should be fairly objective) has been complied with or not, it is not always possible to say whether a bidder has strictly complied with any particular statement of intention. Under the current regime, where confirmation is made public only if the Panel requires it, it is open to a party to the offer to explain the situation to the Panel in private and provide sufficient comfort that the perceived change remains in line with its stated intentions. This becomes much more difficult if the default position is for any report or confirmation to be published. The nuances of any explanation, however reasonable, may be lost in the public context, and this may very well have some reputational consequences for the relevant party.