

ACTING IN CONCERT UNDER THE UK TAKEOVER CODE: NEW UK TAKEOVER PANEL PROPOSAL

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Legal Briefings

The UK Takeover Panel is consulting on changes to who is treated as "acting in concert" for the purposes of the UK Takeover Code.

The changes being proposed in [PCP 2022/2](#) focus on the Panel's approach to aggregating groups of companies and investment entities and it is the impact of those proposals that we focus on in this briefing.

The Panel says its intention is primarily to codify existing practice in this technical area - which is welcome. The proposals also entail changes, a number of which will clearly be beneficial for those subject to these rules in the Takeover Code. The consultation closes on 23 September 2022 and the Panel expects to publish the final rule changes by the end of the year.

The consultation paper contains various diagrams which are helpful in illustrating how the proposals will apply in practice. The Takeover Panel also held a useful webinar on the proposals which can be accessed [here](#).

1. THE CONCEPT OF *ACTING IN CONCERT* UNDER THE UK TAKEOVER CODE

The concept of "*acting in concert*" is a core concept within the UK Takeover Code.

It has implications for:

- when a mandatory takeover offer may be required;

- rules applicable during the course of a live takeover, including the minimum level or particular form of consideration that has to be offered on an offer; and
- rules applicable outside of a live takeover, including restrictions on and the disclosure of dealings.

It is essential that entities that will be affected by the proposals understand the changes, as they will be relevant even if the entity / investor does not intend to undertake or participate in a UK public M&A transaction.

WHAT DOES "ACTING IN CONCERT" MEAN?

The Panel wants to identify persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company, or frustrate the successful outcome of a bid for the company. Control for these purposes means an interest in shares carrying 30% or more of the voting rights of a company, which has been the threshold adopted by the Panel for several decades.

WHO WILL BE TREATED AS "ACTING IN CONCERT" ?

The Panel will look at who is actually, in fact, co-operating to obtain control or frustrate a bid.

A person will be deemed to be acting in concert with its affiliates. An affiliated person is an undertaking in respect of which a person has or controls the majority of voting rights, has the right to appoint or remove a majority of the directors, or has the power to exercise, or actually exercises, dominant influence or control.

The Panel also *presumes* that certain categories of people will be acting in concert, for example within a group of companies, shifting the burden of proof onto such persons to rebut these presumptions if and where appropriate.

It is these presumptions about who is acting in concert that the Takeover Panel is proposing to amend.

WHY DOES IT MATTER?

The Panel treats persons who are acting in concert as a single person and so if one of them deals in shares that may, for example, trigger the requirement to make a mandatory offer under Rule 9 of the Code if the aggregated interests of the concert party go through 30% as a result of the purchase.

It is therefore important for parties to establish who is considered to be acting in concert with them so that they can (if necessary) be asked not to undertake or to limit dealings in a particular Code company.

2. GROUPS

The Panel is proposing changes to amend the presumptions regarding who will be seen as acting in concert in a group of companies.

Current presumption (1)	New presumptions (2) and (3)
<p>(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);</p>	<p>(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;</p>
<p>Note on control 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 (e.g. 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.</p>	<p>Note on control 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:</p> <ul style="list-style-type: none"> • shares carrying 30% or more of the voting rights of that other company; or • 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. <p>In this Note, a reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person.</p>

THE IMPACT OF THE PROPOSED CHANGES IN PRACTICE

- The threshold at which entities within a group are presumed to be *acting in concert* will be raised from 20% to 30%, for reasons of consistency with the Panel's definition of *control*.
- The Panel will look at both voting rights and equity interests (and will not dilute indirect

interests in voting rights but will dilute indirect equity interests).

- Long derivative / option positions will be taken into account in determining whether the thresholds in the new presumptions (1) and (2) have been met. This is on the basis that the Panel believes that the holder may be able to influence how the shares held by the counterparty to hedge the position are voted.
- The rules will apply to individuals, limited partnerships, trusts and other legal or natural persons.
- Interests should be aggregated as follows:
 - in relation to voting rights, a person (or company) should normally take into account any shares in which a person acting in concert with it is interested; and
 - in relation to 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.

3. FUND MANAGERS

A fund manager is currently presumed to be acting in concert with a person whose investments the fund manager manages on a discretionary basis.

The Panel is proposing that:

- a fund manager will be treated as interested in the shares which it manages on a discretionary basis;
- clients of the fund manager will not be treated as having an interest in the shares which the fund manager manages on its behalf (assuming the discretion granted to the fund manager is absolute or the client does not exercise any powers it has retained in relation to dealing, voting and offer acceptance decisions); and
- where more than one discretionary investment operation is conducted in the same group, all the interests in the group will be aggregated.

4. INVESTMENT TRUSTS AND OTHER INVESTMENT COMPANIES

In relation to investment trusts and other investment companies, the Panel is proposing that, outside of an offer:

- an **investment trust** should be treated as being interested in the securities of any Code company held by the investment trust;
- 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;
- an **investment trust and any person who controls** the investment trust (with control being shares carrying 30% or more of the voting rights; or a majority of the equity share capital), 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
- an **investment trust and 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.

The interests of the investment trust and its controller(s) do not however have to be aggregated with the interests of the investment manager and its controller(s) outside of an offer.

If an investment trust makes an offer for a Code company, the investment manager of the bidder / target (and persons controlling, controlled by or under the same control as the investment manager) will be presumed to be acting in concert with the bidder / target. This is codifying the Panel Executive's existing approach.

5. INVESTMENT FUNDS (SUCH AS LPS)

The Panel's view is that limited partnership interests in a fund are generally analogous to equity share capital in a company since the owner will generally benefit on an unlimited basis in the financial performance of the fund. The Panel is therefore proposing that ownership or control of limited partnership interests will be treated in the same way as equity share capital, regardless of the fact that such investors are passive.

OUTSIDE OF AN OFFER

This means that:

- a **person which owns 30% or more of the limited partnership interests in a fund should 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 to assess whether a further acquisition of shares by any one of them triggers an obligation for a mandatory offer; and
- the **investment manager / adviser to the fund** and all persons controlling, controlled by or under the same control as the investment manager / adviser should 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,

but these two groups of people do not need to aggregate their interests together outside of an offer.

IN THE CONTEXT OF AN OFFER

The Panel is proposing to codify the Executive's approach to funds in the context of an offer.

The funds themselves

Funds investing in a new vehicle or company formed for the purpose of making an offer will normally be treated as acting in concert with the bidder.

Investment managers / advisers

An investment manager of or investment adviser to a bidder or target, together with any person controlling, controlled by or under the same control as that investment manager / adviser, is presumed to be acting in concert with the bidder or target respectively.

The investment manager / adviser to a fund making an investment in the equity share capital of the bidder (and persons controlled by, controlling or under the same control as the investment manager / adviser) will also be presumed to be acting in concert with the bidder. This is because the decision to invest in the consortium will be made by the investment manager / adviser; and because there is a community of interest between the investment manager / adviser and the bidder in relation to the outcome of the offer.

Investors in the fund

Where a limited partnership or other investment fund invests in a new vehicle formed for the purpose of making an offer, the Panel will apply proposed new 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 bidder 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.

Consequently, an investor in a fund which is providing equity financing for an offer will be presumed to be acting in concert with the bidder if the investor either:

- will have a "see-through" indirect interest in **30% or more of the equity share capital in the bidder** (in line with presumption (2)); or
- **owns more than 50% of the limited partnership interests** in a fund which is subscribing for equity share capital in the bidder (regardless of the percentage of the equity share capital in the bidder which will be held by the fund), in line with presumption (1).

Waiver for investors / managers / advisers which are part of a larger organisation

Where an investment manager / adviser or the investor is part of a larger organisation, the other parts of that organisation will normally be presumed to be acting in concert with them and the bidder.

The Panel may waive that presumption if it 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 bidder.

The Panel is changing the thresholds for the size of the investment at which it currently is willing to waive the presumption. If the size of the investment of the bidder is:

- **10% or less:** the Panel would normally agree to waive the presumption;
- **more than 10% but less than 30%:** the Panel may agree to waive the presumption depending on the circumstances of the case (currently the threshold is more than 10% but less than 50%); and
- **30% or more:** the Panel would not normally agree to waive the presumption (the

current threshold is 50% or more).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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