



Takeovers Bulletin

Highlights

- Irrevocable undertakings and financial resources confirmations
- Public consultation on Codes amendments
- Quarterly update on the activities of the Takeovers Team

Irrevocable undertakings not to accept an offer do not negate obligations under the Codes

It is not uncommon for an offeror to obtain irrevocable undertakings (IUs) from shareholders in an offer, which may include undertakings not to accept the offer (Non-Accepting IUs). An offer made under the Takeovers Code, regardless of whether it is a mandatory or voluntary general offer, is made to all shareholders of an offeree company for all outstanding shares other than those held by the offeror (and its concert parties, where applicable).

Pursuant to General Principle 4 and Rule 3.5, the announcement of an offer must include a confirmation from the offeror's financial adviser that sufficient resources are available to the offeror to satisfy the full acceptance of the offer. In a cash offer, a financial resources confirmation is submitted to the Executive which typically includes: (i) a description of the offer's source of funding; (ii) the steps taken by the financial adviser in satisfying itself of the sufficiency of the financial resources; and (iii) a confirmation that cash will be available when payment falls due. Practice Note 15 sets out further details about the Executive's practices for financial resources confirmations.

The Executive has always taken a pragmatic approach when dealing with Non-Accepting IUs in the context of financial resources confirmations. In particular, where a shareholder undertakes in a Non-Accepting IU that it: (i) will not accept an offer; and (ii) will not dispose of or otherwise transfer its shares to any other party (ie, the shares will not become available for acceptance by any other party), the Executive will permit an offeror and its financial adviser to take into account the shares that are subject to the Non-Accepting IU (Subject Shares) for the purposes of the financial resources confirmation. In this scenario, the offeror and its financial adviser may exclude the value of the Subject Shares when ascertaining the total amount of cash that the offeror requires to satisfy the full acceptance of the offer. This pragmatic approach balances the interest of an offeror (ie, not requiring it to maintain funding for the Subject Shares) against the Takeovers Code requirements (ie, to ensure that the offeror has sufficient funds to complete an offer) as it can reasonably be assumed that a shareholder will not normally renege on a Non-Accepting IU.

In one case, a shareholder who was subject to a Non-Accepting IU tendered shares for acceptance during an offer period. The offeror and its advisers discovered this on the closing date when the total number of acceptances was greater than the number of shares subject to the offer less the shares under the Non-Accepting IUs. Subsequently, the shareholder withdrew its acceptances before the due date for settling the offer consideration, and the offeror was able to fulfil its payment obligation under the offer in accordance with the Takeovers Code requirements.

Had the shareholder who gave the Non-Accepting IU sold its shares and the purchasers of those shares then accepted the offer, the offeror would have been required to settle the consideration due in accordance with the Takeovers Code. This could potentially lead to serious difficulties for the offeror if: (i) it was not able to obtain additional funding to settle the consideration due; or (ii) the regulatory approvals in connection with the offer did not cover the Subject Shares.

The Executive wishes to emphasise that under the Takeovers Code, an offer is required to be made to all shareholders of an offeree company. The enforceability or legality of a Non-Accepting IU is a civil matter between an offeror and the relevant shareholder of the offeree company. Whether or not a shareholder has breached the terms of a Non-Accepting IU will not negate an offeror's responsibilities and obligations under the Takeovers Code.

In all cases, the Executive expects all accepting shareholders to be paid in a timely manner in accordance with the Takeovers Code requirements. The breach, or potential breach, of the terms of a Non-Accepting IU cannot be used as a reason to withhold payment to shareholders who have tendered their shares to an offer, especially if they acquired their shares on-market with no knowledge that the shares were subject to a Non-Accepting IU.

The Executive wishes to remind all offerors and their advisers that obtaining a Non-Accepting IU will not absolve an offeror of its responsibilities and obligations to fully comply with the Takeovers Code (in particular, the payment of the offer consideration to accepting shareholders in a timely manner) even if there is a breach, or potential breach, of the IU. An offeror who gathers Non-Accepting IUs must understand the risks involved and be prepared to make all necessary arrangements, which may include obtaining additional funding and regulatory approvals at short notice.

Non-compliance with the Takeovers Code is a serious matter and the Executive will not hesitate to take any action it considers appropriate. This may include the commencement of disciplinary proceedings before the Takeovers and Mergers Panel which may result in the imposition of sanctions.

If there is any doubt about the application of the Codes on Takeovers and Mergers and Share Buy-backs (Codes), the Executive should be consulted at the earliest opportunity.

Public consultation on Codes amendments

On 19 May 2023, the Executive launched a five-week consultation on proposed amendments to the Codes which mainly codify existing practices. The proposals followed a review conducted by the Executive in consultation with the Takeovers and Mergers Panel.

The SFC is analysing the responses received and will issue consultation conclusions in due course.

Quarterly update on the activities of the Takeovers Team

In the three months ended 31 March 2023, we received 12 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), eight whitewashes and 44 ruling applications.

Useful links

- [The Codes on Takeovers and Mergers and Share Buy-backs](#)
- [Practice notes](#)
- [Decisions and statements](#)
- [Previous *Takeovers Bulletins*](#)

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