

THE TAKEOVER PANEL

**ADDITIONAL PRESUMPTIONS TO THE DEFINITION
OF ACTING IN CONCERT**

**RESPONSE STATEMENT BY THE
CODE COMMITTEE OF THE PANEL FOLLOWING
THE CONSULTATION ON PCP 2015/3**

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1. Introduction

(a) Background

1.1 On 14 July 2015, the Code Committee of the Takeover Panel (the “**Code Committee**”) published a public consultation paper (“**PCP 2015/3**” or the “**PCP**”) in which it proposed the introduction of three new presumptions to the definition of “acting in concert” in the Takeover Code (the “**Code**”) in order to codify existing practices of the Panel Executive (the “**Executive**”).

1.2 In summary, the Code Committee proposed to introduce new presumptions into the definition of “acting in concert” in relation to each of the three following categories of persons:

- (a) a person, the person’s close relatives, and the related trusts of any of them, all with each other (the proposed new **presumption (5)**);
- (b) the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other (the proposed new **presumption (6)**); and
- (c) shareholders in a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies (the proposed new **presumption (9)**).

(b) Responses to the consultation

1.3 The consultation period in relation to PCP 2015/3 ended on 11 September 2015. The Code Committee received comments on the consultation questions from four respondents, one of whom submitted comments on a confidential

basis. The three respondents who submitted comments on a non-confidential basis are listed in Appendix A and their responses have been published on the Panel's website at www.thetakeoverpanel.org.uk. The Code Committee thanks the respondents for their comments.

- 1.4 The proposals were generally supported by the respondents.

(c) *The Code Committee's conclusions*

- 1.5 Having considered the responses to the consultation, the Code Committee has adopted the amendments to the Code which were proposed in PCP 2015/3.

(d) *Code amendments*

- 1.6 The amendments to the Code which the Code Committee has adopted in this Response Statement are set out in Appendix B. In Appendix B, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code.

(e) *Implementation*

- 1.7 The amendments to the Code introduced as a result of this Response Statement will take effect, and revised pages of the Code will be published, on Monday, 23 November 2015.

2. Close relatives

- Q1. Should the proposed new definition of “close relatives” be introduced?**
- Q2. Should the proposed new presumption (5) of the definition of “acting in concert” in relation to close relatives be introduced?**
- Q3. Should presumptions (2) and (3) of the definition of “acting in concert”, Rule 9.6, the Note on “Exempt fund manager” and “Exempt principal trader” and Note 1 on Rule 19.2 be amended as proposed?**

(a) Introduction

2.1 In Section 2 of the PCP, the Code Committee proposed:

- (a) the introduction of a new definition of “close relatives” into the Code, as follows:

“Close relatives

A person’s close relatives will normally include:

- (1) the person’s spouse, civil partner or cohabitant;
- (2) the person’s children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (1); and
- (3) the spouse, civil partner or cohabitant of any person described in (2).”;

- (b) the introduction of a new presumption (5) to the definition of “acting in concert”, as follows:

“Acting in concert

...

... [T]he following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(5) a person, the person's close relatives, and the related trusts of any of them, all with each other.”; and

- (c) minor and consequential amendments to:
 - (i) presumption (2) to the definition of “acting in concert” (under which a company is presumed to be acting in concert with any of its directors and their close relatives and related trusts);
 - (ii) presumption (3) to the definition of “acting in concert” (under which a company is presumed to be acting in concert with any of its pension schemes and the pension schemes of the companies described in presumption (1) to the definition of “acting in concert”);
 - (iii) Note 3 on the definitions of “exempt fund manager” and “exempt principal trader”;
 - (iv) the first sentence of Rule 9.6 (which applies when directors, or their close relatives or related trusts, sell shares to a person who then becomes required to make a mandatory offer under Rule 9.1); and
 - (v) Note 1 on Rule 19.2 (which applies where responsibility for the supervision of a document or announcement has been delegated by the directors of a company to a committee of the board).

(b) *Summary of respondents' views and the Code Committee's response*

(i) *Introduction*

2.2 All of the respondents agreed that:

- (a) the proposed new definition of “close relatives” should be introduced;

- (b) the proposed new presumption (5) to the definition of “acting in concert” should be introduced; and
- (c) presumptions (2) and (3) to the definition of “acting in concert”, Note 3 on the definition of “exempt fund manager” and “exempt principal trader”, the first sentence of Rule 9.6, and Note 1 on Rule 19.2 should be amended as proposed.

(ii) *Related trusts*

2.3 One respondent asked whether the effect of the presumption that a person is acting in concert with a “related trust” is that the trustee(s), the settlor, the protector and the beneficiaries of that related trust are presumed to be acting in concert with the person concerned. The Code Committee understands that it is the Executive’s longstanding practice to presume the trustee(s), the settlor and the beneficiaries of a person’s related trust to be acting in concert with that person. The Code Committee agrees with this practice and considers that it is consistent with Note 5(f) on Rule 8. Note 5(f) provides that, for the purpose of disclosing the identity of a person who is required to make an Opening Position Disclosure or a Dealing Disclosure under Rule 8, the owner or controller of the interest or short position in the relevant securities must be specified and that, if the owner or controller of the interest or short position is a trust, details of the trustee(s), the settlor and the beneficiaries must be disclosed.

2.4 The Code Committee understands that, in some cases, a protector may be appointed by the settlor or trustees, in order to exercise certain powers in relation to the administration of the trust. The Code Committee understands that the powers of a protector may include, for example, the power to appoint or remove trustees or the power to approve or withhold consent to certain actions by the trustees. In view of this, the Code Committee considers that a trust in respect of which a person is a protector would be a related trust of his and that a person should be presumed to be acting in concert not only with the

trustee(s), the settlor and the beneficiaries of a related trust but also with any protector of the trust.

- 2.5 In addition, the Code Committee has concluded that, for the purposes of Rule 8, the protector of a trust should be regarded as an “owner or controller” of any interest or short position in securities held by the trust and that Note 5(f) on Rule 8 should be amended so as also to refer to the protector of a trust, as set out below.

(iii) *Other fiduciary vehicles*

- 2.6 One respondent asked whether the Panel would extend the references to a person’s “related trusts” in the presumptions to the definition of “acting in concert” to other fiduciary “vehicles”, such as foundations and limited partnerships. The Code Committee considers that the Panel would be likely to extend the application of the presumptions to the definition of “acting in concert” to such fiduciary vehicles and considers that the Panel should be consulted in relevant circumstances where a person, or his close relatives, has such a related fiduciary vehicle.

(iv) *Affiliated persons*

- 2.7 One respondent observed that vehicles other than trusts which were controlled by a person would be deemed to be acting in concert with the person (rather than being presumed to be acting in concert with the person) if they fell within the definition of “affiliated persons” in the first paragraph of the definition of “acting in concert”. The Code Committee agrees and notes that the first paragraph of the definition of “acting in concert” and Note 2 on the definition provide as follows:

“Acting in concert

...

A person and each of its affiliated persons will be deemed to be acting in concert all with each other (see Note 2 below).

...

NOTES ON ACTING IN CONCERT

...

2. Affiliated persons

For the purposes of this definition an “affiliated person” means any undertaking in respect of which any person:

- (a) has a majority of the shareholders’ or members’ voting rights;*
- (b) is a shareholder or member and at the same time has the right to appoint or remove a majority of the members of its board of directors;*
- (c) is a shareholder or member and alone controls a majority of the shareholders’ or members’ voting rights pursuant to an agreement entered into with other shareholders or members; or*
- (d) has the power to exercise, or actually exercises, dominant influence or control.*

For these purposes, a person’s rights as regards voting, appointment or removal shall include the rights of any other affiliated person and those of any person or entity acting in his own name but on behalf of that person or of any other affiliated person.”.

(c) Amendments to the Code

2.8 In the light of the above, the Code Committee has adopted:

- (a) the new definition of “close relatives”;
- (b) the new presumption (5) to the definition of “acting in concert”; and

- (c) the amendments to presumptions (2) and (3) to the definition of “acting in concert”, Note 3 of the Notes on the definition of “exempt fund manager” and “exempt principal trader”, and Note 1 on Rule 19.2,

as proposed in the PCP and as set out in Appendix B.

- 2.9 In addition, the Code Committee has adopted the proposed amendments to the first sentence of Rule 9.6 with a minor modification, as follows:

“9.6 OBLIGATIONS OF DIRECTORS

When directors (or their close relatives or the related trusts of any of them) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under ~~this~~ Rule 9.1, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his obligations under the Rule.”.

- 2.10 As indicated above, the Code Committee has also amended Note 5(f) on Rule 8, as follows:

“5. *Details to be included in the disclosure*

...

(f) *Owner or controller details*

For the purpose of disclosing identity, the owner or controller of any interest or short position in securities disclosed must be specified, in addition to any other details. The naming of nominees or vehicle companies is insufficient. If the owner or controller of the interest or short position is a trust, details of the trustee(s), the settlor, the protector and the beneficiaries of the trust must be disclosed. Where the beneficiaries are a connected group, for example, members of a family, a description of the group will normally be sufficient.”.

3. Companies founded by a member of a person's family

Q4. Should the proposed new presumption (6) of the definition of “acting in concert” in relation to companies founded by a member of a person's family be introduced?

- 3.1 In Section 3 of the PCP, the Code Committee proposed the introduction of a new presumption (6) to the definition of acting in concert in relation to companies founded by a member of a person's family, as follows:

“Acting in concert

...

... [T]he following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(6) the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other;”.

- 3.2 All of the respondents who expressed a view on the matter supported the proposal and the Code Committee has therefore adopted the new presumption (6) to the definition of “acting in concert” as proposed in the PCP and as set out in Appendix B.

4. Shareholders in a private company

Q5. Should the proposed new presumption (9) of the definition of “acting in concert” in relation to shareholders in a private company be introduced?

(a) Introduction

- 4.1 In Section 4 of the PCP, the Code Committee proposed the introduction of a new presumption (9) to the definition of “acting in concert” in relation to shareholders in a private company, as follows:

“Acting in concert

...

... [T]he following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(9) shareholders in a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies.”.

(b) Summary of respondents’ views and the Code Committee’s response

- 4.2 All of the respondents agreed that the proposed new presumption (9) to the definition of “acting in concert” should be introduced.
- 4.3 One respondent suggested the introduction of a new Note on the definition of “acting in concert”, which would make clear that, whilst shareholders in a private company would normally be presumed to be acting in concert, this presumption might be capable of rebuttal in certain circumstances.

- 4.4 The question of the rebuttal of the presumption that shareholders in a private company are acting in concert was addressed by the Code Committee in paragraph 4.3 of PCP 2015/3, as follows:

“Like the other presumptions in the definition of “acting in concert”, this presumption is capable of being rebutted. The Code Committee understands that the Executive will be prepared to agree that the presumption has been rebutted where it can be demonstrated to the Executive’s satisfaction that the shareholders in the private company do not have a common interest and that they are acting independently of each other and will continue to do so in the future. The presumption may be rebutted at the time of the sale or re-registration of the private company or, if circumstances change thereafter, at any time subsequently.”.

- 4.5 The Code Committee understands that the Executive may be prepared to agree that the presumption has been rebutted where, for example, the shareholders in the private company are independent institutional shareholders, as opposed to, say, individuals who founded or who otherwise became members of the private company. However, the Code Committee does not consider that it is necessary to state in the Code that the presumptions of the definition of “acting in concert” are capable of being rebutted or to include in the Code examples of the circumstances in which Panel is likely to agree to a particular presumption being rebutted.

(c) *Amendments to the Code*

- 4.6 In the light of the above, the Code Committee has adopted the new presumption (9) to the definition of “acting in concert” as proposed in the PCP and as set out in Appendix B.

APPENDIX A

Respondents to PCP 2015/3

(excluding the respondent who submitted comments on a confidential basis)

1. BDO LLP
2. Institute of Chartered Accountants in England and Wales
3. The Investment Association

APPENDIX B

Amendments to the Code

DEFINITIONS

Acting in concert

...

Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

...

(2) a company with ~~any of its~~ directors (together with their close relatives and the related trusts of any of them);

(3) a company with any of its pension schemes and the pension schemes of any company ~~covered~~ described in (1);

...

(5) a person, the person's close relatives, and the related trusts of any of them, all with each other;

(6) the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other;

(57) a connected adviser with its client and, if its client is acting in concert with an offeror or ~~with the~~ offeree company, with that offeror or ~~with that~~ offeree company respectively, in each case in respect of the interests in shares of that adviser and persons controlling[#], controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader); ~~and~~

(68) directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent. (See also Note 5 ~~on this definition~~); and

(9) shareholders in a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies.

...

Close relatives

A person's close relatives will normally include:

- (1) the person's spouse, civil partner or cohabitant;
- (2) the person's children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (1); and
- (3) the spouse, civil partner or cohabitant of any person described in (2).

...

Exempt fund manager/Exempt principal trader

...

NOTES ON EXEMPT FUND MANAGER AND EXEMPT PRINCIPAL TRADER

...

3. *The effect of a principal trader or fund manager having exempt status is that presumption (57) of the definition of acting in concert will not apply. However, the principal trader or fund manager will still be regarded as connected with the offeror or offeree company, as appropriate. Connected exempt principal traders, but not connected exempt fund managers, must comply with Rule 38. Connected exempt principal traders and connected exempt fund managers must comply with the relevant provisions of Rule 8.*

Rule 8

RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

...

NOTES ON RULE 8

...

5. Details to be included in the disclosure

...

(f) Owner or controller details

For the purpose of disclosing identity, the owner or controller of any interest or short position in securities disclosed must be specified, in addition to any other details. The naming of nominees or vehicle companies is insufficient. If

the owner or controller of the interest or short position is a trust, details of the trustee(s), the settlor, the protector and the beneficiaries of the trust must be disclosed. Where the beneficiaries are a connected group, for example, members of a family, a description of the group will normally be sufficient.

Rule 9.6

9.6 OBLIGATIONS OF DIRECTORS

When directors (~~and or~~ their close relatives and or the related trusts of any of them) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under ~~this~~ Rule 9.1, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his obligations under the Rule. In addition, except with the consent of the Panel, such directors should not resign from the board until the first closing date of the offer or the date when the offer becomes wholly unconditional, whichever is the later.

Rule 19.2

19.2 RESPONSIBILITY

...

NOTES ON RULE 19.2

1. *Delegation of responsibility*

...

If detailed supervision of any document or advertisement has been delegated to a committee of the board, each of the remaining directors of the company must reasonably believe that the persons to whom supervision has been delegated are competent to carry it out and must have disclosed to the committee all relevant facts directly relating to himself (including his close relatives and his and their related trusts) and all other relevant facts known to him and relevant opinions held by him which, to the best of his knowledge and belief, either are not known to any member of the committee or, in the absence of his specifically drawing attention thereto, are unlikely to be considered by the committee during the preparation of the document or advertisement. This does not, however, override the requirements of the UKLA Rules relating to the acceptance of responsibility for a prospectus or equivalent document where applicable.