HERBERT
SMITH
FREEHILLS

The Secretary to the Code Committee
The Takeover Panel
One Angel Court
London
EC2R 7HJ

By email to: supportgroup@thetakeoverpanel.org.uk

Herbert Smith Freehills LLP
Exchange House
Primrose Street
London EC2A 2EG
T +44 (0)20 7374 8000
F +44 (0)20 7374 0888
DX28 London Chancery Lane

www.herbertsmithfreehills.com

Date
23 September 2022

By email

Dear Secretary to the Code Committee

Response on PCP 2022/2

We are writing in response to Panel Consultation Paper 2022/2 on the definition of acting in concert.

General comments

We welcome the codification of the Panel Executive's approach to the presumptions on acting in concert. We believe that the proposed changes will promote a more coherent and more consistent approach to the application of the rules in this area and codify existing practice in a way that will provide greater clarity to market participants. It will help parties to an offer to understand better how to apply the rules and so identify their concert parties more easily.

We are concerned, however, that the consultation paper suggests that presumptions (1) and (2) will be harder to rebut following the changes. We consider that it is important that the Panel continues to look at who is in fact acting in concert and it may be that in some cases the parties who are presumed to be acting in concert have no relationship with each other or knowledge of the other's position and intentions. It should still be possible in that situation to rebut the presumption and there is no rationale that we can see in making it harder to do so. In short, we consider that presumptions are helpful in getting to a quicker answer and are flexible in allowing for rebuttal, which is appropriate for this fact-dependent area of the application of the Code.

It would also be helpful to have greater clarity around the application of the rules to government-owned entities/sovereign wealth funds.

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership, are separate member firms of the international legal practice known as Herbert Smith Freehills.

Herbert Smith Freehills LLP is a limited liability partnership registered in England and Wales with registered number OC310989. It is authorised and regulated by the Solicitors' Regulation Authority of England and Wales. A list of the members and their professional qualifications is open to inspection at the registered office, Exchange House, Primrose Street, London EC2A 2EG. We use the word partner of Herbert Smith Freehills LLP to refer to a member of Herbert Smith Freehills LLP, or an employee or consultant with equivalent standing and qualifications.

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

Yes, this is more consistent with other provisions of the Code, more logical and we welcome it.

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?

Yes.

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?

Yes.

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?

Yes. However, please note our comments below in relation to the application of this approach to funds.

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?

Yes we agree with this approach and the consistent application of the new presumptions across different legal forms and structures.

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

We do not agree with this proposal. Whilst we agree with the existing approach of applying the Code's rules of disclosure to long derivative and options positions, to extend the spirit of the existing approach in this area is unnecessary and ignores the significant difference between ownership and owning a mere derivative interest. In practice the holder of the derivative/option will not have control over the shares to which it relates. The counterparty may not hedge its position by buying shares to cover the derivative / option or may not hedge it in full. In addition, we do not agree, even if it does hedge the position in full, that the holder of the derivative or option will be able to influence how the counterparty exercises its rights in respect of those shares. In our experience, it would be incorrect to presume that prime brokerage counterparties will usually put their shoulder to the wheel, on behalf of the investors in "swaps", in order to facilitate the de facto control that is implicit in this proposal. To the extent that an investor in a "swap" does exert de facto control through the counterparty over the counterparty's hedged shares, then the existing rules allow the Panel Executive to come to the appropriate conclusion without the need for this new proposal, which would reverse the starting point in the analysis.

It is also important to note that derivatives do not always entitle the holder to settle in kind. Where they do not, the exposure is, and is intended to be, purely economic.

If a party holds both long and short positions, how would the rules apply?

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?

Yes.

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"?

No.

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

Yes.

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?

We agree.

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?

No.

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"?

We refer in above Q5 to our agreement with the consistent application of the new presumptions across different legal forms and structures. However, there should be limits to this spirit, to allow for meaningful and real differences. In other words, it is welcome to apply principles consistently across different legal forms and structures but it is unwelcome to ignore those differences. Specifically, we do not agree that a limited partner's interests in a fund should be treated in the same way as interests in equity share capital. The role of a limited partner is by its nature and design passive and so whilst it may have an economic interest in the outcome of the offer it should not have influence over the fund in relation to the offer. If in fact it does, then that is a different

matter and one the Panel Executive can take into account in the application of the existing rules in this area. We submit it is unnecessary and incorrect to reverse the starting point in that analysis.

There may also be sensitivity in disclosing the interests of limited partners in a fund.

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)?

Yes. We have no comments on the proposed new presumption.

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?

No.

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?

We do not agree that the thresholds should be reduced. The current regime works well and we are concerned that to make the amendments proposed would add unnecessary compliance costs which would not provide any commensurate benefit. Whilst in a listed company, a 30% stake can give effective control (because not all the shares will be voted at a shareholder meeting) and so it is logical to set the control threshold below 50%, that is not the case in a privately owned company where all shares are likely to be voted. In our view, the threshold should remain at the point at which statutory control is obtained, namely at 50%, and so the thresholds should not be changed.

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

No.

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?

Yes.

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?

Yes

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?

No.

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?

Yes and we welcome the codification of existing practice in this respect.

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?

Yes.

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?

Yes.

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?

We agree with the proposed amendment, but this is an area which we believe would benefit from further clarification. There is a distinction to be drawn between: one or two individual founders who start and run a company (i.e. closely acting in concert, in fact, while doing so) which is sold to a larger listed company in exchange for shares; and the now much more common scenario where a company IPOs after several series of private fund-raising rounds, where there are numerous and large PE investors in the company, which ought not to be regarded as acting in concert solely because of passively co-investing in the company. In our experience the Panel Executive deals with this well in practice but it would be helpful to codify, or explain, the Panel Executive's approach in this area.

We would be happy to discuss these comments with you if that would be helpful.

Yours faithfully

Herbert Smith Freehills

Herbert Smith Freehills LLP