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

Our ref mb

24 October 2014

Dear Sir

PCP 2014/2 – Post-offer undertakings and intention statements.

We welcome the opportunity to comment on the Consultation Paper issued by the Code Committee of the Panel PCP 2014/2.

We recognise that the possible offer for AstraZeneca plc by Pfizer Inc. gave rise to issues that generated a significant level of public debate. We do not comment here on that case or the specific issues arising. However, we have concerns over whether in seeking to respond to that case, certain of proposed changes to the City Code involve the assumption by the Panel of a role and responsibilities that are more appropriately dealt with under other regulations and a different legislative framework.

It has historically been the remit of the Code to ensure that the process of a takeover transaction is undertaken on an orderly basis, and that the highest standards of care and accuracy are applied to statements made in the course of an offer. The focus has been on statements made during the offer period and whether persons making such statements have, at the time of making them, made them on reasonable grounds. Parties that cannot demonstrate that they have done so are subject to action by the Panel for potential breach of the Code.

Whilst we do not question the proposition that there should be an enforcement mechanism for certain undertakings given by companies (whether in the context of a regulated takeover or otherwise), we do not believe that the response to this should be that the Panel takes on responsibility for enforcing all undertakings made in the context of a takeover offer.

Rather, we would see it as the role of Government to define in legislation in what circumstances undertakings should be enforced, and to provide a legal basis for such enforcement. We liken

this situation to the appointment of monitoring trustees by completion authorities whose remit is well defined and often restricted to a very specific area of focus.
If Panel resources are to be expended on enforcing undertakings, it will need to be demonstrated that such commitment of resources will always be justified. The public debate to which the proposals respond presuppose a public interest (or even a national interest) element will be present in relation to an undertaking. It is not obvious on the face of it that this will always be clearly the case. It is not clear why a commercial decision that a bidder might take subsequent to a takeover not to proceed with the undertaking should invariably be a matter for an enforcement action by the Panel. For this reason we do not believe that the Panel should move further away from its traditional remit. Parties giving undertakings should only give them when at the time they are an accurate statement of intention and the parties have reasonable grounds. The Panel should continue to take action when parties to an offer fail to meet this requirement.

On a similar basis, in relation to statements of intention, whilst we accept that the existing wording in Note 3 to Rule 19.1 has established a 12 month timeline for commitments, during which time the party may not depart from the commitment unless there has been a material change of circumstances, we do not consider that there is a need for specific disclosure obligations or for the Panel to be involved after the end of the offer period in relation to decisions that may be made about the necessity of such departure.
We accept that the Panel has a legitimate interest in any breach of the Code and note the argument on 4.3 of the PCP that a decision not to proceed with a stated intended course of action might cast doubt on whether the statement when originally made was made in compliance with the Code. We make no comment on the assumption being made here, but assuming that the Panel is able to conclude that there is no breach of the Code, the question arises as to why the Code should require a public announcement to be made. For whose benefit is disclosure being made? Companies whose equity is traded on a public market will need to consider their ongoing obligations to keep the market informed of price sensitive information. For such companies such rules will provide sufficient regulation of the nature and timing of any relevant announcements. In the case of companies that are not subject to a public disclosure regime, the purpose and need for disclosure is moot. To the extent that such a company has stakeholders, existing mechanisms ought to operate to inform them of matters that affect them. Whether any disclosure made under the Code will be seen by its target audience (assuming that it is clear what that audience is) must be a matter of doubt.

If, notwithstanding our concerns as expressed in this letter, the Panel considers that it is necessary for it to proceed with its enforcement proposals, we would strongly argue that there should be provision for restricting the application of those proposals to the small number of cases where material commitments are made, monitoring is straightforward and where the public interest issues are clear. We do not underestimate the difficulties that may attach to defining such cases, but factors that might be considered are whether the commitments have regional or national impact or an impact on an important community.

If such modifications to the approach are not introduced, we anticipate that the proposals will be likely to lead to parties to takeovers avoiding giving undertakings, which would be an unfortunate outcome in terms of certainty, clarity and transparency.

We note in appendix 1 in this letter a few comments on the questions raised in the PCP. If you have any questions on this letter or wish to discuss any of the matters raised, please contact myself, Maggie Brereton by email at maggie.brereton@kpmg.co.uk or by phone on 0207 311 8658.

Yours faithfully

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Appendix 1

Q1 Should the new definitions of "post-offer intention statement" and "post-offer undertaking" be introduced as proposed?

To the extent that the new definitions introduce greater clarity in disclosure compared to the existing guidance we are supportive of the proposals.

Q2 Should the new Rule 19.7 be introduced as proposed?

As discussed in the introduction to this letter, we do not support new Rule 19.7 as drafted. We consider that items (b) and (c) may provide useful disclosure guidance, but we do not support the post-offer enforcement proposals.

Q3 Should the new Rule 19.8 be introduced as proposed?
We are supportive of part (a) of proposed new Rule 19.8, but as discussed in the introduction to this letter, we do not support part (b).

Q4 Should Rule 19.1 be amended, and Note 2 on Rule 19.1 deleted, as proposed?

We note the Panel's intention that the proposed changes do not alter the manner in which Rule 19.1 is currently applied by the Panel in practice and have no comments on the proposed amendments.

Q5 Should the new Rules 24.2(d), 24.3(d)(xv), 25.2(c) and 25.7(c) be introduced, and Rules 27.2(b) and (c) amended, as proposed?

We recognise the need for consequential amendments in the light of the proposed changes to Rule 19. However, any such changes may need further consideration in the light of the final position on proposed Rules 19.7 and 19.8.

Q6 Do you agree with the proposed minor amendments to Rule 24.2?

We have no comments on the proposed change.