PCP 2022/2 26 May 2022

THE TAKEOVER PANEL

PRESUMPTIONS OF THE DEFINITION OF "ACTING IN CONCERT" AND RELATED MATTERS

PUBLIC CONSULTATION BY THE CODE COMMITTEE

The Code Committee of the Takeover Panel (the "**Panel**") invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 23 September 2022.

Comments may be sent by email to:
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Alternatively, please send comments in writing to:

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All responses to formal consultation will be published on the Panel's website at www.thetakeoverpanel.org.uk unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

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1. Introduction and summary

(a) Introduction

1.1 This Public Consultation Paper ("**PCP**") sets out a number of proposed amendments to the presumptions of the definition of "**acting in concert**" in the Takeover Code (the "**Code**"). Certain of these presumptions are largely unchanged since they were originally introduced and the proposals are intended to ensure that the amended presumptions reflect properly both changes in the nature of investment markets since the presumptions were introduced and the current practice of the Panel.

(b) Executive summary

1.2 This PCP:

(a) proposes to raise the threshold in what is currently presumption (1) of the definition of "**acting in concert**" (which relates to companies) from **20% to 30%**, so as to align it with the threshold in the Code's definition of "**control**";

(b) proposes to make explicit that the presumption of acting in concert applies to interests in:

(i) **shares carrying voting rights** (whether or not the shares are also equity share capital); and/or

(ii) **equity share capital** (whether or not the shares also carry voting rights);

(c) explains that the (new) 30% threshold applies differently to interests in voting share capital and (voting or non-voting) equity share capital in that:

(i) **voting control does <u>not</u> "dilute"** through a chain of ownership (i.e., if A owns or controls shares carrying 30% or more of the voting rights in B, which in turn owns or controls shares carrying 30% or more of the voting rights in C, then A is presumed to control C); and

(ii) **equity investment <u>does</u> (normally) "dilute"** through a chain of ownership (i.e., if A owns or controls 30% or more of the equity share capital in B, which in turn owns or controls 30% or more of the equity share capital in C, A is treated as, in effect, having an equity interest of 9% in C). However, **equity ownership of 50% or more is <u>not</u> treated as "diluting"** through the chain of ownership as an owner of more than 50% of the equity share capital in a company is deemed to control that company (as referenced in the **Note on Definitions** at the end of the Definitions Section of the Code);

(d) proposes to address these points by replacing the current presumption (1) with a **new presumption (1)** and a **new presumption (2)**;

(e) proposes to apply the new presumption (1) and the new presumption (2) to **funds in the same way as to companies**, thereby, in effect, treating an investment in a fund as equivalent to an investment in a company's equity share capital; and

(f) clarifies that, where a fund is managed by an independent discretionary fund manager, **the fund manager (but not the investors in the fund) will, in general, be interested in any securities held by the fund**.

1.3 In summary, therefore, the practical application of the new presumptions (1) and (2) would be as set out the in table below:

COMPANIES	
New presumption (1)	**New presumption (2)**
≥30% voting rights or >50% equity share capital (voting and non-voting)	≥30% equity share capital (voting and non-voting)
% interests **do not dilute** through a chain of ownership	% interests **do dilute** through a chain of ownership
FUNDS	
Interests in funds treated in same way as interests in a company's equity share capital	

1.4 Companies and other persons may be presumed to be acting in concert with each other under the new presumption (1) and/or the new presumption (2) and, in determining whether persons are acting in concert, both of new presumptions (1) and (2) would always need to be considered.

1.5 The interaction between the new presumptions (1) and (2) is explained further in **Section 2**.

(c) Proposals

(i) Introduction

1.6 The general definition of "**acting in concert**" in the Definitions Section of the Code provides that:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control … of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other … .".

1.7 Persons may be considered by the Panel to be acting in concert with each other because they have an agreement or understanding to co-operate to obtain or consolidate control of a company to which the Code applies (a "**Code company**") or to frustrate the successful outcome of an offer. These persons are subject to the general definition of "**acting in concert**" and are sometimes referred to as persons who are actually (rather than presumed to be) acting in concert. Such persons are acting in concert in relation to the Code company to which the agreement or understanding relates (which, in the context of an offer, will be the offeree company) but not necessarily in relation to other Code companies.

1.8 In addition, the definition of "**acting in concert**" sets out nine categories of persons who, without prejudice to the general application of the definition, are deemed to have such a degree of common interest with one another that they should be presumed to be acting in concert in relation to any Code company. However, it is possible for any of the presumptions to be rebutted by the persons concerned in consultation with the Panel, either generally or in relation to a particular Code company.

1.9 The concept of "acting in concert" is fundamental to the Panel's application of the Code. Persons acting in concert (whether they are actually acting in concert or presumed to be so) are, in effect, treated under the Code as a single person with the consequence that, if one of them deals in the shares in a Code company, that dealing could have consequences for that person and also potentially for the other persons who are acting in concert with it.

1.10 Accordingly:

(a) **in the context of an offer**, a dealing in the shares in the offeree company by a person who is acting in concert with:

(i) an **offeror** must be taken into account in determining the application of **Rules 4.2**, **4.6**, **5**, **6**, **8**, **9** and **11** to the offeror. For example, an acquisition of shares in the offeree company by a person acting in concert with an offeror could trigger a requirement for the offeror to revise its offer under **Rule 6** or **Rule 11**; and

(ii) the **offeree company** must be taken into account in determining the application of **Rules 4.4**, **4.6**, **5**, **8** and **9** to the offeree company; and

(b) **outside of an offer**, a person's interests in shares in a Code company must be aggregated with those of persons acting in concert with it in considering whether an acquisition of further interests in shares by that person (or a person acting in concert with it) triggers an obligation to make a mandatory offer under **Rule 9.1** (on account of the percentage of shares in which they are collectively interested thereby increasing either (i) to 30% or more of the voting rights or (ii) in the 30% to 50% band). Similar considerations will also apply in determining whether the acquisition is permitted under **Rule 5**.

1.11 However, if no such dealings take place, there are only limited consequences under the Code of persons acting in concert with each other, being principally the requirement for a person acting in concert with an offeror or the offeree company to disclose its interests and dealings in the securities of the offeree company and, in the case of a securities exchange offer, the offeror.

(ii) Presumptions of the definition of "acting in concert"

1.12 Under the definition of "**acting in concert**", the following persons are presumed to be acting in concert:

> "(1) a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20% or more of the equity share capital of a company is regarded as the test of associated company status);
>
> (2) a company with 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 described in (1);
>
> (4) a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;
>
> (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;
>
> (7) a connected adviser with its client and, if its client is acting in concert with an offeror or the offeree company, with that offeror or 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);
>
> (8) 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. … ; 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.".

1.13 The presumptions of acting in concert are a key component in the application of the Code. This is because, as explained, dealings by a person acting in concert with:

(a) an offeror or the offeree company (in the context of an offer); or

(b) a shareholder in a Code company (outside of an offer),

can have significant consequences for, respectively (i) the offeror or the offeree company or (ii) the shareholder, as well as the person dealing.

1.14 Therefore:

(a) in the context of an offer, a party to an offer (i.e. an offeror or the offeree company); and

(b) outside of an offer, an investor with a shareholding, or other interests in shares, approaching 30%, or in the 30% to 50% band, in a Code company,

will wish to establish the persons who are considered to be acting in concert with it in order that (if appropriate) they can be requested not to undertake dealings in the relevant Code company's shares (so as to avoid triggering any of the provisions of the Code referred to above).

1.15 The presumptions of acting in concert address this issue by prescribing those persons or entities which the Panel will presume to be acting in concert with a particular person (and to whom any relevant "stop notice" might therefore be sent).

1.16 If the presumptions did not exist, the Panel would have to establish in every relevant situation whether, on the balance of probabilities and by reference to the available evidence, any particular person who has dealt in the shares of a Code company was actually acting in concert with (i) an offeror or the offeree company or (ii) another shareholder (as appropriate). This would be unworkable in practice. Accordingly, in relation to the categories of persons specified in the presumptions, who are regarded as having a significant degree of common interest with one another, the burden of proof is reversed, such that the persons will be considered to be acting in concert with one another unless the presumption is rebutted.

(iii) Presumption (1)

1.17 Presumption (1) of the definition of "**acting in concert**" ("**presumption (1)**") is particularly important, given that it prescribes the circumstances in which **companies** are presumed to be acting in concert with each other as a result of one company owning or controlling shares in another company.

1.18 There are, however, certain issues regarding the current formulation of presumption (1):

(a) presumption (1) is stated to apply where a company owns or controls 20% or more of the **equity share capital** of another company (i.e. its "*associated company*") but not its **shares carrying voting rights** (noting that shares carrying voting rights need not be equity share capital). However, in considering the relationship between a shareholder and a company, the ownership or control of shares carrying voting rights may be as significant as, if not more significant than, the ownership or control of equity share capital. It is the practice of the Panel Executive (the "**Executive**"), however, to take equity share capital and/or shares carrying voting rights into account in applying presumption (1);

(b) the **20% threshold** for the test for such "*associated company status*" is arguably too low and, in cases where A owns or controls shares carrying between 20% and 29.9% of the voting rights in B, means that A and B are presumed to be acting in concert with each other even though A is not deemed under the Code to control B. It is suggested that 30% would be a more appropriate threshold (given that this is the level at which the Code deems one company to control another company);

(c) interests in the form of **long derivative or option positions** referenced to a company's shares do not count towards the 20% threshold for the test for "*associated company status*". However, elsewhere in the Code, "**interests in shares**" in the form of long derivative or option positions are treated as equivalent to shareholdings; and

(d) presumption (1) is stated to apply to a prescribed **"group" of companies** by reference to a limited number of 20% links in the chain of ownership. In addition, presumption (1) does not explicitly take account of the fact that entities other than "companies" (for example, **individuals, limited partnerships and other persons**) may own or control 20% or more of a company's shares. The Executive's practice, however, is to treat presumption (1) as applying no matter how many 20% links there may be in the chain and to persons other than companies.

1.19 In the light of the above, **Section 2** proposes:

(a) a **new presumption (1)** to provide that:

(i) a company ("X"); and

(ii) any company which controls, is controlled by or is under the same control as X,

are all presumed to be acting in concert with each other (with "*control*" being determined by reference to the existing definition in the **Note on Definitions**, namely interests in either (1) shares carrying **30% or more of the voting rights** in a company or (2) **a majority (i.e. more than 50%) of the equity share capital** in a company, thus capturing not only shares but also interests in the form of **long derivative or option positions**);

(b) a **new presumption (2)** to provide that the following companies are all presumed to be acting in concert with each other:

(i) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in **30% or more of the equity share capital** in Z; and

(ii) any company presumed to be acting in concert with Y or Z under the new presumption (1); and

(c) a new paragraph at the end of the definition of "**acting in concert**" to make clear that, for the purposes of the new presumptions (1) and (2):

(i) a company which controls, is controlled by or is under the same control as X; and

(ii) Y or, as appropriate, a company which controls Y or Z,

includes any **other undertaking (including a partnership or a trust) or any legal or natural person**.

1.20 Given that, in general, companies issue ordinary shares which both:

(a) carry voting rights; and

(b) constitute equity share capital,

in most cases, the new presumption (1) will be the relevant provision for determining whether two or more companies are presumed to be acting in concert with each other. The new presumption (1) will be engaged where one company is treated as "**controlling, being controlled by or being under the same control as**" another company.

1.21 The new presumption (2) will apply where one company is, directly or indirectly, interested in 30% or more of the equity share capital in another company, whether or not it is

interested in shares carrying 30% or more of the voting rights in the company. So, for example, under the new presumption (2), A, B and C will be presumed to be acting in concert with each other where:

(a) A is interested in 40% of the (non-voting) equity share capital in B; and

(b) B is interested in 80% of the (non-voting) equity share capital in C (such that A is indirectly interested in 32% of the equity share capital in C).

In these circumstances, as A does not control B, the new presumption (1) would not apply as between A and B (and therefore would also not apply as between A and C). Nonetheless, given the significance of A's (indirect) investment in C to each of A and C, either one of A or C may be likely to take action to support the other. Accordingly, A, B and C should all be presumed to be acting in concert with each other in these circumstances.

1.22 As explained below, the new presumptions (1) and (2) would be applied not only to companies but also to investment entities such as investment funds.

(iv) Investment entities

1.23 Under presumption (4) of the definition of "**acting in concert**" ("**presumption (4)**"), a **fund manager** is presumed to be acting in concert with a person whose funds the fund manager manages on a discretionary basis, in respect of the relevant investment accounts. However, under **Rule 8.3(d)** and **Note 8 on Rule 8**, a fund manager is treated as interested in the shares that it manages on a discretionary basis (and its client is **not** treated as having an interest in the shares which the fund manager manages on its behalf). This is also the approach adopted by the Executive in **Practice Statement No 12** ("*Rule 9 and the interests in shares of clients whose funds are managed on a discretionary basis*").

1.24 The latter approach is considered to be the better approach and **Section 3(c)** therefore proposes to **delete presumption (4)** and to introduce a new **Note 11** on the definition of "**interests in securities**" to make this clear.

1.25 The new presumptions (1) and (2) would apply to investment companies in the same way as to any other company.

(v) Limited partnerships and investment funds

1.26 At present, the Code does not prescribe any circumstances in which the level of a person's interests in a **limited partnership or investment fund** is such that it should cause the

person and the limited partnership or investment fund to be presumed to be acting in concert with each other.

1.27 **Section 3(e)** proposes that, where a **limited partnership or investment fund**:

(a) invests in a **bid vehicle** formed for the purpose of making an offer; or

(b) acquires an interest in a **Code company**,

the Panel should apply the new presumptions (1) and/or (2) so as to presume an **investor** (e.g. a limited partner) in the limited partnership or investment fund to be acting in concert with:

(i) the **bid vehicle** (as well as the limited partnership or investment fund) (in the case of paragraph (a)); or

(ii) the **limited partnership or investment fund** (in the case of paragraph (b)),

if the percentage of the investor's interests in the limited partnership or investment fund is such that the new presumptions (1) and/or (2) would apply if that fund were a company and if the investor was interested in a corresponding percentage of that company's equity share capital. This would be set out in a new **Note 7** on the definition of "**acting in concert**".

1.28 In addition, **Section 3(e)** proposes:

(a) a **new presumption (5)** to provide that an **investment manager** of or investment adviser to:

(i) an offeror or an investor in an offeror consortium; or

(ii) the offeree company,

together with any person controlling, controlled by or under the same control as that investment manager or adviser, is presumed to be acting in concert with the offeror or the offeree company respectively. This reflects the manner in which the Executive has applied the current presumption (4); and

(b) a **new paragraph (4)** of the definition of "**connected fund managers and principal traders**" to make clear that a fund manager or principal trader which is under the same control as an **investment manager** or investment adviser that is presumed to be acting in concert with an offeror or the offeree company by virtue of the proposed new presumption (5) will be treated as "*connected with*" that offeror or offeree company respectively.

(vi) Offers made by a new bid vehicle

1.29 Under the first sentence of **Note 6** on the definition of "**acting in concert**", investors in a **consortium** (for example, through a vehicle formed for the purpose of making an offer) are normally treated as acting in concert with the offeror.

1.30 If the amendments referred to above are adopted, the persons who may be considered to be acting in concert with the offeror in cases where equity financing for an offer is provided by a fund managed on a discretionary basis by an investment manager or investment adviser are as follows:

(a) **the fund itself**: under the first sentence of **Note 6** on the definition of "**acting in concert**";

(b) **the investment manager of or investment adviser to the fund**: under the new presumption (5); and

(c) **an investor in the fund** that is providing equity financing for the offer if the investor either:

(i) will have a **"see-through" interest in 30% or more of the equity share capital** in the offeror – in view of the proposed new **Note 7** on the definition of "**acting in concert**", the investor would be presumed to be acting in concert with the offeror under the new presumption (2); or

(ii) **owns more than 50% of the limited partnership interests** in the fund (regardless of the percentage of the equity share capital in the offeror which will be held by the fund) – in view of the proposed new **Note 7** on the definition of "**acting in concert**", the investor would be presumed to be acting in concert with the offeror under the new presumption (1) (taking into account also the first sentence of **Note 6** of the definition of "**acting in concert**").

1.31 Where:

(a) the investment manager or the investment adviser; or

(b) the investor,

is part of a larger organisation, the other parts of that organisation will normally be presumed to be acting in concert with:

(i) the investment manager/investment adviser or the investor; and

(ii) the offeror,

under the new presumptions (1) and/or (2). However, **Note 6** on the definition of "**acting in concert**" also provides that the Panel may be prepared to waive the presumption of acting in concert in relation to the other parts of the organisation if the Panel is satisfied that those other parts are **independent** from the investment manager/investment adviser or the investor (as appropriate) and depending on the circumstances of the case, including the size of the investment in the offeror.

1.32 Regarding the **size of the investment** in the offeror, **Note 6** currently draws three bands by reference to which the Panel will decide whether to agree to waive the presumption of acting in concert between the investment manager/adviser or investor and the other parts of its organisation. In view of the proposal described above to change the threshold at which the new presumptions (1) and (2) are engaged to 30%, **Section 3(f)** proposes to amend these three bands so that they would be as follows:

(a) **10% or less** (no amendment proposed): the Panel would normally agree to waive the presumption;

(b) **more than 10% but less than 30%** (reduced from 50%): the Panel may agree to waive the presumption depending on the circumstances of the case; and

(c) **30% or more** (reduced from 50% or more): the Panel would not normally agree to waive the presumption.

(vii) Connected fund managers and connected principal traders

1.33 Under **Rule 7.2**, the presumption that fund managers and principal traders who are "*connected with*" an offeror or the offeree company are acting in concert with that offeror or offeree company is disapplied until, broadly:

(a) an announcement is made identifying the offeror or offeree company; or

(b) the time when the connected fund manager or connected principal trader is made aware of the offer,

whichever is the earlier.

1.34 **Section 4** proposes certain amendments to **Rule 7.2** and to various related provisions of the Code to clarify and simplify the application of **Rule 7.2**. The proposals are not intended to make substantive amendments to the meaning or application of those provisions, save that the proposed **new Note 7 on Rule 7.2** would codify the ability for a person other than a connected fund manager or connected principal trader to seek the treatment that is afforded by **Rule 7.2**.

(viii) Other proposed amendments to the definition of "acting in concert"

1.35 The current **presumptions (2)** and **(3)** provide, in summary, that:

(a) a **company** is presumed to be acting in concert **with its directors** (together with their close relatives and the related trusts of any of them); and

(b) a **company** is presumed to be acting in concert **with its pension scheme(s)** and the pension schemes of any company described in presumption (1).

1.36 **Section 5** proposes to amend these presumptions so that:

(a) the **directors** of a company should be presumed to be acting in concert **with the company**; and

(b) **a company's pension scheme(s)** should be presumed to be acting in concert **with the company**.

1.37 **Section 5** also proposes to amend the current **presumption (9)**, which relates to shareholders in a private company who:

(a) sell their shares in that company in consideration for the issue of new shares in a Code company; or

(b) in connection with an initial public offering or otherwise, become shareholders in a Code company,

so that it would apply also to members of a partnership.

1.38 It is not proposed to make any material amendments to any of the current **presumptions (5) to (8)**. However, it is proposed that certain of these presumptions will be re-ordered, as noted below.

(ix) Summary of the revised presumptions of the definition of "acting in concert"

1.39 If the amendments proposed above are implemented, the presumptions of the definition of "**acting in concert**" would, in summary, be as follows (with presumptions (1) to (5) being new or amended presumptions, as described above, and presumptions (6) to (10) being the current presumptions (5) to (9) which, save as described above, would be re-ordered but not amended):

(1) a company ("X") and any company which **controls, is controlled by or is under the same control** as X, all with each other (with "control" being determined by reference to interests in either (i) shares carrying 30% or more of the voting rights

in a company or (ii) a majority of the equity share capital in a company) (*new presumption*);

(2) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in **30% or more** of the **equity share capital** in Z, together with any company presumed to be acting in concert with Y or Z under presumption (1), all with each other (*new presumption*);

(3) a company's **pension schemes**, and the pension schemes of any company with which the company is presumed to be acting in concert under presumption (1) or (2), with the **company** (*current presumption (3), amended*);

(4) the **directors** of a company (together with their close relatives and the related trusts of any of them) with the **company** (*current presumption (2), amended*);

(5) an **investment manager** of or **investment adviser** to:

(a) an offeror or an investor in an offeror consortium; or

(b) the offeree company,

with the offeror or the offeree company (as appropriate), together with any person controlling, controlled by or under the same control as that investment manager or adviser (with "control" being determined on the basis described in presumption (1)) (*new presumption*);

(6) a **connected adviser** with its **client** and, if its client is acting in concert with an offeror or the offeree company, with that **offeror or 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) (with "control" being determined on the basis described in presumption (1)) (*current presumption (7)*);

(7) the **directors** of a company which is subject to an offer or where the directors have reason to believe a **bona fide offer might be imminent** (*current presumption (8)*);

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

(9) the close relatives of a **founder of a Code company**, their close relatives, and the related trusts of any of them, all with each other (*current presumption (6)*); and

(10) **shareholders in a private company** or **members of a partnership** who sell their shares or interests in consideration for the issue of new shares in a Code company, or who, in connection with an initial public offering or otherwise, become shareholders in a Code company (*current presumption (9), amended*).

(d) Assessment of the impact of the proposals

1.40 **Section 6** provides an assessment of the impact of the proposed amendments.

1.41 In summary, the proposals should provide considerable benefit to offerors, offeree companies and market participants because they will give additional clarity on the application of the presumptions of the definition of "**acting in concert**" and certain related provisions of the Code.

1.42 The proposals should not require offerors, offeree companies or market participants to incur significant additional costs. This is on the basis that, to a large degree, the proposals represent the codification of the Executive's existing practice. In addition, raising the threshold at which the presumption of acting in concert is engaged from 20% to 30% will result in there being fewer cases in which a shareholder is presumed to be acting in concert with the company in which it is invested, leading to a reduction in requirements to consult the Panel and in the administrative and other costs which would otherwise be incurred in monitoring, and where appropriate preventing, the acquisition of interests in shares in Code companies by one another.

1.43 The proposal that the level of investment at which the Panel will not normally agree to waive the acting in concert presumption in relation to other parts of the organisation of which an investor in a new bid vehicle forms part from 50% to 30% could lead to increased costs for the relevant organisations. However, these costs will be outweighed by the benefits of there being a more consistent approach to the application of the presumptions of acting in concert overall.

(e) Invitation to comment

1.44 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 23 September 2022 and should be sent in the manner set out at the beginning of this PCP.

1.45 The proposed amendments to the Code are set out in **Appendix A**. In this PCP, the provisions of the Code are stated as they will be in force on 13 June 2022, i.e. the date on which the amendments announced on 5 May 2022 will be implemented. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted.

1.46 A list of the questions that are put for consultation is set out in **Appendix B**.

(f) Implementation

1.47 The Code Committee expects to publish a Response Statement setting out the final amendments to the Code in late 2022 and expects that the amendments to the Code would come into effect approximately two months after the publication of that Response Statement.

2. Presumption (1) of the definition of "acting in concert"

(a) Summary

2.1 **Section 2** proposes the introduction of:

(a) a **new presumption (1)** of the definition of "**acting in concert**" to provide that:

(i) a company ("X"); and

(ii) any company which controls, is controlled by or is under the same control as X,

are all presumed to be acting in concert with each other (with "**control**" being determined by reference to interests in either (1) shares carrying 30% or more of the voting rights in a company or (2) a majority (i.e. more than 50%) of the equity share capital in a company);

(b) a **new presumption (2)** of the definition of "**acting in concert**" to provide that the following companies are all presumed to be acting in concert with each other:

(i) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in 30% or more of the equity share capital in Z; and

(ii) any company presumed to be acting in concert with Y or Z under the new presumption (1); and

(c) a new paragraph at the end of the definition of "**acting in concert**" to make clear that, for the purposes of the new presumptions (1) and (2):

(i) a company which controls, is controlled by or is under the same control as X; and

(ii) Y or, as appropriate, a company which controls Y or Z,

includes any **other undertaking (including a partnership or a trust) or any legal or natural person**.

A diagram setting out the companies that, by virtue of an interest in a company's shares carrying voting rights, would be subject to the **new presumption (1)** is set out at **Appendix D**. A diagram setting out the companies that, by virtue of an interest or interests in a company's equity share capital, would be subject to the **new presumption (1)** and/or the **new presumption (2)** is set out at **Appendix E**.

(b) Introduction

2.2 The general definition of "**acting in concert**" provides that:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other (see Note 2 below).".

2.3 "**Control**" is defined as follows:

> "Control means an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights … of a company, irrespective of whether such interest or interests give de facto control.".

2.4 Under **Note 2** on the definition of "**acting in concert**", an "**affiliated person**" means, broadly, any undertaking in respect of which any person:

(a) has or controls a majority of the voting rights;

(b) has the right to appoint or remove a majority of the directors; or

(c) has the power to exercise, or actually exercises, dominant influence or control.

2.5 As discussed further below, under presumption (7) of the definition of "**acting in concert**" ("**presumption (7)**"), a "**connected adviser**" is presumed to be acting in concert with its client and, if its client is acting in concert with an offeror or the offeree company, with that offeror or offeree company.

2.6 A "**connected adviser**" is defined as follows:

> "Connected adviser normally includes only the following:
>
> (1) in relation to the offeror or the offeree company:
>
> (a) an organisation which is advising that party in relation to the offer; and
>
> (b) a corporate broker to that party; and
>
> (2) in relation to a person who is acting in concert with the offeror or the offeree company, an organisation which is advising that person either:
>
> (a) in relation to the offer; or
>
> (b) in relation to the matter which is the reason for that person being a member of the relevant concert party.
>
> Such references do not normally include a corporate broker which is unable to act in connection with the offer because of a conflict of interest.".

2.7 As also discussed below, a "**connected fund manager**" or a "**connected principal trader**" may be presumed to be acting in concert with an offeror or the offeree company. "**Connected fund managers and principal traders**" are defined as follows:

> "A fund manager or principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader is controlled# by, controls or is under the same control as:
>
> (1) an offeror or any person acting in concert with it (for example as a result of being an investor in a consortium (see also Note 6 on the definition of acting in concert));
>
> (2) the offeree company or any person acting in concert with the offeree company; or
>
> (3) any connected adviser to any person covered in (1) or (2).".

2.8 If a connected fund manager or a connected principal trader has exempt status, and that exempt status remains relevant, presumption (7) will not apply to that fund manager or principal trader. **Note 2** on the definition of "**exempt fund manager**" and "**exempt principal trader**" provides as follows:

> "*2. When a principal trader or fund manager is connected with the offeror or offeree company, exempt status is not relevant unless the sole reason for the connection is that the principal trader or fund manager is controlled# by, controls or is under the same control as a connected adviser to:*
>
> *(1) the offeror;*
>
> *(2) the offeree company; or*
>
> *(3) a person acting in concert with the offeror (for example as a result of being an investor in a consortium) or with the offeree company. References in the Code to exempt principal traders or exempt fund managers should be construed accordingly. (See also Rule 7.2.)*".

2.9 When the "#" symbol is applied to the term "**controls, controlled by or under the same control as**" (or equivalent) in various provisions of the Code, including:

(a) presumption (7);

(b) the definition of "**connected fund managers and principal traders**";

(c) **Note 2** on the definition of "**exempt fund manager**" and "**exempt principal trader**"; and

(d) **Rule 4.4**,

it refers to the **Note on Definitions** at the end of the Definitions Section (the "**Note of Definitions**"). This provides as follows:

> "*The normal test for whether a person is controlled by, controls or is under the same control as another person will be by reference to the definition of control. There may be other circumstances which the Panel will regard as giving rise to such a relationship (eg where a majority of the equity share capital is owned by another person who does not have a majority of the voting rights); in cases of doubt, the Panel should be consulted.*".

(c) Background to presumption (1)

(i) Introduction

2.10 Presumption (1) applies in relation to a "group" of companies and provides that the following are presumed to be acting in concert with each other:

> "(1) a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20% or more of the equity share capital of a company is regarded as the test of associated company status);".

2.11 Presumption (1) was introduced into the Code in 1974 and has not been substantively amended since then.

2.12 The perimeter of the companies to which the current presumption (1) applies is shown in the diagram at **Appendix C**. This is established by reference to three components:

(a) the "core" group of companies around the "*company*" by reference to which the presumed concert party is determined, comprising (in addition to the company itself) "*its parent, subsidiaries and fellow subsidiaries*". The "company" itself is shown in **orange** and the "core" companies are shown in **blue** in the diagram at **Appendix C**;

(b) the "*associated companies*" of the "company" and the "core" group of companies, as shown in **pink** in the diagram at **Appendix C**; and

(c) the "*companies of which such companies [i.e. the companies in paragraphs (a) and (b)] are associated companies*", as shown in **green** in the diagram at **Appendix C**.

2.13 The companies subject to presumption (1) are presumed to be acting in concert with the "company" itself and with each other in relation to a Code company (which, in the context of an offer, will be the offeree company). Accordingly:

(a) if the "*company*" referred to in **Appendix C** ("X") makes an offer for Company Y, each of the other companies referred to in presumption (1) is presumed to be acting in concert with X (i.e. the offeror) in relation to its offer for Y (i.e. the offeree company); and

(b) outside of an offer, X must aggregate its interests in shares in any Code company ("Z") with the interests in the shares in Z of each of the other companies referred to in presumption (1) in order to determine whether the acquisition by X, or any of the other companies referred to in presumption (1), of an interest in shares in Z triggers an obligation for a mandatory offer to be made for Z under **Rule 9.1** (on account of the concert party centred on X thereby increasing the percentage of shares in Z in which the concert party is interested either (i) to 30% or more or (ii) in the 30% to 50% band).

2.14 Therefore:

(a) in the context of an offer, the focal point for determining the application of presumption (1) is by reference to the offeror (or, where relevant, the offeree company); whereas

(b) outside of an offer (i.e. in relation to the application of the mandatory offer obligation in **Rule 9.1**), the focal point for determining the application of presumption (1) is by reference to the person who acquires an interest in shares in a Code company which potentially triggers the obligation for a mandatory offer to be made. However, it will also be necessary to establish whether that person is, or is presumed to be, part of a wider concert party.

(ii) Rationale for treating the ownership or control of (1) shares carrying voting rights and/or (2) equity share capital as relevant for the purposes of presumption (1)

2.15 In the opinion of the Code Committee, there are two bases for presuming companies which are in the same "group" to be acting in concert with each other:

(a) first, if A owns or controls a significant proportion of the **shares carrying voting rights** in B, A is likely to be able to exert influence over B and thereby also over any other company in which B itself owns or controls a significant proportion of the shares carrying voting rights; and

(b) secondly, if Y owns or controls a significant proportion of the **equity share capital** in Z, that shareholding is likely to be important to each party:

(i) in the case of Y, because Y has a significant exposure to the financial performance of Z; and

(ii) in the case of Z, because Y is a significant investor in Z,

with the result that:

(1) Y may take action which it considers to be in Z's interests in order to support its (significant) investment in Z; and

(2) Z may take action which it considers to be in Y's interests because Y is a significant investor in Z.

(iii) Issues with presumption (1)

2.16 The Code Committee is aware of certain issues regarding the current formulation of presumption (1), as set out below.

2.17 First, the test for "*associated company status*" in presumption (1) is based only on the "**ownership or control**" of "**equity share capital**"[1]. Accordingly:

(a) notwithstanding that the ownership or control of shares carrying voting rights is as significant, if not more significant, in considering the relationship between a shareholder and a company; and

(b) albeit that, where a company has only ordinary shares in issue, a person's percentage holdings of equity share capital and shares carrying voting rights will normally be the same,

the presumption as drafted is not stated to apply where a company owns or controls 20% or more of another company's **shares carrying voting rights** but rather 20% or more of that company's **equity share capital**. The Code Committee understands, however, that the Executive's practice is to take equity share capital and/or shares carrying voting rights into account in applying presumption (1).

2.18 Secondly, the **20% threshold** for the test for "*associated company status*" is arguably too low and, in cases where A owns or controls shares carrying between 20% and 29.9% of the voting rights in B, means that A and B are presumed to be acting in concert with each other even though A is not deemed under the Code to "control" B. It is suggested that 30% would be a more appropriate threshold (given that this is the level at which the Code deems one company to control another company).

2.19 Thirdly, interests in the form of **long derivative or option positions** referenced to a company's shares do not count towards the 20% threshold for the test for "*associated*

[1] Under section 548 of the Companies Act 2006, a company's "equity share capital" is its "issued share capital excluding any part of that capital that, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution".

company status". However, elsewhere in the Code, "**interests in shares**" in the form of long derivative or option positions are treated as equivalent to shareholdings.

2.20 Fourthly, as the diagram in **Appendix C** shows, presumption (1) is stated to apply to a prescribed **"group" of companies** by reference to a limited number of 20% links in the chain of ownership (i.e. the **pink** and **green** companies in **Appendix C**). In addition, presumption (1) does not explicitly take account of the fact that entities other than "companies" (for example, **individuals, limited partnerships and other persons**) may own or control 20% or more of a company's shares. The Code Committee understands that the Executive's practice is to treat presumption (1) as applying no matter how many 20% links there may be in the chain and to persons other than companies.

2.21 In the light of the above, the Code Committee is proposing to reformulate presumption (1) so as to address these issues and to make its application clearer.

(d) Proposed new presumption (1)

(i) Introduction

2.22 The Code Committee proposes to introduce a **new presumption (1)** to provide that:

(a) a company ("X");

(b) any company which controls, is controlled by or is under the same control as X,

are all presumed to be acting in concert with each other.

2.23 The Code Committee proposes that for these purposes "**control**" should be determined by reference to the circumstances described in the existing definition in the **Note on Definitions**, such that it would apply where a person is interested in <u>either</u>:

(a) shares carrying **30% or more of the voting rights** in a company; <u>or</u>

(b) **a majority (i.e. more than 50%) of the equity share capital** in a company.

(ii) Ownership or control of shares carrying 30% or more of the voting rights in a company

2.24 Where a person ("P") owns or controls shares carrying **30% or more of the voting rights** in a company ("C"), P is treated under the **Note on Definitions** as having "**control**" of C. Furthermore, by virtue of P having control of C in these terms, P is also treated as having control of any company in which C owns or controls shares carrying 30% or more of the voting rights (and so on "up the chain" and "down the chain").

2.25 The Code Committee considers that it is appropriate for P and C to be presumed to be acting in concert with each other in these circumstances given that, through its ownership

or control of shares carrying 30% or more of the voting rights in C, P is treated under the Code as controlling C.

(iii) Ownership or control of a majority of the equity share capital in a company

2.26 Similarly, where P owns or controls **a majority (i.e. more than 50%) of the equity share capital** in C, P may be treated under the **Note on Definitions** as having "**control**" of C. Furthermore, by virtue of P having control of C in these terms, P may also be treated as having control of any company in which C owns or controls a majority of the equity share capital (and so on "up the chain" and "down the chain").

2.27 The Code Committee considers that it is appropriate for P and C to be presumed to be acting in concert with each other in these circumstances given that, although P may not own or control any shares carrying voting rights in C, the fact that P owns or controls a majority of the equity share capital in C means that C may act so as to serve the interests of P.

(iv) Consistency with other provisions of the Code

2.28 The Code Committee notes that presuming P and C to be acting in concert with each other in the circumstances described above would align presumption (1) with:

(a) the definition of "**connected fund managers and principal traders**", which provides that a fund manager or a principal trader will be "*connected with*" an offeror or the offeree company if the fund manager or principal trader "**is controlled by, controls or is under the same control as**" an offeror, the offeree company or a connected adviser to either party to the offer (determined by reference to the **Note on Definitions**); and

(b) **Note 16 on Rule 9.1** and **Note 1(c) on Rule 7.2**. These provisions, which are in identical terms, relate principally to the application of **Rule 9.1** to multi-service financial organisations and state that **Rule 9** will be relevant if the aggregate number of shares in a Code company in which any person, and all persons "**controlling, controlled by or under the same control as**" that person, are interested carry 30% or more of the voting rights of the Code company (again, determined by reference to the **Note on Definitions**).

(e) Proposed new presumption (2)

(i) Introduction

2.29 The Code Committee proposes to introduce a **new presumption (2)** to provide that the following companies are all presumed to be acting in concert with each other:

(a) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in 30% or more of the equity share capital in Z; and

(b) any company presumed to be acting in concert with Y or Z under the new presumption (1).

(ii) Rationale for new presumption (2)

2.30 The rationale for presuming Y and Z to be acting in concert with each other in these circumstances is that Y's interest, direct or indirect, in 30% or more of the equity share capital in Z is likely to be important to each of Y and Z, as explained in paragraph 2.15(b).

(f) Interaction between new presumptions (1) and (2)

(i) Introduction

2.31 Companies and other persons may be presumed to be acting in concert with each other under the new presumption (1) and/or the new presumption (2) and, in determining whether persons are acting in concert, both of new presumptions (1) and (2) would always need to be considered.

(ii) New presumption (1) - shares carrying voting rights

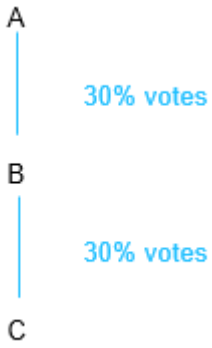
2.32 Under the new presumption (1), if:

(a) A owns or controls shares carrying 30% or more of the voting rights in B; and

(b) B owns or controls shares carrying 30% or more of the voting rights in C,

A, B and C are presumed to be acting in concert with each other (irrespective of whether A owns or controls any equity share capital in B, and whether B owns or controls any equity share capital in C). This is because, in these circumstances, A is treated as controlling B, which in turn is treated as controlling C. This is shown in ***Scenario 1***:

Scenario 1 *– A, B and C presumed to be acting in concert with each other:*



2.33 As a result, the Code Committee considers that, under the new presumption (1), the **ownership or control of shares carrying 30% or more of a company's voting rights** (even if the shares do not also represent equity share capital) **does <u>not</u> dilute** through links in the chain.

2.34 Therefore, in ***Scenario 1***, if any one of A, B or C made an offer for a Code company, the other two companies would both be presumed to be acting in concert with the offeror in relation to that offer.

2.35 Outside of an offer, all of A, B and C must aggregate their interests in the shares in a Code company ("W") in order to determine whether the acquisition by any of them, or a person acting in concert with any of them, of an interest in shares in W triggers a requirement for a mandatory offer to be made for W.

2.36 The Code Committee considers that the presumption of acting in concert arising under the new presumption (1) should cease to apply when the chain of ownership or control of shares carrying 30% or more of the voting rights is broken. So, for example, in ***Scenario 1***, if B owned shares carrying only 25% of the voting rights in C, then B and C would not be presumed to be acting in concert with each other (and, as a consequence, A and C would also not be presumed to be acting in concert with each other).

(iii) New presumption (1) - equity share capital

2.37 Under the new presumption (1), if:

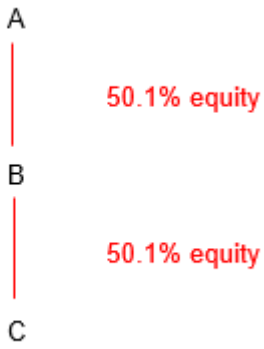
(a) A owns or controls more than 50% of the equity share capital in B; and

(b) B owns or controls more than 50% of the equity share capital in C,

A, B and C are presumed to be acting in concert with each other (irrespective of whether A owns or controls any shares carrying voting rights in B, and whether B owns or controls any shares carrying voting rights in C). This is because, in these circumstances, A is

treated as controlling B, which in turn is treated as controlling C. This is shown in ***Scenario 2***:

Scenario 2 *- A, B and C presumed to be acting in concert with each other:*



2.38 As a result, the Code Committee considers that, under the new presumption (1), the **ownership or control of more than 50% of a company's equity share capital** (whether or not shares also carry voting rights) **does not dilute** through links in the chain.

2.39 Therefore, in ***Scenario 2***, if any one of A, B or C made an offer for a Code company, the other two companies would both be presumed to be acting in concert with the offeror in relation to that offer.

2.40 Outside of an offer, all of A, B and C must aggregate their interests in the shares in a Code company ("W") in order to determine whether the acquisition by any of them, or a person acting in concert with any of them, of an interest in shares in W triggers a requirement for a mandatory offer to be made for W.

2.41 The Code Committee considers that the presumption of acting in concert arising under the new presumption (1) should cease to apply when the chain of ownership or control of more than 50% of the equity share capital is broken. So, for example, in ***Scenario 2***, if B owned 50% or less of the equity share capital in C, then B and C would not be presumed to be acting in concert with each other under the new presumption (1) (and, as a consequence, A and C would also not be presumed to be acting in concert with each other under the new presumption (1)).

(iv) New presumption (2)

2.42 Under the new presumption (2), if:

(a) A owns or controls 30% of the equity share capital in B; and

(b) B owns or controls 30% of the equity share capital in C,

then:

(i) A and B; and, separately

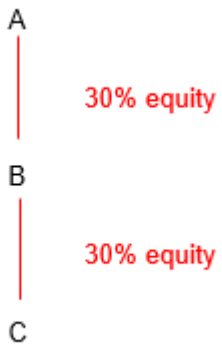
(ii) B and C,

are presumed to be acting in concert with each other, but

(iii) A and C are not presumed to be acting in concert with each other, because A is, indirectly, interested in only 9% of C's equity share capital with the result that A and C would be unlikely to be sufficiently incentivised to take action to support each other.

This is shown in ***Scenario 3***:

Scenario 3 *– A and B presumed to be acting in concert with each other, and B and C presumed to be acting in concert with each other (but A and C not presumed to be acting in concert with each other):*



2.43 As a result, the Code Committee considers that, under the new presumption (2), the **ownership or control of 30% or more of a company's equity share capital does dilute** through links in the chain.

2.44 Therefore, in ***Scenario 3***:

(a) if A made an offer for a Code company, B, but not C, would be presumed to be acting in concert with the offeror (i.e. A) in relation to that offer;

(b) if B made an offer for a Code company, each of A and C would be presumed to be acting in concert with the offeror (i.e. B) in relation to that offer; and

(c) if C made an offer for a Code company, B, but not A, would be presumed to be acting in concert with the offeror (i.e. C) in relation to that offer.

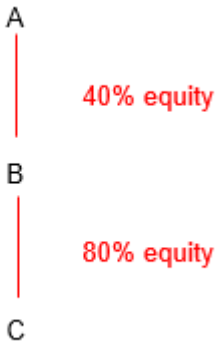
2.45 Outside of an offer:

(a) each of A and C must separately aggregate its interests in the shares in a Code company ("W") with those of B in order to determine whether the acquisition by either A or C (or any person acting in concert with either of them, apart from B) of an interest in shares in W triggers a requirement for a mandatory offer to be made for W; and

(b) B must aggregate its interests in shares in W with those of each of A and C in order to determine whether the acquisition by B (or any person acting in concert with it, apart from A or C) of an interest in shares in W triggers a requirement for a mandatory offer to be made for W.

2.46 By contrast, in ***Scenario 4***:

Scenario 4 *– A, B and C all presumed to be acting in concert with each other:*



all of A, B and C <u>are</u> presumed to be acting in concert with each other <u>under the new presumption (2)</u> because A is, indirectly, interested in more than 30% (i.e. 32%) of C's equity share capital with the result that the rationale in paragraph 2.15(b) applies in relation to not only:

(a) A and B; and

(b) B and C; but also

(c) A and C.

(For completeness, in ***Scenario 4***, B and C are presumed to be acting in concert with each other <u>under the new presumption (1)</u> but A and B are not (with the consequence that A and C are also not presumed to be acting in concert with each other <u>under the new presumption (1)</u>). However, in determining whether persons are acting in concert, both of new presumptions (1) and (2) would always need to be considered.)

2.47 Therefore, in ***Scenario 4***, if any one of A, B or C made an offer for a Code company, the other two companies would both be presumed to be acting in concert with the offeror in relation to that offer.

2.48 Outside of an offer, all of A, B and C must aggregate their interests in the shares in a Code company ("W") in order to determine whether the acquisition by any of them, or a person acting in concert with any of them, of an interest in shares in W triggers a requirement for a mandatory offer to be made for W.

2.49 In the light of the above, the Code Committee notes that, in ***Scenario 2***:

(a) under the new presumption (2):

(i) A, B and C are not presumed to be acting in concert with each other (because A is indirectly interested in less than 30% of the equity share capital in C); but

(ii) A is presumed to be acting in concert with B; and

(iii) B is presumed to be acting in concert with C; however

(b) under the new presumption (1), A, B and C are presumed to be acting in concert with each other (because A owns more than 50% of the equity share capital in B, which in turn owns more than 50% of the equity share capital in C, and interests of more than 50% of a company's equity share capital are treated as conferring "control", and therefore do not dilute through links in the chain of ownership).

(v) Raising the threshold at which the new presumptions (1) and (2) are engaged

2.50 The Code Committee accepts that raising the threshold at which the new presumptions (1) and (2) are engaged from the current level of 20% is not without risk, given that it would reduce the circumstances in which the presumption of acting in concert would apply and would mean that, for example, in the context of an offer, a person who is interested in between 20% and 29.9% of an offeror's share capital (whether shares carrying voting rights or equity share capital) would no longer be presumed to be acting in concert with the offeror.

2.51 However, the Code Committee notes that, during an offer period, the disclosure requirements of **Rule 8.3** would apply, which require the disclosure of dealings by persons who are or become interested in 1% or more of any class of relevant security of the offeree company. Accordingly, if a person subject to **Rule 8.3** who was also interested in between 20% and 29.9% of an offeror's share capital were to deal in shares in the offeree company, those dealings would be required to be disclosed and the Executive could therefore make

enquiries into whether that person should be considered "actually" to be acting in concert with the offeror, in the same way as the Executive currently does in relation to persons with interests of less than 20% in an offeror's share capital.

(g) Interests in shares in the form of derivatives and options

2.52 The Code Committee considers that, in establishing whether:

(a) the 30% (voting rights) or the 50% (equity) threshold in the new presumption (1); or

(b) the 30% (equity) threshold in the new presumption (2),

is satisfied, a person should take into account not only the shares which it owns or controls, but also any shares in respect of which it has any **long derivative or option positions**.

2.53 This is on the basis that a person who has, for example, a long derivative position in the form of a contract for differences referenced to a company's shares carrying voting rights may in practice be able to influence the manner in which shares held by its counterparty in order to hedge that position are voted. In addition, a person who has a long derivative position in the form of a contract for differences referenced to a company's equity share capital will benefit economically if the company is successful and, as such, has an equivalent community of interest with the company to a person who owns or controls the shares themselves. Therefore, the rationales which underpin applying a presumption of acting in concert where a person owns a significant shareholding in a company (whether in the form of shares carrying voting rights or equity share capital) are equally in point where a person's "**interest in shares**" in a company is in the form of a long derivative or option position, as opposed to owning or controlling the shares themselves. In addition, elsewhere in the Code, interests in shares in the form of long derivative or option positions are treated as equivalent to shareholdings.

2.54 The Code Committee acknowledges that:

(a) it is important for a company to be able to establish the persons with whom it is presumed to be acting in concert in order that, where necessary, it can request those persons not to deal in a particular Code company's shares (for example, by sending them a "**stop notice**"). This is because dealings by any such person could either:

(i) trigger an obligation for the company under the Code; or

(ii) be in breach of a restriction in the Code; and

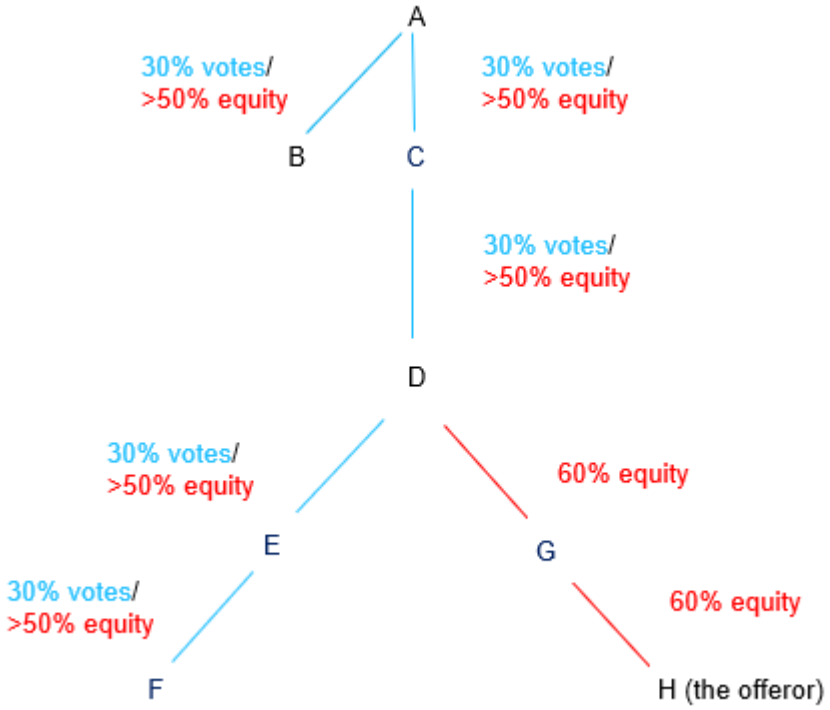
(b) a company will not always know whether a person has a long derivative or option position referenced to its shares, particularly if the existence of such positions is not required to be disclosed in the relevant jurisdiction.

2.55 The Code Committee accepts that a company cannot be expected to send such a stop notice to a person where the person's existence is not known to it. However, the disclosure of long positions in the form of derivatives and options is now required in a number of jurisdictions and so this issue should be unlikely to arise frequently in practice. The Code Committee considers that, in the unlikely event that a person who is presumed to be acting in concert with a company under either of the new presumptions (1) or (2) (but whose existence was not known to the company at the relevant time) deals in relevant securities of the offeree company and the company is subsequently made aware of the person's existence, the Panel should be consulted as to the appropriate course of action to be taken.

(h) If A and B are presumed to be acting in concert, any company controlling, controlled by or under the same control as A or B is also presumed to be acting in concert with A and B

2.56 The Code Committee considers that, where A is presumed to be acting in concert with B under either of the new presumptions (1) or (2), any company which controls, is controlled by or is under the same control as A or B (in accordance with the **Note on Definitions**) should also be presumed to be acting in concert with A and B. So, in ***Scenario 5***:

Scenario 5 *– A, B, C, D, E, F and G all presumed to be acting in concert with H (the offeror):*



D (and G) is presumed to be acting in concert with H under each of:

(a) the new presumption (1) - because D has more than 50% of the equity share capital in G, which has more than 50% of the equity share capital in H; and

(b) the new presumption (2) - because D has a “see-through” (diluted) indirect interest of more than 30% (i.e. 36%) in the equity share capital in H,

and, as a consequence, each of:

(c) A (which indirectly controls D);

(d) B (which is under the same control as D, i.e. both are controlled by A);

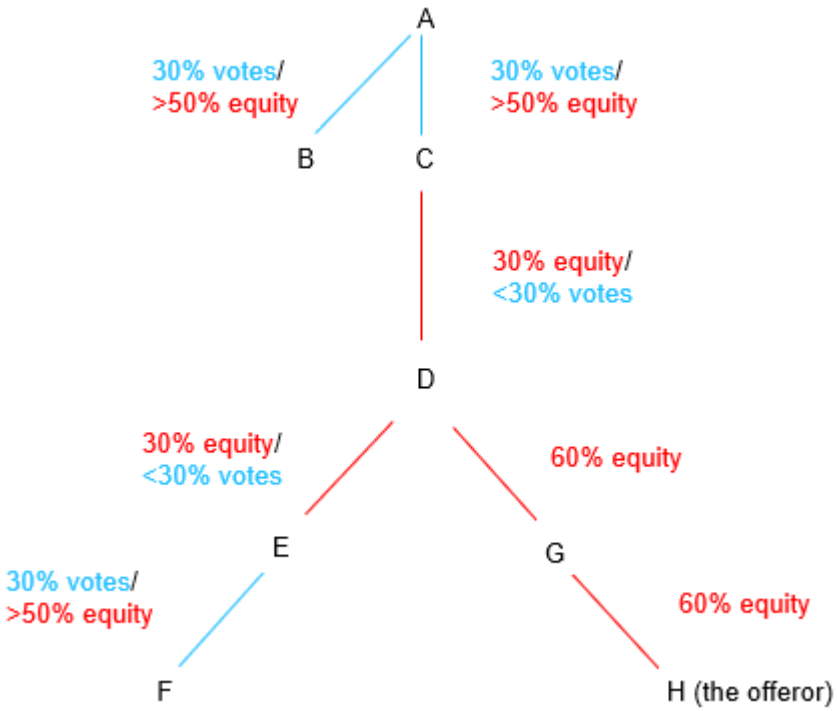
(e) C (which directly controls D); and

(f) E and F (which are controlled by D),

would also be presumed to be acting in concert with H if, for example, H made an offer for a Code company.

2.57 However, if the position was instead as set out in ***Scenario 6***:

Scenario 6 *– only D and G presumed to be acting in concert with H (the offeror):*



such that the connections between:

(a) C and D; and

(b) D and E,

were in the form of the ownership or control of only 30% of the equity share capital (and shares carrying less than 30% of the voting rights), none of A, B, C, E or F would be presumed to be acting in concert with H if, for example, H made an offer for a Code company. This is because:

(i) C does not "control" D (because C is interested in shares carrying less than 30% of D's voting rights and less than 50% of D's equity share capital), with the result that C is not presumed to be acting in concert with H under the new presumption (1), and C's "see-through" (diluted) interest in H's equity share capital is less than 30% (i.e. 10.8%), with the result that C is not presumed to be acting in concert with H under the new presumption (2);

(ii) D does not "control" E (because D is interested in shares carrying less than 30% of E's voting rights and less than 50% of E's equity share capital) with the result that E is not presumed to be acting in concert with H under the new presumption (1), and E is not interested, directly or indirectly, in any of H's equity share capital, with

the result that E is not presumed to be acting in concert with H under the new presumption (2); and

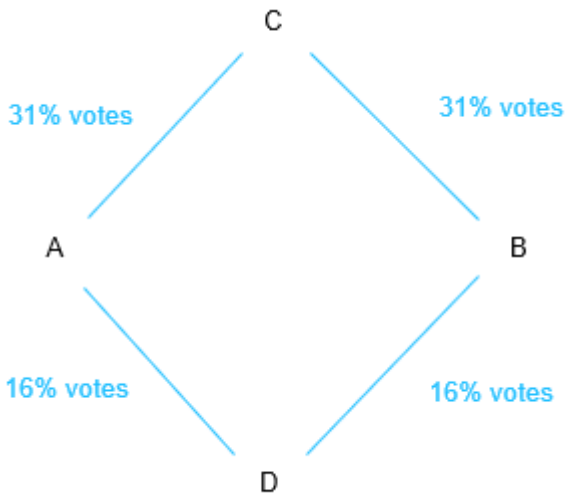
(iii) as neither C nor E is presumed to be acting in concert with H, the concert party chain of ownership is broken and therefore none of A, B or F is presumed to be acting in concert with H.

(i) Aggregation of shareholdings

2.58 In considering whether a person (or company) is subject to the new presumptions (1) or (2), the Code Committee considers that:

(a) in relation to the ownership or control of **shares carrying voting rights**, a person (or company) should normally **take into account** not only the shares in which it is interested but also any **shares in which a person acting in concert with it is interested**.

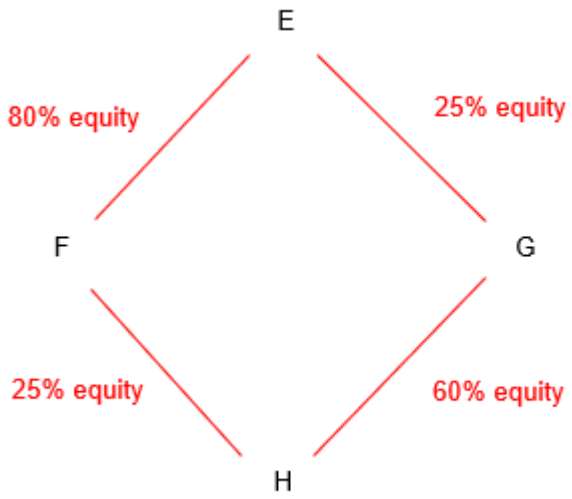
Scenario 7 *– A and B (and C) are presumed to be acting in concert with D:*



Therefore, in ***Scenario 7***, A and B (and C) would be presumed to be acting in concert with D in relation to a Code company under the new presumption (1), even though A and B are each interested in shares carrying only 16% of the voting rights in D. This is because A and B are each presumed to be acting in concert with C, and so with each other, under the new presumption (1); and

(b) in relation to the ownership or control of **equity share capital**, a person should **take into account** the aggregate percentage of a company's **equity share capital in which it is indirectly interested**.

Scenario 8 *– E is presumed to be acting in concert with H:*



Therefore, in ***Scenario 8***, E would be presumed to be acting in concert with H in relation to a Code company under the new presumption (2). This is because E is indirectly interested in an **aggregate** of 35% of H's equity share capital – 20% via F and 15% via G:

(For completeness, the Code Committee notes that, in ***Scenario 8***, F and G are also presumed to be acting in concert with H:

(i) F is acting in concert with H under the new presumption (2) because, under the **Note on Definitions**, F is "controlled" by E (which, as noted above, is acting in concert with H); and

(ii) G is acting in concert with H under both of the new presumptions (1) and (2) because G is interested in 60% of the equity share capital in H, but

neither E and G nor F and H are presumed to be acting in concert with each other.)

(j) Application of new presumptions (1) and (2) to a person (and not only a company) interested in shares carrying 30% or more of the voting rights or the equity share capital in a company

2.59 The Code Committee considers that the new presumptions (1) and (2) should apply not only in relation to a "group" of companies but also in relation to any other **undertaking (including a partnership or a trust) or any legal or natural person**.

2.60 The application of the new presumptions (1) and (2) to the ownership of interests in a limited partnership or other investment fund is addressed in **Section 3(e)**.

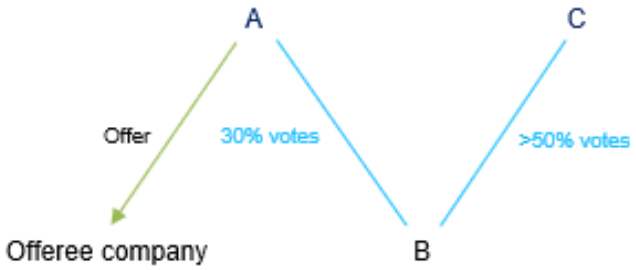
(k) Rebuttal of the new presumptions (1) and/or (2)

2.61 The Code Committee confirms that the new presumptions (1) and (2), like the other presumptions of the definition of "**acting in concert**", would be capable of **rebuttal** by reference to the facts of any particular case.

2.62 However, the Code Committee notes that if, as proposed above, the threshold at which the new presumptions (1) and (2) are engaged is raised from 20% to 30%, the evidence required to satisfy the Panel that either presumption should be rebutted in any particular case is likely to be high.

2.63 One circumstance where the new presumption (1) may be capable of rebuttal would be where, for example, an offeror ("A") is interested in shares carrying 30% or more of the voting rights in a company ("B") but another person ("C") owns or controls shares carrying more than 50% of B's voting rights, as shown in ***Scenario 9***:

Scenario 9 *– presumption that B is acting in concert with A in relation to A's offer for the offeree company is likely to be rebutted:*



2.64 This is on the basis that, notwithstanding that A is interested in shares carrying 30% of the voting rights in B, B is in fact controlled by C.

(l) Application of new presumptions (1) and/or (2) to an interest of 30% or more in the shares in an offeree company

2.65 The Code Committee understands that the Executive's practice is not to treat any person which owns or controls shares carrying 20% or more of the voting rights or 20% or more of the equity share capital in an **offeree company** as acting in concert with that offeree company by virtue of the current presumption (1).[2]

[2] However, if a person owns or controls a majority of an offeree company's voting rights, or can exercise dominant influence or control, it will be an "affiliated person" of, and therefore deemed to be acting in concert with, the offeree company under Note 2 on the definition of "acting in concert".

2.66 The Code Committee agrees with the Executive's practice and does not seek to change it through the amendments proposed in this PCP.

(m) Proposed amendments

2.67 In the light of the above, the Code Committee proposes to:

(a) delete the **current presumption (1)** and introduce a **new presumption (1)** and a **new presumption (2)** of the definition of "**acting in concert**", as follows:

> "**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:
>
> ~~(1) a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20% or more of the equity share capital of a company is regarded as the test of associated company status);~~
>
> (1) a company ("X") and any company which controls#, is controlled by or is under the same control as X, all with each other;
>
> (2) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in 30% or more of the equity share capital in Z, together with any company presumed to be acting in concert with either Y or Z under (1), all with each other;
>
> …
>
> For the purposes of presumptions (1) and (2), a reference to:
>
> (a) a company which controls#, is controlled by or is under the same control as X; and
>
> (b) Y or, as appropriate, a company which controls Y or Z,
>
> includes any other undertaking (including a partnership or a trust) or any legal or natural person.
>
> The reference in presumption (2) to a company being "indirectly" interested in the equity share capital of another company refers only to the economic rights attached to such shares and not to any voting rights carried by such shares.";

(b) delete the current **Note on Definitions** at the end of the Definitions Section and introduce a **new Note on Definitions**, as follows:

"***NOTE ON DEFINITIONS***

~~*The normal test for whether a person is controlled by, controls or is under the same control as another person will be by reference to the definition of control. There may be other circumstances which the Panel will regard as giving rise to such a relationship (eg where a majority of the equity share capital is owned by another person who does not have a majority of the voting rights); in cases of doubt, the Panel should be consulted.*~~

A company (or, where appropriate, a fund manager, a principal trader or an adviser) will be regarded as controlling another company if it is interested in:

(a) shares carrying 30% or more of the voting rights of that other company; or

(b) a majority of the equity share capital in that other company,

and references to a company being controlled by or being under the same control as another company are to be construed accordingly.

In this Note, a reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person."; and

(c) introduce a **new Note on the definition of "control"**, to make clear that a reference to a company "**controlling, being controlled by or being under the same control as**" another company is to the (new) **Note on Definitions**, as follows:

"***NOTE ON CONTROL***

A reference to a company (or, where appropriate, a fund manager, a principal trader or an adviser) controlling, being controlled by or being under the same control as another company is to be construed in accordance with the Note on Definitions at the end of the Definitions Section.".

Q1 Should the threshold at which the presumption of acting in concert is engaged be raised from 20% to 30%?

Q2 Should (i) a person and (ii) a company in which the person owns or controls shares carrying 30% or more of the voting rights be presumed to be acting in concert with each other?

Q3 Should (i) a person and (ii) a company in which the person owns or controls more than 50% of the equity share capital be presumed to be acting in concert with each other?

Q4 Should (i) a person and (ii) a company in which the person owns or controls, directly or indirectly, 30% or more of the equity share capital be presumed to be acting in concert with each other?

Q5 Should the new presumptions (1) and (2) apply to individuals, limited partnerships and other persons who own or control shares carrying 30% or more of the voting rights or equity share capital in a company?

Q6 Should long derivative or option positions be taken into account in determining whether the new presumptions (1) and (2) are engaged?

Q7 Where A is presumed to be acting in concert with B under the new presumption (1) or (2), should any company under the same control as A or B also be presumed to be acting in concert with A and B?

Q8 Do you have any comments on: (i) the new presumption (1); (ii) the new presumption (2); (iii) the new Note on Definitions; or (iv) the new Note on the definition of "control"?

3. Investment entities

(a) Summary

3.1 **Section 3** proposes:

(a) the deletion of **presumption (4)**, under which a fund manager is presumed to be acting in concert with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;

(b) the introduction of a **new Note 11** on the definition of "**interests in securities**" to provide that:

(i) a fund manager is treated as interested in the shares that it manages on a discretionary basis; and

(ii) a client of an independent fund manager will not be treated as having an interest in the shares which the fund manager manages on its behalf;

(c) the introduction of a **new Note 7** on the definition of "**acting in concert**" to provide that where a limited partnership or investment fund:

(i) invests in a bid vehicle formed for the purpose of making an offer; or

(ii) acquires an interest in shares in a Code company,

the Panel will apply the new presumptions (1) and/or (2) so as to presume an investor (e.g. a limited partner) in the limited partnership or investment fund to be acting in concert with:

(A) the bid vehicle (as well as the limited partnership or investment fund) (in the case of paragraph (i)); or

(B) the limited partnership or investment fund (in the case of paragraph (ii)),

if the percentage of the investor's interests in the limited partnership or investment fund are such that the new presumptions (1) and/or (2) would apply if that fund were a company and if the investor was interested in a corresponding percentage of that company's equity share capital;

(d) the introduction of a **new presumption (5)** of the definition of "acting in concert" ("**new presumption (5)**") to provide that an investment manager of or investment adviser to:

(i) an offeror or an investor in an offeror consortium; or

(ii) the offeree company,

together with any person controlling, controlled by or under the same control as that investment manager or investment adviser, is presumed to be acting in concert with the offeror or the offeree company respectively;

(e) the introduction of a **new paragraph (4)** of the definition of "**connected fund managers and principal traders**" to make clear that a fund manager or principal trader which is under the same control as an investment manager or investment adviser that is presumed to be acting in concert with an offeror or the offeree company by virtue of the proposed new presumption (5) will be treated as "*connected with*" that offeror or offeree company respectively; and

(f) certain amendments to **Note 6** on the definition of "**acting in concert**" to conform that provision with the proposed new presumptions (1) and (2).

(b) Introduction

3.2 The definition of "**interests in securities**" provides as follows:

> "A person who has long economic exposure, whether absolute or conditional, to changes in the price of securities will be treated as interested in those securities. A person who only has a short position in securities will not be treated as interested in those securities.
>
> In particular, a person will be treated as having an interest in securities if the person:
>
> (1) owns them;
>
> (2) has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them;
>
> …".

3.3 **Note 2** on the definition of "**interests in securities**" provides as follows:

> "***2. Interests of two or more persons***
>
> *As a result of the way in which interests in securities are categorised, two or more persons may be treated as interested in the same securities. …*".

3.4 **Presumption (4)** provides that the following persons are presumed to be acting in concert:

> "(4) a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts".

3.5 By way of extension to presumption (4), **Note 8** on the definition of "**acting in concert**" provides as follows:

> "***8. Sub-contracted fund managers***
>
> *Where a fund manager sub-contracts discretionary management of funds to another independent fund manager, the Panel will normally regard those funds as controlled by the latter if the discretion regarding dealing, voting and offer acceptance decisions relating to the funds, originally granted to the fund manager, has been transferred to the sub-contracted fund manager and presumption (4) will apply to the sub-contracted fund manager in respect of those funds. This approach assumes that the sub-contracted fund manager does not take instructions from the beneficial owner or from the originally contracted manager on the dealings in question and that fund management arrangements are not established or used to avoid disclosure*.".

3.6 By way of further extension, **Rule 8.3(d)** provides as follows:

> "**(d) If a person manages investment accounts on a discretionary basis, that person, and not the person on whose behalf the relevant securities (or interests in relevant securities) are managed, will be treated for the purpose of this Rule as interested in the relevant securities concerned. Except with the consent of the Panel, where more than one discretionary investment management operation is conducted in the same group, the interests in relevant securities of all such operations will be treated for the purpose of this Rule as those of a single person and must be aggregated (see Note 8 below).**".

3.7 **Note 8** on **Rule 8** further provides as follows:

> "***8. Discretionary fund managers***
>
> *The principle normally applied by the Panel is that where the investment decision is made by a discretionary fund manager, the discretionary fund manager, and not the person on whose behalf the fund is managed, will be treated as interested in (or having a short position in or right to subscribe for), or having dealt in, the relevant securities concerned. For that reason, Rule 8.3(d) requires a discretionary fund manager to aggregate the investment accounts which it manages for the purpose of determining whether it has an obligation to disclose. The beneficial owner would not normally, therefore, be concerned with disclosure to the extent that the investment is managed on a discretionary basis. However, where any of the funds managed on behalf of a beneficial owner are not managed by the fund manager originally contracted to do so but are managed by a different independent third party who has discretion regarding dealing, voting and offer acceptance decisions, the fund manager to whom the management of the funds has been sub-contracted (and not the originally contracted fund manager) is required to aggregate those funds and to comply with the relevant disclosure obligations accordingly.*
>
> *This approach assumes that the discretionary fund manager does not take instructions from the beneficial owner (or, in the case of sub-contracted funds, from the originally contracted manager or the beneficial owner) on the positions or dealings in question and that fund management arrangements are not established or used to avoid disclosure.*".

3.8 Presumption (3) of the definition of "**acting in concert**" ("**presumption (3)**") provides that the following persons are presumed to be acting in concert:

"(3) a company with any of its pension schemes and the pension schemes of any company described in (1)".

3.9 By way of extension to presumption (3), **Note 7** on the definition of "**acting in concert**" provides as follows:

"***7. Pension schemes***

The presumption that a company is acting in concert with any of its pension schemes will normally be rebutted if it can be demonstrated to the Panel's satisfaction that the assets of the pension scheme are managed under an agreement or arrangement with an independent third party which gives such third party absolute discretion regarding dealing, voting and offer acceptance decisions relating to any securities in which the pension scheme is interested. Where, however, the discretion given is not absolute, the presumption will be capable of being rebutted, provided that the pension scheme trustees do not exercise any powers they have retained to intervene in such decisions.".

3.10 Presumption (7) provides that the following persons are presumed to be acting in concert:

"(7) a connected adviser with its client and, if its client is acting in concert with an offeror or the offeree company, with that offeror or 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)".

(c) Proposed deletion of presumption (4) and amendments to the definition of "interests in securities"

(i) Introduction

3.11 The Code Committee notes that, in the provisions referred to above, the Code takes different approaches to funds under discretionary management:

(a) under **presumption (4)**, a fund manager is presumed to be acting in concert with a person whose funds the fund manager manages on a discretionary basis, in respect of the relevant investment accounts; however

(b) under **Rule 8.3(d)** and **Note 8 on Rule 8**, a fund manager is treated as interested in the shares that it manages on a discretionary basis (and its client is not treated as having an interest in the shares which the fund manager manages on its behalf).

(ii) The Code Committee's analysis

3.12 The Code Committee considers that the better approach is for a fund manager to be treated as interested in any shares which it manages on a discretionary basis. This is on the basis that a fund manager which has been granted discretionary management authority has **general control** of the funds provided to it and of the shares which it manages, including as to the manner in which the shares are voted. On this basis, the

fund manager is interested in such shares under paragraph (2) of the definition of "**interests in securities**".

3.13 The Code Committee notes that this is also the position adopted by the Executive in **Practice Statement No 12** ("*Rule 9 and the interests in shares of clients whose funds are managed on a discretionary basis*") which states that:

> "The Executive … interprets [presumption (4)] to mean that funds managed on a discretionary basis by a fund management organisation will be treated for the purposes of the Code as controlled by the fund management organisation and not by the person(s) on whose behalf the funds are managed. Therefore, the fund management organisation, and not its clients, will be treated as interested in any shares and other interests in shares managed by the fund management organisation on a discretionary basis. As a result, the Executive will aggregate shares which the fund management organisation manages on behalf of its clients on a discretionary basis with shares and interests in shares in which the fund management organisation and other persons under the same control as it are interested for their own account in assessing whether, for example, an obligation to make a mandatory offer under Rule 9.1 of the Code has been triggered.".

3.14 In line with:

(a) **Note 8 on Rule 8**; and

(b) the practice adopted by the Executive as set out in **Practice Statement No 12**,

the Code Committee also considers that a client whose funds are managed on a discretionary basis by an independent fund manager should not be treated as interested in shares acquired on its behalf by the fund manager if the client has given the fund manager absolute discretion regarding dealing, voting and offer acceptance decisions. If, as is sometimes the case, the discretion granted by the client is not absolute because the client has reserved the right to exercise certain rights, for example to vote shares in certain circumstances, the Code Committee considers that the client should nonetheless not be treated as interested in the shares acquired on its behalf by the fund manager if it does not in practice exercise the rights in question. This would also be consistent with the approach taken in **Note 7** on the definition of "**acting in concert**" with regard to the circumstances in which presumption (3) may be rebutted in relation to a company and its pension schemes. The Code Committee considers that the same approach should be taken where one fund manager sub-contracts discretionary management of funds to another fund manager.

3.15 In addition, the Code Committee proposes to amend the introductory wording to the numbered paragraphs of the definition of "**interests in securities**" in order to make clear that a person will be treated as having an interest in securities if the person falls within any of paragraphs (1) to (5), irrespective of whether the person has a long economic exposure to changes in the price of securities.

(iii) Proposed amendments

3.16 In the light of the above, the Code Committee proposes to:

(a) delete:

(i) presumption (4);

(ii) **Note 8** on the definition of "**acting in concert**";

(iii) **Rule 8.3(d)**; and

(iv) **Note 8 on Rule 8**;

(b) amend the definition of "**interests in securities**", as follows:

"~~In particular,~~ Notwithstanding the above, a person will be treated as having an interest in securities if the person:

…

(2) has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them, including as a fund manager (see Note 11);";

(c) introduce a new **Note 11** on the definition of "**interests in securities**", as follows:

"***11. Fund managers***

(a) A fund manager will be treated as having an interest in securities which it manages for a client on a discretionary basis.

(b) A client will not be treated as having an interest in securities if it has given to an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions. If the discretion is not absolute, the client will not normally be treated as having an interest in securities provided that it does not exercise any powers it has retained to intervene in such decisions.

(c) Where a fund manager sub-contracts discretionary management of funds to another independent fund manager, the same approach will be applied, i.e. the sub-contracted fund manager, and not the original fund manager, will be treated as having an interest in securities provided that the sub-contracted fund manager has been given absolute discretion regarding dealing, voting and offer acceptance decisions (and, if the discretion is not absolute, the originally contracted fund manager will not normally be treated as having an interest in securities provided that it does not exercise any powers it has retained to intervene in such decisions)."; and

(d) introduce a new **Note 8 on Rule 8**, as follows:

"***8. Fund managers***

(a) See Note 11 on the definition of interests in securities.

(b) Except with the consent of the Panel, where more than one discretionary investment management operation is conducted in the same group, the interests in relevant securities of all such operations will be treated for the purposes of Rule 8 as those of a single person and must be aggregated.".

(d) Investment trusts (and other investment companies)

(i) Introduction

3.17 In many cases, investment entities are companies. For example, an investment trust is a closed-end investment company which is managed by its board of directors. In such cases, the board is responsible for, among other matters, appointing an investment manager and setting the key policies for the company, such as the investment, gearing, dividend and discount management policies. The day-to-day investment decisions are taken by the investment manager, which typically manages the company's investments on a discretionary basis.

(ii) Application of the Code - outside of an offer

3.18 The Code Committee considers that the provisions of the Code referred to above, including the proposed new presumptions (1) and (2), should apply to an investment trust (or any other investment company) in the same way as to any other company.

3.19 Therefore, the Code Committee considers that, if the amendments referred to above are adopted:

(a) under paragraph (1) of the definition of "**interests in securities**", an investment trust should be treated as being **interested in** the securities of any Code company held by the investment trust;

(b) under paragraph (2) of the definition of "**interests in securities**", the investment manager of the investment trust should also be treated as being **interested in** the securities of any Code company held by the investment trust;

(c) under the new presumption (1):

(i) an investment trust; and

(ii) any person who **controls** the investment trust (determined by reference to the **Note on Definitions**), together with any person controlling, controlled by or under the same control as that person,

should be presumed to be acting in concert with each other; and

(d) under the new presumption (2):

(i) an investment trust; and

(ii) any person who is interested, directly or indirectly, in **30% or more of the equity share capital** in the investment trust, together with any person controlling, controlled by or under the same control as that person,

should be presumed to be acting in concert with each other.

3.20 As a result, the Code Committee considers that:

(a) under the new presumptions (1) **and/or** (2) respectively, an **investment trust** and any **person** referred to in paragraph 3.19(c)(ii) or 3.19(d)(ii) should be required to **aggregate their interests** in shares in any Code company in order to determine whether the acquisition of further interests in shares by any one of them triggers an obligation for a mandatory offer to be made under **Rule 9.1** - see the entities with the **orange** shareholdings in Code company Z, holding an aggregate of 19% of Z's shares, shown on the right hand side of ***Scenario 10***; and

(b) under **Note 16 on Rule 9.1**, the **investment manager** of the investment trust and all **persons controlling, controlled by or under the same control** as the investment manager should be required to **aggregate their interests** in shares in any Code company (including the shares held by the investment trust) in order to determine whether the acquisition of further interests in shares by any one of them triggers an obligation for a mandatory offer to be made under **Rule 9.1** – see the entities with the **purple** shareholdings in Code company Z, holding an aggregate of 16% of Z's shares, shown on the left hand side of ***Scenario 10***.

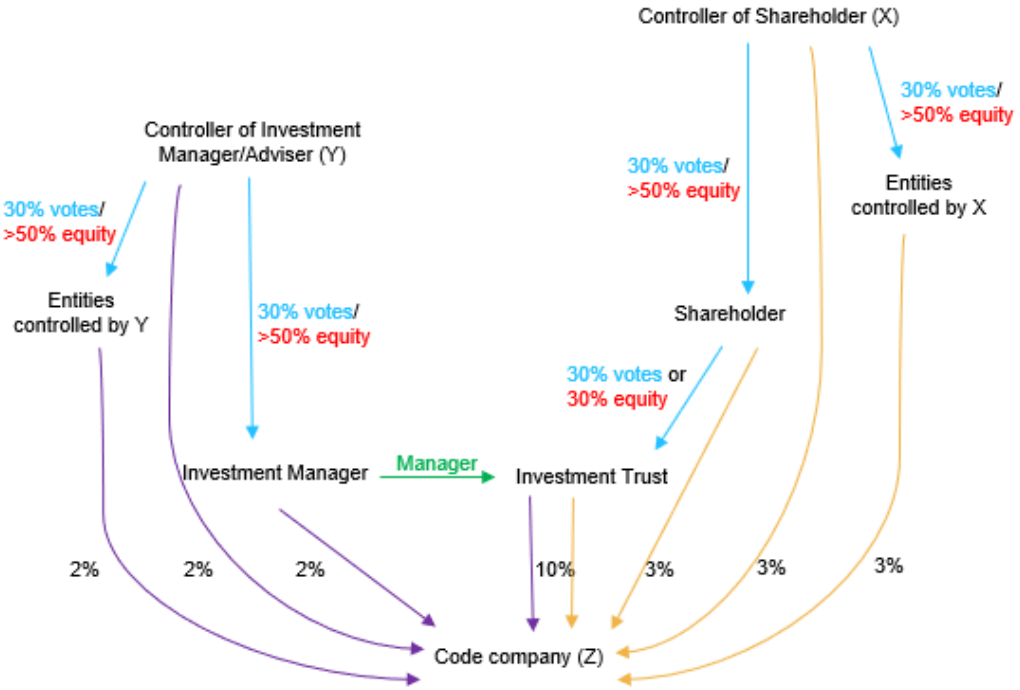
3.21 However, outside of an offer, the two groups of persons referred to in paragraphs 3.20(a) and (b) are not presumed to be acting in concert with one another in relation to a Code company.

Scenario 10 *- outside of an offer, the shares in Z held by the Investment Trust (i.e. 10%) are required to be aggregated separately with other shares in Z owned or controlled by each of:*

(i) the Investment Manager (and persons controlling, controlled by or under the same control as the Investment Manager) (i.e. the 6% shown in purple); and

(ii) the ≥30% Shareholder (and persons controlling, controlled by or under the same control as the Shareholder) (i.e. the 9% shown in orange),

but there is no requirement for the shares in Z owned or controlled by the persons referred to in (i) and (ii) both to be aggregated with each other:



(iii) Application of the Code – in the context of an offer

3.22 In the case of an **investment trust making an offer** for a Code company (for example, another investment trust), the Code Committee understands that the Executive's practice is to regard the **investment manager** of the offeror or the offeree company (and persons controlling, controlled by or under the same control as the investment manager) as acting in concert with the **offeror or offeree company** (as appropriate). This is by reference to the current presumption (4) and because there is a community of interest between, on the one hand, the investment manager (and also persons controlling, controlled by or under the same control as the investment manager) and, on the other, the offeror or offeree company itself in relation to the outcome of the offer. This practice is similar to the approach taken in relation to connected advisers to an offeror or offeree company, as set out in presumption (7).

3.23 The Code Committee agrees with this practice and believes that it should be reflected in the Code. Therefore, as explained below, the Code Committee proposes to introduce a **new presumption (5)** to this effect.

3.24 Therefore, if the Investment Trust in ***Scenario 10*** announced an offer or possible offer for Code company Z, the persons referred to in both paragraph 3.20(a) and paragraph 3.20(b) would then be presumed to be acting in concert with the offeror (i.e. the Investment Trust) in relation to that offer as follows:

(a) the 30% shareholder (and any person controlling, controlled by or under the same control as it) would be presumed to be acting in concert with the offeror under the new presumption (1) or (2) (depending on whether the shareholding represented, respectively, shares carrying 30% or more of the **voting rights** or 30% or more of the **equity share capital**); and

(b) the investment manager of the offeror (and any person controlling, controlled by or under the same control as it) would be presumed to be acting in concert with the offeror under the new presumption (5) (see below).

(e) Investment funds (such as limited partnerships)

(i) Introduction

3.25 There are a number of investment entities which are not companies. For example, a limited partnership or a similar investment fund is not a company and does not have a board of directors. Although investors may benefit from certain rights set out in the fund documentation, their limited partnership interests do not normally carry voting rights. Investment funds may be accessible to the public (for example, unit trusts) or raised privately by investment managers (for example, limited partnerships). A limited partnership or an investment fund is generally managed on a discretionary basis by an investment manager and/or an investment adviser.

3.26 On the basis that a limited partnership or investment fund (referred to in the remainder of this PCP as a "**fund**") is not a company, and that holders of limited partnership interests in a fund do not normally hold voting rights, the proposed new presumptions (1) and (2) do not apply directly in relation to (i) a fund and (ii) a person (or company) which owns 30% or more of the limited partnership or other relevant interests in a fund.

3.27 However, the Code Committee considers that limited partnership interests in a fund are generally analogous to equity share capital in a company since, in each case, the owner will generally benefit on an unlimited basis in the financial performance of the fund or the company (as appropriate). Therefore, the Code Committee considers that the approach set out above in relation to the ownership or control of equity share capital in a company can be applied in relation to the ownership of limited partnership or other relevant interests in a fund, as described below.

(ii) Application of the Code – outside of an offer

3.28 The Code Committee considers that, in line with the new presumption (2), outside an offer a person which owns 30% or more of the limited partnership interests in a fund should be required to **aggregate** its interests in shares in a Code company (together with the interests of any person controlling, controlled by or under the same control as the person)

with those of the fund in determining whether the acquisition of further interests in shares by any one of them triggers an obligation for a mandatory offer to be made under **Rule 9.1** – see the entities with the **orange** shareholdings in Code company Z, holding an aggregate of 19% of Z's shares, shown on the right hand side of ***Scenario 11***.

3.29 In addition, under **Note 16 on Rule 9.1**, the **investment manager** of and/or **investment adviser** to the fund and all persons **controlling, controlled by or under the same control as** the investment manager and/or investment adviser should be required to **aggregate their interests** in shares in any Code company (including the shares held by the fund) in order to determine whether the acquisition of further interests in shares by any one of them triggers an obligation for a mandatory offer to be made under **Rule 9.1** – see the entities with the **purple** shareholdings in Code company Z, holding an aggregate of 16% of Z's shares, shown on the left hand side of ***Scenario 11***.

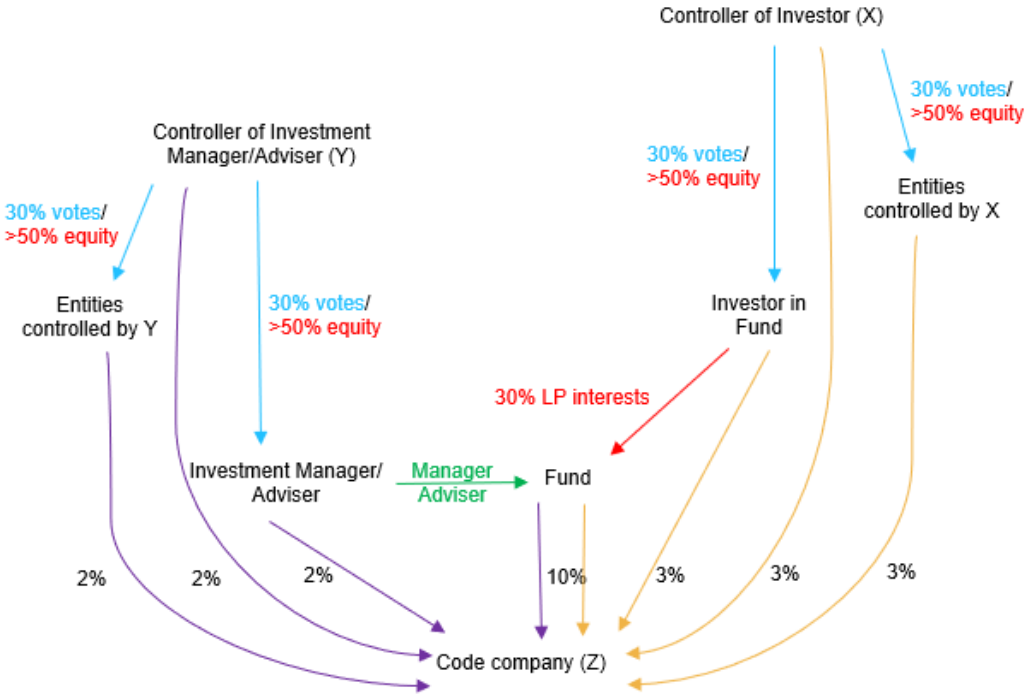
3.30 However, outside an offer, the two groups of persons referred to in paragraphs 3.28 and 3.29 are not presumed to be acting in concert with one another in relation to a Code company.

Scenario 11 *– outside of an offer, shares in Z held by the Fund (i.e. 10%) are required to be aggregated separately with other shares in Z owned or controlled by each of:*

(i) the Investment Manager/Investment Adviser (and persons controlling, controlled by or under the same control as the Investment Manager/Investment Adviser) (i.e. the 6% shown in purple); and,

(ii) the ≥30% Investor in the Fund (and persons controlling, controlled by or under the same control as the Investor) (i.e. the 9% shown in orange),

but there is no requirement for the shares in Z owned or controlled by the persons referred to in (i) and (ii) both to be aggregated with each other:



(iii) Application of the Code – in the context of an offer

(1) THE FUND ITSELF

3.31 The first sentence of **Note 6** on the definition of "**acting in concert**" provides as follows:

> "***6. Consortium offers***
>
> *Investors in a consortium (eg through a vehicle company formed for the purpose of making an offer) will normally be treated as acting in concert with the offeror. …*".

3.32 The Code Committee understands that the Executive's practice is to apply this provision not only to persons who invest in the consortium bid vehicle but also to any person who invests in any other new vehicle or company formed for the purpose of investing, directly or indirectly, in the consortium bid vehicle – for example, by investing in a new fund formed for this purpose, and including through the exercise of a co-investment right.

3.33 Where equity financing for an offer is provided by an existing fund, the fund is treated as acting in concert with the offeror under the first sentence of **Note 6** on the definition of "**acting in concert**".

(2) THE INVESTMENT MANAGER OF OR INVESTMENT ADVISER TO THE FUND

3.34 The Code Committee understands that the Executive's practice is to regard the investment manager of or investment adviser to a fund making an investment in the equity share capital in the offeror (and persons controlled by, controlling or under the same control as the investment manager or investment adviser) as acting in concert with the

offeror. This is by reference to the current presumption (4); because the decision to invest in the consortium will be made by the investment manager or investment adviser; and because there is a community of interest between, on the one hand, the investment manager or investment adviser (and persons controlling, controlled by or under the same control as it) and, on the other, the offeror in relation to the outcome of the offer.

3.35 The Code Committee agrees with this practice and believes that it should be reflected in the Code. Therefore, as explained below, the Code Committee proposes to introduce a **new presumption (5)** to this effect.

(3) AN INVESTOR IN THE FUND

3.36 In addition, the Code Committee considers that an **investor** in an existing fund which is providing equity financing for an offer should be presumed to be acting in concert with the offeror if the investor either:

(a) **will have a "see-through" indirect interest in 30% or more of the equity share capital in the offeror**. This would be in line with the application of the new presumption (2) in relation to the ownership or control of equity share capital in a company; or

(b) **owns more than 50% of the limited partnership interests in a fund which is subscribing for equity share capital in the offeror** (regardless of the percentage of the equity share capital in the offeror which will be held by the fund). This would be in line with the application of the new presumption (1) in relation to the ownership or control of equity share capital in a company.

3.37 Therefore, in ***Scenario 12***:

(a) D would be presumed to be acting in concert with the offeror under the new presumption (2) – because D has a "see-through" indirect interest of more than 30% (i.e. 32%) in the equity share capital in the offeror; and

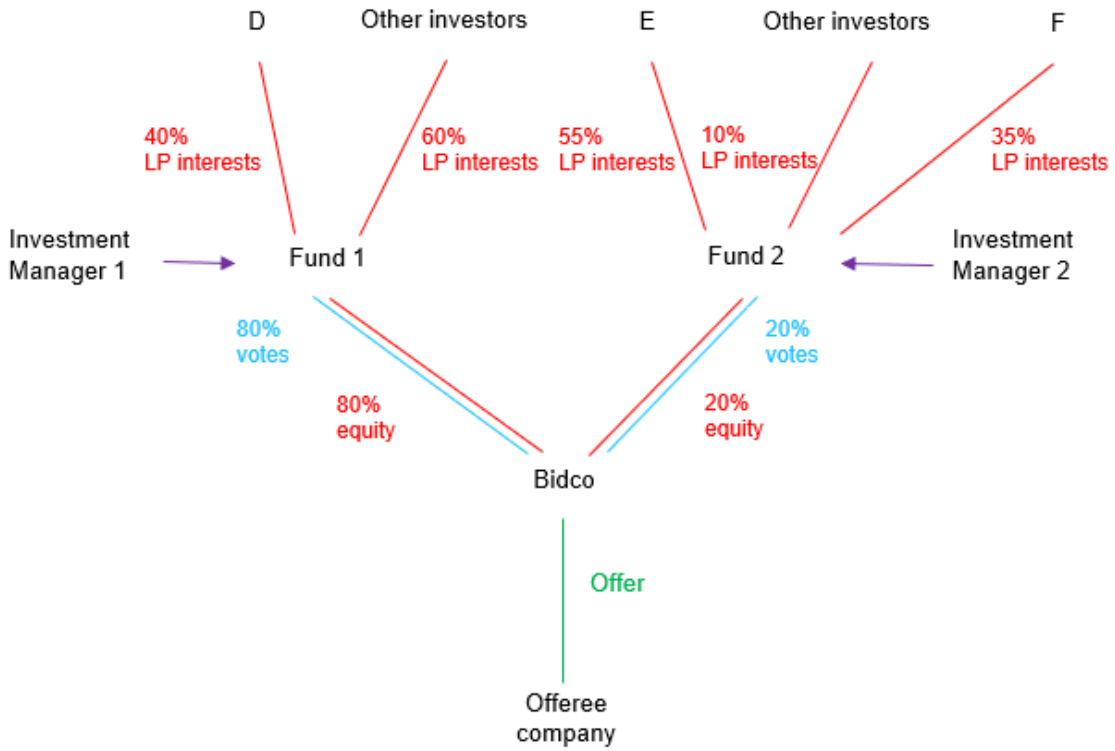
(b) E would be presumed to be acting in concert with the offeror under the new presumption (1) – because E has more than 50% of the limited partnership interests in Fund 2 and, by reference to the **Note on Definitions**, is therefore regarded as "controlling" Fund 2 which, under the first sentence of **Note 6** on the definition of "**acting in concert**", is treated as acting in concert with the offeror; but

(c) F would not be presumed to be acting in concert with the offeror because F owns only 35% of the limited partnership interests in Fund 2, with the result that neither the analysis in the new presumption (1) nor the analysis in the new presumption (2) applies:

(i) the new presumption (1) does not apply because F is not regarded as "controlling" Fund 2; and

(ii) the new presumption (2) does not apply because F's "see-through'' indirect interest in the equity share capital in the offeror is less than 30% (i.e. 7%).

Scenario 12 *- in addition to Fund 1 and Fund 2, and Investment Manager 1 and Investment Manager 2, D and E (but not F) presumed to be acting in concert with the offeror:*



(iv) Proposed amendments

3.38 In the light of the above, the Code Committee proposes to introduce:

(a) a new **Note 7** on the definition of "**acting in concert**", as follows:

"***7. Investors in limited partnerships and other investment funds***

Where a limited partnership or other investment fund (a "fund") (including a fund managed by an independent fund manager):

(a) invests in a new vehicle formed for the purpose of making an offer; or

(b) acquires an interest in shares in a company to which the Code applies,

the Panel will apply presumptions (1) and/or (2) of the definition of acting in concert so as to presume an investor in the fund to be acting in concert with the offeror (in the case of paragraph (a)) or the fund (in the case of paragraph (b)) if the percentage of the investor's interests in the fund is such that the presumption would apply if the fund were a company and the investor was interested in a corresponding percentage of the company's equity share capital.";

(b) a **new presumption (5)** of the definition of "**acting in concert**", as follows:

"(5) an investment manager of or investment adviser to:

(a) an offeror or an investor in an offeror consortium; or

(b) the offeree company,

with the offeror or offeree company (as appropriate), together with any person controlling#, controlled by or under the same control as that investment manager or investment adviser;"; and

(c) a **new paragraph (4)** of the definition of "**connected fund managers and principal traders**", as follows:

"A fund manager or principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader is controlled# by, controls or is under the same control as:

…

(4) an investment manager of or investment adviser to:

(a) an offeror or an investor in an offeror consortium; or

(b) the offeree company.".

(f) Offers made by a new bid vehicle

(i) Introduction

3.39 **Note 6** on the definition of "**acting in concert**" explains that:

(a) an investor in a consortium bid vehicle will be treated as acting in concert with the offeror; and

(b) where the investor is part of a larger organisation, the Panel may in certain circumstances be prepared to waive the presumption that other parts of the investor's organisation are also acting in concert with the offeror under the current presumption (1).

3.40 **Note 6** on the definition of "**acting in concert**" provides as follows:

"***6. Consortium offers***

Investors in a consortium (eg through a vehicle company formed for the purpose of making an offer) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert.

Where the investment in the consortium is, or is likely to be, 10% or less of the equity share capital (or other similar securities) of the offeror, the Panel will normally be prepared to waive the acting in concert presumption in relation to other parts of the organisation, including any connected fund manager or principal trader, provided it is satisfied as to the independence of those other parts from the investor. Where the investment is, or is likely to be, more than 10% but less than 50%, the Panel may be prepared to waive the acting in concert presumption in relation to other parts of the organisation depending on the circumstances of the case. (See also Connected fund managers and principal traders in the Definitions Section and Rule 7.2.)".

3.41 **Note 6** applies both where the investor is investing funds as principal and where it is investing funds on behalf of discretionary clients.

(ii) Application of Note 6 on the definition of "acting in concert" to funds

3.42 If the amendments proposed above are adopted, the persons who may be considered to be acting in concert with the offeror in cases where equity financing for an offer is provided by a fund managed on a discretionary basis are as follows:

(a) **the fund itself**: the fund is treated as acting in concert with the offeror under the first sentence of **Note 6** on the definition of "**acting in concert**" (see paragraph 3.33);

(b) **the investment manager of or investment adviser to the fund**: the manager or adviser would be presumed to be acting in concert with the offeror under the **new presumption (5)** (see paragraphs 3.34 and 3.35); and

(c) **an investor in the fund that is providing equity financing for the offer** if the investor either:

(i) will have a "see-through" interest in 30% or more of the equity share capital in the offeror – in view of the proposed new **Note 7** on the definition of "**acting in concert**", the investor would be presumed to be acting in concert with the offeror under the new presumption (2) (see paragraph 3.36(a)); or

(ii) owns more than 50% of the limited partnership interests in the fund (regardless of the percentage of the equity share capital in the offeror which will be held by the fund) – in view of the proposed new **Note 7** on the definition of "**acting in concert**", the investor would be presumed to be acting in concert with the offeror under the new presumption (1) (taking into account

also the first sentence of **Note 6** of the definition of "**acting in concert**") (see paragraph 3.36(b)).

3.43 Where:

(a) the investment manager or the investment adviser; or

(b) the investor,

is part of a larger organisation, the other parts of that organisation will normally be presumed to be acting in concert with:

(i) the investment manager/investment adviser or the investor; and

(ii) the offeror,

under the new presumptions (1) and/or (2). However, under **Note 6** on the definition of "**acting in concert**", the Panel may be prepared to waive the presumption of acting in concert in relation to the other parts of the organisation if the Panel is satisfied that those other parts are independent from the investment manager/investment adviser or investor (as appropriate) and depending on the circumstances of the case, including the size of the investment in the offeror.

3.44 Regarding the size of the investment in the offeror, **Note 6** currently draws three bands by reference to which the Panel will decide whether to agree to waive the presumption of acting in concert between the investment manager/adviser or investor and the other parts of its organisation:

(a) **10% or less**: the Panel will normally agree to waive the presumption;

(b) **more than 10% but less than 50%**: the Panel may agree to waive the presumption depending on the circumstances of the case; and

(c) **50% or more**: the Panel will not normally agree to waive the presumption.

(ii) Proposed amendments

3.45 The Code Committee considers that the Panel should continue to have the ability to agree to waive the new presumptions (1) and/or (2) in relation to other parts of the investment manager/investment adviser or investor's organisation in certain circumstances. However, in view of the proposal in **Section 2** that the threshold at which the new presumptions (1) and (2) are engaged should become 30%, it is proposed that the bands in **Note 6** on the definition of "**acting in concert**" for the size of the investment in the offeror should be re-cast as follows:

(a) **10% or less**: the Panel would normally agree to waive the presumption;

(b) **more than 10% but less than 30%**: the Panel may agree to waive the presumption depending on the circumstances of the case; and

(c) **30% or more**: the Panel would not normally agree to waive the presumption.

3.46 The Code Committee also considers that **Note 6** on the definition of "**acting in concert**" (including the heading) should be amended so as to remove the references to a "consortium" on the basis that it applies to any offer made by a new bid vehicle, and not only where there is a consortium of investors. For example, **Note 6** should apply where a single investment manager or investment adviser makes an offer for a Code company (albeit that the investment manager or investment adviser may source the equity financing for the offer from a number of different funds under its management).

3.47 In the light of the above, the Code Committee proposes to amend **Note 6** on the definition of "**acting in concert**", as follows:

> "***6. ~~Consortium offers~~Offers made by a new vehicle or company***
>
> *(a) Where an offer is made by ~~Investors in a consortium (eg through~~ a new vehicle or company formed for the purpose of making an offer), each of the investors in the offeror will normally be treated as acting in concert with the offeror.*
>
> *(b) Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert with the investor and thus with the offeror.*
>
> *(c) Where the investment ~~in the consortium~~ is, or is likely to be, 10% or less of the equity share capital (or other similar ~~securities~~ interests) of the offeror, the Panel will normally be prepared to waive ~~the acting in concert~~ any presumption ~~in relation to~~ that the other parts of the organisation, including any connected fund manager or principal trader, are acting in concert with the investor or the offeror in relation to the offer, provided it is satisfied as to the independence of those other parts from the investor.*
>
> *(d) Where the investment is, or is likely to be, more than 10% but less than 30~~50~~%, the Panel may be prepared to waive ~~the~~ any acting in concert presumption in relation to other parts of the organisation provided it is satisfied as to the independence of those other parts from the investor and depending on the circumstances of the case.*
>
> *(e) ~~(~~See also the definition of c~~C~~onnected fund manager~~s~~ and connected principal trader~~s~~ ~~in the Definitions Section~~ and Rule 7.2.~~)~~*".

(g) Persons who subscribe for shares in an existing company which becomes an offeror

3.48 For completeness, the Code Committee notes that **Section 3(f)** refers to an offer made by a new bid vehicle, where **Note 6** on the definition of "**acting in concert**" is engaged. If, by contrast, one or more persons subscribe for new shares in an **existing company**

which becomes an offeror in order to assist the offeror in financing its offer, the Panel should be consulted in order that it can determine whether the investors should be treated as acting in concert with the offeror.

3.49 The Panel will consider this matter on its facts and in doing so the Code Committee understands that the Executive is likely to take into account factors such as:

(a) the size of the investment(s) being made, both in absolute terms and by reference to the size of the fundraising;

(b) the number of investors participating in the fundraising;

(c) the value of the offeror and the offeree company, and the percentage of the offeror company's shares that is already held, and will be held, by the investor(s);

(d) the nature of any other rights or benefits being secured by the investor(s) at the time – for example, representation on the board of the offeror; and

(e) the stage in the offer timetable at which the investment is being made.

Q9 Should a fund manager be treated as interested in shares which it manages on a discretionary basis?

Q10 Should a client be treated as not interested in shares if it has given an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions?

Q11 Do you have any comments on (i) the proposed amendments to the definition of "interests in securities" and (ii) the proposed new Note 11 on the definition of "interests in securities" in relation to funds managed on a discretionary basis?

Q12 Should an investor in a fund be presumed to be acting in concert with (i) the offeror or (ii) the fund itself in the circumstances proposed – i.e. by reference to the new presumptions (1) and (2) as if the investor's interest in the fund represented equity share capital in a company? Do you have any comments on the proposed new Note 7 on the definition of "acting in concert"?

Q13 Should an investment manager of or investment adviser to (i) an offeror or an investor in an offeror consortium or (ii) the offeree company (together with any person controlling, controlled by or under the same control) be presumed to be acting in concert with the offeror or offeree company? Do you have any comments on the proposed new presumption (5)?

Q14 Do you have any comments on the proposed new paragraph (4) of the definition of "connected fund managers and principal traders" in relation to an investment manager of or investment adviser to (i) an offeror or an investor in a consortium or (ii) the offeree company?

Q15 Should Note 6 on the definition of "acting in concert", regarding the circumstances in which the Panel may agree to waive the presumption of acting in concert in relation to the other parts of the organisation of which an investor in an offer made by a new bid vehicle forms part, be amended as proposed?

4. Dealings by connected fund managers and connected principal traders

(a) Introduction

4.1 **Section 4** proposes certain amendments to **Rule 7.2** and to various related provisions of the Code to clarify and simplify the application of **Rule 7.2** to connected fund managers, connected principal traders and other persons who are presumed to be acting in concert with an offeror or the offeree company.

4.2 In general, the proposals are not intended to make substantive amendments to the meaning or application of those provisions, save that save that the proposed **new Note 7 on Rule 7.2** would codify the ability for a person other than a connected fund manager or connected principal trader to seek the treatment that is afforded by **Rule 7.2**.

(b) Fund managers and principal traders

4.3 A "**principal trader**" is defined as follows:

> "A principal trader is a person who:
>
> (1) is registered as a market-maker with a recognised investment exchange, or is accepted by the Panel as a market-maker; or
>
> (2) is a member firm of a recognised investment exchange dealing as principal in order book securities.".

4.4 Although various provisions refer to fund managers, that term is not currently defined in the Code. The Code Committee considers that the term should be defined and therefore proposes to introduce a new definition of a "**fund manager**" into the Definitions Section, as follows:

> "**Fund manager**
>
> A fund manager is an entity which manages investment accounts on behalf of another person on a discretionary basis.".

(c) Connected fund managers and connected principal traders

4.5 As explained in **Section 2**, a fund manager or principal trader will be "*connected with*" an offeror or an offeree company if it is "**controlled by, controls or is under the same control as**":

(a) the offeror or any person acting in concert with it (including an investor in an offeror consortium);

(b) the offeree company or any person acting in concert with it; or

(c) a connected adviser to any person referred to in paragraphs (a) and (b).

4.6 If the **Note on Definitions** is amended as proposed in **Section 2**, a company (or, where appropriate, a fund manager, a principal trader or and adviser) will be regarded as "controlling" another company if it is interested in:

(a) shares carrying 30% or more of the voting rights; or

(b) a majority of the equity share capital,

of that other company.

4.7 Where a connected fund manager or connected principal trader is controlled by, controls or is under the same control as:

(a) an offeror or the offeree company (or a person acting in concert with either of them), it will normally be presumed to be acting in concert with the offeror or offeree company (as appropriate) on account of (current) presumption (1); and

(b) a connected adviser to an offeror or the offeree company (or a person acting in concert with either of them), it will normally be presumed to be acting in concert with the offeror or offeree company (as appropriate) on account of (current) presumption (7).

(d) Exempt fund managers and exempt principal traders

4.8 Fund managers and principal traders which are members of a financial services group which includes a corporate finance adviser or a corporate broker may apply to the Panel for "exempt status". The principal requirement for being granted exempt status is that the fund manager or principal trader is able to demonstrate its independence from the group's corporate finance advisory and corporate broking operations.

4.9 Where a connected fund manager or connected principal trader has exempt status, and where the sole reason that it is connected with the offeror or the offeree company is that it is controlled by, controls or is under the same control as a connected adviser to the offeror or the offeree company (or a person acting in concert with either of them), presumption (7) will not apply to the connected fund manager or connected principal trader (see presumption (7) itself and **Note 2** on the definitions of "**exempt fund manager**" and "**exempt principal trader**"). In other words, the exempt fund manager or exempt principal trader will not be presumed to be acting in concert with the offeror or the offeree company (as the case may be) and may continue to deal in securities of the offeror or the offeree company without those dealings having consequences under the Code for the offeror or offeree company with which it is connected. The exempt fund manager or exempt principal trader will, however, continue to be regarded as a connected fund

manager or connected principal trader and, as such, required to comply with (as appropriate):

(a) **Rule 8.5**, which relates to disclosures by exempt principal traders;

(b) **Rule 8.6**, which relates to disclosures by exempt fund managers which do not have interests in the securities of any party to the offer representing 1% or more and which are dealing for discretionary clients; and

(c) **Rule 38**, which relates to dealings by connected exempt principal traders (see also **Note 3** on the definitions of "**exempt fund manager**" and "**exempt principal trader**").

4.10 If the reason that the fund manager or principal trader is connected with an offeror or the offeree company is not solely that it is a member of the same "group" as a connected adviser – for example, if the fund manager or principal trader is controlled by, controls or is under the same control as the offeror itself – the exempt status of the fund manager or principal trader will not be relevant for the purposes of that particular offer. In other words, in such circumstances, the connected fund manager or connected principal trader will be presumed to be acting in concert with the offeror or offeree company with which it is connected, notwithstanding that it has been granted exempt status by the Panel.

(e) Disapplication of the presumption of acting in concert prior to awareness of an offer or possible offer

(i) Purpose of Rule 7.2

4.11 As is stated in the headnote to **Rule 7.2**:

> "*Rule 7.2 and the Notes thereon address the position of connected fund managers and principal traders who either do not have exempt status or whose exempt status is not relevant by virtue of the operation of Note 2 on the definitions of exempt fund manager and exempt principal trader.*".

4.12 The purpose of **Rule 7.2** was summarised in **PCP 2004/3** (*Market-related issues*), as follows:

> "2.6 … [T]he presumption of concertedness [between a connected fund manager or a connected principal trader and an offeror of the offeree company] does not apply when the relevant fund manager or principal trader benefits from exempt status. However, not all relevant fund managers or principal traders have exempt status. Also, exempt status is not relevant where the entity is in the same group as an offeror or the offeree company itself, or is in the same group as an investor in an offer consortium. Without any relaxation of these presumptions of concertedness, therefore, dealings by such non-exempt entities could have significant consequences.

> 2.7 Recognising this issue, Rule 7.2 of the Code provides, broadly, that connected non-exempt fund managers … [and principal traders] will not normally be presumed to be acting in concert before the identity of the offeror or the offeree company, as the case may be, is publicly known. This is on the basis that, before the nature of the connection is made public, the fund manager [or principal trader] should not be aware of the fact that the party with which it is connected might be involved in a takeover. If in fact the fund manager [or principal trader] had been aware of the possible transaction before the relevant public announcement, the relaxation of the presumption of concertedness provided by Rule 7.2 would not apply. Once the connection between the fund manager [or principal trader] and the offeror or offeree company is publicly known, the presumption of concertedness will apply as normal.
>
> 2.8 This therefore means, for example, that a potential offeror contemplating a bid does not normally need to be concerned about the consequences of dealings by a discretionary fund manager which might be connected with it (for example, because the fund manager is in the same group either as the offeror or an adviser to the offeror) until after its identity as an offeror or potential offeror is publicly announced. Equally, a fund manager can continue its normal dealing activities without restraint until it becomes aware of the fact that it is connected with an offeror or offeree company.".

4.13 Although various amendments to **Rule 7.2** were introduced in **RS 2004/3**, following the consultation on **PCP 2004/3**, the above extract continues to be an accurate summary of the purpose of **Rule 7.2**. In summary:

(a) dealings in the securities of a potential offeror or potential offeree company by a connected fund manager or connected principal trader before it is aware of the possibility that an offer might be made for the offeree company will not have consequences for the offeror or offeree company with which it is connected in relation to that offer. For example, an acquisition of shares in the offeree company by a fund manager which is connected with a potential offeror will not have price-setting consequences under **Rule 6** if that offeror proceeds to make an offer; and

(b) dealings in the securities of an offeror or the offeree company by a connected fund manager or connected principal trader after the time at which it becomes aware that an offer might be made for the offeree company (either because it has been informed privately about a possible offer or as a result of a public announcement) (commonly referred to as the "**Rule 7.2 moment**") will have consequences for the offeror or offeree company with which it is connected in relation to that offer unless that connected fund manager or connected principal trader has exempt status which remains relevant for the purposes of that offer. For example, an acquisition of shares in the offeree company by a "non-exempt" fund manager which is connected with an offeror will have price-setting consequences under **Rule 6** (such that, in practice, a stop notice is likely to be issued so as to ensure that the fund manager does not make any such acquisitions).

(ii) Simplification of Rules 7.2(a) and (b) and the Notes on Rule 7.2

4.14 The Code Committee considers that there is considerable duplication between:

(a) **Rules 7.2(a)** and **(b)**; and

(b) **Notes 1(a)** and **(b) on Rule 7.2**,

and proposes to make those provisions simpler and improve their comprehensibility. **Note 1(c) on Rule 7.2** is discussed further below.

4.15 It is also proposed to make minor amendments to **Notes 2** to **6 on Rule 7.2**. With one exception, these amendments are intended to improve the clarity of those provisions but not to make substantive amendments. The exception is **Note 3 on Rule 7.2**, which currently provides that the Panel will not normally require the disclosure of "book flattening" dealings by a connected principal trader following the Rule 7.2 moment. The Code Committee understands that the Executive's practice is, in fact, to require the disclosure of such dealings and considers that this practice should be codified.

4.16 In addition, the Code Committee proposes to delete:

(a) the current **Rule 7.2(c)**, which, in effect, duplicates **Note 2** on the definition of "**exempt fund manager**" and "**exempt principal trader**"; and

(b) **Note 7 on Rule 7.2**, on the basis that the cross-reference to **Note 6** on the definition of "**acting in concert**" with regard to consortium offers (which, in any event, is duplicated in the definition of "**connected fund managers and principal traders**") is no longer necessary.

(iii) Application of Rule 9.1

4.17 Although **Rule 7.2** operates to ensure that dealings by a connected fund manager or a connected principal trader before it is aware of a possible offer will not have consequences for the offeror or offeree company with which it is connected in relation to any subsequent offer, it is important to note that any such dealings could nonetheless be relevant to the question of whether an obligation to make a mandatory offer for a Code company is triggered under **Rule 9.1**.

4.18 This issue is currently addressed in **Note 1(c) on Rule 7.2** (and in the identical **Note 16 on Rule 9.1**) which provides as follows:

> "*Rule 9 will … be relevant if the aggregate number of shares in which any person and all persons controlling#, controlled by or under the same control as that person (including any exempt fund manager or exempt principal trader) are interested carry 30% or more of the voting rights of a company. However, provided that recognised*

intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.

If such a group of persons includes a principal trader and the aggregate number of shares in a company in which the group is interested approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire interests in shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period, the shares are acquired in a client-serving capacity and the number of shares which the principal trader holds in a client-serving capacity does not at any relevant time exceed 3% of the voting rights of the company. The Panel should be consulted in such cases.".

4.19 This provision is relevant principally to a multi-service financial organisation. Such an organisation, which is likely to comprise various companies in a corporate group structure, may have interests in the securities of a Code company in a variety of capacities. For example, an integrated bank may hold shares in a Code company:

(a) for its own account;

(b) as a fund manager on behalf of discretionary clients; and

(c) as a market-maker or principal trader.

4.20 The purpose of **Note 1(c) on Rule 7.2** and **Note 16 on Rule 9.1** is to make clear that, even though dealings in securities by a fund manager or principal trader which is part of a multi-service financial organisation before a Rule 7.2 moment will not have Code consequences for the offeror or offeree company with which it is connected, such dealings will nevertheless be relevant in determining whether the organisation has itself triggered an obligation to make a mandatory offer for a Code company under **Rule 9.1**.

4.21 Although **Note 1(c) on Rule 7.2** and **Note 16 on Rule 9.1** relate primarily to multi-service financial organisations, **Rule 9.1** applies similarly to any group of persons to which one of the presumptions of the definition of "**acting in concert**" applies. For example, members of a "group" of companies which are presumed to be acting in concert with each other by virtue of presumption (1) (because they are under the common control of company A) may include:

(a) fund manager Y, which holds shares in various companies, including Code company X; and

(b) operating company Z, which hold shares in, and which is considering making an offer for, Code company X.

4.22 In such circumstances:

(a) Y will be a connected fund manager (i.e. it will be connected with Z) in relation to any offer made by Z for X (because Y and Z are under the same control); and

(b) for so long as Y is unaware that Z is considering making an offer for X (i.e. prior to the Rule 7.2 moment), any dealings by Y in the securities of X will not have price-setting consequences for Z if Z proceeds to make an offer for X; but

(c) Y and Z will, or ought to be, aware that (outside of an offer) they are presumed to be acting in concert in relation to X (and any other Code company) by virtue of presumption (1) and they, and A, will therefore need to ensure that their aggregate interests in the shares in X do not pass through the 30% threshold if they do not wish to trigger an obligation for either of them (or A) to make a mandatory offer for X.

4.23 In other words, notwithstanding that **Rule 7.2(a)** and **Rule 7.2(b)** will result in the deferral of the application of the presumption of acting in concert in relation to certain consequences under the Code, if a fund manager or principal trader is (or ought to be) aware that it is presumed to be acting in concert with one or more other persons outside of an offer, **Rule 9.1** will be relevant to dealings undertaken by members of the presumed concert party at any time.

4.24 In order to clarify the (ongoing) application of **Rule 9.1** in such circumstances, the Code Committee proposes to replace the current **Note 1(c) on Rule 7.2** with a new **Rule 7.2(c)**, as set out below. In addition, the Code Committee proposes to make minor amendments to **Note 16 on Rule 9.1**, as set out in **Appendix A**.

(iv) Proposed amendments to Rule 7.2

4.25 If the amendments described above, which are set out in full in **Appendix A**, are adopted as proposed, **Rule 7.2** and **Notes 1** to **6 on Rule 7.2** will read as follows:

> "**7.2 CONNECTED FUND MANAGERS AND CONNECTED PRINCIPAL TRADERS**
>
> *NB Rule 7.2 and the Notes thereon address the position of connected fund managers and connected principal traders who either do not have exempt status or whose exempt status is not relevant by virtue of the operation of Note 2 on the definitions of exempt fund manager and exempt principal trader.*
>
> **(a) Where a fund manager or principal trader is connected with an offeror or potential offeror, any presumption that the connected fund manager or connected principal trader is acting in concert with that offeror or potential offeror will be applied only from when:**
>
> **(i) the offeror or potential offeror is first publicly identified; or**
>
> **(ii) the connected fund manager or connected principal trader is made aware of the possible offer to be made by the potential offeror,**

whichever is the earlier.

(b) Where a fund manager or principal trader is connected with the offeree company, any presumption that the connected fund manager or connected principal trader is acting in concert with the offeree company will be applied only from when:

(i) the offer period commences; or

(ii) the connected fund manager or connected principal trader is made aware of a possible offer for the offeree company,

whichever is the earlier.

(c) Notwithstanding Rule 7.2(a) and Rule 7.2(b), Rule 9.1 will apply on an ongoing basis to a fund manager or principal trader and to any person with which it is presumed to be acting in concert. See also Note 15 on Rule 9.1.

NOTES ON RULE 7.2

1. Previous dealings

Subject to Note 2, dealings and securities borrowing and lending transactions by connected fund managers and connected principal traders prior to the relevant time specified in Rule 7.2(a) or Rule 7.2(b) will not be relevant for the purposes of (as appropriate) Rules 4.2, 4.6, 5, 6, 9.5, 11 and 36.

2. "Actual" concertedness

Rule 7.2 does not apply if a connected fund manager or connected principal trader is in fact acting in concert with an offeror or with the offeree company.

3. "Book flattening" by connected principal traders

(a) With the prior consent of the Panel, after a connected principal trader is presumed to be acting in concert with an offeror or the offeree company, it may, within a time period agreed in advance by the Panel:

(i) reduce its interests in securities of the offeree company or an offeror, or acquire interests in such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 4.2, 4.4, 5, 6, 9.5, 11 and 36; and

(ii) pursuant to Rule 4.6, take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company.

(b) Any such dealings must be disclosed under Rules 4.6, 8.4, 24.4 or 25.4, as appropriate.

4. Dealings by connected fund managers

(a) After a connected fund manager is presumed to be acting in concert with an offeror or the offeree company, it may, with the prior consent of the Panel and within a time period agreed in advance by the Panel:

(i) acquire an interest in securities of the offeree company, with a view to reducing any short position, without such acquisitions being relevant for the purposes of Rules 4.4, 5, 6, 9.5, 11 and 36; and

(ii) pursuant to Rule 4.6, take action to unwind a securities borrowing transaction in respect of relevant securities of the offeree company.

(b) Any such dealings must be disclosed under Rule 8.4, Rule 4.6 or Note 2 on Rule 4.6, as appropriate.

(c) After the commencement of the offer period, with the prior consent of the Panel, a connected fund manager presumed to be acting in concert with an offeror may sell offeree company securities without such sales being relevant for the purposes of Rule 4.2. Any such sale must be disclosed under Rule 8.4.

5. Rule 9

The Panel should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that the number of shares in which the offeror or potential offeror and persons acting in concert with it, including any connected fund managers and connected principal traders to which Rule 7.2(a) applies, are interested carry in aggregate 30% or more of the voting rights of the offeree company.

6. Disclosure of dealings in offer documentation

Interests in relevant securities of, and dealings by, non-exempt connected fund managers and non-exempt connected principal traders (whether before or after the time referred to in Rule 7.2(a) or (b)) must be disclosed in any offer document in accordance with Rule 24.4 and in any offeree board circular in accordance with Rule 25.4, as the case may be.".

(v) Application of Rule 7.2 to persons other than connected fund managers and connected principal traders

4.26 The Code Committee understands that the Executive may be prepared to extend the treatment afforded by **Rule 7.2** to a person who falls within one of the presumptions of the definition of "**acting in concert**" but who is not a connected fund manager or a connected principal trader. For example, an investor in a fund which is investing in a consortium and who will have a "see-through" interest in 30% or more of the equity share capital in the offeror will be presumed to be acting in concert with the offeror under the proposed new presumption (2). However, on the basis that the definition of "**connected fund managers and principal traders**" applies to fund managers and principal traders which are controlled by, controlling or under the same control as an offeror or a person acting in concert with it (but not to a fund manager or principal trader which is itself acting in concert with an offeror), such an investor is not a "**connected fund manager**".

4.27 The Code Committee considers that such a person should be able to seek the treatment afforded by **Rule 7.2** and that this ability should be codified. Therefore, the Code Committee proposes to introduce a new **Note 7 on Rule 7.2**, as follows:

"***7. Persons other than connected fund managers and connected principal traders***

In certain circumstances, the Panel may be prepared to apply the treatment afforded by Rule 7.2(a) or Rule 7.2(b) to a person who is presumed to be acting in

concert with an offeror or the offeree company but who is not a connected fund manager or connected principal trader. Where such treatment is sought, the Panel should be consulted at the earliest opportunity.".

(vi) Other minor and consequential amendments

4.28 A number of the Rules of the Code include a Note which draws attention to the fact that dealings in securities by a fund manager or principal trader to which exempt status is not relevant will be treated in accordance with **Rule 7.2**. The Code Committee considers that it is no longer necessary to include these statements in the Code and therefore proposes to delete: **Note 6 on Rules 4.1 and 4.2**; **Note 3 on Rule 4.6**; **Note 6 on Rule 5.1**; **Note 8 on Rule 6**; **Note 13 on Rule 9.1**; **Note 7 on Rule 11.1**; and **Note 1 on Rule 36.3**.

4.29 In addition, the Code Committee proposes to:

(a) introduce a cross-reference to **Rule 7.2** into each of the definition of "**acting in concert**" and the definition of "**connected fund managers and principal traders**" (which would be re-titled "**connected fund manager and connected principal trader**");

(b) make minor amendments to: the definition of "**exempt fund manager**"; **Notes 1**, **2** and **5** on the definitions of "**exempt fund manager**" and "**exempt principal trader**"; the definition of "**principal trader**"; and **Note 3 on Rule 24.4**; and

(c) make certain amendments to **Notes 2**, **3** and **4** on the definition of "**recognised intermediary**" consequential upon other amendments proposed above,

as set out in **Appendix A**.

(f) Dealings in offeree securities by persons acting in concert with the offeree company

4.30 **Rule 4.4** restricts the acquisition of interests in securities in the offeree company by a financial adviser or corporate broker to the offeree company, or by any person which "controls, is controlled by or is under the same control as" such an adviser or broker, other than an exempt fund manager or an exempt principal trader acting as such.

4.31 In addition, **Rule 4.4** restricts a person to whom it applies from:

(a) making a loan to another person for the purpose of acquiring securities in the offeree company; or

(b) entering into an arrangement with another person which may be an inducement for that person to deal or refrain from dealing in securities in the offeree company.

4.32 The principal concern which led to the introduction of **Rule 4.4** in 1998 was that, in the context of a hostile offer, a financial adviser or corporate broker to the offeree company might acquire interests in shares in the offeree company in order to prevent the shares in question from being accepted to the offer, thereby increasing the chances that the offer would lapse (and in the hope that it would be rewarded for its actions by the grateful offeree company at a later date).

4.33 The Code Committee understands that it is the Executive's practice also to apply the spirit of **Rule 4.4** so as to restrict the acquisition of interests in securities in the offeree company not only by the offeree company's financial adviser or corporate broker (and other persons in the same "group" as the adviser or broker) but also by persons in the same "group" as the offeree company itself, whether as principal or on behalf of discretionary clients.

4.34 The Code Committee agrees with this application of **Rule 4.4** and considers that it should be codified by amending **Rule 4.4** so that the restrictions would apply to any fund manager or principal trader which is connected with the offeree company and to any person which controls, is controlled by or is under the same control as such connected fund manager or principal trader. In addition, it is proposed to make certain minor drafting amendments to **Rule 4.4**.

4.35 If the amendments described above, which are set out in full in **Appendix A**, are adopted as proposed, **Rule 4.4** would read as follows:

> "**4.4 DEALINGS IN OFFEREE COMPANY SECURITIES BY PERSONS ACTING IN CONCERT WITH THE OFFEREE COMPANY**
>
> **During the offer period, no fund manager or principal trader (other than an exempt fund manager or exempt principal trader) which is connected with the offeree company, or any person controlling#, controlled by or under the same control as any such connected fund manager or connected principal trader, may, except with the consent of the Panel:**
>
> **(a) acquire any interest in securities of the offeree company;**
>
> **(b) make any loan to assist a person to acquire any interest in securities of the offeree company, other than a loan to an existing customer in the ordinary course of business and on normal commercial terms; or**
>
> **(c) enter into any dealing arrangement of the kind referred to in Note 11 of the definition of acting in concert in relation to relevant securities of the offeree company.**".

Q16 Do you have any comments on the proposed new definition of a "fund manager"?

Q17 Should Rule 7.2 and the Notes thereon, with regard to dealings by connected fund managers and connected principal traders, be amended as proposed?

Q18 Should Note 7 on Rule 7.2, in relation to extending the application of Rule 7.2 to a person other than a connected fund manager or a connected principal trader, be introduced as proposed?

Q19 Do you have any comments on the proposed amendments to various provisions of the Code which relate to the proposed amendments to Rule 7.2?

Q20 Should Rule 4.4, with regard to dealings in offeree company securities by persons acting in concert with the offeree company, be amended as proposed?

5. Other amendments

(a) Summary

5.1 **Section 5** proposes certain minor amendments to:

(a) presumption (2) of the definition of "**acting in concert**" ("**current presumption (2)**"), which relates to a **company** and its **directors**;

(b) presumption (3), which relates to a **company** and its **pension schemes(s)** and the pension scheme(s) of any company with which the first company is presumed to be acting in concert (**see also Section 3**); and

(c) presumption (9) of the definition of "**acting in concert** ("**presumption (9)**"), which relates to **shareholders in a private company** who sell their shares in that company in consideration for the issue of new shares in a Code company or who, in connection with an initial public offering or otherwise, become shareholders in a Code company.

(b) Current presumption (2)

(i) Introduction

5.2 The current presumption (2) relates to a company and its directors and provides as follows:

> "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 its directors (together with their close relatives and the related trusts of any of them)".

5.3 Under presumption (5) of the definition of "**acting in concert**" ("**presumption (5)**"), a person, the person's close relatives, and the related trusts of any of them are presumed to be acting in concert with each other.

5.4 The Code Committee considers that:

(a) if a company makes an offer for an offeree company, each of the directors of the offeror company (together with their close relatives and the related trusts of any of them) should be presumed to be acting in concert with the offeror; and

(b) outside of an offer, the company must aggregate its interests in shares in a Code company with the interests of each of its directors (together with their close relatives

and the related trusts of any of them) in determining whether the acquisition of interests in shares by a member of the concert party that is centred on the company will trigger an obligation for a mandatory offer to be made under **Rule 9.1**.

(ii) Application of current presumption (2) – in the context of an offer

5.5 The Code Committee considers that if:

(a) a director of a company; or

(b) a second company of which that director is also a director,

makes an offer for an offeree company, the first company should not be presumed to be acting in concert with:

(i) the director in relation to their offer; or

(ii) the second company in relation to its offer.

5.6 So, in ***Scenario 13***:

Scenario 13 *- Director A presumed to be acting in concert with each of Company B and Company C, but Company B and Company C not presumed to be acting in concert with Director A or with each other:*

(a) Director A is presumed to be acting in concert with Company B in relation to its offer for Offeree Company D (but Company C is not presumed to be acting in concert with Company B in relation to that offer); and

(b) Director A is presumed to be acting in concert with Company C in relation to its offer for Offeree Company F (but Company B is not presumed to be acting in concert with Company C in relation to that offer); but

(c) neither Company B nor Company C is presumed to be acting in concert with Director A in relation to its offer for Offeree Company E.

(iii) Application of current presumption (2) – outside of an offer

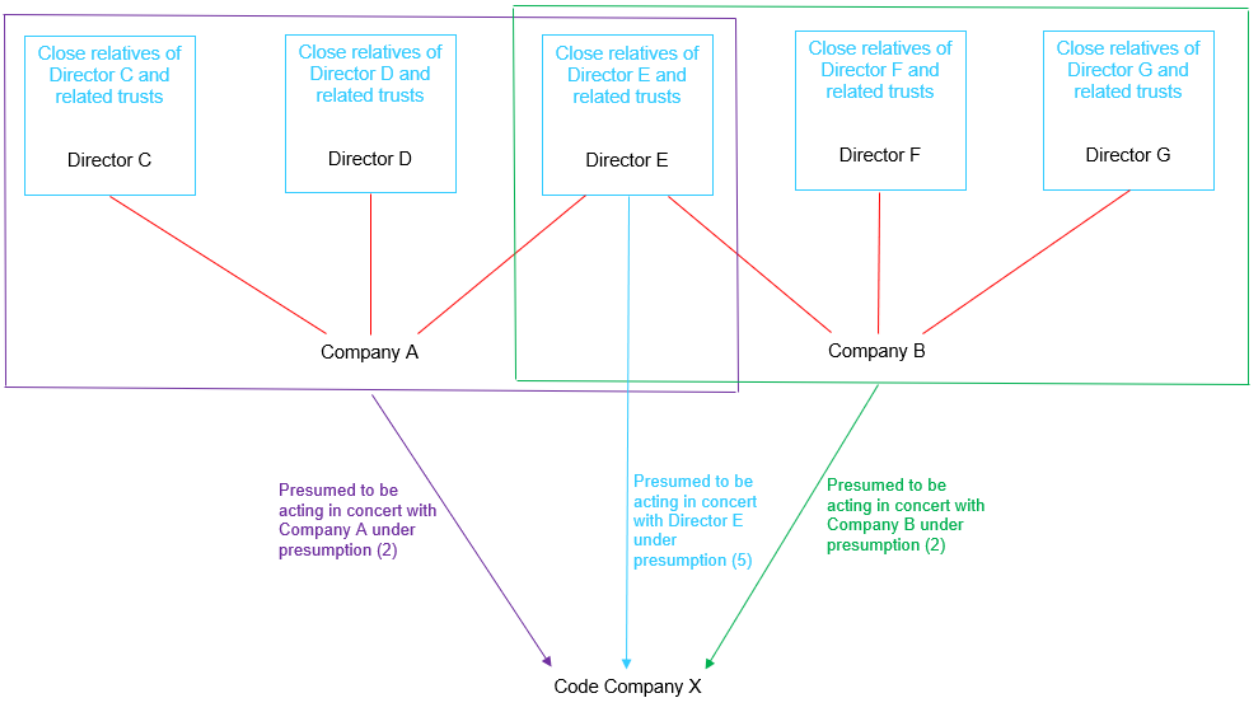
5.7 Outside of an offer, there is no requirement under the current presumption (2) for a director to take account of the company's interests in shares in a Code company in determining whether the acquisition of interests in shares by a member of the concert party that is centred on the director (including, under presumption (5), that director's close relatives and the related trusts of any of them) will trigger an obligation for a mandatory offer to be made under **Rule 9.1**.

5.8 However, under the current presumption (2), the interests in the shares in a Code company of each of the directors of a company (together with those of their close relatives and the related trusts of any of them) must be aggregated with the company's interests in the shares in that Code company in determining whether the acquisition by any of these persons of an interest in shares will trigger an obligation for a mandatory offer to be made under **Rule 9.1** as a result of the percentage of shares in which the concert party that is centred on the company is interested increasing through a Rule 9 threshold.

5.9 Therefore, the individual concert parties centred on each of the directors under presumption (5), comprising the director and each of that director's close relatives and the related trusts of any of them, will each be part of a separate, wider concert party centred on the company under the current presumption (2).

5.10 So, in ***Scenario 14***:

Scenario 14 *– Directors C, D and E acting in concert with Company A, and Directors E, F and G acting in concert with Company B (but Company A and Company B not acting in concert with Director E or with each other):*



(a) under presumption (5), the close relatives of each of Directors C, D, E, F and G (and the related trusts of any of them) are presumed to be acting in concert with each of Directors C, D, E, F and G respectively (as shown in **blue** in relation to Director E);

(b) under current presumption (2), Directors C, D and E (and their respective close relatives and the related trusts of any of them) are presumed to be acting in concert with Company A (as shown in **purple**); and

(c) under current presumption (2), Directors E, F and G (and their respective close relatives and the related trusts of any of them) are presumed to be acting in concert with Company B (as shown in **green**); but

(d) Company A (and its directors and their close relatives and the related trusts of any of them) is <u>not</u> presumed to be acting in concert with Company B (and its directors and their close relatives and the related trusts of any of them), notwithstanding that they have a common director in Director E.

5.11 However, if, in ***Scenario 14***, Director E held shares carrying 30% of the voting rights in each of Company A and Company B, then Company A (and its directors and their close relatives and the related trusts of any of them) and Company B (and its directors and their close relatives and the related trusts of any of them) <u>would</u> each be presumed to be acting in concert both with Director E and with each other.

(iv) Proposed amendment

5.12 In the light of the above, the Code Committee proposes to **amend current presumption (2)** (which would become the **new presumption (4)**), as follows:

> "(~~2~~4) the directors of a company ~~with its directors~~ (together with their close relatives and the related trusts of any of them) with the company;".

(c) Presumption (3)

5.13 Presumption (3) relates to a company and its pension schemes and the pension schemes of any company presumed to be acting in concert with the first company under presumption (1), and provides as follows:

> "(3) a company with any of its pension schemes and the pension schemes of any company described in (1);".

5.14 In line with the proposed amendments to the current presumption (2), the Code Committee proposes to **amend presumption (3)**, as follows:

> "(3) a company's ~~with any of its~~ pension schemes, and the pension schemes of any company with which the company is presumed to be acting in concert ~~described in~~ under (1) or (2), with the company;".

(d) Presumption (9)

5.15 Presumption (9) relates to shareholders in a private company and provides as follows:

> "(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.".

5.16 In practice, presumption (9) is applied not only to shareholders in a private company who exchange their shares in that company for shares in a Code company, or where there is an initial public offering of the company (in the process of which it becomes a Code company), but also to members of a partnership (including a limited liability partnership) who sell their partnership interests in return for shares in a company which is, or which subsequently becomes, a Code company.

5.17 The Code Committee agrees that this is the correct application of presumption (9) and considers that it should apply to members of any closely held entity which is similar to a private company or partnership (for example, an unlisted public company) who subsequently become shareholders in a Code company.

5.18 In addition, the Code Committee considers that the words "following the re-registration of that company as a public company" in presumption (9) do not add to the meaning of the provision and could therefore be deleted.

5.19 In the light of the above, the Code Committee proposes to **amend presumption (9)** (which would become the **new presumption (10)**), as follows:

> "(~~9~~10) shareholders in a private company or members of a partnership who sell their shares ~~in that company~~ or interests 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.".

Q21 Should the current presumption (2), regarding the directors of a company being presumed to be acting in concert with the company, be amended as proposed?

Q22 Should presumption (3), regarding a company's pension scheme(s) being presumed to be acting in concert with the company, be amended as proposed?

Q23 Should presumption (9), regarding shareholders in a private company who sell their shares in consideration for the issue of new shares in a company to which the Code applies, be amended as proposed?

6. Assessment of the impact of the proposals

(a) Summary

6.1 The amendments proposed in this PCP relate to the presumptions of the definition of "**acting in concert**" and certain related provisions of the Code.

6.2 The Code Committee considers that the proposals will provide considerable benefit to parties to an offer, persons presumed to be acting in concert with such persons, market participants and practitioners because they will give additional clarity and certainty as to the application of those presumptions and related provisions.

6.3 The Code Committee does not consider that the proposals will require such persons to incur significant additional costs. This is on the basis that, to a large degree, the proposals codify the Executive's existing practice.

(b) Presumptions (1) and (2)

6.4 The amendments proposed in **Section 2**:

(a) raise the threshold in the current presumption (1) from 20% to 30% so as to align it with the threshold in the Code's definition of "**control**";

(b) make explicit that the current presumption (1) applies to voting share capital and/or equity share capital; and

(c) ensure that interests in shares in the form of long derivative or option positions referenced to a company's shares will count towards the thresholds in the proposed new presumptions (1) and (2).

6.5 Codifying the Executive's existing practice will ensure that the circumstances in which companies are presumed to be acting in concert with each other is better understood. This is important given that the acquisition of interests in shares by a person acting in concert with another person, or by a person acting in concert with an offeror or the offeree company, can have significant consequences under the Code.

6.6 The 20% threshold at which presumption (1) is currently engaged can result in companies being presumed to be acting in concert with each other where one company does not have "**control**" (as defined in the Code) of that company. Companies which are presumed to be acting in concert with each other need to have in place systems to monitor, and where appropriate prevent, the acquisition of interests in shares in Code companies by one another, which can be particularly onerous, and difficult to justify, in circumstances where one of the companies is not deemed to have control of the other. Raising the threshold at which the presumption is engaged from 20% to 30% will result in there being

fewer cases in which a shareholder is presumed to be acting in concert with the company in which it is invested, leading to a reduction in requirements to consult the Panel and in the administrative and other costs which would otherwise be incurred by the parties in monitoring and, where appropriate, preventing the acquisition of interests in shares in Code companies by one another.

6.7 Whilst the requirement to take into account any shares in respect of which a person has any long derivative or option positions will extend the interests which are taken into account when establishing whether a relevant threshold is satisfied, taking such interests into account is consistent with the rationales which underpin the proposed new presumptions (1) and (2). To the extent that there may be an additional burden on parties to an offer or market participants as a result of the new requirement, the Code Committee considers that this is offset by the increase of the threshold from 20% to 30% and the benefit to the market generally of treating shares in respect of which a person has any long derivative or option positions in the same way as shares which that person owns or controls.

(c) Other presumptions of the definition of "acting in concert"

6.8 The amendments in **Section 3**:

(a) ensure a consistent approach is taken to funds under discretionary management;

(b) codify the Executive's existing practice to treat an investment manager of or investment adviser to an offeror (or an investor in an offeror consortium) or the offeree company as acting in concert with the offeror or offeree company, and clarify that such an investment manager or investment adviser will be treated as connected with that offeror or offeree company respectively;

(c) provide clarity and certainty as to the circumstances in which the level of a person's interests in a limited partnership or investment fund is such that it would cause the person to be presumed to be acting in concert with (i) an offeror or (ii) the limited partnership or fund itself; and

(d) provide clarity and certainty as to the persons who may be considered to be acting in concert with the offeror in cases where equity financing for an offer is provided by a fund managed on a discretionary basis by an investment manager or investment adviser.

6.9 The proposal that the Panel will not normally agree to waive the presumption of acting in concert in relation to other parts of the organisation of which an investor in a new bid vehicle forms part where the investment will be 30% or more (reduced from the current threshold of 50%) will lead to more cases where other parts of the organisation will be

presumed to be acting in concert with the offeror. This could lead to increased costs for the relevant organisation in those cases. However, the Code Committee considers that these costs will be outweighed by the introduction of a more consistent approach to the application of the presumptions of acting in concert.

6.10 The amendments proposed in **Section 4** clarify and simplify the application of **Rule 7.2** to connected fund managers, connected principal traders and other persons who are presumed to be acting in concert with an offeror or the offeree company.

6.11 The amendments proposed in **Section 5**:

(a) re-formulate the presumptions relating to a company and its directors and pension schemes, such that the directors and pension schemes of a company should be presumed to be acting in concert with the company, but not vice versa; and

(b) apply presumption (9) (to be re-numbered as presumption (10)) to members of a partnership,

and are in line with the Executive's existing practice.

(d) Conclusion

6.12 In summary, the Code Committee does not believe that the proposals will require offerors and offeree companies or other market participants to incur significant additional costs. To the extent that the proposals expand the scope of the presumptions of the definition of "**acting in concert**" rather than simply codify the Executive's existing practice, the Code Committee considers that the benefits provided by the additional clarity and certainty will outweigh any impact of the expanded scope.

APPENDIX A

Proposed amendments to the Code

DEFINITIONS

Acting in concert

This definition has particular relevance to mandatory offers and further guidance with regard to behaviour which constitutes acting in concert is given in the Notes on Rule 9.1.

Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other (see Note 2 below).

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:

~~(1) a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20% or more of the equity share capital of a company is regarded as the test of associated company status);~~

(1) a company ("X") and any company which controls#, is controlled by or is under the same control as X, all with each other;

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

(2) a company ("Y") and any other company ("Z") where Y is interested, directly or indirectly, in 30% or more of the equity share capital in Z, together with any company presumed to be acting in concert with either Y or Z under (1), all with each other;

(3) a company's ~~with any of its~~ pension schemes, and the pension schemes of any company with which the company is presumed to be acting in concert ~~described in~~ under (1) or (2), with the company;

~~(4) a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;~~

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

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

(5) an investment manager of or investment adviser to:

(a) an offeror or an investor in an offeror consortium; or

(b) the offeree company,

with the offeror or offeree company (as appropriate), together with any person controlling#, controlled by or under the same control as that investment manager or investment adviser;

~~(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;~~

(~~7~~6) a connected adviser with its client and, if its client is acting in concert with an offeror or the offeree company, with that offeror or 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);

(~~8~~7) the 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); ~~and~~

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

(9) 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; and

(~~9~~10) shareholders in a private company or members of a partnership who sell their shares ~~in that company~~ or interests 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.

For the purposes of presumptions (1) and (2), a reference to:

(a) a company which controls#, is controlled by or is under the same control as X; and

(b) Y, or, as appropriate, a company which controls Y or Z,

includes any other undertaking (including a partnership or a trust), or any legal or natural person.

The reference in presumption (2) to a company being "indirectly" interested in the equity share capital of another company refers only to the economic rights attached to such shares and not to any voting rights carried by such shares.

See also Rule 7.2.

#See Note at end of Definitions Section.

NOTES ON ACTING IN CONCERT

…

6. ~~Consortium offers~~Offers made by a new vehicle or company

(a) Where an offer is made by ~~Investors in a consortium (eg through a~~ a new vehicle or company formed for the purpose of making an offer), each of the investors in the offeror will normally be treated as acting in concert with the offeror.

(b) Where such an investor is part of a larger organisation, the Panel should be consulted to establish which other parts of the organisation will also be regarded as acting in concert with the investor and thus with the offeror.

(c) Where the investment ~~in the consortium~~ is, or is likely to be, 10% or less of the equity share capital (or other similar ~~securities~~ interests) of the offeror, the Panel will normally be prepared to waive ~~the acting in concert~~ any presumption ~~in relation to~~ that the

other parts of the organisation, including any connected fund manager or principal trader, are acting in concert with the investor or the offeror in relation to the offer, provided it is satisfied as to the independence of those other parts from the investor.

(d) Where the investment is, or is likely to be, more than 10% but less than 30~~50~~%, the Panel may be prepared to waive ~~the~~ any acting in concert presumption in relation to other parts of the organisation provided it is satisfied as to the independence of those other parts from the investor and depending on the circumstances of the case.

(e) ~~(~~See also the definition of c~~C~~onnected fund managers and connected principal traders ~~in the Definitions Section~~ and Rule 7.2.~~)~~

7. Investors in limited partnerships and other investment funds

Where a limited partnership or other investment fund (a "fund") (including a fund managed by an independent fund manager):

(a) invests in a new vehicle formed for the purpose of making an offer; or

(b) acquires an interest in shares in a company to which the Code applies,

the Panel will apply presumptions (1) and/or (2) of the definition of acting in concert so as to presume an investor in the fund to be acting in concert with the offeror (in the case of paragraph (a)) or the fund (in the case of paragraph (b)) if the percentage of the investor's interests in the fund is such that the presumption would apply if the fund were a company and the investor was interested in a corresponding percentage of the company's equity share capital.

~~7~~8. Pension schemes

…

~~8. Sub-contracted fund managers~~

~~Where a fund manager sub-contracts discretionary management of funds to another independent fund manager, the Panel will normally regard those funds as controlled by the latter if the discretion regarding dealing, voting and offer acceptance decisions relating to the funds, originally granted to the fund manager, has been transferred to the sub-contracted fund manager and presumption (4) will apply to the sub-contracted fund manager in respect of those funds. This approach assumes that the sub-contracted fund manager does not take instructions from the beneficial owner or from the originally contracted manager on the dealings in question and that fund management arrangements are not established or used to avoid disclosure.~~

…

Connected fund manager~~s~~ and connected principal trader~~s~~

A fund manager or principal trader will normally be connected with an offeror or the offeree company, as the case may be, if the fund manager or principal trader is controlled# by, controls or is under the same control as:

(1) an offeror or any person acting in concert with it (for example as a result of being an investor in a consortium (see also Note 6 on the definition of acting in concert));

(2) the offeree company or any person acting in concert with the offeree company; ~~or~~

(3) any connected adviser to any person covered in (1) or (2)~~.~~; or

(4) an investment manager of or investment adviser to:

(a) an offeror or an investor in an offeror consortium; or

(b) the offeree company.

See also Rule 7.2.

Control

…

NOTE ON CONTROL

A reference to a company (or, where appropriate, a fund manager, a principal trader or an adviser) controlling, being controlled by or being under the same control as another company is to be construed in accordance with the Note on Definitions at the end of the Definitions Section.

…

Dealings

…

NOTES ON DEALINGS

…

2. Securities borrowing and lending

Securities borrowing and lending transactions are not regarded as dealings. However, under Rule 4.6, if an offeror, the offeree company or any person acting in concert with an offeror or the offeree company enters into, or takes action to unwind, a securities borrowing or lending transaction (including any financial collateral arrangement of the kind referred to in Note ~~4~~3 on Rule 4.6) in respect of relevant securities of a securities exchange offeror or, with the Panel's consent, the offeree company, the transaction must be disclosed as if it were a dealing in relevant securities (see Note 5(l) on Rule 8).

…

Exempt fund manager

An exempt fund manager is a ~~person who~~ fund manager who ~~manages investment accounts on a discretionary basis and~~ is recognised by the Panel as an exempt fund manager for the purposes of the Code (see Notes ~~under~~ on ~~E~~exempt fund manager and exempt principal trader).

…

NOTES ON EXEMPT FUND MANAGER AND EXEMPT PRINCIPAL TRADER

1. ~~Persons~~ Fund managers ~~who manage investment accounts on a discretionary basis~~ and principal traders must apply to the Panel in order to seek the relevant exempt status and will have to comply with any requirements imposed by the Panel as a condition of its granting such status.

2. When a principal trader or fund manager is connected with the offeror or offeree company, exempt status is not relevant unless the sole reason ~~for the connection is that~~

~~the~~ that it is a connected principal trader or a connected fund manager is that it is controlled# by, controls or is under the same control as a connected adviser to:

(1) the offeror;

(2) the offeree company; or

(3) a person acting in concert with the offeror (for example as a result of being an investor in a consortium) or with the offeree company.

References in the Code to exempt principal traders or exempt fund managers should be construed accordingly. (See also Rule 7.2.)

3. The effect of a principal trader or fund manager having exempt status is that presumption (~~7~~6) 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.

…

5. In appropriate cases, a ~~trading entity~~ fund manager or principal trader may be granted exempt status on an ad hoc basis subject to the satisfaction of certain conditions. References in the Code to an exempt principal trader~~s~~ or an exempt fund manager include a person~~s~~ granted such ad hoc exempt status, for so long as ~~the grant of~~ such ~~exempt~~ status remains valid and subject always to the conditions on which such ~~ad hoc exempt~~ status is granted in any particular case.

…

Fund manager

A fund manager is an entity which manages investment accounts on behalf of another person on a discretionary basis.

…

Interests in securities

…

A person who has long economic exposure, whether absolute or conditional, to changes in the price of securities will be treated as interested in those securities. A person who only has a short position in securities will not be treated as interested in those securities.

~~In particular,~~ Notwithstanding the above, a person will be treated as having an interest in securities if the person:

(1) owns them;

(2) has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them, including as a fund manager (see Note 11);

(3) by virtue of any agreement to purchase, option or derivative:

(a) has the right or option to acquire them or call for their delivery; or

(b) is under an obligation to take delivery of them,

whether the right, option or obligation is conditional or absolute and whether it is in the money or otherwise; or

(4) is party to any derivative:

(a) whose value is determined by reference to their price; and

(b) which results, or may result, in the person having a long position in them; and

(5) in the case of Rule 5 only, has received an irrevocable commitment in respect of them.

NOTES ON INTERESTS IN SECURITIES

…

4. Securities borrowing and lending

If a person has borrowed or lent securities, the person will normally be treated as interested in any securities which it has lent but (except in the circumstances set out in Note 1~~7~~6 on Rule 9.1) will not normally be treated as interested in any securities which it has borrowed. If a person has on-lent securities which it has borrowed, it will not normally be treated as interested in those securities.

…

11. Fund managers

(a) A fund manager will be treated as having an interest in securities which it manages for a client on a discretionary basis.

(b) A client will not be treated as having an interest in securities if it has given to an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions. If the discretion is not absolute, the client will not normally be treated as having an interest in securities provided that it does not exercise any powers it has retained to intervene in such decisions.

(c) Where a fund manager sub-contracts discretionary management of funds to another independent fund manager, the same approach will be applied, i.e. the sub-contracted fund manager, and not the original fund manager, will be treated as having an interest in securities provided that the sub-contracted fund manager has been given absolute discretion regarding dealing, voting and offer acceptance decisions (and, if the discretion is not absolute, the originally contracted fund manager will not normally be treated as having an interest in securities provided that it does not exercise any powers it has retained to intervene in such decisions).

…

Principal trader

A principal trader is ~~a person who~~ an entity which:

(1) is registered as a market-maker with a recognised investment exchange, or is accepted by the Panel as a market-maker; or

(2) is a member firm of a recognised investment exchange dealing as principal in order book securities.

…

Recognised intermediary

…

NOTES ON RECOGNISED INTERMEDIARY

…

2. Recognised intermediary status is relevant only for the purposes of Note 1~~6~~5 on Rule 9.1, ~~Note 1(c) on Rule 7.2,~~ Rule 8.3(~~e~~d) and Note 5(b) on Rule 8, in each case to the extent only that the recognised intermediary is acting in a client-serving capacity. As a result, subject to Note 3 below and to the extent only that it is acting in a client-serving capacity: (i) a recognised intermediary will not be treated, for the purposes of Rule 9.1, as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities; (ii) any dealings by it in relevant securities during an offer period will not be required to be publicly disclosed under Rules 8.3(a) to (~~d~~c); and (iii) dealing disclosures required to be made by it under Rule 8.5(c) will need to include the details specified in Note 5(b), rather than those specified in Note 5(a), on Rule 8.

3. Where a recognised intermediary is, or forms part of, a principal trader connected either with an offeror or potential offeror or with the offeree company, the recognised intermediary will not benefit from the dispensations afforded by Note 1~~6~~5 on Rule 9.1 ~~and Note 1(c) on Rule 7.2~~ after the time at which the principal trader is presumed to be acting in concert with either the offeror or potential offeror or with the directors of the offeree company (as the case may be) in accordance with Rule 7.2(a) and Rule 7.2(b) respectively. ~~However, in accordance with Rule 7.2(c), where a recognised intermediary is, or forms part of, an exempt principal trader which is connected with either an offeror or potential offeror or with the offeree company for the sole reason that it is controlled# by, controls or is under the same control as a connected adviser to that party, the recognised intermediary will not be presumed to be acting in concert with that party and will therefore continue to benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2.~~

Where a recognised intermediary is, or forms part of, a person acting in concert with the offeree company, it will not benefit from the exception from disclosure afforded by Rule 8.3(~~e~~d) after the commencement of the offer period. Where a recognised intermediary is acting in concert with an offeror or potential offeror, it will not benefit from the exception from disclosure afforded by Rule 8.3(~~e~~d) after the identity of the offeror or potential offeror with which it is acting in concert is publicly announced. After such time, disclosures should be made under Rule 8.4 or, if the recognised intermediary is, or forms part of, an exempt principal trader whose exempt status has not fallen away, Rule 8.5.

…

4. Any dealings by a recognised intermediary which is not acting in a client-serving capacity will not benefit from the dispensations afforded by Note 1~~6~~5 on Rule 9.1, ~~Note 1(c) on Rule 7.2,~~ Rule 8.3(~~e~~d) and Note 5(b) on Rule 8 with the result that all such dealings by it will be subject to the provisions of the Code as if those dispensations did not apply.

…

NOTE ON DEFINITIONS

~~The normal test for whether a person is controlled by, controls or is under the same control as another person will be by reference to the definition of control. There may be other circumstances which the Panel will regard as giving rise to such a relationship (eg where~~

~~*a majority of the equity share capital is owned by another person who does not have a majority of the voting rights); in cases of doubt, the Panel should be consulted.*~~

A company (or, where appropriate, a fund manager, a principal trader or an adviser) will be regarded as controlling another company if it is interested in:

(a) shares carrying 30% or more of the voting rights of that other company; or

(b) a majority of the equity share capital in that other company,

and references to a company being controlled by or being under the same control as another company are to be construed accordingly.

In this Note, a reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person.

Rule 2.7

2.7 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

…

(c) When a firm intention to make an offer is announced, the announcement must include:

…

(xi) details of any relevant securities of the offeree company which the offeror or any person acting in concert with it has borrowed or lent, save for any borrowed relevant securities which have been either on-lent or sold and details of any financial collateral arrangements which the offeror or any person acting in concert with it has entered into (see Note 4<u>3</u> on Rule 4.6);

Rule 4

4.1 PROHIBITED DEALINGS BY PERSONS OTHER THAN THE OFFEROR

…

NOTES ON RULES 4.1 and 4.2

…

~~***6. Discretionary fund managers and principal traders***~~

~~*Dealings in securities of the offeree company by non-exempt discretionary fund managers and principal traders which are connected with the offeror will be treated in accordance with Rule 7.2.*~~

…

4.4 DEALINGS IN OFFEREE COMPANY SECURITIES BY ~~CERTAIN~~ PERSONS ACTING IN CONCERT WITH THE OFFEREE COMPANY ~~CONCERT PARTIES~~

During the offer period, no fund manager or principal trader ~~except for~~ (other than an exempt ~~principal traders and exempt~~ fund manager~~s~~ or exempt principal trader)~~, no financial adviser or corporate broker~~ which is connected with the offeree company, ~~(~~or any person controlling#, controlled by or under the same control# as any such connected fund manager or connected principal trader, ~~adviser or corporate broker) to an offeree company (or any of its parents, subsidiaries or fellow subsidiaries, or their associated companies or companies of which such companies are associated companies) shall~~ may, except with the consent of the Panel:

(a) ~~either for its own account or on behalf of discretionary clients~~ acquire any interest in securities of the offeree company ~~shares~~; ~~or~~

(b) make any loan ~~to a person~~ to assist ~~the~~ a person ~~in acquiring~~ to acquire any ~~such~~ interest in securities of the offeree company, other than a loan to an existing customer ~~save for lending~~ in the ordinary course of business and on normal commercial terms ~~to persons with which they have an established customer relationship~~; or

(c) enter into any ~~indemnity or option~~ dealing arrangement ~~or any arrangement, agreement or understanding, formal or informal, of whatever nature, which may be an inducement for a person to retain, deal or refrain from dealing in~~ of the kind referred to in Note 11 of the definition of acting in concert in relation to ~~relevant~~ securities of the offeree company.

…

4.6 SECURITIES BORROWING AND LENDING TRANSACTIONS BY OFFERORS, THE OFFEREE COMPANY AND THEIR CONCERT PARTIES

…

NOTES ON RULE 4.6

…

~~***3. Discretionary fund managers and principal traders***~~

~~*Securities borrowing or lending transactions by non-exempt discretionary fund managers and principal traders will be treated in accordance with Rule 7.2.*~~

4~~3~~. …

Rule 5.1

5.1 RESTRICTIONS

…

NOTES ON RULE 5.1

…

~~*6. Discretionary fund managers and principal traders*~~

~~*Dealings by non-exempt discretionary fund managers and principal traders which are connected with an offeror will be treated in accordance with Rule 7.2.*~~

~~7~~6. Gifts

…

Rule 6

RULE 6. ACQUISITIONS RESULTING IN AN OBLIGATION TO OFFER A MINIMUM LEVEL OF CONSIDERATION

…

NOTES ON RULE 6

…

~~*8. Discretionary fund managers and principal traders*~~

~~*Dealings by non-exempt discretionary fund managers and principal traders which are connected with an offeror will be treated in accordance with Rule 7.2.*~~

~~9~~8. Offer period

…

Rule 7.2

7.2 ~~DEALINGS BY~~ CONNECTED ~~DISCRETIONARY~~ FUND MANAGERS AND CONNECTED PRINCIPAL TRADERS

NB Rule 7.2 and the Notes thereon address the position of connected fund managers and connected principal traders who either do not have exempt status or whose exempt status is not relevant by virtue of the operation of Note 2 on the definitions of exempt fund manager and exempt principal trader.

(a) ~~Discretionary~~ Where a fund manager~~s~~ ~~and~~ or principal trader~~s~~ ~~who, in either case, are~~ is connected with an offeror or potential offeror, ~~will not normally be presumed to be~~ any presumption that the connected fund manager or connected principal trader is acting in concert with that ~~person until~~ offeror or potential offeror will be applied only from when:

(i) ~~its identity as an~~ the offeror or potential offeror is first publicly ~~announced~~ identified; or~~, if prior to that,~~

(ii) ~~the time at which~~ the connected ~~party~~ fund manager or connected principal trader is made aware of the possible offer to be made by the potential offeror ~~had actual knowledge of the possibility of an offer being made by a person with whom it is connected~~,

whichever is the earlier.

~~**Rules 5, 6, 9, 11 and 36 will then be relevant to acquisitions of interests in offeree company securities and Rule 4.2 to sales of offeree company securities by such persons. Rule 4.6 will be relevant to securities borrowing and lending transactions.**~~

(b) ~~Similarly, discretionary~~ Where a fund manager~~s and~~ or principal trader~~s who, in either case, are~~ is connected with the offeree company, ~~will not normally be presumed to be~~ any presumption that the connected fund manager or connected principal trader is acting in concert with the offeree company ~~until~~ will be applied only from when:

(i) ~~the commencement of~~ the offer period commences; or~~, if prior to that,~~

(ii) ~~the time at which~~ the connected ~~party~~ fund manager or connected principal trader ~~had actual knowledge of the possibility~~ is made aware of a~~n~~ possible offer ~~being made~~ for the offeree company ~~and that it was connected with the offeree company~~,

whichever is the earlier.

~~**Rules 4.4, 5 and 9 may then be relevant to acquisitions of interests in offeree company securities. Rule 4.6 will be relevant to securities borrowing and lending transactions.**~~

~~**(See also the definition of connected fund managers and principal traders.)**~~

~~**(c) An exempt fund manager or exempt principal trader which is connected for the sole reason that it is controlled# by, controls or is under the same control as a connected adviser will not be presumed to be in concert even after the commencement of the offer period or the identity of the offeror being publicly announced (as the case may be). (See Note 2 on the definitions of exempt fund manager and exempt principal trader.)**~~

(c) Notwithstanding Rule 7.2(a) and Rule 7.2(b), Rule 9.1 will apply on an ongoing basis to a fund manager or principal trader and to any person with which it is presumed to be acting in concert. See also Note 15 on Rule 9.1.

NOTES ON RULE 7.2

1. Previous d~~D~~ealings ~~prior to a concert party relationship arising~~

~~(a) As a result of Rule 7.2(a) and notwithstanding the usual application of the presumptions of acting in concert,~~ Subject to Note 2, dealings and securities borrowing and lending transactions by ~~discretionary~~ connected fund managers and connected principal traders ~~connected with an offeror or potential offeror~~ prior to the relevant time specified in Rule 7.2(a) or Rule 7.2(b) will not ~~normally~~ be relevant for the purposes of (as appropriate) Rules 4.2, 4.6, 5, 6, 9.5, 11 and 36 ~~before the identity of the offeror or potential offeror has been publicly announced or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected~~.

~~(b) Similarly, as a result of Rule 7.2(b) and notwithstanding the usual application of the presumptions of acting in concert, dealings and securities borrowing and lending transactions by discretionary fund managers and principal traders connected with the offeree company will not normally be relevant for the purposes of Rules 5 or 9 before the commencement of the offer period or, if prior to that, the time at which the connected party had actual knowledge of the possibility of an offer being made for the offeree company.~~

~~(c) Rule 9 will, however, be relevant if the aggregate number of shares in which any person and all persons controlling#, controlled by or under the same control as that person (including any exempt fund manager or exempt principal trader) are interested carry 30%~~

~~*or more of the voting rights of a company. However, provided that recognised intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.*~~

~~*If such a group of persons includes a principal trader and the aggregate number of shares in a company in which the group is interested approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire interests in shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period, the shares are acquired in a client-serving capacity and the number of shares which the principal trader holds in a client serving capacity does not at any relevant time exceed 3% of the voting rights of the company. The Panel should be consulted in such cases.*~~

2. ~~Qualifications~~ "Actual" concertedness

~~(a) Rule 7.2 does not apply i~~If a connected ~~discretionary~~ fund manager or connected principal trader is in fact acting in concert with an offeror or with the offeree company~~, the usual concert party consequences will apply irrespective of whether the offeree company is in an offer period or the identity of the offeror or potential offeror has been publicly announced~~.

~~*(b) If an offeror or potential offeror, or any company in its group, has funds managed on a discretionary basis by an exempt fund manager, Rule 7.2 may be relevant. If, for example, any securities of the offeree company are managed by such exempt fund manager for the offeror or potential offeror, the exception in Rule 7.2(c) in relation to exempt fund managers may not apply in respect of those securities. The Panel should be consulted in such cases.*~~

3. ~~Dealings~~ "Book flattening" by connected principal traders

(a) With the prior consent of the Panel, a~~After a connected principal trader is presumed to be acting in concert with an offeror or the offeree company~~ by virtue of Rules 7.2(a) or (b)~~, it may~~ stand down from its dealing activities. In such circumstances, with the prior consent of~~, within a time period agreed in advance by the Panel~~, the principal trader may~~:

> *(i) reduce its interests in securities of the offeree company ~~securities~~ or an offeror ~~securities~~, or ~~may~~ acquire interests in such securities with a view to reducing any short position, without such dealings being relevant for the purposes of Rules 4.2, 4.4, 5, 6, 9.5, 11 and 36; and~~, notwithstanding the usual application of the presumptions of acting in concert and Rules 7.2(a) and (b). The Panel will also normally,~~*
>
> *(ii) pursuant to Rule 4.6, ~~consent to connected principal trader taking~~ take action to unwind a securities borrowing or lending transaction in respect of relevant securities of the offeree company ~~in such circumstances~~.*

(b) ~~The Panel will not normally require~~ Any such dealings ~~to~~ must be disclosed under Rules 4.6, 8.4, 24.4 or 25.4, as appropriate~~. Any such dealings must take place within a time period agreed in advance by the Panel.~~

4. Dealings by ~~discretionary~~ connected fund managers

(a) After a ~~discretionary~~ connected fund manager is presumed to be acting in concert with an offeror or ~~potential offeror~~ the offeree company~~, by virtue of Rule 7.2(a), any acquisition by it of any interest in offeree company securities will normally be relevant for Rules 5, 6, 9, 11 and 36. Similarly, any acquisition of any interest in offeree company securities by a discretionary fund manager after it is presumed to be acting in concert by~~

~~*virtue of Rule 7.2(b) will not normally be permitted by virtue of Rule 4.4(a). However, with the prior consent of the Panel, a discretionary fund manager connected with either the offeree company or an offeror or potential offeror will normally be permitted to*~~ *it may, with the prior consent of the Panel and within a time period agreed in advance by the Panel:*

> *(i) acquire an interest in ~~offeree company~~ securities of the offeree company, with a view to reducing any short position, without such acquisitions being relevant for the purposes of Rules 4.4~~(a)~~, 5, 6, 9.5, 11 and 36; and~~, notwithstanding the usual application of the presumptions of acting in concert and Rules 7.2(a) and (b). The Panel will also normally~~,*
>
> *(ii) pursuant to Rule 4.6, ~~consent to connected discretionary fund managers taking~~ take action to unwind a securities borrowing transaction~~s~~ in respect of relevant securities of the offeree company ~~in such circumstances~~.*

(b) Any such ~~acquisitions or unwinding arrangements~~ dealings must ~~take place within a time period agreed in advance by the Panel and should~~ be disclosed ~~pursuant to~~ under Rule 8.4, Rule 4.6 or Note 2 on Rule 4.6, as appropriate.

(~~b~~c) After the commencement of the offer period, with the prior consent of the Panel, a ~~discretionary~~ connected fund manager ~~connected~~ presumed to be acting in concert with an offeror ~~will normally be permitted to~~ may sell offeree company securities without such sales being relevant for the purposes of Rule 4.2~~, notwithstanding the usual application of the presumptions of acting in concert and Rule 7.2(a)~~. Any such sale ~~should~~ must be disclosed under Rule 8.4.

5. Rule 9

The Panel should be consulted if, once the identity of the offeror or potential offeror is publicly known, it becomes apparent that the number of shares in which the offeror or potential offeror and persons acting in concert with it, including any connected ~~discretionary~~ fund managers and connected principal traders to which Rule 7.2(a) applies, are interested carry in aggregate 30% or more of the voting rights of the offeree company.

6. Disclosure of dealings in offer documentation

Interests in relevant securities of, and dealings ~~(whether before or after the presumptions in Rules 7.2(a) and (b) apply)~~ by, non-exempt connected ~~discretionary~~ fund managers and non-exempt connected principal traders ~~(unless exempt)~~ (whether before or after the time referred to in Rule 7.2(a) or (b)) must be disclosed in any offer document in accordance with Rule 24.4 and in any offeree board circular in accordance with Rule 25.4, as the case may be. ~~This will not apply in respect of a dealing that has been permitted by Note 3 above and has not been required to be disclosed.~~

~~*7. Consortium offers*~~

~~*See also Note 6 on the definition of acting in concert where the connected fund manager or principal trader is part of the same organisation as an investor in a consortium.*~~

7. Persons other than connected fund managers and connected principal traders

In certain circumstances, the Panel may be prepared to apply the treatment afforded by Rule 7.2(a) or Rule 7.2(b) to a person who is presumed to be acting in concert with an offeror or the offeree company but who is not a connected fund manager or connected principal trader. Where such treatment is sought, the Panel should be consulted at the earliest opportunity.

Rule 8

RULE 8. DISCLOSURE OF DEALINGS AND POSITIONS

…

8.3 DISCLOSURE BY PERSONS WITH INTERESTS IN SECURITIES REPRESENTING 1% OR MORE

…

~~**(d) If a person manages investment accounts on a discretionary basis, that person, and not the person on whose behalf the relevant securities (or interests in relevant securities) are managed, will be treated for the purpose of this Rule as interested in the relevant securities concerned. Except with the consent of the Panel, where more than one discretionary investment management operation is conducted in the same group, the interests in relevant securities of all such operations will be treated for the purpose of this Rule as those of a single person and must be aggregated (see Note 8 below).**~~

(de) Rules 8.3(a) to (~~d~~c) do not apply to recognised intermediaries acting in a client-serving capacity (see Note 9 below).

(~~f~~e) A person making a disclosure in accordance with Rules 8.1, 8.2, 8.4 or 8.5 need not also disclose the same information pursuant to Rule 8.3.

…

NOTES ON RULE 8

…

5. Details to be included in the disclosure

…

(l) Securities borrowing and lending

…

The provisions of this Note also apply in respect of any financial collateral arrangements of the kind referred to in Note ~~4~~3 on Rule 4.6 entered into or unwound by a party to the offer or any person acting in concert with it as if such arrangements were securities lending transactions.

…

~~***8. Discretionary fund managers***~~

~~*The principle normally applied by the Panel is that where the investment decision is made by a discretionary fund manager, the discretionary fund manager, and not the person on whose behalf the fund is managed, will be treated as interested in (or having a short position in or right to subscribe for), or having dealt in, the relevant securities concerned. For that reason, Rule 8.3(d) requires a discretionary fund manager to aggregate the investment accounts which it manages for the purpose of determining whether it has an obligation to disclose. The beneficial owner would not normally, therefore, be concerned with disclosure to the extent that the investment is managed on a discretionary basis. However, where any of the funds managed on behalf of a beneficial owner are not managed by the fund manager originally contracted to do so but are managed by a*~~

~~*different independent third party who has discretion regarding dealing, voting and offer acceptance decisions, the fund manager to whom the management of the funds has been sub-contracted (and not the originally contracted fund manager) is required to aggregate those funds and to comply with the relevant disclosure obligations accordingly.*~~

~~*This approach assumes that the discretionary fund manager does not take instructions from the beneficial owner (or, in the case of sub-contracted funds, from the originally contracted manager or the beneficial owner) on the positions or dealings in question and that fund management arrangements are not established or used to avoid disclosure.*~~

8. Fund managers

(a) See Note 11 on the definition of interests in securities.

(b) Except with the consent of the Panel, where more than one discretionary investment management operation is conducted in the same group, the interests in relevant securities of all such operations will be treated for the purposes of Rule 8 as those of a single person and must be aggregated.

Rule 9.1

9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT

…

NOTES ON RULE 9.1

…

10. Convertible securities, warrants and options

…

(See also Note 1~~4~~3 on Rule 9.1.)

…

~~***13. Discretionary fund managers and principal traders***~~

~~*Dealings by non-exempt discretionary fund managers and principal traders which are connected with an offeror or the offeree company will be treated in accordance with Rule 7.2.*~~

1~~4~~3. Allotted but unissued shares

…

1~~5~~4. Treasury shares

…

1~~6~~5. Aggregation of interests across a group and recognised intermediaries

Rule 9.1 will be relevant if the aggregate number of shares in which any person and all persons ~~controlling#, controlled by or under the same control as that person~~ with which it is presumed to be acting in concert (including any ~~exempt~~ fund manager or ~~exempt~~

principal trader which has been granted exempt status) are interested carry 30% or more of the voting rights of a company.

However, provided that recognised intermediary status has not fallen away (see Note 3 on the definition of recognised intermediary), a recognised intermediary acting in a client-serving capacity will not be treated as interested in (or as having acquired an interest in) any securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities (other than those held in a proprietary capacity) for these purposes.

If such a group of persons includes a principal trader and the aggregate number of shares in a company in which the group is interested approaches or exceeds 30% of the voting rights, the Panel may consent to the principal trader continuing to acquire shares in the company without consequence under Rule 9.1 provided that the company is not in an offer period, the shares are acquired in a client-serving capacity and the number of shares which the principal trader holds in a client-serving capacity does not at any relevant time exceed 3% of the voting rights of the company. The Panel should be consulted in such cases.

~~17~~6. Borrowed or lent shares

…

~~18~~7. Changes in the nature of a person's interest

…

~~19~~8. Bank recovery and resolution

…

Rule 11

11.1 WHEN A CASH OFFER IS REQUIRED

…

NOTES ON RULE 11.1

…

~~***7. Discretionary fund managers and principal traders***~~

~~*Dealings by non-exempt discretionary fund managers and principal traders which are connected with an offeror will be treated in accordance with Rule 7.2.*~~

~~8~~7. Allotted but unissued shares

…

~~9~~8. Dividends

…

~~10~~9. Convertible securities, warrants and options

…

1~~1~~0. Offer period

…

11.2 WHEN A SECURITIES OFFER IS REQUIRED

…

NOTES ON RULE 11.2

…

7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 2, 5, 6, 7, ~~8, 10~~ 9 and 1~~1~~0 on Rule 11.1 which may be relevant.

Rule 24.4

24.4 INTERESTS AND DEALINGS

(a) The offer document must state:

…

(iv) details of any relevant securities of the offeree company and (in the case of a securities exchange offer only) the offeror which the offeror or any person acting in concert with it has borrowed or lent (including for these purposes any financial collateral arrangements of the kind referred to in Note 4~~3~~ on Rule 4.6), save for any borrowed shares which have been either on-lent or sold.

…

NOTES ON RULE 24.4

…

3. ~~Discretionary~~ Connected fund managers and connected principal traders

Interests in relevant securities and short positions of non-exempt ~~discretionary~~ connected fund managers and connected principal traders ~~which are connected with the offeror~~ and their dealings since the date 12 months prior to the offer period will need to be disclosed under Rules 24.4(a)(ii)(b) *and 24.4*(c) *respectively.*

Rule 25.4

25.4 INTERESTS AND DEALINGS

(a) The offeree board circular must state:

…

(iv) details of any relevant securities of the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any person acting in concert with the offeree company has

borrowed or lent (including for these purposes any financial collateral arrangements of the kind referred to in Note 43 on Rule 4.6), save for any borrowed shares which have been either on-lent or sold; and

Rule 36.3

36.3 ACQUISITIONS DURING AND AFTER THE OFFER

…

NOTES ON RULE 36.3

~~***1. Discretionary fund managers and principal traders***~~

~~*Dealings by non-exempt discretionary fund managers and principal traders which are connected with an offeror will be treated in accordance with Rule 7.2.*~~

~~***2.***~~ ***Partial offer resulting in an interest of less than 30%***

APPENDIX B

List of questions

Q1 **Should the threshold at which the presumption of acting in concert is engaged be raised from 20% to 30%?**

Q2 **Should (i) a person and (ii) a company in which the person owns or controls shares carrying 30% or more of the voting rights be presumed to be acting in concert with each other?**

Q3 **Should (i) a person and (ii) a company in which the person owns or controls more than 50% of the equity share capital be presumed to be acting in concert with each other?**

Q4 **Should (i) a person and (ii) a company in which the person owns or controls, directly or indirectly, 30% or more of the equity share capital be presumed to be acting in concert with each other?**

Q5 **Should the new presumptions (1) and (2) apply to individuals, limited partnerships and other persons who own or control shares carrying 30% or more of the voting rights or equity share capital in a company?**

Q6 **Should long derivative or option positions be taken into account in determining whether the new presumptions (1) and (2) are engaged?**

Q7 **Where A is presumed to be acting in concert with B under the new presumption (1) or (2), should any company under the same control as A or B also be presumed to be acting in concert with A and B?**

Q8 **Do you have any comments on: (i) the new presumption (1); (ii) the new presumption (2); (iii) the new Note on Definitions; or (iv) the new Note on the definition of "control"?**

Q9 **Should a fund manager be treated as interested in shares which it manages on a discretionary basis?**

Q10 **Should a client be treated as not interested in shares if it has given an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions?**

Q11 **Do you have any comments on (i) the proposed amendments to the definition of "interests in securities" and (ii) the proposed new Note 11 on the definition of "interests in securities" in relation to funds managed on a discretionary basis?**

Q12 **Should an investor in a fund be presumed to be acting in concert with (i) the offeror or (ii) the fund itself in the circumstances proposed – i.e. by reference to the new presumptions (1) and (2) as if the investor's interest in the fund represented equity share capital in a company? Do you have any comments on the proposed new Note 7 on the definition of "acting in concert"?**

Q13 **Should an investment manager of or investment adviser to (i) an offeror or an investor in an offeror consortium or (ii) the offeree company (together with any person controlling, controlled by or under the same control) be presumed to be acting in concert with the offeror or offeree company? Do you have any comments on the proposed new presumption (5)?**

Q14 **Do you have any comments on the proposed new paragraph (4) of the definition of "connected fund managers and principal traders" in relation to an investment**

manager of or investment adviser to (i) an offeror or an investor in a consortium or (ii) the offeree company?

Q15 Should Note 6 on the definition of "acting in concert", regarding the circumstances in which the Panel may agree to waive the presumption of acting in concert in relation to the other parts of the organisation of which an investor in an offer made by a new bid vehicle forms part, be amended as proposed?

Q16 Do you have any comments on the proposed new definition of a "fund manager"?

Q17 Should Rule 7.2 and the Notes thereon, with regard to dealings by connected fund managers and connected principal traders, be amended as proposed?

Q18 Should Note 7 on Rule 7.2, in relation to extending the application of Rule 7.2 to a person other than a connected fund manager or a connected principal trader, be introduced as proposed?

Q19 Do you have any comments on the proposed amendments to various provisions of the Code which relate to the proposed amendments to Rule 7.2?

Q20 Should Rule 4.4, with regard to dealings in offeree company securities by persons acting in concert with the offeree company, be amended as proposed?

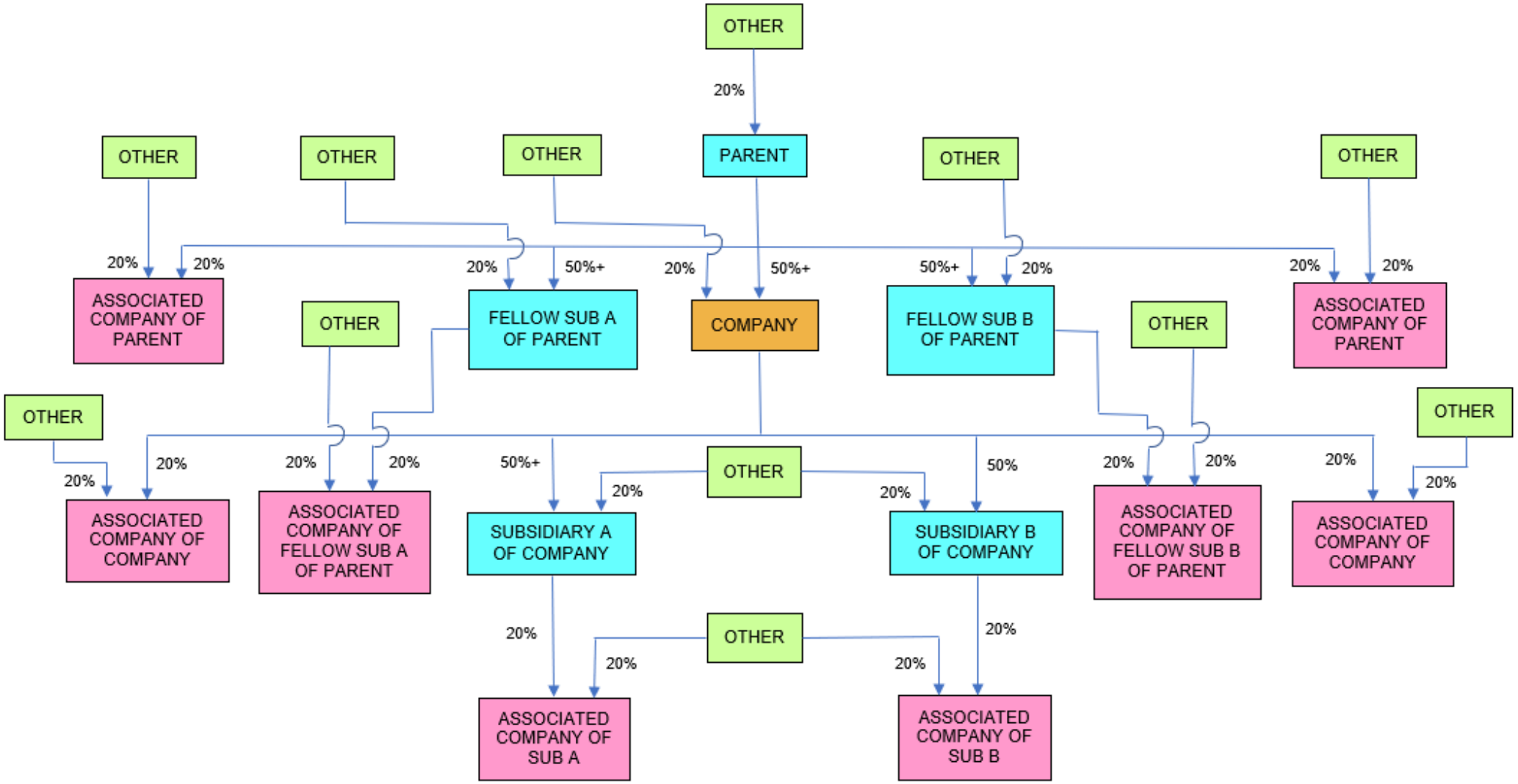
Q21 Should the current presumption (2), regarding the directors of a company being presumed to be acting in concert with the company, be amended as proposed?

Q22 Should presumption (3), regarding a company's pension scheme(s) being presumed to be acting in concert with the company, be amended as proposed?

Q23 Should presumption (9), regarding shareholders in a private company who sell their shares in consideration for the issue of new shares in a company to which the Code applies, be amended as proposed?

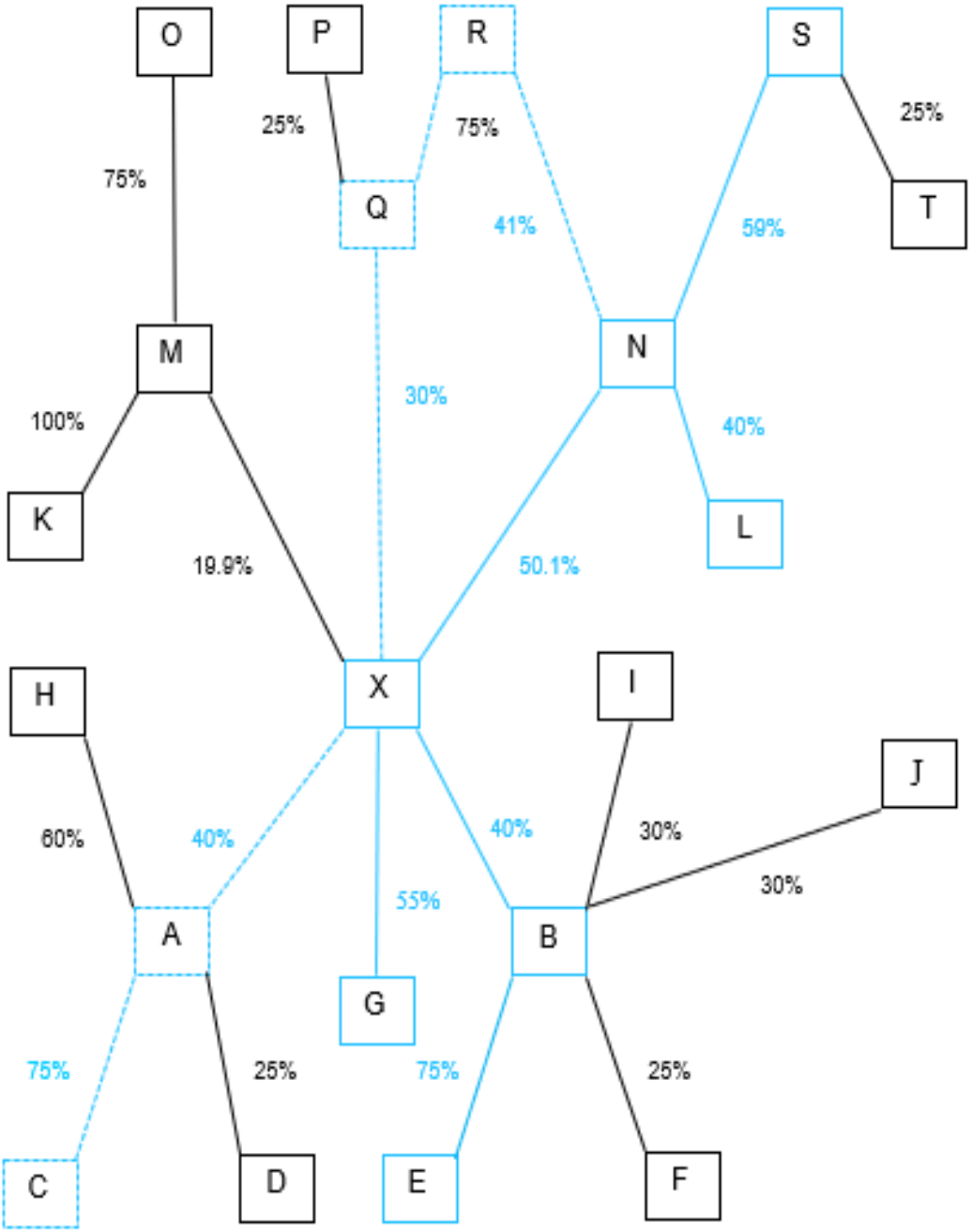
APPENDIX C

Companies to which the current presumption (1) applies



APPENDIX D

Companies presumed to be acting in concert with X under the new presumption (1) where shareholdings represent <u>shares carrying voting rights only</u>



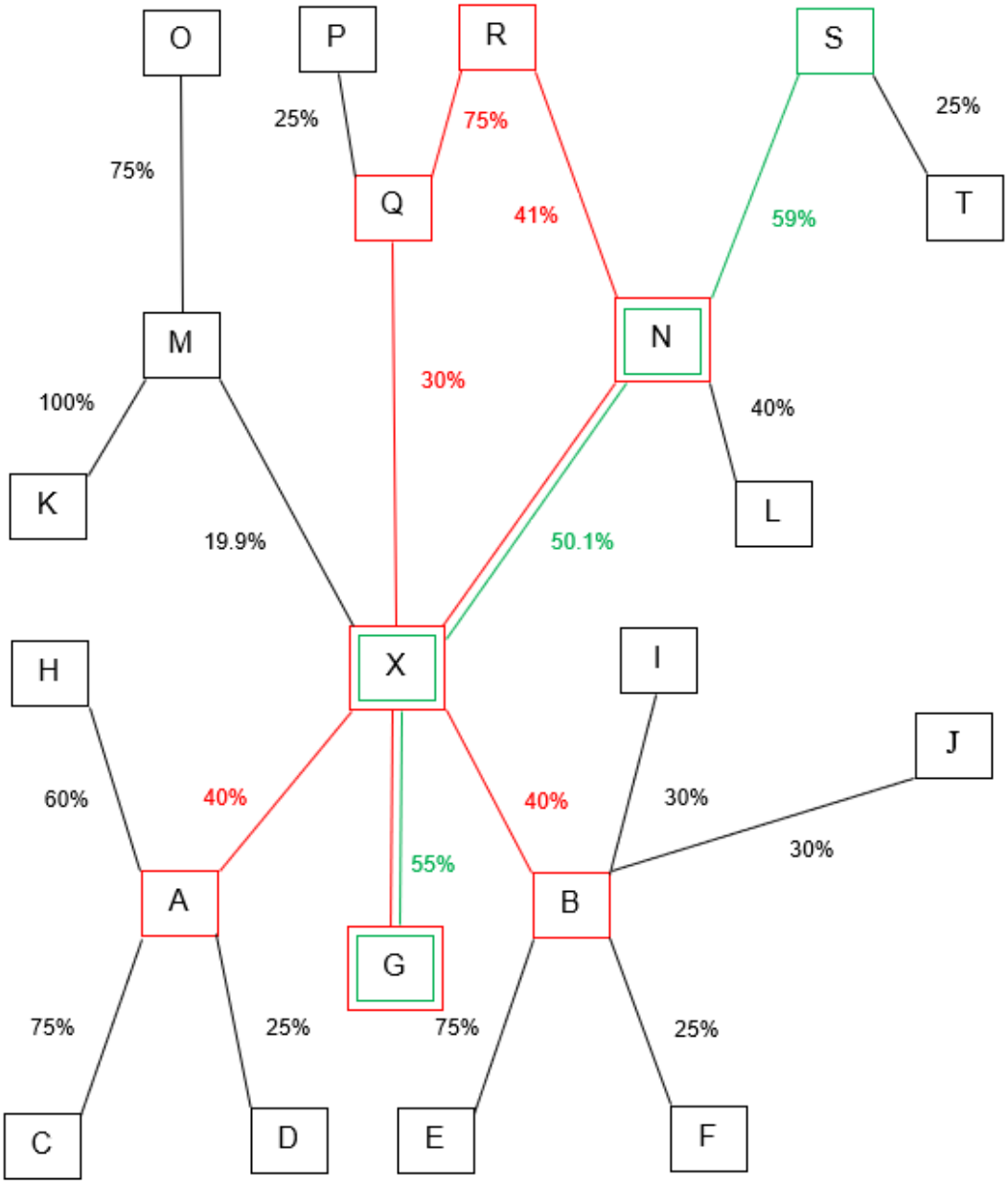
—— : presumed to be acting in concert with X in relation to a Code company (including an offeree company for which X is making an offer) under the new presumption (1)

- - - - : presumed to be acting in concert with X in relation to a Code company (including an offeree company for which X is making an offer) - but presumption likely to be rebutted

—— : not presumed to be acting in concert with X

APPENDIX E

Companies presumed to be acting in concert with X under the new presumptions (1) and/or (2) where shareholdings represent <u>equity share capital only</u>



— : presumed to be acting in concert with X in relation to a Code company (including an offeree company for which X is making an offer) <u>under the new presumption (1)</u>

— : presumed to be acting in concert with X in relation to a Code company (including an offeree company for which X is making an offer) <u>under the new presumption (2)</u>

— : not presumed to be acting in concert with X