

The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY

Submitted via email to: supportgroup@thetakeoverpanel.org.uk

24 October 2014

Dear Sirs,

RE: Post-offer undertakings and intention statements

The IMA represents the UK-based investment management industry. Our members include independent asset managers, the investment management arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. Our members manage investments worth more than £5 trillion for their clients, who are UCITS and other authorised funds, pension funds, insurers, sovereign wealth funds and individuals.

The IMA welcomes the opportunity to comment on the Code Committee's consultation on post-offer undertakings and intention statements. Although we do not provide specific answers to the questions in the consultation, we set out in this letter our overall views on the proposals.

IMA members recognise the continuing political pressure that "more needs to be done" in this area. The existing Rules, the Panel already has obligations at least to monitor adherence to statements made during the course of the offer on, for example, the conduct of the offeree's business. IMA members understand the reasoning behind the proposal to make a clear distinction between statements of intention and commitments and the proposed mechanisms which would assist the Panel in enforcing commitments. IMA members also believe it important, if the new Rules are introduced, that the Panel should, as proposed, have no role in enforcing commitments made to third parties, such as government agencies. This is important in ensuring that the role and independence of the Panel is preserved.

However, IMA members also have concerns about the proposals.

- There is a real risk that the proposals will lead to a weakening of the weight and enforceability of statements made during the course of an offer. We believe that, under the proposed new Rules, there is a strong possibility that the failure of, respectively, Guinness and Kraft to adhere to statements of intention in relation to the appointment of Sir Thomas Risk and the future of the Somerdale factory

would have had few or no consequences: in reality it is likely that only a very ill-advised offeror would not be able to pass the “reasonable grounds when made” test. Whilst recognising that commercial pressure in the context of an offer may well exist to make a firm commitment, as opposed to a statement of intention, we are concerned that the proposals on statements of intention may represent an unfortunate weakening of the “Seventh General Principle” (that parties are held to what they say) and so provide opportunities for the cynical to exploit.

- Whilst, as stated above, we understand the reasoning behind the proposals for enforcement of the commitments, we are concerned that they may take the Panel much deeper into areas which are beyond its core remit and competence (of ensuring proper conduct of an offer, bearing in mind, in particular, the interests of offeree shareholders) and that this may have unforeseen and unintended consequences, which could weaken the Panel. For example, if an overseas offeror, making an offer wholly in cash, undertook not to close a factory in Brazil belonging to the offeree, the Panel might find itself embroiled in some highly complicated and difficult extra-territorial issues – and on a matter of, arguably at least, little continuing relevance to offeree shareholders.
- In this context, IMA members have already expressed concern about the effectiveness of the new Rule 25.2 and the apparent ability of some offerors to hide behind a “strategic review” rather than making a clear statement when it seemed highly probable they were really in a position to do so. This is separate from the issues under consultation, but does highlight some of the difficulties the Panel faces in this area.

The IMA and its members remain strongly supportive of the Panel, its work and its mode of operation and would be most concerned if greater involvement in this area led to a weakening of it.

The IMA would welcome further discussion on any of the points we raise in our response.

Yours faithfully,

Robert Hingley