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BIDDER INTENTION STATEMENTS: UK AND AUSTRALIAN REQUIREMENTS COMPARED

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Legal Briefings – By **Robert Moore, Andrew Rich, William Chew, Lucy Robson and Antonia Kirkby**

In light of the increasing importance attached to a bidder's intentions as regards the target by target shareholders and wider stakeholders, bidders in UK takeovers are now required to make more detailed and earlier disclosure of their intentions and to report on their compliance with those intention statements after closing. In this article, we compare and contrast the UK and Australian requirements with respect to disclosure of bidder intentions.

IN BRIEF

- There has been a significant expansion in recent years of the UK regime around a bidder's statements of its future intentions regarding the target's business.
- Disclosure is required earlier in the transaction timeline and the UK Takeover Code includes a list of specific aspects of the target's business about which disclosure must be made.
- Bidders are expected to comply with their disclosed intentions for 12 months after the takeover closes. An announcement is required at the end of the period confirming compliance, or earlier if a different course of action is taken.
- By way of contrast, in the Australian context, a bidder’s intentions are usually expressed in general terms.
- The Australian takeovers regime has not undergone a similar reform to that in the UK, and accordingly, the differences between the UK and Australian regimes on bidders’ intention statements are stark.

BACKGROUND

Bidders in UK takeovers have long been required to disclose information in their offer document about their future intentions regarding the target's business (including its employees), but incremental changes since 2011 have significantly expanded the disclosure regime.

The UK regime on post-offer intentions statements first came under scrutiny following Kraft Food Group's controversial hostile bid for Cadbury in 2010: during the offer, Kraft had said it would keep a particular factory open (which Cadbury intended to close) but, when new information came to light after the transaction closed, Kraft announced it would in fact have to close the factory. This raised questions about the basis for the statements made during the bid and the extent to which bidders should be held to their publicly-expressed intentions. Further reform was later prompted by Pfizer proposing legally binding commitments (rather than statements of its future intentions) during its proposed bid for AstraZeneca in 2014 – this sparked debate over the extent to which statements of intention were binding and could be enforced by The Panel on Takeovers and Mergers in the UK (**Panel**).

More recent changes to the UK Takeover Code (**Code**) require bidders to disclose their intentions earlier in the bid process. Recognising the importance of these statements to both investors and wider stakeholders, the Panel has also clarified that bidders will be expected to act in compliance with their stated intentions for the 12 months (or other period specified in the intention statement) after the takeover closes, and confirm that they have done so, or make an announcement if they follow a different course of action.

THE UK FRAMEWORK: POST-OFFER INTENTION STATEMENTS V POST-OFFER UNDERTAKINGS

POST-OFFER INTENTION STATEMENTS

The Code requires that any post-offer intention statement must be both:

- an accurate statement of that party's intention at the time the statement is made; and
- made on reasonable grounds.

This has both a subjective element (i.e. that the bidder honestly holds that intention at the time the statement is made) and an objective element (i.e. that the bidder's belief had a reasonable and informed basis). Both of these elements link into the broader Code requirements that any statements made during the course of an offer must be prepared with the highest standards of care and accuracy and that parties to an offer will be held to what they say during an offer period, supporting the overarching UK takeover principle of avoiding false markets.

Bidders are free to make additional statements of their intentions following the offer, but at a minimum must disclose their intentions regarding:

- the target's future business, including their intentions for any research and development functions;
- the continued employment of the target group's employees and management, including any material change in conditions of employment or the balance of the skills and functions of employees and management;
- their strategic plans for the target and the likely repercussions on employment and on the locations of the target's places of business, including its headquarters;
- employer contributions into the target's pension scheme(s) (including for the funding of any scheme deficit), accrual of benefits for existing members, and the admission of new members;
- any redeployment of the target's fixed assets; and
- the maintenance of any existing trading facilities for target securities.

The core position under the Code is that bidders will be expected to act consistently with their post-offer intention statements for the 12 months (or any other period specified in the intention statement) after the transaction has closed. However, the statements are not legally binding, in order to encourage bidders to make meaningful disclosures which are useful to shareholders and stakeholders, rather than the more generic or heavily qualified statements to which they might otherwise resort. The Panel also reviews draft intentions language and will engage with bidders on their proposed language prior to publication.

POST-OFFER UNDERTAKINGS

To provide a framework for bidders seeking to make binding commitments, post-offer undertakings (**POUs**) were introduced into the Code in light of the review which followed Pfizer's approach to AstraZeneca in 2014.

POUs are legally binding commitments given voluntarily by a bidder (or another party to an offer) to address specific issues, and are distinct from the mandatory post-offer intention statements detailed above. Post-offer undertakings will be treated, and strictly enforced, by the Panel as binding commitments. A third party supervisor will be appointed to monitor compliance with the POU (and reports on such compliance will be required at least annually). If the giver of a POU fails to comply, ultimately, the Panel may go to court to obtain an order to secure compliance. For further discussion of the background to POUs, see our earlier article, *Committed to the deal*.

The regime for giving a POU is stricter and requires detailed discussions with the Panel. A POU must be specific and precise and must specify the period for which the commitment is made (typically up to five years) and any qualifications and conditions to it (but generic qualifications such as material adverse change are not permitted).

POUs have only been given on three transactions to date (Softbank's bid for ARM in 2016, Melrose's hostile bid for GKN in 2018 and Comcast's bid for Sky in 2018) and in each case have primarily been given to alleviate political, media or regulatory concerns regarding an offer for a high-profile UK target. Areas covered by the POUs included maintaining headquarters in the UK, committing to certain expenditure in the business and increasing employee headcount.

As alternatives to the POU regime, bidders have also given undertakings directly to the relevant Government department and made commitments by deed poll. These undertakings were given in order to allow a party to extend the commitment beyond the five years typically accepted by the Panel for a POU or because it was considered appropriate that relevant bodies have direct rights to enforce such undertakings. Binding longer-term commitments remain rare however, and we expect that to continue to be the case.

EARLIER DISCLOSURE OF INTENTIONS

Previously, bidders were only required to include intentions statements in the formal offer document and not on announcement of a firm intention to make an offer (under Rule 2.7 of the Code). However, the Panel recognised that requiring disclosure at a later stage in the process meant that shareholders and stakeholders were less well equipped to have an informed debate on the merits of a transaction (which is particularly significant in a hostile takeover or if there are competing bidders). It was thought that employee representatives and pension trustees, who can have their opinion on the takeover published in the offer document, were also being placed at a disadvantage by having to prepare their opinion on the basis of the limited information published in the Rule 2.7 announcement rather than the more detailed information which would be published at the same time as their opinion.

To address this concern, bidders are now required to include statements of their intentions regarding the specific matters set out above in both the Rule 2.7 announcement and the offer document. Although bidders have always considered their future intentions as part of their private transaction planning, intention statements are now an essential workstream to progress before a Rule 2.7 announcement including submitting them to the Panel in advance.

COMPLIANCE & MONITORING

Although the Panel had a practice of privately following up with bidders on their intention statements 12 months after a takeover closed, the Code has been revised to make that private practice a public one. Bidders are expected to comply with their stated intentions for 12 months (or other period specified in the intention statement) after the takeover closes and must consult the Panel if they decide to take a different course of action during that time. The Panel will usually then require an announcement to be made, describing the alternative course of action and explaining the reason for the changed approach. The bidder may also be required to set out its revised intentions in the announcement.

At the end of the 12 months, bidders must confirm in writing to the Panel that they have (or have not) taken the actions stated and announce their confirmation publicly, disclosing and explaining any deviations from their original statements.

Failure to take the stated action is not a breach of the Code but if the Panel concludes that the party did not meet one of the tests described above when it made the statement, the Panel's usual sanctions will be available to it (for example, public or private criticism).

So far the number of bidders announcing a departure from their intentions within the 12 months following completion has been limited. Predictably, where there has been a departure, the reasons given have typically involved closing and consolidating certain operations following the conclusion of post completion integration work although in one instance, the financial performance of the target being significantly worse than expected was given as a reason to replace the target's executive directors. To date, there has not been any significant backlash to the announcements of a change in intentions. However, on a high profile bid or a statement on a sensitive issue, that may well not be the case.

THE AUSTRALIAN CONTEXT

CHAPTER 6 REQUIREMENTS

The Australian takeovers regime has not undergone a similar reform to that in the UK following Kraft’s takeover of Cadbury in 2010, which in general resulted in the regime in the UK being more protective of certain interest groups. Under the Australian equivalent of the Code, Chapter 6 of the *Corporations Act 2001* (Cth) (**Chapter 6**), there are no specific requirements for an announcement of a takeover offer to include any statements regarding the bidder’s intentions for the target. However, Chapter 6 requires a bidder’s statement (i.e. the offer document) to set out details of the bidder’s intentions regarding:

- the continuation of the business of the target;
- any major changes to be made to the business of the target, including any redeployment of fixed assets; and

- any future employment of the present employees of the target.

REGULATORY GUIDANCE

Chapter 6 does not require bidders to form intentions, only that they must be disclosed if formed. However, failure to formulate any intentions and disclose them in the bidder's statement may result in a departure from one of the key principles underlying Chapter 6, i.e. that the acquisition of control over shares should occur in an efficient, competitive and informed market. Accordingly, guidance from the Australian Takeovers Panel (**Australian Panel**) indicates that bidders should consider including disclosure on intentions regarding:

- integration plans or directions, even if imprecise;
- management expertise; and
- intended dividend policy.

Guidance from the Australian Securities and Investments Commission (**ASIC**) similarly indicates that if a bidder has formed intentions regarding the target, it must disclose those intentions. However, if a bidder has actions in mind, but has made no decision to implement those actions, it must disclose the reason why it has not made a decision on the matter. In addition, the ASIC guidance states that non-committal or undecided statements of intention (e.g. a statement as to the bidder's 'present intention' or 'to review and evaluate the activities and investments and other assets of the target if the offer is successful') are generally insufficient to satisfy the disclosure requirements of Chapter 6.

PRACTICAL APPLICATION

In practice, it is typical for a bidder's statement to set out the bidder's intentions in two scenarios:

- if the bidder acquires 100% of the target; and
- if the bidder does not acquire 100%, but still acquires a shareholding sufficient to obtain control of the target.

However, these statements are generally articulated in significantly less specific terms than would ordinarily be the case in a UK offer document. In addition, in the Australian context, there is no requirement for a bidder to confirm post-completion of a takeover whether they have or have not complied with their stated intentions, nor is it policy or practice of the Australian Panel or ASIC to follow up with bidders post-completion to ensure or monitor compliance.

The authors of this article do not see any need to reform the Australian regime to align it more closely with the UK regime. In Australia, if a particular and specific course of action is required or expected of a bidder following completion of a takeover, there are other avenues for obtaining such a commitment from the bidder. These include undertakings and other commitments given to the Foreign Investment Review Board, the Australian Competition and Consumer Commission or other regulators as part of the regulatory approval process.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ROBERT MOORE
PARTNER, LONDON

+44 20 7466 2918
robert.moore@hsf.com

ANDREW RICH
PARTNER, SYDNEY

+61 2 9225 5707
andrew.rich@hsf.com

WILLIAM CHEW
SENIOR ASSOCIATE, SYDNEY
+61 2 9225 5827
william.chew@hsf.com

LUCY ROBSON
SENIOR ASSOCIATE (SCOTLAND), LONDON
+44 20 7466 2848
Lucy.Robson@hsf.com

ANTONIA KIRKBY
PROFESSIONAL SUPPORT CONSULTANT, LONDON

+44 20 7466 2700
Antonia.Kirkby@hsf.com

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