

Presumptions of the Definition of  
“Acting in Concert”:  
Rule changes and new guidance



Webinar: 1 February 2023

# Introduction

- Response Statement to PCP 2022/2 published on 14/12/2022
- Amendments to the Code take effect on 20/2/2023
- Key changes to current presumption (1):
  - threshold raised from 20% to 30%
  - applies to voting interests as well as equity interests
  - long derivative/option positions count towards 30% threshold
  - applies to interests in a fund in the same way as to interests in shares in a company
- Implemented by two new presumptions
- Review of presumptions in general and their application, including further guidance in a number of areas



# Overview: new presumptions (1) and (2)

COMPANIES	
New presumption (1)	New presumption (2)
<p>Companies connected by:</p> <p>(1) <math>\geq 30\%</math> voting rights <u>or</u></p> <p>(2) <math>&gt;50\%</math> equity share capital (voting and non-voting)</p> <p>(See new <b>Note on Definitions</b>)</p>	<p>(1) Companies connected, directly or indirectly, by <math>\geq 30\%</math> equity share capital (voting and non-voting) <u>and</u></p> <p>(2) Companies presumed to be AIC with companies in limb (1) under new presumption (1)</p>
<b>Rationale:</b> “control”	<b>Rationale:</b> “shoulder to the wheel”
% interests <b>do not dilute</b> through a chain of ownership	% interests <b>do dilute</b> through a chain of ownership
FUNDS	
<b>Note 7 on definition of “acting in concert”:</b> interests in funds treated in same way as interests in a company’s equity share capital (whether voting or non-voting)	



# Overview: new presumption (5) and Note 11 on definition of “interests in securities”

- **New presumption (5):** an investment manager/adviser to:
  - an offeror
  - an investor in a Bidco or
  - the offeree companypresumed to be acting in concert with the offeror or offeree company (as appropriate), together with any person controlling, controlled by or under the same control as that investment manager/adviser
- Corresponding amendment to **definition of “connected fund manager and connected principal trader”**
- **Note 11 on definition of “interests in securities”:** a fund manager is treated as interested in shares which it manages for a client on a discretionary basis (and client not treated as interested in shares if it has given an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions)
- Deletion of current presumption (4) and withdrawal of **Practice Statement No 12**



# Overview: Note 6 on definition of “acting in concert”

- **Note 6(a):**
  - any shareholder or other investor in Bidco or
  - any person presumed to be acting in concert with a shareholder or other investor in Bidco under new presumption (1)  
presumed to be acting in concert with Bidco
- **Notes 6(b) to (d):**
  - where a person presumed to be acting in concert with Bidco is part of a larger organisation, Panel may be prepared to disapply the presumption in relation to the members of the larger organisation if satisfied of their independence, and depending on size of investment:
    - (i)  $\leq 10\%$ : normally disapply
    - (ii)  $> 10\%$ : 30% - may disapply depending on circumstances
    - (iii)  $> 30\%$ : will not disapply
  - but Rule 7.2 may be applied to portfolio companies
- **Note 6(e):** follow-on offers

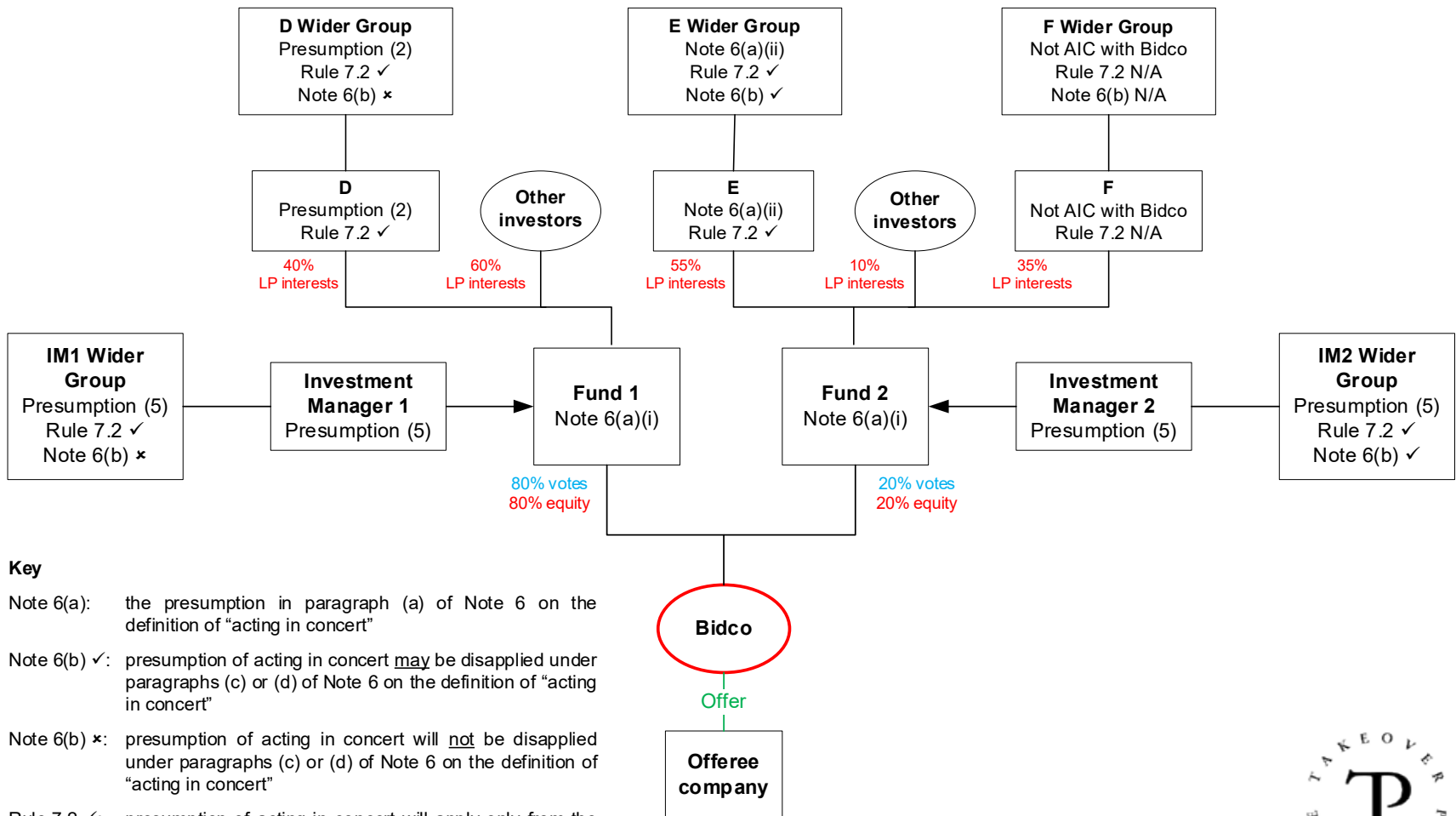


# Overview: Rule 7.2

- No substantive change proposed in PCP
- Therefore, the presumption that connected fund managers and/or connected principal traders are acting in concert with the offeror/offeree company under any of new presumptions (1), (2), (5) or (6) will apply only from the earlier of when:
  - offeror/offeree company is first publicly identified or
  - connected fund manager/connected principal trader is made aware of possible offer
- **New Rule 7.2(d):**
  - treatment in Rules 7.2(a) and (b) may also be applied to a person presumed to be acting in concert with an offeror/offeree company which is not a “connected” fund manager/principal trader: e.g. passive investors and portfolio companies
- Where Rule 7.2 applies, any prior dealings not relevant - but:
  - they must be disclosed in offer document under Rule 24.4(c)
  - Panel likely to enquire as to reason for dealing at that time
  - absent a satisfactory explanation, Panel may conclude that the person dealing was aware of the possible offer when it dealt and so should be treated as acting in concert with the offeror at the time of the dealing



# Application of presumption (5), Note 6 on the definition of “acting in concert” and Rule 7.2



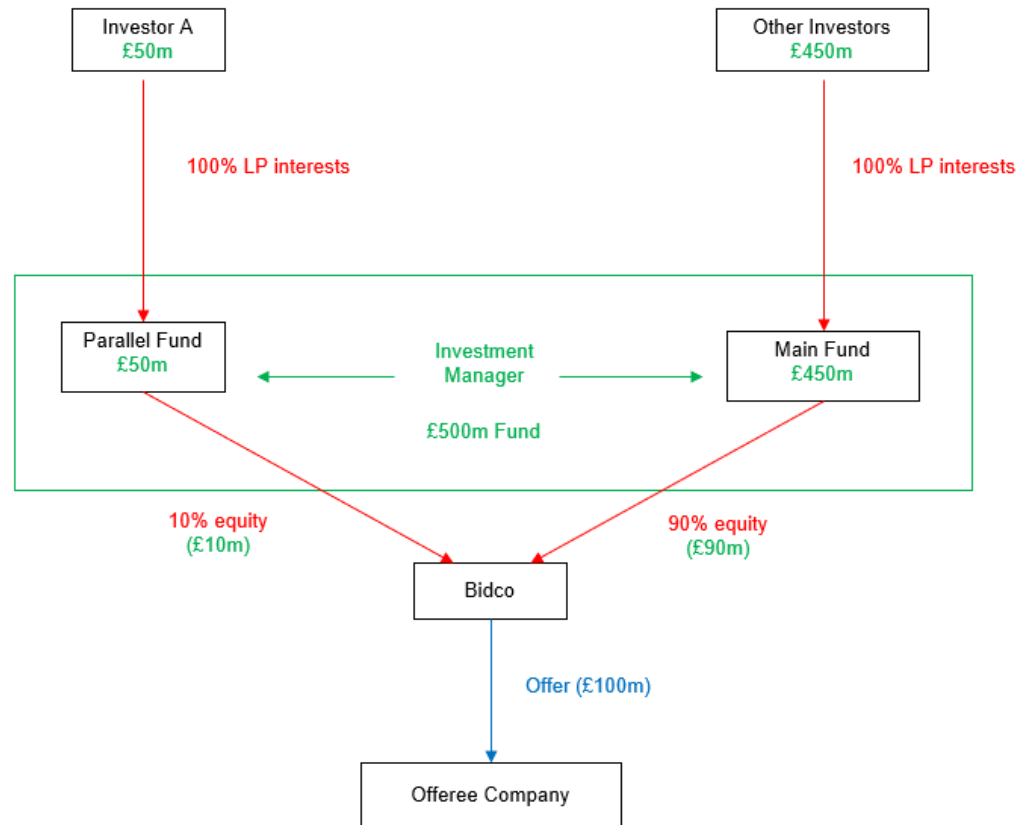
## Other points on offers by financial sponsors

- **New Note 2(b) on Rule 24.3(b):** the identity of a person with  $\geq 5\%$  indirect interest in the offeree company as a result of being an investor in a fund which invests in the offeror will not be required to be disclosed in offer document unless the person is presumed to be acting in concert with Bidco
- **“Investee company comfort letter”** for  $\leq 50\%$  investments discontinued
- **“Parallel” funds** not treated as separate funds, and the investor in the parallel fund will not be treated as acting in concert with the fund even though it holds  $> 50\%$  of the LP interests, provided the parallel fund is managed on a unified basis with the “main” fund



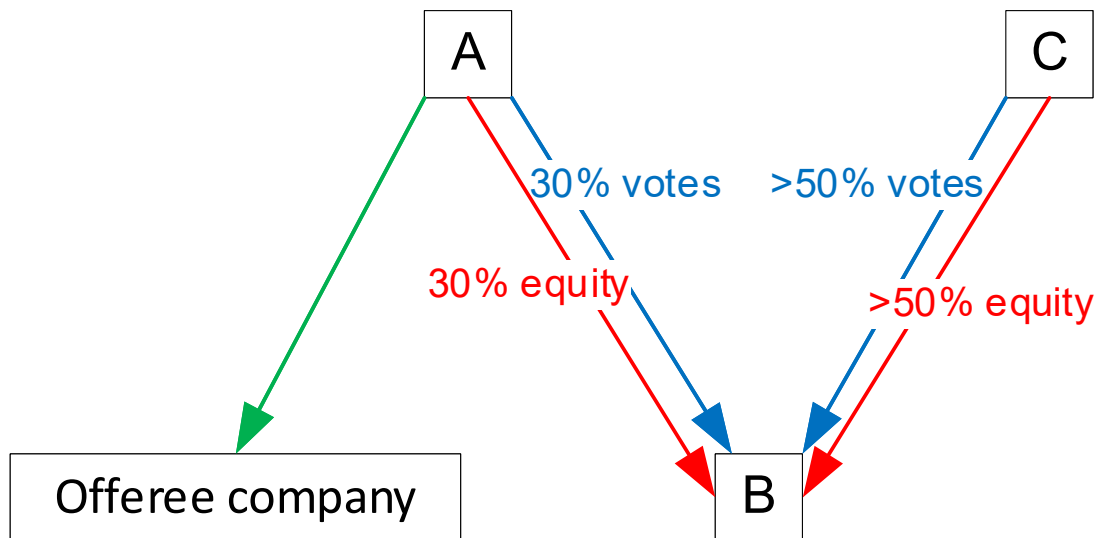


# Parallel Funds



- Investor A not presumed to be acting in concert with:
    - Parallel Fund (under presumption (1) and Note 7 on the definition of “acting in concert”)
    - Bidco (under Note 6(a)(ii) on the definition of “acting in concert”)
- provided the Parallel Fund and the Main Fund are managed on a unified basis

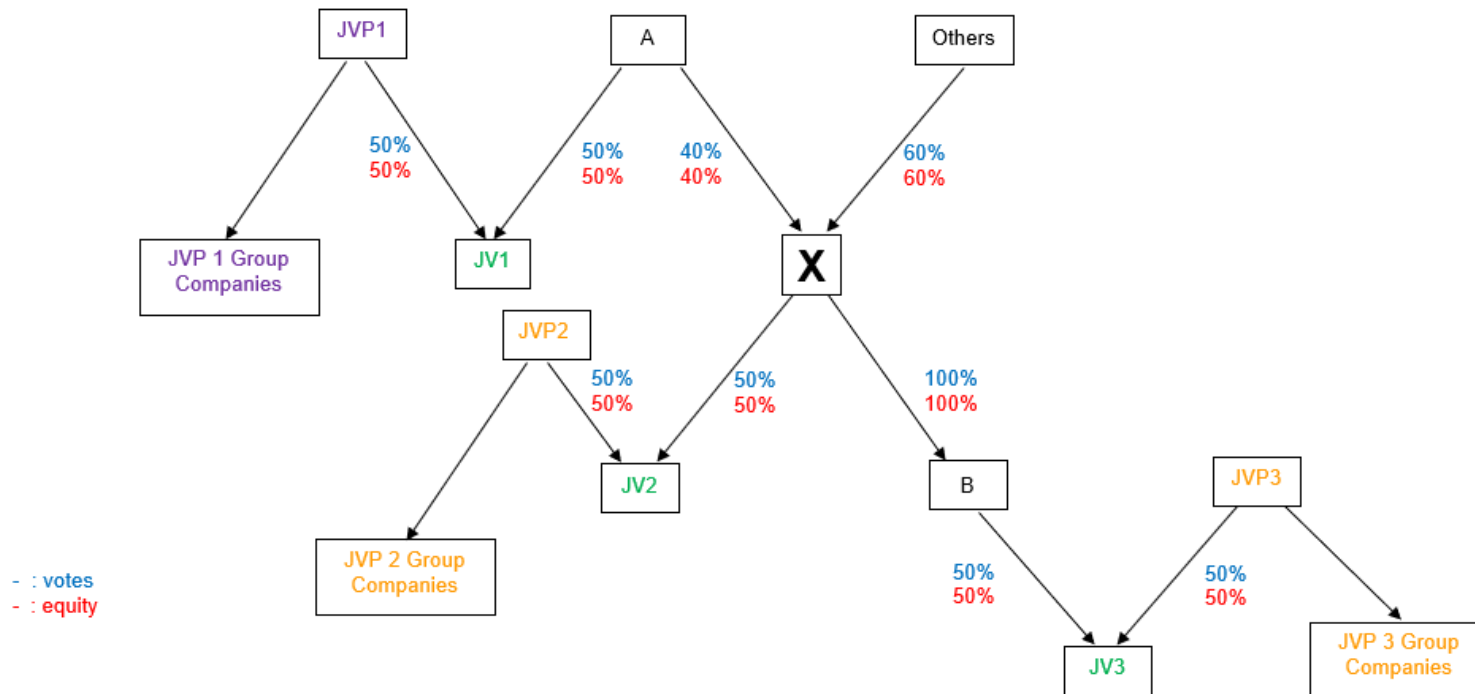
# Joint Venture Companies and Partners



- Both new presumption (1) and new presumption (2) should be capable of rebuttal in relation to B and C
- But Panel must be consulted so it can consider the relevant facts



# Joint Venture Companies and Partners

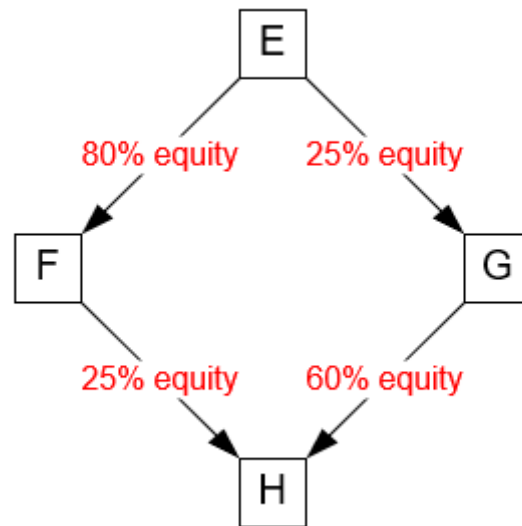


- **JV1**, **JV2** and **JV3** presumed to be acting in concert with X under both presumption (1) and presumption (2)
- **JVP1** not presumed to be acting in concert with X
- **JVP2** and **JVP3** presumed to be acting in concert with X under second limb of presumption (2), but presumption likely to be rebutted



## New presumption (2): aggregation of indirect interests

- Diagram used in PCP

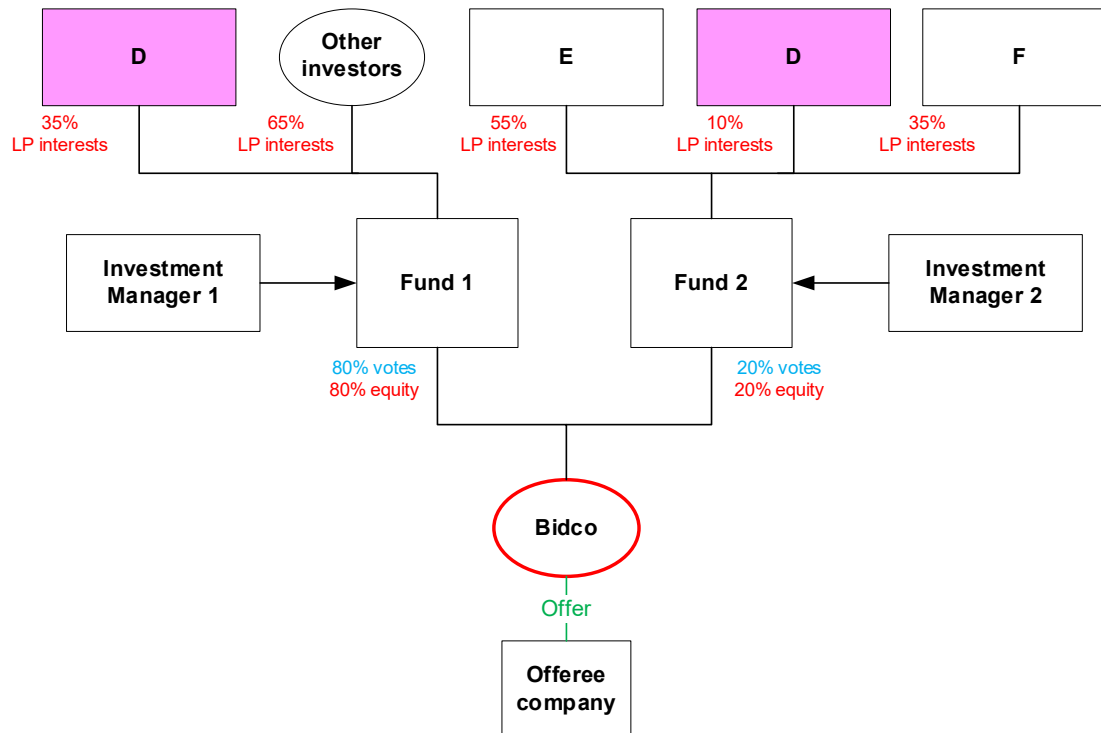


- E is indirectly interested in 35% of H's equity share capital (i.e. 20% via F and 15% via G)
- PCP explained that E and H are presumed to be acting in concert



# New presumption (2): aggregation of indirect interests

- In a Bidco offer:
  - aggregation required: limited number of funds investing
  - D presumed to be acting in concert with Bidco under new presumption (2) (28% via Fund 1 and 2% via Fund 2)



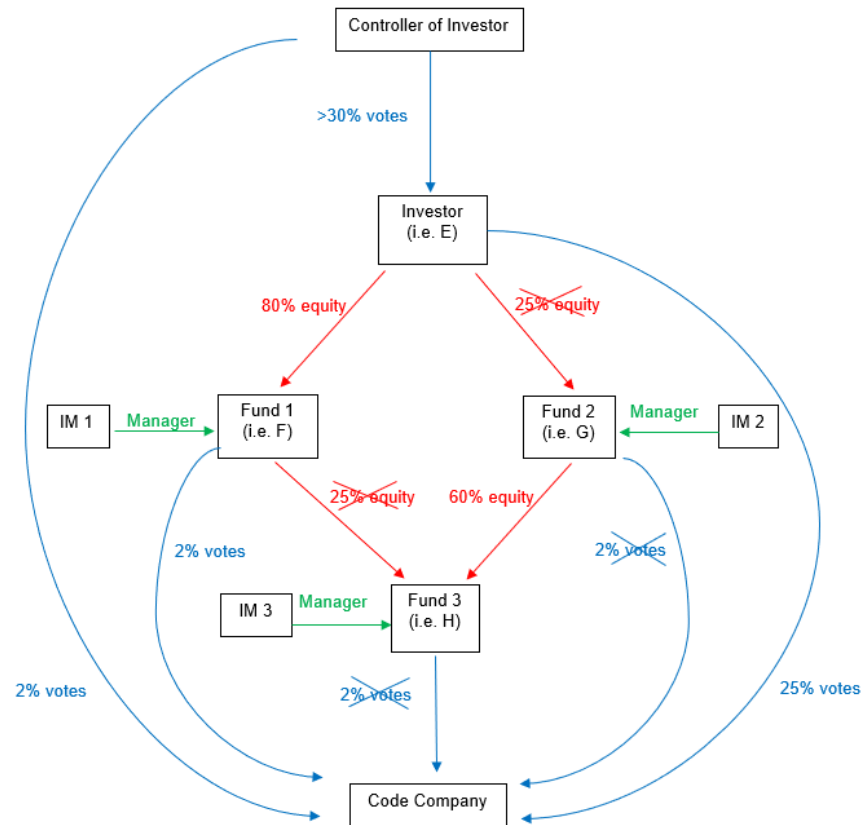
## New presumption (2): aggregation of indirect interests

- Outside of a Bidco offer:
  - investor may have investments in a significant number of companies or funds; and
  - those companies or funds are likely themselves to have invested in a large number of other companies or funds
- Also, in many cases, the investor's direct interests may be small in percentage terms
- Therefore, for pragmatic reasons, outside of a Bidco offer indirect interests will only be required to be aggregated (together with direct interests) where each link in the chain is in respect of 30% or more of:
  - the relevant company's equity share capital; or
  - the relevant fund's LP interests
- New paragraph (e) at the end of the presumptions of "acting in concert"



# New presumption (2): aggregation of indirect interests

- Example 1 (outside of a Bidco offer):

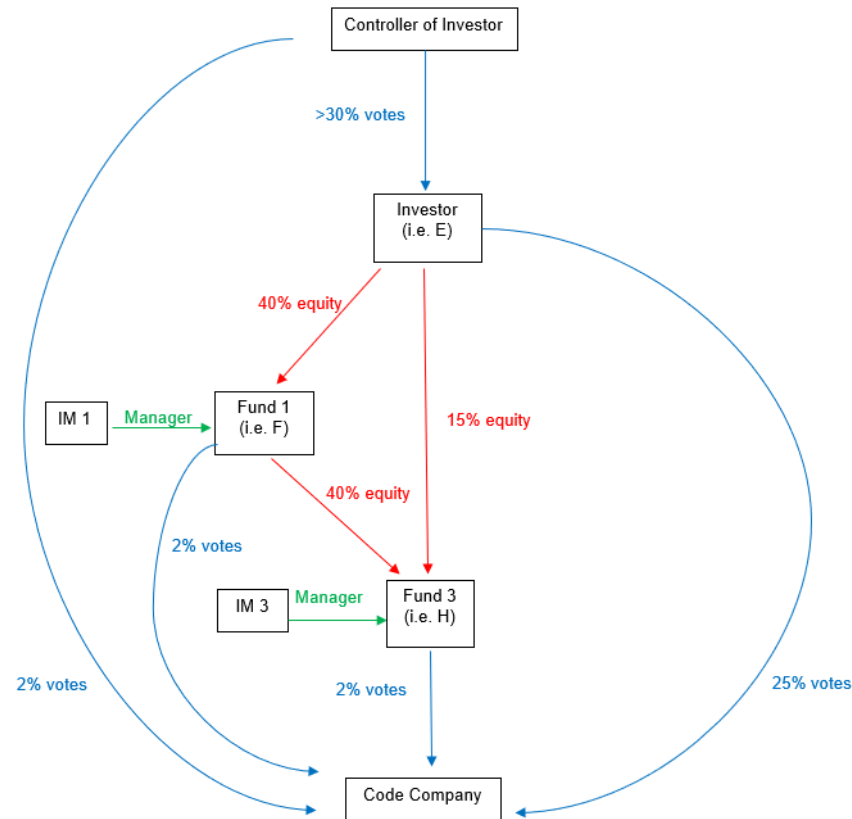


- neither Fund 2 nor Fund 3 presumed to be acting in concert with Investor
- Investor and persons acting in concert with it interested in 29% of Code company (i.e. 25% directly and 2% via each of Controller and Fund 1)



# New presumption (2): aggregation of indirect interests

- Example 2 (outside of a Bidco offer scenario):



- both Fund 1 and Fund 3 presumed to be acting in concert with Investor under first limb of new presumption (2)
- Investor and persons acting in concert with it interested in 31% of Code company (i.e. as for Example 1 plus 2% via Fund 3)



# Rebuttal of presumptions

- Importance of presumptions:
  - burden of proof
- “We have no relationship with each other”:
  - you do(!), because presumption applies
  - request for rebuttal based simply on an assertion
  - hostage to fortune – Panel doesn’t know what actions parties might subsequently take
- “We have no knowledge of each other’s positions or intentions”:
  - again, rebuttal request based simply on an assertion
  - parties may co-operate once offer becomes public
  - Rule 7.2(d)



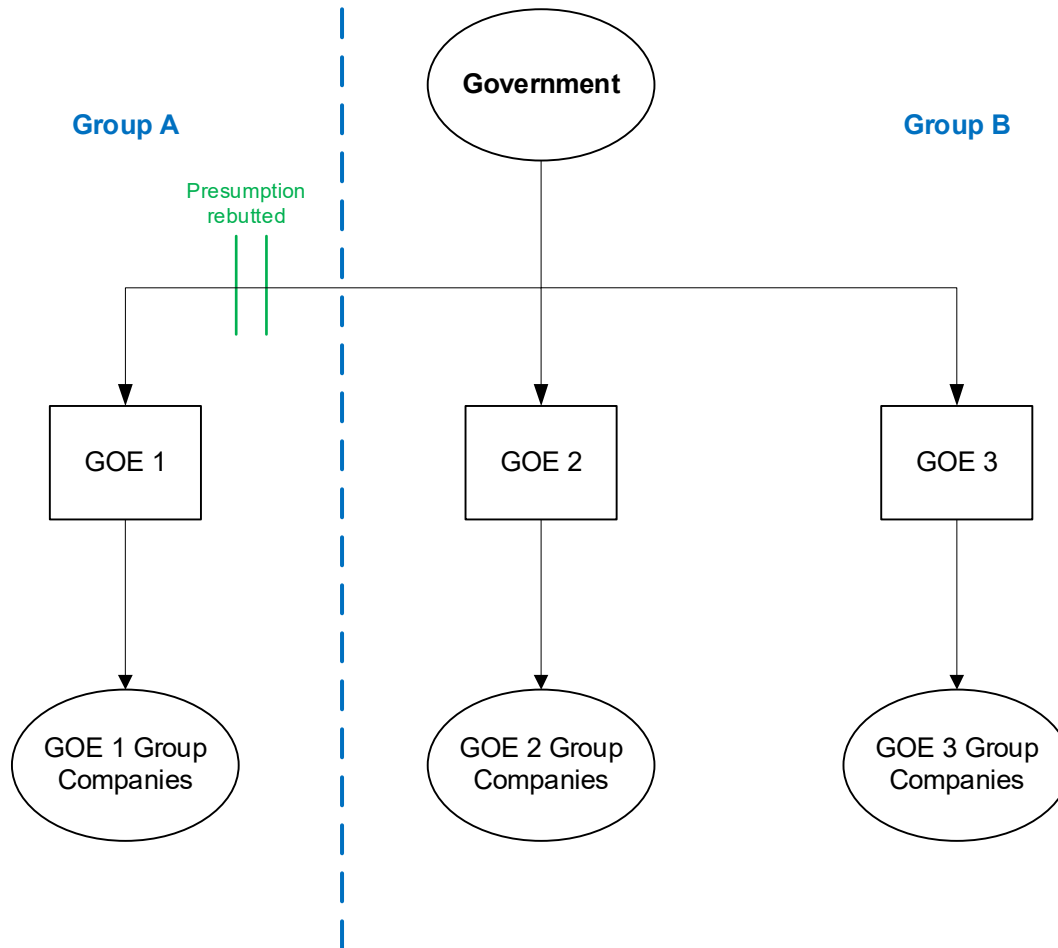
# Government-owned entities

- New presumptions (1) and (2) apply to Governments and GOEs
- But Panel may agree that the presumption(s) should be rebutted as between a Government and a particular GOE
- Relevant factors include whether the GOE is:
  - established as an independent legal entity with its own independent investment mandate and governance structure
  - under separate management control from the Government and from other GOEs
  - operationally separate from the Government and from other GOEs
- Panel must be consulted on case-by-case basis



# Government-owned entities

- Where Panel agrees presumption is rebutted:



# Presumption (10)

- Applies to shareholders in a private company or members of a partnership who:
  - sell their shares in consideration for new shares in a Code company; or
  - in connection with an IPO, become shareholders in a Code company
- Panel may be willing to rebut presumption (10) in relation to:
  - shareholders with de minimis holdings
  - passive shareholders who have no involvement in day-to-day management
  - non-founder managers and other employees
  - shareholders whose relationship has broken down
  - EBTs
- Panel likely to be unwilling to rebut presumption (10) in relation to:
  - founder shareholders
  - members of a core group with influence over the company
  - participants in an MBO of the company
  - shareholders who were previously joint offerors for the company
- Consultation required on case-by-case basis

