



John Dovey
Secretary to the Code Committee
The Takeover Panel
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London, EC2R 7HJ

Sent via email: supportgroup@thetakeoverpanel.org.uk

23 September 2022

Dear John,

UK Finance response to the public consultation - PCP 2022/2

UK Finance is grateful for the opportunity to respond to this public consultation paper PCP 2022/2 on the 'presumptions of the definition of "acting in concert" and related matters' ('Consultation').

UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers, and facilitate innovation.

The role of the Takeover Panel (the 'Panel') and the Takeover Code (the 'Code') are vital for our members as they participate and advise clients active in mergers and acquisitions, and other activities covered by the Code. Our Corporate Finance Committee brings together these members, and we appreciate the time you have spent engaging with the Committee regarding various Code amendments including this Consultation.

UK Finance is broadly supportive of the changes proposed in this Consultation and please find attached our response. We look forward to continued engagement with the Panel on Code related matters.

Yours sincerely,

Avanthi Weerasinghe
Principal, Capital Markets & Wholesale Policy
UK Finance

UK Finance response to the public consultation - PCP 2022/2

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

Our members generally support the proposed change.

However, we note that raising the threshold from 20% to 30% will inevitably result in a narrower 'safety net' for offeree companies as fewer parties are caught by the concert party presumption. We are interested in understanding whether the Panel had considered 25% as the threshold instead of 30%, given that 25% is the level at which a shareholder gains effective negative control of a company.

In the Panel webinar and the further briefing given by the Panel Executive to UK Finance, the Executive mentioned that the burden to rebut the new presumptions is likely to be high. Accordingly, we think it would be helpful to have some extra guidance from the Panel in the Response Statement on a number of areas where parties to offer routinely seek to rebut the presumption of concertedness which would otherwise arise, in particular:

- Joint Ventures (JV): confirmation that the Panel would be likely to rebut any presumption under new presumption 2 that a JV partner and the JV partner's own group are also acting in concert with the bidder;
- Given in many transactions a concert party may include a link into a state-controlled entity it would be helpful for the Panel to set out some guidance on its general approach to applying acting in concert presumptions to such entities.

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

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?

We agree that the new presumptions (1) and (2) should apply to all holders of voting rights or equity whether they are a company, an individual, a limited partnership or another type of person.

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

Yes

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”?

We do not have any comments in addition to the comments included within this submission including our response to Q 1, 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?

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?

Yes.

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”?

It would be helpful if the Panel could acknowledge in the response statement that there are many different types of fund structures and a passive LP is capable of being differentiated from non-voting equity share capital and shouldn’t therefore always attract the same treatment.

We would also be grateful for clarification whether the broad approach of the PCP of seeking equivalence in treatment and disclosure between fund structures and corporates means that Rule 24.3(b)(iii) will prompt disclosure of the identity of LPs with a see through economic interest of 5% or more in the offeree post completion.

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, all of the above should be presumed to be acting in concert. No further comments in relation to 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?

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?

Yes

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.

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?

Yes. Further guidance on how this is applied by the Executive in practice would be helpful. In particular any relevant factors the Executive considers when agreeing to rebut the presumption.