RS 2022/2 14 December 2022

THE TAKEOVER PANEL

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

RESPONSE STATEMENT BY THE CODE COMMITTEE

CONTENTS

1. Executive summary

(a) Introduction

1.1 On 26 May 2022, the Code Committee of the Takeover Panel (the "**Code Committee**") published a Public Consultation Paper ("**PCP 2022/2**" or the "**PCP**") which proposed amendments to the presumptions of the definition of "**acting in concert**" and related provisions of the Takeover Code (the "**Code**"), as summarised below.

1.2 A webinar by the Panel Executive (the "**Executive**") on the proposals and related slides were subsequently made available on the Panel's website.

1.3 This Response Statement ("**RS**") sets out the Code Committee's conclusions following the consultation, including the final text of the amendments to the Code.

1.4 In this RS:

(a) a reference to a "**current presumption**" is to a presumption of the definition of "**acting in concert**" in the Definitions Section of the Code as it stands prior to the amendments set out in this RS; and

(b) a reference to a "**new presumption**" is to a presumption of that definition as it will be following the implementation of the amendments set out in this RS.

(b) Summary of proposals

(i) New presumptions (1) and (2)

1.5 **Section 2 of the PCP** proposed the introduction of:

(a) **new presumption (1)** to presume a company to be acting in concert with any company which it "***controls, is controlled by or is under the same control as***";

(b) **new presumption (2)** to presume a company to be acting in concert with (i) any company in which it has a **direct or indirect interest in 30% or more of the equity share capital** (whether or not the shares carry voting rights) and (ii) any company presumed to be acting in concert with either of them under **new presumption (1)**;

(c) a **new Note on Definitions** to provide that, under **new presumption (1)**, "***control***" means interests in:

(i) shares carrying **30% or more of the voting rights** in a company; or

(ii) **more than 50% of the equity share capital** in a company; and

(d) a **new paragraph** in the definition of "**acting in concert**" to provide that, in **new presumptions (1) and (2)**, a "**company**" includes any **other undertaking (including a partnership or a trust) or any legal or natural person**.

1.6 **Section 2(f) of the PCP** explained that, in considering the application of **new presumptions (1) and (2)** to companies in a chain of ownership:

(a) under **new presumption (1)**, interests of either:

(i) 30% or more of a company's shares carrying voting rights; or

(ii) more than 50% of a company's equity share capital,

do not dilute through links in the chain of ownership, i.e. if A owns or controls shares carrying 30% or more of the voting rights (or more than 50% of the equity share capital) in B, which in turn owns or controls shares carrying 30% or more of the voting rights (or more than 50% of the equity share capital) in C, then A is presumed to control C; whereas

(b) under **new presumption (2)**, interests of 30% or more of a company's equity share capital **do dilute** through links in the chain, e.g. if A owns or controls 30% of the equity share capital in B, which in turn owns or controls 30% of the equity share capital in C, A is treated as, in effect, having an interest of 9% in the equity share capital in C.

(ii) Investment funds

1.7 **Section 3 of the PCP** proposed:

(a) the deletion of **current 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 securities 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 securities which the fund manager manages on its behalf on a discretionary basis;

(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 company to which the Code applies (a "**Code company**"),

the Panel will apply **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:

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

(2) **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 is such that **new presumptions (1) and/or (2)** would apply if:

- that fund were a company; and
- the investor was interested in a corresponding percentage of that company's equity share capital;

(d) the introduction of **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 will be treated as "*connected with*" an offeror or an offeree company (as the case may be) if it "*is controlled by, controls or is under the same control as*" an **investment manager** or **investment adviser** to:

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

(ii) the offeree company; and

(f) amendments to **Note 6** on the definition of "**acting in concert**" in relation to an offer made by a **consortium offeror**. In summary, it was proposed that, consistent with **new presumptions (1) and (2)**, the threshold at which the Panel would cease to be willing to agree that the other parts of a consortium investor's larger organisation are not acting in concert with the consortium offeror should be **reduced from 50% to 30%** of the equity share capital in the consortium offeror.

(iii) Dealings by connected fund managers and connected principal traders

1.8 **Section 4 of the PCP** proposed amendments to **Rule 7.2** 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. In summary, **Rule 7.2** provides that, where a "non-exempt" fund manager or principal trader is "*connected with*" an offeror or the offeree company, the presumption that the connected fund manager or connected principal trader is acting in concert with that offeror or offeree company will not be applied until the "**Rule 7.2 moment**", i.e. the time at which either:

(a) the offeror or the offeree company (as the case may be) is first publicly identified; or, if earlier

(b) the connected fund manager or connected principal trader is made aware of the possible offer.

1.9 In addition, it was proposed to introduce a **new Note 7 on Rule 7.2** to codify the ability for 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, also to seek the treatment that is afforded by **Rule 7.2**.

1.10 **Section 4 of the PCP** also proposed amendments to **Rule 4.4** to restrict the acquisition of interests in securities in the offeree company during the offer period not only by the offeree company's financial adviser or corporate broker but also by a person which "*controls, is controlled by or is under the same control as*" the offeree company itself.

(iv) Other amendments

1.11 **Section 5 of the PCP** proposed certain minor amendments to:

(a) **current presumption (2)**, which relates to a company and its **directors**;

(b) **current presumption (3)**, which relates to a company and its **pension schemes(s)**; and

(c) **current 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 (an "**IPO**") or otherwise, become shareholders in a Code company.

(c) Responses to consultation

1.12 The consultation period in relation to PCP 2022/2 ended on 23 September 2022. Responses were received from the five respondents listed in **Appendix A** and their responses have been published on the Panel's website. The Code Committee thanks the respondents for their comments.

1.13 The respondents were generally supportive of the proposals. The principal comments and suggestions made by respondents are summarised in **Sections 2 to 5**.

(d) The Code Committee's conclusions

1.14 Having considered the responses to the consultation, the Code Committee has adopted the amendments proposed in the PCP, subject to certain modifications, as described in **Sections 2 to 5**. The final text of the amendments to the Code is set out in **Appendix B**.

1.15 In particular:

(a) **new presumption (1)** has been adopted as proposed in the PCP and will presume the following persons to be acting in concert:

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

(b) the drafting of **new presumption (2)** has been modified, as set out in **Section 2(e)**, and will presume the following persons to be acting in concert:

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

(c) the drafting of **Note 6** on the definition of on "**acting in concert**" in relation to consortium offers has been modified, as explained in **Section 3(d)**.

1.16 In addition, the Code Committee has addressed various requests from respondents for guidance on the application of the presumptions, including in relation to:

(a) the circumstances in which **new presumptions (1) and (2)** may be rebutted (see **Section 2(f)**);

(b) joint ventures (see **Section 2(g)**);

(c) portfolio companies of a private equity firm (see **Section 2(h)**) and the application of **Rule 7.2** to such portfolio companies (see **Section 4(a)(iii)**);

(d) government-owned entities (see **Section 2(i)**);

(e) the aggregation of direct and indirect equity interests for the purposes of **new presumption (2)** (see **Section 3(b)(iii)** and **Appendix C**);

(f) the application of **new presumption (1)** to "parallel funds" (see **Section 3(b)(iv)**); and

(g) the application of **new presumption (10)** to shareholders in a private company or members of a partnership who become shareholders in a Code company (see **Section 5(c)**).

1.17 In PCP 2022/2:

(a) the diagram in **Appendix D** illustrated the companies that would be subject to **new presumption (1)** by virtue of an interest in a company's **shares carrying voting rights**; and

(b) the diagram in **Appendix E** illustrated the companies that would be subject to **new presumptions (1) and/or (2)** by virtue of an interest in a company's **equity share capital**.

1.18 For ease of reference:

(a) **Appendix D to this RS** replicates **Appendix D to the PCP**, which is unchanged; and

(b) **Appendix E to this RS** sets out an updated version of the diagram in **Appendix E to the PCP**, which clarifies, among other matters, whether the companies referred to are presumed to be acting in concert under the "**first limb**" of **new presumption (2)** and/or the "**second limb**" of **new presumption (2)**.

1.19 **Appendix F** sets out an illustrative ***Scenario F*** in relation to a consortium offer, which is referred to in **Section 3(d)**. This corresponds to Scenario 12 in paragraph 3.37 of the PCP, with additional information to show the "**Wider Groups**" of which Investors D, E and F are a part and explaining the application of the **new Note 6** on the definition of "**acting in concert**" and **Rule 7.2**.

(e) Code amendments

1.20 As indicated above, the amendments which have been adopted following the consultation are set out in **Appendix B**. In **Appendix B**, underlining indicates new text and striking-through indicates deleted text, as compared with the current provisions of the Code.

1.21 Unless stated otherwise, where new or amended provisions are set out in the main body of this RS, they are marked to show changes from the provisions as they were proposed to be amended in the PCP.

(f) Implementation

1.22 The amendments to the Code set out in this RS will take effect on Monday, 20 February 2023 (the "**implementation date**").

1.23 The Code, as amended, will be applied from the implementation date to all companies and transactions to which it relates, including those on-going transactions which straddle the implementation date, except where to do so would give the amendments retroactive effect.

1.24 Where a party has any doubt as to the consequences of the amendments set out in this RS, in particular as to their impact on any transaction which is in existence or contemplation, it should consult the Panel prior to the implementation date to obtain a ruling or guidance.

2. New presumptions (1) and (2)

(a) Proposed new presumptions (1) and (2)

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?**

(i) Summary of proposals

2.1 **Current presumption (1)** applies in relation to a "group" of companies and provides that the following persons 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);".

2.2 **Section 2(c) of the PCP** identified various issues regarding **current presumption (1)**. In summary, these were that:

(a) the presumption is stated to apply where a company owns or controls 20% or more of the **equity share capital** of another company but not its **shares carrying voting rights**. 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;

(b) the **20% threshold** for the test of "*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;

(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*", whereas elsewhere in the Code such "**interests in shares**" are treated as equivalent to shareholdings; and

(d) the presumption is stated to apply to a prescribed "group" of **companies** by reference to a limited number of 20% links in the chain of ownership and, in addition, 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.

2.3 **Section 2 of the PCP** proposed amendments which would, in effect:

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

(b) make explicit that the presumption 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).

2.4 In summary, **Section 2 of the PCP** proposed the deletion of **current presumption (1)** and the introduction of:

(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;

(b) a **new Note on Definitions** at the end of the Definitions Section to provide that, for purpose of **new presumption (1)** (and certain other provisions), 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:

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

(ii) **more than 50% of the equity share capital** in that other company,

and that references to a company being "*controlled by*" or "*under the same control as*" another company are to be construed accordingly;

(c) 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 be construed in accordance with the **new Note on Definitions**;

(d) **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 (whether or not the shares carry voting rights) (i.e. the "**first limb**" of **new presumption (2)**); and

(ii) any company presumed to be acting in concert with Y or Z under **new presumption (1)** (i.e. the "**second limb**" of **new presumption (2)**);

(e) a **new paragraph** at the end of the definition of "**acting in concert**" to provide that the reference in **new 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; and

(f) a further **new paragraph** at the end of the definition of "**acting in concert**" to make clear that, for the purposes of **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**.

2.5 **Section 2(f) of the PCP** explained that, in considering the application of **new presumptions (1) and (2)** to companies in a chain of ownership:

(a) under **new presumption (1)**, interests of either:

(i) 30% or more of a company's shares carrying voting rights; or

(ii) more than 50% of a company's equity share capital,

do not dilute through links in the chain; whereas

(b) under **new presumption (2)**, interests of 30% or more of a company's equity share capital **do dilute** through links in the chain.

2.6 In the PCP:

(a) the diagram in **Appendix D** illustrated the companies that would be subject to **new presumption (1)** by virtue of an interest in a company's **shares carrying voting rights**; and

(b) the diagram in **Appendix E** illustrated the companies that would be subject to **new presumptions (1) and/or (2)** by virtue of an interest in a company's **equity share capital**.

2.7 For ease of reference:

(a) **Appendix D to this RS** replicates **Appendix D to the PCP**, which is unchanged; and

(b) **Appendix E to this RS** sets out an updated version of the diagram in **Appendix E to the PCP**, which clarifies, among other matters, whether the companies referred to are presumed to be acting in concert under the **first limb** and/or the **second limb** of **new presumption (2)**.

(ii) Respondents' comments

2.8 Respondents were generally supportive of:

(a) raising the threshold in **current presumption (1)** from 20% to 30%;

(b) the application of **new presumptions (1) and (2)** to shares carrying voting rights as well to as equity share capital; and

(c) the application of **new presumptions (1) and (2)** to individuals, limited partnerships and other persons, as well as to companies.

2.9 One respondent noted that there was a degree of complexity to **new presumptions (1) and (2)** and was concerned that this could create a "regulatory barrier", such that relevant persons might need to take professional advice in order to understand the new provisions. In this regard, the respondent welcomed the webinar and related slides which the Executive had made available on the Panel's website and suggested that the diagrams set out in those slides could be referred to in the Code itself.

2.10 One respondent noted that raising the threshold at which the presumption of acting in concert is engaged from 20% to 30% would result in fewer parties being caught by the

presumption and was concerned that this might weaken the protection of offeree companies afforded by the current 20% threshold. The respondent noted that a shareholder with 25% of a company's voting rights might be said to have "negative control" of the company (in that it would be able to block the passing of a special resolution which requires a 75% majority) and suggested that 25% might therefore be a more appropriate threshold.

2.11 Another respondent noted that, whilst a threshold of 30% would be consistent with the existing definition of "**control**", a 30% shareholder in a private company might not have de facto control of the company, for example, where another shareholder has a larger shareholding.

(iii) The Code Committee's response

2.12 The Code Committee continues to believe that the 20% threshold in **current presumption (1)** is too low.

2.13 The Code Committee notes the observation that a shareholder with 25% of the voting rights in a company can block the passing of a special resolution. However, the Code does not generally recognise the concept of "negative control" and the Code Committee continues to believe that the threshold at which **new presumptions (1) and (2)** should be engaged should be raised to 30%, consistent with the level at which the Code deems a person to have control of a Code company.

2.14 As noted in paragraph 2.15 of the PCP, the Code Committee considers that there are two bases for presuming companies which are in the same "group" to be acting in concert with each other:

(a) first, the rationale that applies to **new presumption (1)**: if A owns or controls a significant proportion of the **shares carrying voting rights** (or a majority of the **equity share capital**) 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 (or a majority of the equity share capital); and

(b) secondly, the rationale that applies to **new presumption (2)**: 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.

2.15 The Code Committee continues to believe that these rationales are both sound and simple. It is, however, acknowledged that it may be necessary to seek professional advice in applying the new presumptions to a complex group structure (which, in any event, may already be the case in relation to the current presumptions).

2.16 The Code Committee recognises that there may be circumstances in which Shareholder A has 30% or more of the voting rights in Company B but does not control B, for example, because another shareholder has more than 50% of the voting rights. As noted in paragraph 2.63 of the PCP, in circumstances where B is clearly controlled by another shareholder, the presumption that A and B are acting in concert should be capable of rebuttal. This is addressed in **Section 2(g)** in relation to joint ventures. The circumstances in which **new presumptions (1) and/or (2)** may be rebutted is discussed more generally in **Section 2(f)**.

2.17 Whilst it is not currently practicable for the Code to refer to the webinar and slides on the proposals in the PCP, they will remain available on the Closed Consultations page of the Panel's website.

(b) Derivatives and options

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

(i) Summary of proposals

2.18 **Section 2(g) of the PCP** proposed that, in establishing whether the relevant thresholds are satisfied, i.e.:

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

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

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**. It was therefore proposed that the **new Note on Definitions** (which, in effect, defines the meaning of "*control*" for the purpose of **new presumption (1)**) and **new presumption (2)** should be drafted by reference to a person's "**interests in shares**". This was because

paragraphs (3) and (4) of the definition of "**interests in securities**" (which definition applies equally to references to "**interests in shares**") respectively encompass long option and derivative positions.

(ii) Respondents' comments

2.19 All but one of the respondents agreed with or did not object to the proposition that long derivative or option positions should be taken into account under **new presumptions (1) and (2)**.

2.20 The other respondent, whilst agreeing with the Code's existing approach to the disclosure of derivative and options positions generally, disagreed with the proposal that **new presumptions (1) and (2)** should extend to such positions. The respondent considered that a holder of a long derivative or option position would not, in practice, be able to control the shares to which the position related.

2.21 In addition, the same respondent queried how **new presumptions (1) and (2)** would apply where a person has both a long and a short position.

(iii) The Code Committee's response

2.22 The Code Committee continues to believe that it is appropriate to take long derivative and option positions into account for the purposes of **new presumptions (1) and (2)**. As indicated above, the means by which this will be achieved is by introducing references to a person's "**interests in shares**" into both the **new Note on Definitions** and **new presumption (2)** (on the basis that paragraphs (3) and (4) of the definition of "**interests in securities**" respectively encompass long option and derivative positions).

2.23 The Code Committee undertook a series of consultations on the application of the Code to derivatives and options between 2005 and 2007.[1] As a result of those consultations, various provisions were amended to take into account not only the shares owned by a person but also the shares in which the person is interested by virtue of a long derivative or option position. This approach was extended to both:

(a) the "disclosure rules" such as, for example, **Rule 8** (which requires certain persons to make disclosures of their interests in shares during an offer period) (see **PCP 2005/2**); and

(b) the "control rules" such as, for example, **Rule 9.1** (pursuant to which a person may be required to make a mandatory offer for a Code company if it acquires an interest

[1] See PCP 2005/1, PCP 2005/2, RS 2005/2, PCP 2005/3, RS 2005/3 and Panel Statement 2007/15

in shares and thereby increases the percentage of shares carrying voting rights in which it is interested, together with those of persons acting in concert with it, to 30% or more, or in the 30% to 50% band) (see **PCP 2005/3**).

2.24 The treatment of derivative and option positions as interests in shares is an established and accepted feature of the Code and taking such positions into account for the purposes of **new presumptions (1) and (2)** is a logical extension of the existing approach.

2.25 **Note 1** on the definition of "**interests in securities**" sets out the approach to be taken where a person has both a long and a short position. This provides that short positions should normally only be deducted from long positions where:

(a) the offsetting positions are in respect of the **same class of security**;

(b) the offsetting positions are in respect of the **same investment product**, e.g. a short contract for differences cannot be used to offset a call option;

(c) save for the number of securities in question, the offsetting positions are on the **same terms**, e.g. the strike price and, if appropriate, the exercise period; and

(d) the offsetting positions are with the **same counterparty**, i.e. a short position with Counterparty A cannot be used to offset a long position with Counterparty B.

(c) Persons under the control of persons subject to new presumptions (1) and/or (2)

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?**

(i) Summary of proposals

2.26 **Section 2(h) of the PCP** put forward the proposition that, where A and B are presumed to be acting in concert under **new presumption (1) or (2)**, any person under the same control as A or B should also be presumed to be acting in concert with both A and B. This was illustrated by Scenarios 5 and 6 in the PCP.

(ii) Respondents' comments

2.27 One respondent sought confirmation that the intention of **new presumption (1)** and the **second limb** of **new presumption (2)** was not to capture entities which were not connected with an offeror. By way of example, the respondent sought confirmation that if (as in ***Scenario 1*** below):

(a) a private equity firm ("**PEF 1**") makes an offer through a bid vehicle ("**Bidco**"); and

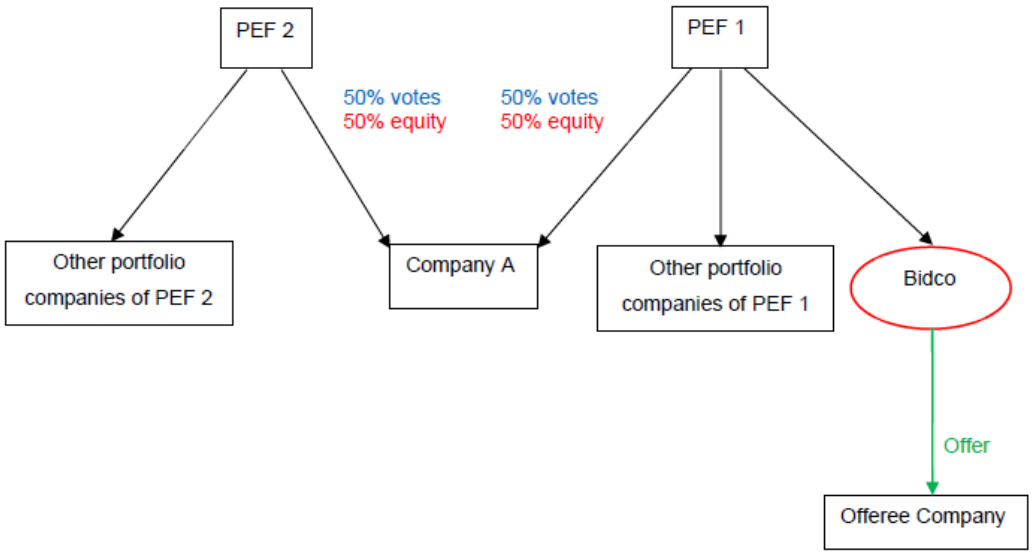
(b) PEF 1 holds 50% of the voting rights and equity share capital of a portfolio company ("**Company A**"); and

(c) the remaining 50% in Company A is held by another private equity firm ("**PEF 2"**), then:

(i) PEF 1 and its portfolio companies (including Company A) are presumed to be acting in concert with Bidco; but

(ii) PEF 2 and its portfolio companies (other than Company A) are not presumed to be acting in concert with Bidco.

Scenario 1 *– PEF 1 and its portfolio companies, including Company A, acting in concert with Bidco, but PEF 2 and its portfolio companies (other than Company A) not acting in concert with Bidco:*



(iii) The Code Committee's response

2.28 The Code Committee confirms that, in ***Scenario 1***, PEF 1 and any person controlling, controlled by or under the same control as PEF 1, including PEF 1's ≥30% portfolio companies, are acting in concert with Bidco. However, PEF 2 and its ≥30% portfolio companies (other than Company A) are not acting in concert with Bidco under any of **new presumptions (1), (2) or (5)**.

2.29 If, however, Company A was making the offer, both PEF 1 and PEF 2, and their respective ≥30% portfolio companies, would be acting in concert with Company A (i.e. the offeror) under both **new presumption (1) and new presumption (2)**.

(d) Aggregation of interests in shares

2.30 **Section 2(i) of the PCP** addressed the issue of the aggregation of interests in shares by persons presumed to be acting in concert with each other. In particular, Scenario 8 in the PCP examined the aggregation of interests in equity share capital under **new presumption (2)**.

2.31 Certain respondents raised questions regarding the aggregation of equity interests under **new presumption (2)**. This issue is discussed below in **Section 3(b)(iii)** and **Appendix C**.

(e) Code amendments

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"?**

(i) Summary of proposals

2.32 **Section 2(m) of the PCP** set out the text of the proposed **new presumptions (1) and (2)** and proposed certain related amendments.

(ii) Respondents' comments

2.33 None of the respondents had any comments on the drafting of **new presumption (1)**, the **new Note on Definitions** or the **new Note** on the definition of "**control**".

2.34 One respondent made drafting suggestions in relation to **new presumption (2)** which, as proposed, provided that the following persons would be presumed to be acting in concert:

> "(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;".

2.35 The respondent considered that it should be made clearer that the presumption was to be applied not only "down" but also "up" the chain of ownership from Company Y.

(iii) The Code Committee's response

2.36 The Code Committee has amended the proposed **new presumption (2)** so as to make clear that it is engaged either:

(a) where Company Y is interested, directly or indirectly, in 30% or more of the equity share capital in Company Z; and/or

(b) where Company Z is interested, directly or indirectly, in 30% or more of the equity share capital in Company Y.

2.37 In addition, the proposed first **new paragraph** at the end of the definition of "**acting in concert**" has been amended so as to make clear that, for the purposes of **new presumptions (1) and (2)**, any reference to a "**company**" includes any other **undertaking (including a partnership or a trust) or any legal or natural person**.

2.38 The Code Committee has also introduced **new paragraphs** at the end of the definition of "**acting in concert**" to codify the principle that, in considering the application of **new presumptions (1) and (2)** to companies in a chain of ownership:

(a) under **new presumption (1)**, interests of either

(i) 30% or more of a company's shares carrying voting rights; or

(ii) more than 50% of a company's equity share capital,

do not dilute through links in the chain; whereas

(b) under **new presumption (2)**, interests of 30% or more of a company's equity share capital **do dilute** through links in the chain.

(iv) Amendments to the Code

2.39 In the light of the above, the Code Committee has:

(a) deleted **current presumption (1)** and introduced **new presumption (1)** as proposed in paragraph 2.67 of the PCP, 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:
>
> (1) a company ("X") and any company which controls#, is controlled by or is under the same control as X, all with each other;
>
> …
>
> *#See Note at end of Definitions Section.*";

(b) deleted the **current Note on Definitions** and introduced the **new Note on Definitions** proposed in paragraph 2.67 of the PCP (subject to the minor changes shown below), as follows:

"***NOTE ON DEFINITIONS***

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.";

(c) introduced the **new Note** on the definition of "**control**" proposed in paragraph 2.67 of the PCP (subject to the minor changes shown below), 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.";

(d) introduced the **new presumption (2)** in an amended form from that proposed in paragraph 2.67 of the PCP, as follows:

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

(e) introduced the **new paragraphs** at the end of the definition of "**acting in concert**" in an amended form from that proposed in paragraph 2.67 of the PCP, as follows:

"For the purposes of presumptions (1) and/or (2)~~, a reference to~~:

(a) a reference to 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~~.~~;

(b) under presumption (1), interests of either 30% or more in a company's shares carrying voting rights or the majority of a company's equity share capital do not dilute through a chain of ownership;

(c) under presumption (2), interests of 30% or more in a company's equity share capital dilute through a chain of ownership;

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

(f) Circumstances in which new presumptions (1) and (2) may be rebutted

(i) Introduction

2.40 Two respondents, both of whom supported the introduction of **new presumptions (1) and (2)**, emphasised the importance of the Panel:

(a) retaining the discretion to consider the facts of any specific situation on its merits; and, in particular

(b) being willing to agree that these presumptions could be rebutted in appropriate cases.

The respondents gave as examples circumstances where the relevant persons have no relationship with each other or have no knowledge of each other's positions or intentions.

2.41 The Code Committee recognises the importance of the Panel retaining the flexibility to consider individual cases on their merits and confirms that, where appropriate, the Panel may agree to **new presumptions (1) and/or (2)** being rebutted. Given the importance attached to the presumptions, the agreement by the Panel to the rebuttal of a presumption is significant. As explained in paragraph 1.16 of the PCP:

> "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.".

(ii) Where persons have no relationship with each other

2.42 Although it may be argued that persons who do not have any relationship with each other are not "**acting in concert**" under the general definition – because the absence of a relationship between them would indicate that they do not "*co-operate to obtain or consolidate control … of a company or to frustrate the successful outcome of an offer for a company*" – that argument is less persuasive in relation to persons who are presumed to be acting in concert. This is because such persons do, by definition, have a relationship with each other, which is the basis for the relevant presumption applying. In the case of persons who fall under **new presumption (1) or (2)**, that relationship arises as a result of one of the persons, respectively, either:

(a) controlling, being controlled by or being under the same control as the other; or

(b) being interested, directly or indirectly, in 30% or more of the equity share capital of the other.

2.43 Whilst it may be argued that **new presumption (1)** should be rebutted if the relevant persons do not have a relationship with each other beyond one person simply being a passive shareholder in the other – on the basis that, in these circumstances, the shareholder does not exercise "*control*" over the company (see paragraph 2.14(a)) – that argument is less persuasive in relation to **new presumption (2)**. This is because the rationale for **new presumption (2)** – that the significant exposure which one person has to the financial performance of the other may be sufficient for either person to take action which it considers to be in the other's interests (see paragraph 2.14(b)) – is not predicated on there being any further relationship, or interaction, between the persons.

2.44 In addition, the Code Committee considers that the Panel should be cautious in agreeing to a request to rebut **new presumption (1) and/or (2)** on the basis of an argument that the relevant persons do not have a relationship with each other, particularly when the rebuttal will apply to the future actions of the persons. This is because:

(a) first, at the time that the request is made, the actions that the relevant persons might subsequently take will not be known; and

(b) secondly, given that the relevant persons are unlikely to be able to adduce evidence to prove the point definitively, an argument that the relevant presumption should be rebutted on this basis is likely to be based simply on an assertion as to the absence of a relationship.

2.45 Therefore, in view of the importance of the presumptions, the prudent approach is that, absent compelling evidence to the contrary, they should apply and, if a dealing takes place, the Panel can then decide whether to grant a derogation from the relevant Rule in the full knowledge of the facts.

(iii) Where persons have no knowledge of each other's positions or intentions

2.46 Likewise, it may be argued that persons who have no knowledge of each other's positions or intentions are not "**acting in concert**" – because the absence of this knowledge would indicate that they have similarly not co-operated with each other – and that in these circumstances **new presumption (1) and/or (2)** should be rebutted.

2.47 However, such an argument is also likely to be based simply on an assertion as to the absence of knowledge. In addition, even if it were accepted that A did not have knowledge of the intentions of B (with which it is presumed to be acting in concert) prior

to B announcing an offer or possible offer, A might thereafter co-operate with B to obtain control of the offeree company. Therefore, at the least, the presumption should be applied from the time when A is made aware of the offer or possible offer. This is the approach taken by **Rule 7.2(a)** (see **Section 4(a)**).

(iv) Conclusion

2.48 Therefore, whilst **new presumptions (1) and (2)** are, like the other presumptions, capable of rebuttal, each request to this effect must be considered carefully on its facts, taking account of all relevant information, including the points noted above.

(g) Joint ventures

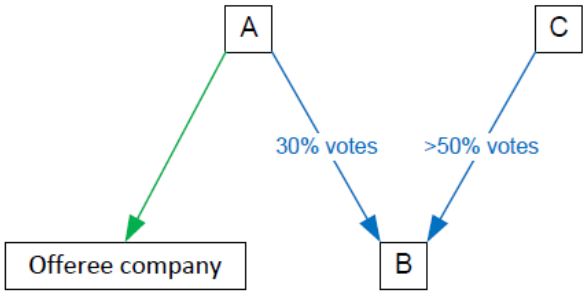
(i) Introduction

2.49 Three respondents queried the application of **new presumptions (1) and (2)** to joint venture companies and joint venture partners.

(ii) Joint venture companies

2.50 One respondent noted that paragraph 2.63 of the PCP referred to one example of where **new presumption (1)** may be capable of rebuttal as being where 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 in the PCP and reproduced below as ***Scenario 2***:

Scenario 2 *– presumption that B is acting in concert with A in relation to A's offer for the offeree company likely to be rebutted:*



2.51 In relation to ***Scenario 2***, the respondent enquired if the same position would apply if A and C were also interested in B's equity share capital in the same proportions as their holdings of B's shares carrying voting rights (with the consequence that A and B were also presumed to be acting in concert under the **first limb** of **new presumption (2)**). The respondent suggested that, in these circumstances, **new presumption (2)** should also be capable of being rebutted as between A and B on the basis that the joint venture

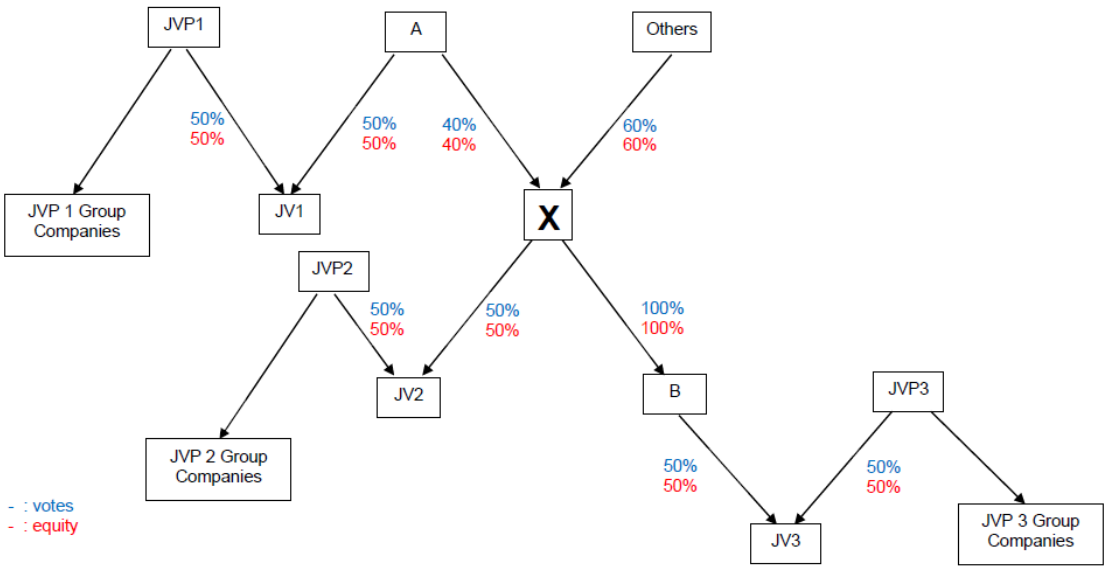
company (i.e. B) would be unlikely to take action to support A if more than 50% of B's shares carrying voting rights and equity share capital was owned by C.

2.52 Notwithstanding the point made in paragraph 2.43, the Code Committee considers that both **new presumption (1)** and **new presumption (2)** should be capable of rebuttal in such circumstances but emphasises that the Executive should be consulted in any such case so that it can reach a decision in the light of all the relevant facts.

(iii) Joint venture partners

2.53 Three respondents raised questions in relation to joint venture partners, as illustrated in ***Scenario 3*** below.

Scenario 3 *– (i) JV1, JV2 and JV3 presumed to be acting in concert with X; (ii) JVP1 not presumed to be acting in concert with X; and (iii) JVP2 and JVP3 presumed to be acting in concert with X under the second limb of new presumption (2) but presumption likely to be rebutted:*



2.54 The three respondents asked for confirmation that, in relation to a particular company ("**X**"), the following persons would <u>not</u> be presumed to be acting in concert with X:

(a) a joint venture partner ("**JVP1**") of a shareholder in X ("**A**") which was presumed to be acting in concert with X; and

(b) a joint venture partner ("**JVP2**") of X or a joint venture partner ("**JVP3**") of a company controlled by X ("**B**").

2.55 The Code Committee confirms as follows:

(a) each of joint venture companies "**JV1**", "**JV2**" and "**JV3**" (and also A and B) is presumed to be acting in concert with X under both **new presumption (1)** (because they control, are controlled by or are under the same control as X) and:

(i) in the case of JV2 and JV3 (and A and B), the **first limb** of **new presumption (2)** (on the basis of an equity interest of 30% or more); and

(ii) in the case of JV1, the **second limb** of **new presumption (2)** (because JV1 is presumed to be acting in concert with A under **new presumption (1)**);

(b) as explained in **Section 2(c)**, JVP1 (and its group) is not presumed to be acting in concert with X under either **new presumption (1)** or **new presumption (2)**; and

(c) JVP2 (and its group) and X:

(i) are not presumed to be acting in concert under **new presumption (1)**; but

(ii) are presumed to be acting in concert under the **second limb** of **new presumption (2)** (because JVP2 holds more than 30% of the shares carrying voting rights in JV2, which is presumed to be acting in concert with X under the **first limb** of **new presumption (2)**).

2.56 However, the Panel is likely to agree that the presumption of acting in concert between JVP2 (and its group) and X should be **rebutted** because JVP2's ownership of shares in JV2 does not represent a basis for JVP2 to take action to support X (and vice versa).

2.57 Similarly:

(a) JVP3 (and its group) and X are not presumed to be acting in concert under **new presumption (1)** but are presumed to be acting in concert under the **second limb** of **new presumption (2)**; but

(b) the latter presumption is likely to be **rebutted** for the reason set out in paragraph 2.56.

2.58 Therefore, in summary, the position in respect of joint ventures is as follows:

(a) when looking "up the chain" from the company on which the concert party is centred (X):

(i) subject, if applicable, to the points made in **Section 2(g)(ii)**, the joint venture company (JV1) is presumed to be acting in concert with X; and

(ii) the fellow joint venture partner (JVP1) is not presumed to be acting in concert with X; and

(b) when looking "down the chain" from X:

(i) subject, if applicable, to the points made in **Section 2(g)(ii)**, each relevant joint venture company (JV2 and JV3) is presumed to be acting in concert with X; and

(ii) each relevant fellow joint venture partner (JVP2 and JVP3) is presumed to be acting in concert with X under the **second limb** of **new presumption (2)** but the presumption is likely to be **rebutted**.

(h) Portfolio companies of a private equity firm

(i) Introduction

2.59 Two respondents noted that, in the case of an offer by a private equity firm, the Executive has to date been willing to agree that **current presumption (1)** may be rebutted in respect of portfolio companies in which the firm owns and/or manages between **20% and 50%** of the share capital if certain confirmations are provided, including that:

(a) the private equity firm does not exercise day-to-day management control over the portfolio company;

(b) representatives of the private equity firm hold a minority of the voting rights exercisable at board meetings of the portfolio company;

(c) the portfolio company is a trading company which is not a direct competitor of the offeree company and it is not part of the portfolio company's business to make investments in publicly traded equity securities;

(d) no executive of the private equity firm is aware of the portfolio company having made any investment in the offeree company, no such person has requested that the company should do so and no such person will request the company to do so; and

(e) the private equity firm has a significant number of portfolio companies (generally at least 30) in which it owns and/or manages between 20% and 50% of the share capital.

2.60 One of the respondents referred to above sought confirmation that this practice would continue, but in relation to portfolio companies in which a private equity firm owns and/or manages between **30% and 50%** of the share capital.

2.61 The other respondent acknowledged that portfolio companies of a private equity firm should be treated in the same way as any other company but sought confirmation that

new presumption (1) and/or (2) would be rebutted if a third party owned or controlled a majority of the voting rights.

(ii) The Code Committee's conclusions

2.62 The circumstances in which **new presumptions (1) and (2)** may be rebutted are discussed in **Section 2(f)**.

2.63 The Code Committee understands that the Executive's practice in relation to private equity portfolio companies described above will be discontinued. This is on the basis that:

(a) the threshold at which **new presumptions (1) and (2)** is engaged is being raised from 20% to 30%;

(b) as explained above, a confirmation that one party has not co-operated, and will not co-operate, with another party should not, of itself, be sufficient for a presumption of acting in concert to be rebutted. Otherwise, the basis for the presumptions would be negated whenever such a confirmation is provided; and

(c) the circumstances in which **new presumptions (1) and/or (2)** may be rebutted in relation to joint venture companies is as described above and there is no logical basis for taking a different approach as between minority investments held by a corporate trading group and minority investments held by a private equity firm.

2.64 In addition, the Code Committee notes that:

(a) the confirmations referred to above are not relevant for a portfolio company whose business is to make investments in publicly traded equity securities;

(b) even if such confirmations were to be accepted in relation to the firm's other portfolio companies, if any such company were to deal in shares in the offeree company, the Panel would be concerned to understand why this had occurred and on what basis the relevant company was not actually acting in concert with the offeror; and

(c) the treatment afforded by **Rule 7.2** should normally be available to a portfolio company (see paragraph 4.10).

(i) Government-owned entities

2.65 A number of respondents queried how **new presumptions (1) and (2)** would apply to sovereign wealth funds and other government-owned entities ("**GOEs**").

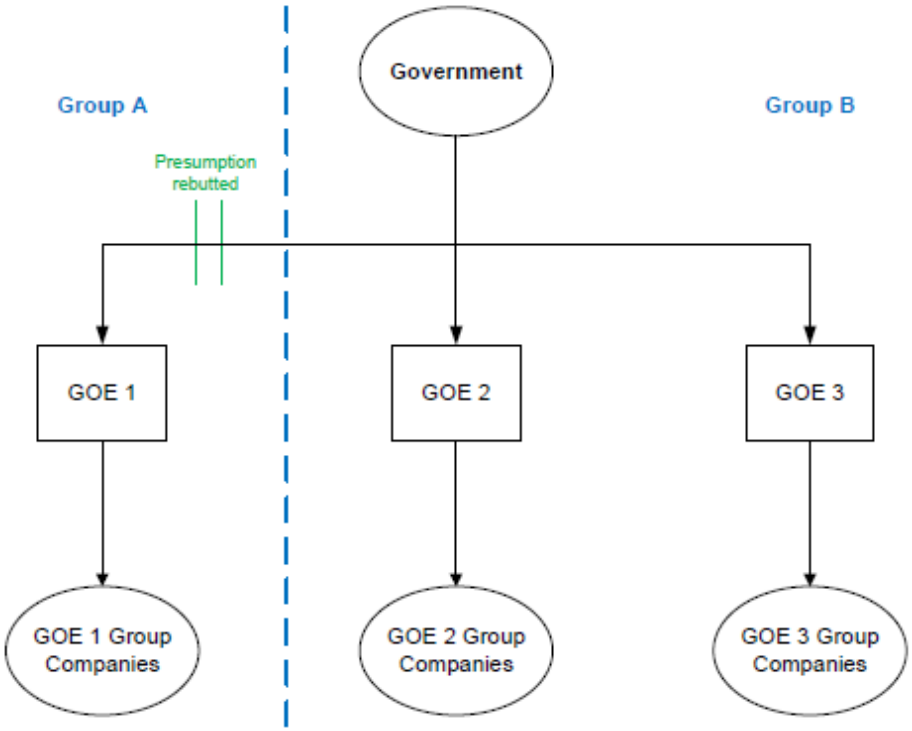
2.66 The Executive's practice has been to apply **current presumption (1)** to GOEs in the same way as to corporate groups, with the top company in the relevant GOE group structure being treated as the "*company*" referred to at the beginning of **current presumption (1)** and the relevant government being treated as "*its parent*". As a result, the Executive has generally concluded that GOEs should be presumed to be acting in concert with the relevant government and with other GOEs owned or controlled by that government.

2.67 In certain cases, the Executive has, however, agreed that the presumption should be rebutted, in which event there are two separate "groups" (which are not presumed to be acting in concert with each other), as follows:

(a) the relevant GOE and persons presumed to be acting in concert with it (but excluding the government and other GOEs which are presumed to be acting in concert with the government), i.e. GOE 1 and the GOE 1 Group Companies in "Group A" in ***Scenario 4*** below; and

(b) the government and any other GOEs presumed to be acting in concert with the government, i.e. the government, and GOEs 2 and 3 and their respective Group Companies in "Group B" in ***Scenario 4***.

Scenario 4 *– position if the presumption of "acting in concert" between the Government and GOE 1 is rebutted:*



2.68 In considering whether **current presumption (1)** should be rebutted as between a government and a GOE, factors that the Executive will take into account include whether the GOE is:

(a) established as an independent legal entity with its own independent investment mandate and governance structure;

(b) under separate management control from the government and from other GOEs; and

(c) operationally separate from the government and from other GOEs.

2.69 The Code Committee considers that it is appropriate to take a different approach in relation to the government of a sovereign state (which has a number of functions and responsibilities) by comparison with the top company in a corporate or private equity group (whose sole function and responsibility is the ownership and/or management of the other companies in the group) and that, in appropriate circumstances, the approach set out in paragraphs 2.67 and 2.68 may continue to be applied to GOEs following the introduction of **new presumptions (1) and (2)**.

2.70 Any person or organisation which wishes to argue that a government and a particular GOE should not be treated as acting in concert should consult the Executive on a case-by-case basis.

3. Investment funds

(a) Deletion of presumption (4) and amendments to the definition of "interests in securities"

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?**

(i) Summary of proposals

3.1 **Section 3(c) of the PCP** proposed:

(a) the deletion of:

(i) **current 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; and

(ii) **Note 8** on the definition of "**acting in concert**", **Rule 8.3(d)** and the **current Note 8 on Rule 8**, each of which relate to **discretionary fund managers**;

(b) the amendment of the definition of "**interests in securities**" by means of:

(i) the introduction of a **new Note 11** to provide that:

(1) a **fund manager** is treated as interested in securities that it manages on a discretionary basis; and

(2) a **client** of an independent fund manager will not be treated as having an interest in securities if it has given the fund manager absolute discretion regarding dealing, voting and offer acceptance decisions or, if the discretion is not absolute, if the client does not exercise any powers it has retained to intervene in such decisions; and

(ii) the introduction of a reference to fund managers and to the **new Note 11** into paragraph (2) of the definition of "**interests in securities**", i.e. to make

clear that a fund manager will be interested in securities which it manages on a discretionary basis; and

(c) the introduction of a **new Note 8 on Rule 8** to replicate the requirement in the second sentence of **Rule 8.3(d)** that, 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.

(ii) Respondents' comments

3.2 All respondents agreed with the propositions that:

(a) a fund manager should be treated as interested in securities which it manages on a discretionary basis; and

(b) a client should not be treated as interested in securities in respect of which it has given to an independent fund manager absolute discretion regarding dealing, voting and offer acceptance decisions.

3.3 None of the respondents had any comments on the proposed amendments to the definition of "**interests in securities**", including the proposed **new Note 11**.

(iii) Amendments to the Code

3.4 As proposed in paragraph 3.16 of the PCP, the Code Committee has:

(a) deleted:

(i) **current presumption (4)**;

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

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

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

(b) introduced the **new Note 11** on the definition of "**interests in securities**", which will read 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).";

(c) amended paragraph (2) of the definition of "**interests in securities**", which will read as follows:

"**Interests in securities**

…

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);"; and

(d) introduced the **new Note 8 on Rule 8** (subject to the minor change shown below), 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~~ fund 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.".

3.5 In the light of the above, the Code Committee understands that the Executive intends to withdraw **Practice Statement No 12** ("*Rule 9 and the interests in shares of clients whose funds are managed on a discretionary basis*") on the implementation date, on the basis that it will no longer be necessary (see paragraphs 3.12 to 3.14 of the PCP).

(b) Investors in funds

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"?**

(i) Summary of proposals

3.6 **Section 3(e) of the PCP** proposed the introduction of a **new Note 7** on the definition of "**acting in concert**" to provide 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 shares** in a Code company,

the Panel will apply **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 with 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 **new presumptions (1) and/or (2)** would apply if:

- that fund were a company; and
- the investor was interested in a corresponding percentage of that company's equity share capital.

(ii) Application of new presumptions (1) and (2) to a fund investor

3.7 All respondents, whilst agreeing in principle that there should be a consistency of approach as between companies and funds, queried whether it would always be correct to treat a limited partner's interests in a fund in the same way as a shareholder's interests in a company. In summary, the respondents noted that the role of a limited partner in a limited partnership (a "**fund investor**") is, by definition, passive and that, while it may have an economic interest in the outcome of an offer, a fund investor would not normally have any influence over the fund in which it was invested. For this reason, the respondents suggested that the Panel should be prepared not to apply a presumption of concertedness in respect of a passive fund investor in appropriate circumstances.

3.8 The Code Committee acknowledges that a fund investor is not in an identical position to that of a holder of (non-voting) equity share capital in a company. However, as set out in paragraph 3.27 of the PCP, such persons are in an analogous position in that they will both benefit from the financial performance of the fund/company. Accordingly, each such person will have an incentive to take action which it considers to be in the interests of the fund/company.

3.9 The Code Committee therefore continues to consider that it is appropriate to treat a limited partnership interest in a fund in the same way as a holding of (non-voting) equity share capital. The question as to the circumstances in which **new presumptions (1) and (2)** may be rebutted is addressed in **Section 2(f)**.

(iii) Aggregation of indirect interests for the purposes of new presumption (2)

3.10 Certain respondents raised questions regarding the aggregation of equity interests for the purposes of determining whether **new presumption (2)** is engaged in relation to a fund investor. These were as follows:

(a) in the case of an **offer by a new vehicle** or company whose equity share capital is provided by two or more investment funds, whether it is necessary, and practicable, for a fund investor to aggregate its interests across the separate funds to establish whether the fund investor is indirectly interested in 30% or more of the equity share capital in the consortium offeror vehicle or company; and

(b) likewise, whether, and if so how, this aggregation principle applies **outside of an offer** for the purpose of determining whether a person is acting in concert with a company or fund as a result of indirect interests in that company or fund's equity share capital or limited partnership interests respectively.

3.11 The Code Committee notes that a person ("**A**") may be interested in a company or fund ("**X**") either (a) directly or (b) indirectly (through one or more other companies or funds) and that, in order to determine whether A and X are acting in concert under **new presumption (2)**, all of these interests could potentially be required to be aggregated with each other, including indirect interests held via companies or funds in which A has less than 30% of the equity share capital or limited partnership interests.

3.12 The Code Committee recognises the practical difficulties that are likely to arise from such a requirement and its conclusions on the circumstances in which A should be required to aggregate its direct and indirect interests in X for the purposes of determining whether **new presumption (2)** is engaged are set out in **Appendix C**. In summary, the Code Committee considers that:

(a) in the case of an **offer by a new vehicle** or company, **new presumption (2)** should be applied as written. This is on the basis that, in practice, only a limited number of funds will participate in a consortium offer. Accordingly, in this scenario, the indirect interests of a fund investor in the equity share capital in the consortium offeror should be required to be aggregated with each other in order to determine whether, under **new presumption (2)**, a fund investor is acting in concert with the consortium offeror.[2] (It is noted that, in a consortium offer, a fund investor can only have an indirect interest in 30% or more of the equity share capital in the consortium offeror if it has 30% or more of the limited partnership interests in at least one of the funds which is providing equity financing for the offer); however

(b) **outside of an offer scenario** as described in paragraph (a), the position is more complicated, given that a person may have investments in a significant number of companies or funds, which may themselves invest in a number of other companies or funds. In this scenario, the Code Committee has concluded that (in addition to any direct interests) an investor's indirect interests in a company or fund should be taken into account in determining whether **new presumption (2)** is engaged only where each link in the chain of interests is in respect of 30% or more of:

(i) the relevant company's equity share capital; or

(ii) the relevant fund's limited partnership interests.

Accordingly, the Code Committee has introduced a **new paragraph (e)** at the end of the definition of "**acting in concert**" to this effect, as set out in paragraph 3.24(b).

3.13 In view of the above, if there are no funds in respect of which a fund investor holds 30% or more of the limited partnership interests (or companies in which it holds 30% or more of the equity share capital), it will not have to consider whether it is acting in concert with another person under **new presumption (2)** on account of its indirect interests.

(iv) Application of new presumption (1) to "parallel" funds

3.14 During the consultation, a point was raised regarding the application of **new presumption (1)** where there is more than one constituent limited partnership within a fund. This may arise because, for tax or other reasons, the participation of one or more fund investors is structured through the relevant fund investor (or investors) holding its limited partnership interests through a separate, bespoke, partnership (a "**parallel fund**")

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[2] If the fund investor has any direct interests in the equity share capital in the consortium offeror, it will be presumed to be acting in concert with the consortium offeror under the **new Note 6(a)** on the definition of "**acting in concert**" – see **Section 3(d)**.

in which it holds the entirety of the limited partnership interests. However, aside from the fact that it has invested through the parallel fund, the fund investor:

(a) participates in the fund on the same terms as the other investors; and

(b) is treated by the investment manager in the same manner as the other investors.

3.15 In particular, confirmation was sought as to whether, applying **new presumption (1)** and **Note 7** on the definition of "**acting in concert**", the fund investor would be treated as acting in concert with the parallel fund on account of the fund investor holding more than 50% of the limited partnership interests in the parallel fund. If this were the case, and if the parallel fund invested in a consortium offeror alongside the main fund, then, applying **Note 6(a)** on the definition of "**acting in concert**", the fund investor could be treated as acting in concert with the consortium offeror by virtue of the fund investor having invested in the parallel fund as opposed to the main fund, even if the parallel fund represents only a small percentage of the total equity commitments.

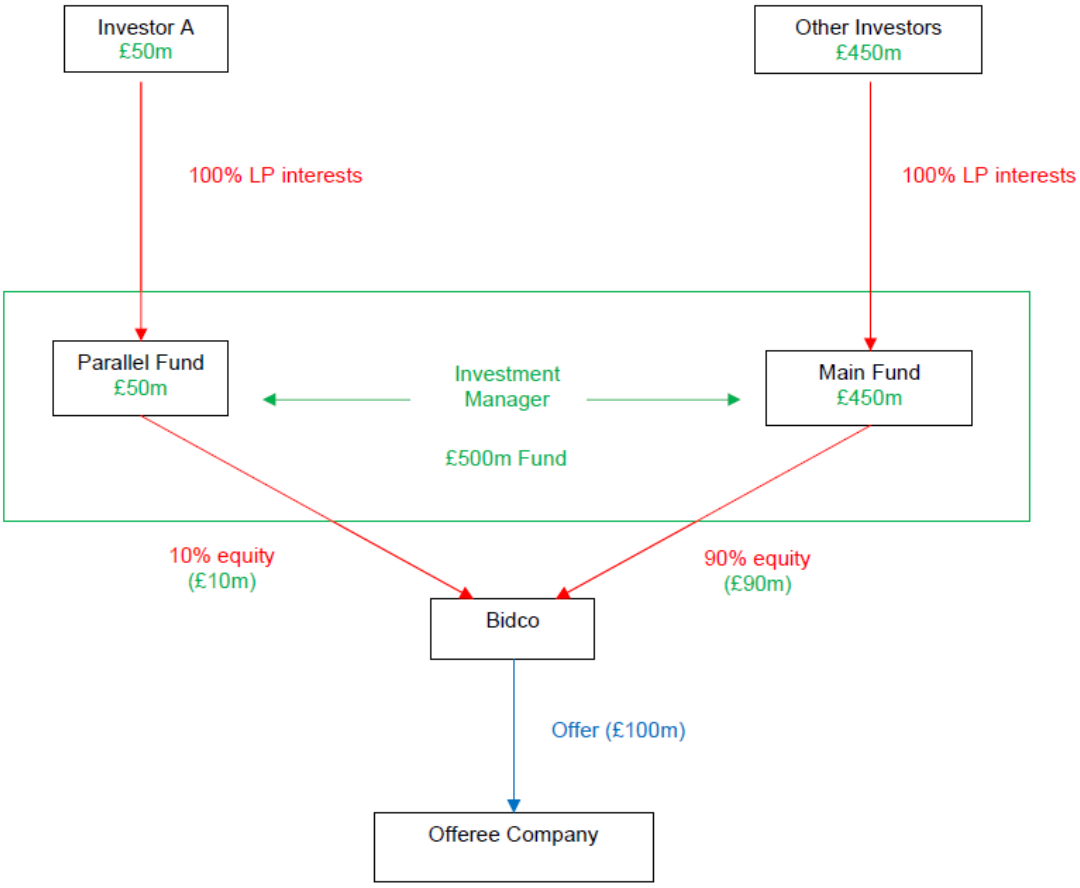
3.16 This situation is illustrated in ***Scenario 5*** below, in which:

(a) the **Investment Manager** has raised a £500m fund (the "**Fund**") and proposes to invest £100m in an offer made by a new vehicle ("**Bidco**") for a Code company (the "**Offeree Company**");

(b) 10% of the Fund was subscribed by **Investor A** which invested £50m through a parallel fund (the "**Parallel Fund**"); and

(c) the balance of the Fund was subscribed by **other investors** who invested the remaining £450m through the main fund (the "**Main Fund**").

Scenario 5 *- Investor A not acting in concert with Bidco even though it has 100% of the limited partnership interests in the Parallel Fund which has invested directly in Bidco:*



3.17 The Code Committee confirms that, provided that the Main Fund and the Parallel Fund are managed as a single composite fund on a unified basis, Investor A will not be presumed to be acting in concert with Bidco. This is because Investor A will be treated as holding 10% of the limited partnership interests in the Fund and, accordingly, as having a 10% indirect interest in the equity share capital of Bidco.

3.18 For completeness, where an investor makes a positive decision to invest in a bidco, including by exercising a co-investment right or participating in an equity syndication, **Note 6(a)** on the definition of "**acting in concert**" will apply (see **Section 3(d)**). Accordingly, in these circumstances, each of the investor and, depending on the application of **Notes 6(b) to (d)** on the definition of "**acting in concert**", the members of its larger organisation will, following the **Rule 7.2 moment**, be treated as acting in concert with the bidco (see **Section 4(a)**).

(v) Application of Rule 24.3(b)(iii)

3.19 Two respondents asked how **Rule 24.3(b)(iii)** should be applied in relation to a fund investor.

3.20 **Rule 24.3(b)(iii)** provides as follows:

> "**24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER**
>
> **Except with the consent of the Panel:**
>
> …
>
> **(b) if the offeror is other than a company referred to in (a) above, the offer document must contain:**
>
> …
>
> **(iii) in respect of any person not included in (ii) above whose pre-existing interest in the offeror is such that the person has a potential direct or indirect interest of 5% or more in any part of the capital of the offeree company which the Panel regards as equity capital, details of the person's identity and interest in the offeror and such further information as the Panel may require in the particular circumstances of the case (see Note 2);**".

3.21 The Code Committee understands that, in practice, the Executive has not generally applied **Rule 24.3(b)(iii)** to a person who has a potential indirect interest of 5% or more in the equity share capital in the offeree company only as a result of being a fund investor.

3.22 The Code Committee considers that details of a fund investor which has a potential indirect interest of 5% or more in the equity share capital in the offeree company should be required to be disclosed under **Rule 24.3(b)(iii)** but only where, applying **Note 7** on the definition of "**acting in concert**", the fund investor is presumed to be acting in concert with the offeror, i.e. because it:

(a) has an **indirect interest of 30% or more** in the equity share capital in the offeror – for example, "Investor D" in ***Scenario F*** in **Appendix F**; or

(b) holds **more than 50%** of the limited partnership interests in a fund investing in the offeror – for example, "Investor E" in ***Scenario F*** in **Appendix F**,

A **new Note 2(b) on Rule 24.3** to this effect has therefore been introduced, as set out in paragraph 3.24(c).

(vi) Note 7 on the definition of "acting in concert"

3.23 None of the respondents had any comments on the drafting of the **new Note 7** on the definition of "**acting in concert**".

(vii) Amendments to the Code

3.24 In the light of the above, the Code Committee has:

(a) introduced the **new Note 7** on the definition of "**acting in concert**" as proposed in paragraph 3.38(a) of the PCP (subject to the minor drafting changes shown below), 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~~ investment manager):*
>
> *(a) invests in a new company (or other 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) introduced a **new paragraph (e)** at the end of the definition of "**acting in concert**", as follows:

> "(e) except for the purposes of establishing whether a person is acting in concert with a new company (or other vehicle) formed for the purpose of making an offer (see paragraph (a) of Note 7 below), if an investor invests in a fund or company and that fund or company in turn invests in another fund or company, the investor's indirect interests in the latter fund or company will (in addition to the investor's direct interests) only be taken into account in determining whether the investor and that fund or company are presumed to be acting in concert under presumption (2) if each link in the chain of interests represents 30% or more of the relevant fund's limited partnership interests or the relevant company's equity share capital."; and

(c) made certain amendments to **Rule 24.3** and **Note 2 on Rule 24.3**, as set out in **Appendix B**, including the introduction of a **new Note 2(b) on Rule 24.3**, as follows:

> "***2. Further information requirements***
>
> …
>
> *(b) Where a person has a potential indirect interest of 5% or more in the equity share capital of the offeree company solely as a result of being an investor in a limited partnership or other investment fund which is interested in the securities of the offeror, the details specified in paragraph (iii) of Rule 24.3(b) will be required to be disclosed in the offer document only if that person is, or is presumed to be, acting in concert with the offeror.*".

(c) Investment managers and investment advisers

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?**

(i) Summary of proposals

3.25 **Section 3(e) of the PCP** further proposed:

(a) the introduction of **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; and

(b) 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 will be treated as "*connected with*" an offeror or an offeree company (as the case may be) if it "*is controlled by, controls or is under the same control as*" an **investment manager** or **investment adviser** to:

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

(ii) the offeree company.

(ii) Respondents' comments

3.26 All respondents agreed with the proposition that an investment manager of or investment adviser to:

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

(b) the offeree company,

(together with any person "*controlling, controlled by or under the same control as*" the investment manager or investment adviser) should be presumed to be acting in concert with the offeror or offeree company.

3.27 The respondents did not have any comments on either:

(a) **new presumption (5)**; or

(b) the **new paragraph (4)** of the definition of "**connected fund managers and principal traders**".

3.28 One respondent sought guidance in relation to the use of the terms "**investment manager**" and "**investment adviser**".

(iii) The Code Committee's response

3.29 The Code Committee notes that the terms "**investment manager**" and "**investment adviser**", as used in **new presumption (5)** and the **new paragraph (4)** of the definition of "**connected fund managers and connected principal traders**", refer to a person who manages or advises a fund or person which is an investor in a new company (or other vehicle) formed for the purpose of making an offer (or an investment trust company which is an offeror or offeree company).

3.30 In contrast, the term "**fund manager**" is generally used in the Code to refer to a person who manages funds of securities which are admitted to trading on public markets (including in the context of the terms "**connected fund manager**" and "**exempt fund manager**").

3.31 Having reviewed the current usage of these terms in the Code, the Code Committee has amended the references to an "**investment manager [or] investment adviser**" in **Rule 20.1(b)(ii)** and **Rule 20.2(a)(ii)** so as to refer to a "**fund manager**". These amendments will not, however, alter the meaning or effect of those provisions.

(iv) Amendments to the Code

3.32 In the light of the above, the Code Committee has:

(a) adopted **new presumption (5)** as proposed in paragraph 3.38(b) of the PCP (subject to the minor drafting changes shown below), as follows:

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

(a) an offeror; ~~or~~

(b) an investor in ~~an offeror consortium~~ a new company (or other vehicle) formed for the purpose of making an offer; or

(~~b~~c) 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;";

(b) adopted the **new paragraph (4)** of the definition of "**connected fund managers and principal traders**" proposed in paragraph 3.38(c) of the PCP (subject to the minor drafting changes shown below), as follows:

"**Connected fund manager and connected principal trader**

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~~

(b) an investor in ~~an offeror consortium~~ a new company (or other vehicle) formed for the purpose of making an offer; or

(~~b~~c) the offeree company."; and

(c) made the minor amendments to **Rule 20.1(b)(ii)** and **Rule 20.2(a)(ii)** referred to in paragraph 3.31, as set out in **Appendix B**.

(d) Consortium offers

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?**

(i) Summary of proposals

3.33 **Section 3(f) of the PCP** proposed amendments to **Note 6** on the definition of "**acting in concert**" in relation to an offer made by a consortium offeror.

3.34 As explained in the PCP, the **current Note 6** provides, in summary, that:

(a) where the offeror is a bid vehicle established by a consortium of investors, each consortium investor will be treated as acting in concert with the offeror; and

(b) where an investor in the consortium offeror is part of a "**larger organisation**", the Panel will determine which parts of that larger organisation are presumed to be acting in concert with that investor (and with the offeror). In such circumstances,

provided it is satisfied as to the consortium investor's independence from the other parts of its larger organisation, the Panel:

(i) will normally disapply any presumption that those other parts of the consortium investor's larger organisation are acting in concert with that investor, or with the offeror, if the investor's investment represents an interest of **10% or less** in the equity share capital in the offeror; and

(ii) may disapply any presumption that those other parts of the consortium investor's larger organisation are acting in concert with that investor, or with the offeror, if the investor's investment represents an interest of **more than 10% but less than 50%** in the equity share capital in the offeror.

3.35 In summary, it was proposed that, consistent with **new presumptions (1) and (2)**, the threshold at which the Panel would cease to be willing to agree that the other parts of a consortium investor's larger organisation are not acting in concert with the consortium offeror should be **reduced from 50% to 30%** of the equity share capital in the consortium offeror. In other words, the Panel would not normally disapply the presumption that the other parts of the investor's larger organisation are acting in concert with the offeror if the investor's investment represents **30% or more** of the equity share capital in the offeror.

3.36 In addition, **Section 3 of the PCP** noted that, where the investor in the consortium offeror is a **fund under discretionary management**, each of the following persons (and its larger organisation) would be presumed to be acting in concert with the consortium offeror (in addition to the fund itself):

(a) the **investment manager** of or **investment adviser** to that fund (see **new presumption (5)**); and

(b) an **investor in that fund** if that investor either:

(i) owns more than 50% of the limited partnership interests in the fund (see **new presumption (1)** and the **new Note 7** on the definition of "**acting in concert**"); or

(ii) has a "see-through" interest in 30% or more of the equity share capital in the consortium offeror (see **new presumption (2)** and the **new Note 7** on the definition of "**acting in concert**").

3.37 It was proposed that, in certain specified circumstances, the Panel should be prepared to disapply the presumption of acting in concert under **Note 6** on the definition of "**acting in concert**" in relation to members of the larger organisation of, as relevant:

(a) the **investment manager** of or **investment adviser** to the fund (as referred to in paragraph 3.36(a)); or

(b) the **investor in that fund** (as referred to in paragraph 3.36(b)).

3.38 Scenario 12 in paragraph 3.37 of the PCP provided an illustration of a consortium offer. That scenario is replicated as ***Scenario F*** in **Appendix F**, with additional information to show the larger organisations, or "**Wider Groups**", of which Investors D, E and F are a part and explaining the application of **Note 6** on the definition of "**acting in concert**" and **Rule 7.2** (as to which, see **Section 4(a)**).

3.39 In ***Scenario F***, on the basis of the proposals in the PCP:

(a) the consortium offeror ("**Bidco**") has been established by **Fund 1** and **Fund 2** who hold, respectively, 80% and 20% of the equity share capital in Bidco (and, as such, are treated as acting in concert with Bidco under the **proposed Note 6(a)**);

(b) Fund 1 and Fund 2 are managed by, respectively, **Investment Manager 1** and **Investment Manager 2** (and, as such, Investment Managers 1 and 2, and the members of their respective **Wider Groups**, are presumed to be acting in concert with Bidco under **new presumption (5)**);

(c) Fund 1's investors include **Investor D** who, by virtue of its 40% limited partnership interests in Fund 1, has a 32% indirect interest in the equity share capital in Bidco (and, as such, is presumed, together with the members of the **D Wider Group**, to be acting in concert with Bidco under **new presumption (2)**, applied in accordance with the **new Note 7** on the definition of "**acting in concert**"); and

(d) Fund 2's investors include:

(i) **Investor E** who has 55% of the limited partnership interests in Fund 2 (and, as such, is presumed, together with the members of the **E Wider Group**, to be acting in concert with Bidco under **new presumption (1)**, applied in accordance with the **new Note 7**); and

(ii) **Investor F** who has 35% of the limited partnership interests in Fund 2 (and, as such, is presumed to be acting in concert, together with the members of the **F Wider Group**, with Fund 2 under **new presumption (2)** but is not presumed to be acting in concert with Bidco under either **new presumption (1)** or **new presumption (2)**).

(ii) Respondents' comments

3.40 Three respondents agreed with or did not object to the proposed amendments to **Note 6** on the definition of "**acting in concert**".

3.41 One of those respondents made some drafting suggestions in relation to the revised **Note 6**.

3.42 The same respondent sought guidance on the factors which the Panel might take into account in determining whether to disapply the presumption of acting in concert in relation to a person's larger organisation.

3.43 Two respondents disagreed with the proposal that the threshold above which the Panel would cease to be willing to disapply the presumption of acting in concert in relation to a consortium investor's larger organisation should be reduced from 50% to 30%.

3.44 One of the respondents who disagreed with the proposal considered that lowering the threshold would result in additional compliance costs without commensurate benefits and that it was not appropriate to apply the 30% "control" threshold used for a Code company in respect of a private company.

3.45 One respondent considered that a distinction should be made between investors in:

(a) a newly formed consortium offeror; and

(b) a previously established investment vehicle which subsequently becomes an offeror for a Code company.

The respondent considered that existing investors in the latter should not automatically be presumed to be acting in concert with the offeror and that **new presumptions (1) and (2)** should apply in such a situation.

(iii) The Code Committee's response

3.46 The Code Committee considers that it is important for there to be consistency between the revised **Note 6** on the definition of "**acting in concert**" and **new presumption (2)** and therefore continues to believe that the threshold above which the Panel would cease to disapply the presumption of acting in concert in relation to the members of a consortium investor's larger organisation should be reduced from **50% to 30%**. Unless the threshold is so reduced, an investor in a consortium offeror (and the members of its larger organisation) would benefit from more liberal treatment than an investor in an existing corporate group (and the members of its larger organisation), which the Code Committee does not consider to be appropriate.

3.47 The factors which the Panel might take into account in determining whether to disapply the presumption of acting in concert in relation to a person's larger organisation were set out in paragraph 16.5 of **RS 2004/3**, i.e.:

(a) whether the offer is (or becomes) hostile, competitive or otherwise contentious;

(b) the total size of the organisation's investment in the consortium offeror and the percentage of that amount that is represented by the organisation's own funds or funds which it controls;

(c) the adequacy of the information barriers between the equity finance operation and the other operations;

(d) whether the other operations have existing **exempt principal trader** or **exempt fund manager** status; and

(e) what other role or roles other parts of the organisation have in the transaction, e.g. advisory and/or lending.

3.48 A number of drafting amendments have been made to the **new Note 6** (as set out below in paragraph 3.54) to clarify the application of the **Note**, including the following:

(a) a person presumed to be acting in concert with a consortium investor under **new presumption (1)** will be presumed to be acting in concert with the consortium offeror (see **new Note 6(a)(ii)**); and

(b) the presumption of acting in concert may be disapplied in relation to the members of the larger organisation of the persons referred to in paragraph (a) (see **new Note 6(b)**).

3.49 For the purposes of determining whether the 10% or 30% thresholds in the **new Notes 6(c) and (d)** are triggered in relation to a person who owns more than 50% of the limited partnership interests in a fund which is investing in a consortium offeror, the relevant percentage is the percentage of the equity share capital which the fund itself will hold in the consortium offeror. Therefore, in ***Scenario F***, in relation to Investor E and the E Wider Group, the relevant percentage is Fund 2's (direct) 20% equity interest in Bidco rather than Investor E's (indirect) 11% equity interest in Bidco.

3.50 It is noted that, if a person is presumed to be acting in concert with a consortium offeror under **new presumption (2)**, the members of the person's larger organisation would, by definition, not be able to benefit from the treatment referred to in the **new Note 6(b)**. This is because:

(a) for a person to be presumed to be acting in concert with the consortium offeror under **new presumption (2)**, it will have a direct or indirect interest in at least 30% of the equity share capital in the consortium offeror (for example, Investor D in ***Scenario F*** who has a 32% indirect interest in the equity share capital in Bidco); and

(b) if a person (such as Investor D) has an indirect interest of 30% or more in the equity share capital in the consortium offeror, the treatment referred to in **Note 6(b)** will not be available (because that treatment will cease to be available at the 30% level).

3.51 With regard to the point made by the respondent referred to in paragraph 3.45, the Code Committee confirms that **Note 6** on the definition of "**acting in concert**" normally only applies in relation to investors which invest in a new vehicle or company formed for the purpose of making an offer. In accordance with the **new Note 6(a)**, such investors will be presumed to be acting in concert with the consortium offeror in connection with the offer for which the consortium offeror was established, regardless of the size of their shareholding in the consortium offeror.

3.52 If the (former) consortium offeror, or the offeree company which it acquired, subsequently makes an offer for a Code company without any further investment from the investors in the (former) consortium offeror:

(a) the **new Note 6** will not apply to that subsequent offer; and, accordingly

(b) the investors in the former consortium offeror will be presumed to be acting in concert with the offeror only if they are subject to either **new presumption (1)** or **new presumption (2)**.

3.53 However, the **new Note 6** will apply if one or more investors subscribes for new equity share capital in the former consortium offeror (or the former offeree company) for the purpose of a subsequent offer for a Code company. The Code Committee has introduced an additional paragraph (e) into the **new Note 6** to this effect.

(iv) Amendments to the Code

3.54 In the light of the above, the Code Committee has deleted the **current Note 6** on the definition of "**acting in concert**" and has introduced a **new Note 6**, incorporating various amendments to the version proposed in paragraph 3.47 of the PCP, as follows:

"***6. Offer by a consortium offeror***

(a) Where an offeror is a new company (or other vehicle) formed for the purpose of making the offer (a "consortium offeror"):

(i) each shareholder (or other investor) in the consortium offeror; and

(ii) save as described in this Note, any person presumed to be acting in concert with that shareholder (or other investor) under presumption (1),

will be presumed to be acting in concert with the consortium offeror.

(b) Where a person presumed to be acting in concert with the consortium offeror is part of a larger organisation, the Panel may, depending on the circumstances of the case, agree to disapply the presumption in relation to the members of that larger organisation (see paragraphs (c) and (d)).

(c) Where the investment is, or is likely to be, 10% or less of the equity share capital (or other similar interests) in the consortium offeror, the Panel will normally disapply any presumption that the members of the larger organisation are acting in concert with the consortium offeror, provided it is satisfied as to their independence from the relevant person referred to in paragraph (b).

(d) Depending on the circumstances of the case, where the investment is, or is likely to be, more than 10% but less than 30% of the equity share capital (or other similar interests) in the consortium offeror, the Panel may be prepared to disapply any presumption that the members of the larger organisation are acting in concert with the consortium offeror, provided it is satisfied as to their independence from the relevant person referred to in paragraph (b).

(e) This Note 6 will also apply if one or more shareholders (or other investors) subscribes for new equity share capital (or other interests) for the purpose of the former consortium offeror (or the former offeree company) making another offer.

(f) See also: Note 7; the definition of connected fund manager and connected principal trader; and Rule 7.2.".

4. Dealings by connected fund managers and connected principal traders

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

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?**

(i) Summary of proposals

4.1 **Section 4 of the PCP** proposed amendments to **Rule 7.2** 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 As explained in paragraphs 4.12 and 4.13 of the PCP, **Rule 7.2** provides that, where a "non-exempt" fund manager or principal trader is "*connected with*" an offeror or the offeree company, the presumption that the connected fund manager or connected principal trader is acting in concert with that offeror or offeree company will not be applied until the "**Rule 7.2 moment**", i.e. the time at which either:

(a) the offeror or the offeree company (as the case may be) is first publicly identified; or, if earlier

(b) the connected fund manager or connected principal trader is made aware of the possible offer.

4.3 As a result:

(a) dealings in the securities of a potential offeror or potential offeree company by a connected fund manager or connected principal trader before the **Rule 7.2 moment** will not have consequences under the Code for the offeror or offeree company with which it is connected in relation to that 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 **Rule 7.2 moment** will have consequences under the Code 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 is an "**exempt fund manager**" or "**exempt principal trader**" whose "exempt status" remains relevant for the purposes of that offer).

4.4 The proposals in **Section 4 of the PCP** were not intended to make substantive amendments to the meaning or application of the **current Rule 7.2** and **Notes on Rule 7.2** (the proposed amended versions of which were set out in paragraph 4.25 of the PCP).

4.5 In addition, it was proposed to introduce a **new Note 7 on Rule 7.2** to codify the ability for 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 a connected principal trader, also to seek the treatment that is afforded by **Rule 7.2**.

(ii) Respondents' comments

4.6 All respondents agreed with the proposed amendments to **Rule 7.2** and the related provisions.

4.7 One respondent considered that the principle in **Rule 7.2** that the presumption of acting in concert with an offeror should not be applied until the **Rule 7.2 moment** should also be extended to:

(a) a portfolio company of a private equity offeror (other than a portfolio company that is a connected fund manager or a connected principal trader) (referred to by the respondent as a "*connected portfolio company*"); and

(b) a passive limited partner in a fund managed by a private equity offeror (referred to by the respondent as a "*connected passive investor*").

4.8 One respondent queried whether the proposed new definition of a "**fund manager**" should refer to a "*person*" rather than to an "*entity*".

(iii) The Code Committee's response

4.9 The proposed extension of the treatment afforded by **Rule 7.2** to a person who falls within one of the presumptions but who is not a **connected fund manager** or a **connected principal trader** was addressed in paragraphs 4.26 and 4.27 of the PCP, as follows:

"4.26 … 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. …".

4.10 The Code Committee understands that, under the **proposed new Note 7 on Rule 7.2**, the Executive would normally be willing to extend the treatment afforded by **Rule 7.2** to a "*connected passive investor*" and/or to a "*connected portfolio company*" as mentioned by the respondent referred to in paragraph 4.7. Where this is the case, the presumption of acting in concert will apply in the normal way from the earlier of the time at which:

(a) the offeror or offeree company is first publicly identified as such; and

(b) the investor or company is made aware of the possible offer.

4.11 However:

(a) notwithstanding the application of **Rule 7.2**, under **Rule 24.4(c)**, any dealings in relevant securities of the offeree company during the 12 months prior to the commencement of the offer period undertaken by a person acting in concert with the offeror must be disclosed in the offer document. This would include any dealings by a "*connected passive investor*" and/or a "*connected portfolio company*" to which the treatment afforded by **Rule 7.2** was extended under the **proposed new Note 7**; and

(b) in accordance with the Executive's normal practice in relation to **Rule 7.2**, if:

(i) the treatment afforded by **Rule 7.2(a)** was extended to a person presumed to be acting in concert with an offeror, including a "*connected passive investor*" or a "*connected portfolio company*"; and

(ii) it became clear, as a result of **Rule 24.4(c)** or otherwise, that that person had acquired an interest in shares in the offeree company prior to the offeror first being publicly identified as such,

the Executive would be likely to enquire why the person acquired the interest(s) that it did at the time that it did. Absent a satisfactory explanation, the Executive may conclude that the person was aware of the possible offer at the time that it dealt, such that the person would then be treated as acting in concert with the offeror at the time of the dealing.

(iv) Amendments to the Code

4.12 In the light of the above, the Code Committee has:

(a) adopted the amendments to **Rule 7.2** (which has been renamed "*Time from which presumptions of acting in concert apply*") and to **Notes 1 to 6 on Rule 7.2**, and deleted the **current Note 7 on Rule 7.2**, as proposed in **Appendix A to the PCP**;

(b) introduced the **new Note 7 on Rule 7.2** proposed in paragraph 4.27 of the PCP. However, given the importance of the provision, the Code Committee has instead adopted the **proposed new Note 7** as a **new Rule 7.2(d)**;

(c) introduced the new definition of "**fund manager**", as proposed in paragraph 4.4 of the PCP (but modified so as to refer to a "*person*" rather than to an "*entity*"); and

(d) not adopted the proposed amendment to the definition of "**principal trader**" (which would have amended the reference to a "*person*" so as to refer to an "*entity*").

4.13 In addition, the Code Committee has:

(a) deleted:

(i) **Note 6 on Rules 4.1 and 4.2**;

(ii) **Note 3 on Rule 4.6**;

(iii) **Note 6 on Rule 5.1**;

(iv) **Note 8 on Rule 6**;

(v) **Note 13 on Rule 9.1**;

(vi) **Note 7 on Rule 11.1**; and

(vii) **Note 1 on Rule 36.3**,

as proposed in paragraph 4.28 of the PCP;

(b) introduced a cross-reference to **Rule 7.2** into each of:

(i) the definition of "**acting in concert**"; and

(ii) the definition of "**connected fund managers and principal traders**" (now titled "**connected fund manager and connected principal trader**"),

as proposed in paragraph 4.29(a) of the PCP;

(c) adopted the amendments to:

(i) the definition of "**exempt fund manager**";

(ii) **Notes 1**, **2** and **5** on the definition of "**exempt fund manager**" and "**exempt principal trader**"; and

(iii) **Note 3 on Rule 24.4**,

as proposed in paragraph 4.29(b) of the PCP; and

(d) adopted the amendments to **Notes 2**, **3** and **4** on the definition of "**recognised intermediary**", as proposed in paragraph 4.29(c) of the PCP.

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

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?

(i) Summary of proposals

4.14 **Section 4(f) of the PCP** proposed amendments to **Rule 4.4**, which 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 a financial adviser or corporate broker, other than an exempt fund manager or an exempt principal trader acting as such.

4.15 In summary, it was proposed to amend **Rule 4.4** to restrict the acquisition of interests in securities in the offeree company during the offer period not only by the offeree company's financial adviser or corporate broker (and any person which "*controls, is controlled by or is under the same control as*" the adviser or broker) but also by a person which "*controls, is controlled by or is under the same control as*" the offeree company itself, whether as principal or on behalf of discretionary clients.

(ii) Respondents' comments

4.16 All respondents agreed with or did not object to the proposed amendments to **Rule 4.4**.

(iii) The Code Committee's response

4.17 As proposed to be amended, **Rule 4.4** would have focused on offeree company-connected **fund managers** and **principal traders**, together with any person which "*controls, is controlled by or is under the same control as*" such a connected fund manager or connected principal trader. However, this would unintentionally have

resulted in a **financial adviser** or **corporate broker** to an offeree company which was not in the same group as a connected fund manager or connected principal trader no longer being subject to the restrictions in **Rule 4.4** (for example, a "**connected adviser**" to an offeree company which was not part of a larger organisation). An explicit restriction on connected advisers to the offeree company has therefore been retained in the new **Rule 4.4**.

(iv) Amendments to the Code

4.18 In the light of the above, the Code Committee has deleted the **current Rule 4.4** and has introduced a **new Rule 4.4**, incorporating various amendments from the version set out in paragraph 4.35 of the PCP, as follows:

"**4.4 DEALINGS IN OFFEREE COMPANY SECURITIES BY CERTAIN PERSONS ACTING IN CONCERT WITH THE OFFEREE COMPANY**

(a) Except with the consent of the Panel, during the offer period, none of:

(i) a connected adviser to the offeree company;

(ii) a connected fund manager or connected principal trader (other than an exempt fund manager or exempt principal trader) which is connected with the offeree company; or

(iii) any person controlling#, controlled by or under the same control as any such connected adviser, connected fund manager or connected principal trader,

may take any of the actions specified in paragraph (b).

(b) The actions referred to in paragraph (a) are:

(i) acquiring any interest in securities in the offeree company;

(ii) making any loan to assist a person to acquire any interest in securities in the offeree company, other than a loan to an existing customer in the ordinary course of business and on normal commercial terms; and

(iii) entering 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.".

5. Other amendments

(a) New presumption (4): directors of a company

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?

5.1 **Section 5(b) of the PCP** proposed to amend **current presumption (2)** (which would become **new presumption (4)**) to clarify that the directors of a company are presumed to be acting in concert with that company (rather than, as currently stated, the company being presumed to be acting in concert with its directors).

5.2 All respondents agreed with the proposed amendments and the Code Committee has therefore deleted **current presumption (2)** and adopted **new presumption (4)** proposed in paragraph 5.12 of the PCP, which will read as follows:

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

5.3 In addition, two respondents sought confirmation of their understanding that, in the context of an offer, whilst the directors of an offeror would be presumed to be acting in concert with the offeror, there was no presumption that the directors of other companies within the offeror's group (other than the ultimate holding company of a bidco) were acting in concert with the offeror.

5.4 The Code Committee confirms that the directors of a company which is presumed to be acting in concert with an offeror under **new presumption (1) or (2)** (other than the ultimate holding company of a bidco) are not presumed to be acting in concert with the offeror under **new presumption (4)**.

(b) Presumption (3): a company's pension scheme

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?

5.5 **Section 5(c) of the PCP** similarly proposed to amend **presumption (3)** to clarify that a company's pension schemes are presumed to be acting in concert with the company (rather than, as currently stated, the company being presumed to be acting in concert with its pension schemes).

5.6 All respondents agreed with or did not object to the amendments proposed in paragraph 5.14 of the PCP, which the Code Committee has adopted. The amended **presumption (3)** will therefore read as follows:

> "(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;".

5.7 In addition, a minor amendment has been made to the **current Note 7** on the definition of "**acting in concert**" (which will become the **new Note 8**), as set out in **Appendix B**.

(c) New presumption (10): shareholders in a private company

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?**

5.8 **Section 5(d) of the PCP** proposed to amend **current presumption (9)** (which would become **new presumption (10)**) so that it would presume a concert party to exist between not only:

(a) shareholders in a private company who exchange their shares in that company for shares in a Code company; and

(b) shareholders who, in connection with an IPO, become shareholders in a Code company; but also

(c) members of a partnership who sell their partnership interests in return for shares in a Code company or who become shareholders in a Code company in connection with an IPO.

5.9 All respondents agreed with or did not object to the proposed amendments and the Code Committee has therefore adopted **new presumption (10)** as proposed in paragraph 5.19 of the PCP, as follows:

> "(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 company to which the Code applies, or who, in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies.".

5.10 A number of respondents sought guidance as to how **current presumption (9)** is, and **new presumption (10)** will be, applied in practice by the Panel.

5.11 The Code Committee understands that the general approach to **new presumption (10)** will continue to be that set out in paragraph 4.3 of **PCP 2015/3**, which stated that:

> "the Executive will be prepared to agree that the presumption has been rebutted where it can be demonstrated to the Executive's satisfaction that the shareholders in the private company do not have a common interest and that they are acting independently of each other and will continue to do so in the future".

In most cases, therefore, it will be possible to demonstrate that not every shareholder in a private company should be presumed to be acting in concert at the time of an IPO or other relevant transaction.

5.12 The Code Committee understands that the Executive may be willing to rebut **new presumption (10)** in relation to:

(a) shareholders with *de minimis* holdings;

(b) passive shareholders (including independent institutional shareholders and private equity firms) who have no involvement in day-to-day management;

(c) non-founder managers and other employees who acquired their shareholdings by virtue of their employment;

(d) shareholders whose relationship has broken down; and

(e) employee benefit trusts (on the basis of the factors set out in **Note 5 on Rule 9.1**).

5.13 However, shareholders in the following categories are unlikely to be able to rebut **new presumption (10)**:

(a) founder shareholders;

(b) members of any core group which retains influence over the company;

(c) shareholders who participated in a previous management buy-out for the company; and

(d) shareholders who were previously joint offerors for the company.

5.14 The Code Committee understands that, following the amendments to **new presumption (10)**, the Executive intends to take the same approach in relation to members of a partnership as is taken in relation to shareholders in a private company.

5.15 Any person seeking to rebut **new presumption (10)** should consult the Executive.

(d) Other presumptions

5.16 As indicated in paragraph 1.39 of the PCP:

(a) **current presumption (5)**, which relates to a person, the person's **close relatives** and their **related trusts**, has moved to become **new presumption (8)**;

(b) **current presumption (6)**, which relates to the close relatives of a **founder** of a Code company and their **close relatives** and **related trusts**, has moved to become **new presumption (9)**;

(c) **current presumption (7)**, which relates to **connected advisers**, has become **new presumption (6)**; and

(d) **current presumption (8)**, which relates to directors of a Code company which is subject to an offer or possible offer, has become **new presumption (7)**,

as set out in **Appendix B**.

(e) Cross-references

5.17 The Code Committee has taken this opportunity to correct the cross-references in:

(a) **Note 2 on Rule 6**; and

(b) **Note 6 on Rule 11.2**,

as set out in **Appendix B**.

APPENDIX A

Non-confidential respondents to PCP 2022/2

1. British Private Equity & Venture Capital Association

2. Herbert Smith Freehills LLP

3. Institute of Chartered Accountants in England and Wales

4. Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales

5. UK Finance

APPENDIX B

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 one of the companies is interested, directly or indirectly, in 30% or more of the equity share capital in the other, together with any company which would be presumed to be acting in concert with either Y or Z under presumption (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 presumption (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;

(b) an investor in a new company (or other vehicle) formed for the purpose of making an offer; or

(c) 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/or (2):

(a) a reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person;

(b) under presumption (1), interests of either 30% or more in a company's shares carrying voting rights or the majority of a company's equity share capital do not dilute through a chain of ownership;

(c) under presumption (2), interests of 30% or more in a company's equity share capital dilute through a chain of ownership;

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

(e) except for the purposes of establishing whether a person is acting in concert with a new company (or other vehicle) formed for the purpose of making an offer (see paragraph (a) of Note 7 below), if an investor invests in a fund or company and that fund or company in turn invests in another fund or company, the investor's indirect interests in the latter fund or company will (in addition to the investor's direct interests) only be taken into account in determining whether the investor and that fund or company are presumed to be acting in concert under presumption (2) if each link in the chain of interests represents 30% or more of the relevant fund's limited partnership interests or the relevant company's equity share capital.

See also Rule 7.2.

#See Note at end of Definitions Section.

NOTES ON ACTING IN CONCERT

…

~~***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.)*~~

6. Offer by a consortium offeror

(a) Where an offeror is a new company (or other vehicle) formed for the purpose of making the offer (a "consortium offeror"):

(i) each shareholder (or other investor) in the consortium offeror; and

(ii) save as described in this Note, any person presumed to be acting in concert with that shareholder (or other investor) under presumption (1),

will be presumed to be acting in concert with the consortium offeror.

(b) Where a person presumed to be acting in concert with the consortium offeror is part of a larger organisation, the Panel may, depending on the circumstances of the case, agree to disapply the presumption in relation to the members of that larger organisation (see paragraphs (c) and (d)).

(c) Where the investment is, or is likely to be, 10% or less of the equity share capital (or other similar interests) in the consortium offeror, the Panel will normally disapply any presumption that the members of the larger organisation are acting in concert with the consortium offeror, provided it is satisfied as to their independence from the relevant person referred to in paragraph (b).

(d) Depending on the circumstances of the case, where the investment is, or is likely to be, more than 10% but less than 30% of the equity share capital (or other similar interests) in the consortium offeror, the Panel may be prepared to disapply any presumption that the members of the larger organisation are acting in concert with the consortium offeror, provided it is satisfied as to their independence from the relevant person referred to in paragraph (b).

(e) This Note 6 will also apply if one or more shareholders (or other investors) subscribes for new equity share capital (or other interests) for the purpose of the former consortium offeror (or the former offeree company) making another offer.

(f) See also: Note 7; the definition of connected fund manager and connected principal trader; 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 investment manager):

(a) invests in a new company (or other 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) 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

~~The p~~Presumption (3) ~~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.

~~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;

(b) an investor in a new company (or other vehicle) formed for the purpose of making an offer; or

(c) 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 43 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 Eexempt 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 a person 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 ~~17~~16 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).

…

Recognised intermediary

…

NOTES ON RECOGNISED INTERMEDIARY

…

2. Recognised intermediary status is relevant only for the purposes of Note ~~16~~15 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 ~~16~~15 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 ~~16~~15 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 "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 43 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 SECURITIES BY CERTAIN OFFEREE COMPANY CONCERT PARTIES**~~

~~**During the offer period, except for exempt principal traders and exempt fund managers, no financial adviser or corporate broker (or any person controlling, controlled by or under the same control# as any such 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, except with the consent of the Panel:**~~

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

~~**(b) make any loan to a person to assist the person in acquiring any such interest 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 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 relevant securities of the offeree company.**~~

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

(a) Except with the consent of the Panel, during the offer period, none of:

(i) a connected adviser to the offeree company;

(ii) a connected fund manager or connected principal trader (other than an exempt fund manager or exempt principal trader) which is connected with the offeree company; or

(iii) any person controlling#, controlled by or under the same control as any such connected adviser, connected fund manager or connected principal trader,

may take any of the actions specified in paragraph (b).

(b) The actions referred to in paragraph (a) are:

(i) acquiring any interest in securities of the offeree company;

(ii) making any loan to assist a person to acquire any interest in securities in the offeree company, other than a loan to an existing customer in the ordinary course of business and on normal commercial terms; and

(iii) entering into any dealing arrangement of the kind referred to in Note 11 of the definition of acting in concert in relation to relevant securities in the offeree company.

NOTE ON RULE 4.4

Irrevocable commitments and letters of intent

Rule 4.4~~(c)~~(b)(iii) does not prevent an adviser to an offeree company from procuring irrevocable commitments or letters of intent not to accept an offer.

…

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.*~~

43. Financial collateral arrangements

…

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.*~~

76. Gifts

…

Rule 6

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

…

NOTES ON RULE 6

…

2. Acquisitions prior to the three month period

The discretion given to the Panel in Rule 6.1~~(c)~~(a)(iii) will not normally be exercised unless the vendors, or other parties to the transactions giving rise to the interests, are directors of, or other persons closely connected with, the offeror or the offeree company.

…

~~***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.*~~

98. Offer period

…

Rule 7.2

7.2 ~~DEALINGS BY CONNECTED DISCRETIONARY FUND MANAGERS AND PRINCIPAL TRADERS~~TIME FROM WHICH PRESUMPTIONS OF ACTING IN CONCERT APPLY

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 ~~an~~ 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.

(d) 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.

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.~~

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).~~

(~~e~~d) 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 fund 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

…

5. Employee benefit trusts

…

~~No presumption of concertedness will~~ The above does not apply in respect of shares held within the EBT but controlled by the beneficiaries.

…

10. Convertible securities, warrants and options

…

(See also Note ~~14~~13 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.~~

~~14~~13. Allotted but unissued shares

…

~~15~~14. Treasury shares

…

~~16~~15. 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.

…

~~17~~16. Borrowed or lent shares

…

~~18~~17. Changes in the nature of a person's interest

…

~~19~~18. 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

…

~~11~~10. Offer period

…

11.2 WHEN A SECURITIES OFFER IS REQUIRED

…

NOTES ON RULE 11.2

…

6. Acquisitions in exchange for securities to which selling restrictions are attached

Where an offeror and any person acting in concert with it has acquired interests in shares representing 10% or more of any class of shares in issue in the offeree company during the offer period and within 12 months prior to its commencement and the consideration received or receivable by the vendor or other party to the transaction giving rise to the interest includes shares to which selling restrictions of the kind set out in ~~the second sentence of~~ Rule 11.2(b) are attached, the Panel should be consulted.

7. Applicability of the Notes on Rule 11.1 to Rule 11.2

See Notes 2, 5, 6, 7, ~~8, 10~~ 9 and ~~11~~10 on Rule 11.1 which may be relevant.

Rule 20

20.1 EQUALITY OF INFORMATION TO SHAREHOLDERS AND PERSONS WITH INFORMATION RIGHTS

…

(b) Except with the consent of the Panel, and subject to the Notes on Rule 20.1, if any material new information or significant new opinion relating to an offer or a party to an offer is:

…

(ii) provided by or on behalf of an offeror or the offeree company to any shareholder in, or other person interested in any relevant securities of, an offeror or the offeree company, or to any ~~investment manager, investment adviser~~ fund manager or investment analyst; or

…

that material new information or significant new opinion must, at the same time, be published in an announcement in accordance with Rule 30.1.

…

20.2 MEETINGS AND TELEPHONE CALLS WITH SHAREHOLDERS AND OTHERS

(a) This Rule 20.2 applies to meetings (including any telephone call or meeting held by electronic means) attended by:

…

(ii) any shareholder in, or other person interested in any relevant securities of, an offeror or the offeree company, or any ~~investment manager, investment adviser~~ fund manager or investment analyst,

which take place during an offer period or prior to the commencement of an offer period (but, in the case of the latter, only if the meeting relates to a possible offer or would not be taking place but for the possible offer).

Rule 24.3

24.3 FINANCIAL AND OTHER INFORMATION ON THE OFFEROR, THE OFFEREE COMPANY AND THE OFFER

Except with the consent of the Panel:

…

(b) if the offeror is other than a company referred to in (a) above, the offer document must contain:

(i) in respect of the offeror, the information described in (a) above (so far as appropriate) and such further information as the Panel may require ~~in the particular circumstances of the case~~ (see Note 2);

(ii) in respect of any person who has made (or proposes to make or increase) an investment in the offeror for the purposes of the offer such that the person ~~has or~~ will have ~~a potential direct or~~ an indirect interest in any ~~part~~ of the equity share capital of the offeree company ~~which the Panel regards as equity capital~~, details of the person's identity and interest in the offeror and such further information as the Panel may require ~~in the particular circumstances of the case~~ (see Note 2); and

(iii) in respect of any person not included in (ii) above whose pre-existing interest in the offeror is such that the person has a potential direct or indirect interest of 5% or more in ~~any part of~~ the equity share capital of the offeree company ~~which the Panel regards as equity capital~~, details of the person's identity and interest in the offeror and such further information as the Panel may ~~require in the particular circumstances of the case~~ (see Note 2);

…

NOTES ON RULE 24.3

…

2. Further information requirements

(a) ~~For the purposes of paragraphs (ii) and (iii) of Rule 24.3(b), the expression "person" will normally include the ultimate owner(s), and persons having control (as defined), of the offeror if not already included under paragraphs (ii) or (iii).~~ Whilst the ~~precise nature of the further~~ information ~~which may be~~ required to be disclosed under paragraphs (i), (ii) or (iii) of Rule 24.3(b) ~~in any particular case~~ will depend on the circumstances of ~~that~~ the case, ~~the Panel would~~ it should normally ~~expect it to~~ include a general description of the business interests of the offeror and/or other person(s) concerned and details of those assets which ~~the Panel considers~~ may be relevant to the business of the offeree company.

(b) Where a person has a potential indirect interest of 5% or more in the equity share capital of the offeree company solely as a result of being an investor in a limited partnership or other investment fund which is interested in the securities of the offeror, the details specified in paragraph (iii) of Rule 24.3(b) will be required to be disclosed in the offer document only if that person is, or is presumed to be, acting in concert with the offeror.

(~~b~~c) The Panel must be consulted ~~in advance~~ in any case to which Rule 24.3(b) applies~~,~~ or may apply ~~regarding the application of its provisions to that particular case~~.

(d) Where information is incorporated into the offer document by reference to another source, the Panel will normally require that information to be available in the English language.

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<u>3</u> on Rule 4.6), save for any borrowed shares which have been either on-lent or sold.

…

NOTES ON RULE 24.4

…

3. ~~Discretionary~~ <u>Connected</u> fund managers and <u>connected</u> principal traders

Interests in relevant securities and short positions of non-exempt ~~discretionary~~ <u>connected</u> fund managers and <u>connected</u> 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 4<u>3</u> 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

…

NOTE~~S~~ 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 C

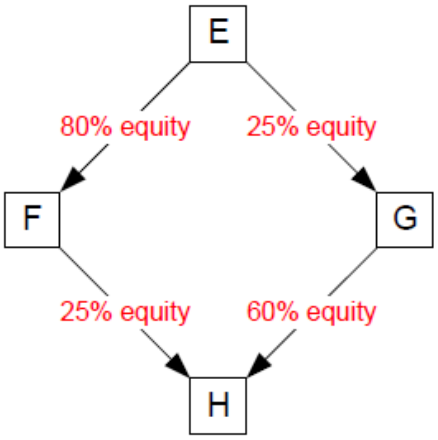
Aggregation of direct and indirect equity interests for the purposes of new presumption (2)

1. Background

1.1 Paragraph 2.58 of the PCP stated that, in establishing whether a person is acting in concert with a company under **new presumption (2)** as a result of the person being interested (directly or indirectly) in 30% or more of the equity share capital in the company, the person should take account of the aggregate percentage of the company's equity share capital in which it is (directly or indirectly) interested.

1.2 Accordingly, it was explained that in Scenario 8 in the PCP, replicated below as ***Scenario C1***, E and H are presumed to be acting in concert with each other because E is indirectly interested in an aggregate of 35% of H's equity share capital: 20% via F and 15% via G.

Scenario C1 *- E and H presumed to be acting in concert with each other under the first limb of new presumption (2):*



1.3 For completeness, the PCP also noted that, in the above scenario:

(a) E and F; and

(b) G and H,

are also presumed to be acting in concert with each other under **new presumption (1)** (in addition to **new presumption (2)**) because:

(i) under the **new Note on Definitions**, E "controls" F (because E is interested in a majority of the equity share capital in F); and

(ii) on the same basis, G controls H.

1.4 However, notwithstanding that:

(a) E's interests in 25% of the equity share capital in G; and

(b) F's interests in 25% of the equity share capital in H,

are relevant to concluding that E and H are acting in concert under **new presumption (2)**, neither:

(i) E and G; nor

(ii) F and H,

are presumed to be acting in concert with each other (under either **new presumption (1)** or **new presumption (2)**).

1.9 As indicated in **Section 3(b)(iii)** of this RS, certain respondents raised questions regarding the aggregation of equity interests for the purposes of determining whether **new presumption (2)** is engaged in relation to a fund investor. These were as follows:

(a) in the case of an **offer by a new vehicle** or company whose equity share capital is provided by two or more investment funds, whether it is necessary, and practicable, for a fund investor to aggregate its interests across the separate funds to establish whether the fund investor is indirectly interested in 30% or more of the equity share capital in the consortium offeror vehicle or company; and

(b) likewise, whether, and if so how, this aggregation principle applies **outside of an offer** for the purpose of determining whether a person is acting in concert with a company or fund as a result of indirect interests in that company or fund's equity share capital or limited partnership interests respectively.

2. Summary

2.1 As indicated in **Section 3(b)(iii)** of this RS, a person ("**A**") may be interested in a company or fund ("**X**") either (a) directly or (b) indirectly (through one or more other companies or funds) and that, in order to determine whether A and X are acting in concert under **new presumption (2)**, all of these interests could potentially be required to be aggregated with each other, including indirect interests held via companies or funds in which A has less than 30% of the equity share capital or limited partnership interests.

2.2 The Code Committee recognises the practical difficulties that are likely to arise from such a requirement and its conclusions on the circumstances in which A should be required

to aggregate its direct and indirect interests in X for the purposes of determining whether **new presumption (2)** is engaged are set out in this **Appendix C**. In summary, and as explained further below:

(a) in the case of an **offer by a new vehicle** or company, **new presumption (2)** should be applied as written. This is on the basis that, in practice, only a limited number of funds will participate in a consortium offer. Accordingly, in this scenario, the indirect interests of a fund investor in the equity share capital in the consortium offeror should be required to be aggregated with each other in order to determine whether, under **new presumption (2)**, a fund investor is acting in concert with the consortium offeror.[3] (It is noted that, in a consortium offer, a fund investor can only have an indirect interest in 30% or more of the equity share capital in the consortium offeror if it has 30% or more of the limited partnership interests in at least one of the funds which is providing equity financing for the offer); however

(b) **outside of an offer scenario** as described in paragraph (a), the position is more complicated, given that a person may have investments in a significant number of companies or funds, which may themselves invest in a number of other companies or funds. In this scenario, the Code Committee has concluded that (in addition to any direct interests) an investor's indirect interests in a company or fund should be taken into account in determining whether **new presumption (2)** is engaged only where each link in the chain of interests is in respect of 30% or more of:

(i) the relevant company's equity share capital; or

(ii) the relevant fund's limited partnership interests,

as set out in the **new paragraph (e)** at the end of the definition of "**acting in concert**".

2.3 In view of the above, if there are no funds in respect of which a fund investor holds 30% or more of the limited partnership interests (or companies in respect of which it holds 30% or more of the equity share capital), it will not have to consider whether it is acting in concert with another person under **new presumption (2)** on account of its indirect interests.

[3] If the fund investor has any direct interests in the equity share capital in the consortium offeror, it will be presumed to be acting in concert with the consortium offeror under the **new Note 6(a)** on the definition of "**acting in concert**" – see **Section 3(d)** of this RS.

3. Application of new presumption (2) in a newco offer

(a) Introduction

3.1 One respondent was concerned that, where a new vehicle or company formed for the purpose of making an offer was backed by more than one investment fund, the aggregation principle referred to above would mean that the investment managers to each of the funds investing in the new company would need to disclose the identity of the limited partners in their funds to a third party (for example, the advisers to the consortium offeror) to establish whether any of the limited partners would indirectly be interested in 30% or more of the equity share capital in the consortium offeror (and, as such, would be presumed to be acting in concert with the consortium offeror under **new presumption (2)**). Given that an investment manager considers the identity of its limited partners to be highly confidential, the respondent questioned whether the application of the aggregation principle in these circumstances was workable.

3.2 The respondent also considered that the same issue would arise if a consortium offeror sought to introduce an additional fund after the offer was announced or to syndicate its equity share capital during the offer period.

(b) The Code Committee's conclusion

(i) Application of new presumption (2)

3.3 The Code Committee considers that the aggregation principle can be applied in the case of an offer made by a new vehicle or company without details of a limited partner's interests in individual investment funds having to be disclosed to a third party. This is on the basis that, in practice, only a limited number of investors will participate in a consortium offer.

3.4 Assuming that a fund investor does not have a direct interest in the consortium offeror,[4] the following steps can be followed to determine whether a fund investor is presumed to be acting in concert with the consortium offeror under **new presumption (2)**:

(a) **step 1**: the investment manager to each fund investing in the consortium offeror should consider whether any fund investor holds 30% or more of the limited partnership interests in the fund:

(i) if there are no ≥30% fund investors, the investment manager does not need to take any further action;

---

[4] See previous footnote

(ii) if there are any ≥30% fund investors, the investment manager should, at the **Rule 7.2 moment**, notify the relevant fund investor(s) of this fact and of the percentage of the equity share capital in the consortium offeror that will be held by the fund, together with:

(1) the identity of any other funds investing in the consortium offeror; and

(2) the percentage of the consortium offeror's equity share capital that will be held by those other funds; and

(b) **step 2**: if a fund investor is notified under (a)(ii), it can then investigate whether it holds limited partnership interests in any of the other funds investing in the equity share capital in the consortium offeror and, if so, calculate its aggregate indirect interest.

3.5 The same approach can be followed if a new fund is introduced after the announcement of the offer. If this causes the relevant person's indirect interest in the equity share capital in the consortium offeror to increase to 30% or more, it will be treated as then having come into concert with the consortium offeror. Alternatively, if this causes the relevant person's indirect interest to decrease to less than 30%, it will then cease to be acting in concert with the consortium offeror.

(ii) Disclosure obligations

3.6 If a person is:

(a) presumed to be acting in concert with a consortium offeror under **new presumption (2)** (or otherwise); and

(b) interested in the shares of the offeree company,

those interests, and the person's identity as a person acting in concert with the offeror, will be required to be disclosed:

(i) under **Rule 8.1(a)**, in the offeror's **Opening Position Disclosure**; and

(ii) under **Rule 24.3(d)(iii)** and **Note 3 on Rule 24.3**, in the **offer document**.

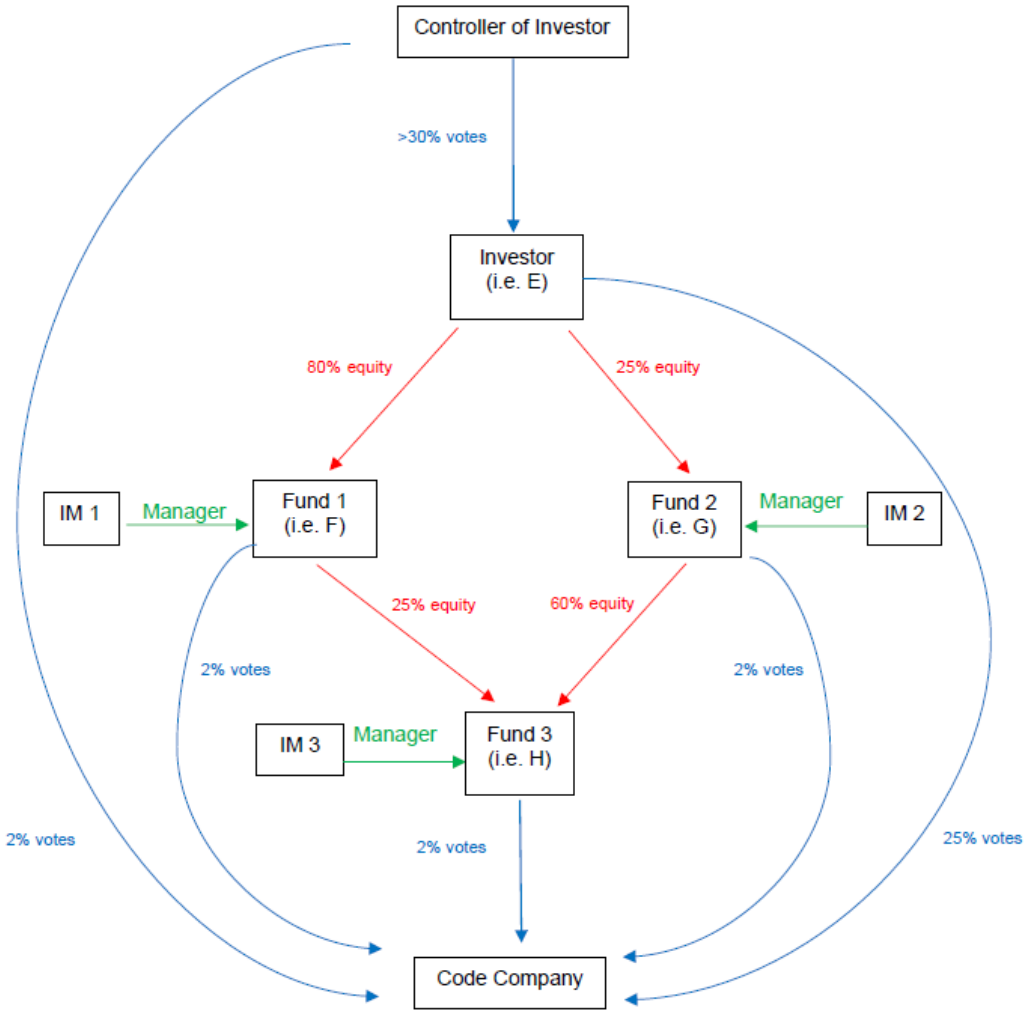
3.7 See also paragraphs 3.19 to 3.22 of this RS, in relation to the separate disclosure requirement under **Rule 24.3(b)(iii)**.

4. Application of new presumption (2) outside a newco offer

(a) Introduction

4.1 The aggregation of equity interests to establish whether the **first limb** of **new presumption (2)** is engaged is more complicated outside of an offer scenario as described in Section 3 above (i.e. for the purpose of determining whether an obligation to make a mandatory offer under **Rule 9** has been triggered). A diagram showing how this issue might arise is shown in ***Scenario C2***, which uses the same percentage figures as in ***Scenario C1***.

Scenario C2 *- application of new presumption (2) in determining whether an obligation to make a mandatory offer under Rule 9 has been triggered: Fund 1, but not also Fund 3, treated as acting in concert with the Investor:*



4.2 On the wording of the relevant provisions, the Investor and Fund 3 are presumed to be acting in concert under:

(a) the **first limb** of **new presumption (2)** (because of the Investor's indirect interest in an aggregate of 35% of the limited partnership interests in Fund 3); and

(b) **Note 7** on the definition of "**acting in concert**",

and, accordingly, the Investor and Fund 3 should, prima facie, be required to aggregate their respective interests (and those of persons acting in concert with them) in the shares in any Code company in order to determine whether an obligation to make a mandatory offer under **Rule 9** has been triggered.

4.3 However, given that, in practice, a person may have investments in a significant number of companies or funds, and that those companies or funds may themselves invest in a number of other companies or funds, it is not likely to be practicable for a person to ascertain the aggregate percentage of:

(a) the equity share capital; and/or

(b) the limited partnership interests,

of all the companies or funds respectively in which the person is indirectly interested (and vice versa).

4.4 This aggregation exercise will be particularly difficult given that, in many cases, the person's interests in the companies and funds in which it is directly invested may be relatively small (in percentage terms), such that there would not otherwise be any reason for the person to monitor the investments made by those companies and funds for the purposes of the Code.

4.5 So, for example, in ***Scenario C2***, given that the Investor and Fund 2 are not presumed to be acting in concert, the Investor would have no reason to monitor, for the purposes of the Code, the companies or funds in which Fund 2 is invested and, as a result, the Investor would not be aware of the companies or funds in which it is indirectly interested as a result of its investment in Fund 2 (and similarly with regard to Fund 1 with respect to Fund 3).

(b) The Code Committee's conclusion

4.6 In the above scenario, the Code Committee has concluded that (in addition to any direct interests) an investor's indirect interests in a company or fund should be taken into account in determining whether **new presumption (2)** is engaged only where each link in the chain of interests is in respect of 30% or more of:

(a) the relevant company's equity share capital; or

(b) the relevant fund's limited partnership interests.

This is set out in the **new paragraph (e)** at the end of the definition of "**acting in concert**".

4.7 Therefore, in ***Scenario C2***, the indirect interests of the Investor in Fund 3 do not need to be taken into account. This is because, working through the chain through which the Investor has indirect interests in Fund 3:

(a) Fund 1 has an interest of less than 30% in Fund 3; and

(b) the Investor has an interest of less than 30% in Fund 2,

such that the Investor and Fund 3 would not be treated as acting in concert under **new presumption (2)**. As a result, the Investor and Fund 3 would not be expected to monitor each other's interests and dealings in the shares of Code companies for the purpose of determining whether they (and persons acting in concert with them) were, in aggregate, interested in 30% or more of the shares carrying voting rights in any particular Code company.

4.8 Consequently, in ***Scenario C2***, the Investor and persons presumed to be acting in concert with it would be interested in an aggregate of 29% of the shares carrying voting rights in the Code company comprising:

(a) the 25% stake held by the Investor;

(b) the 2% stake held by the Controller of the Investor (which is acting in concert with the Investor under **new presumption (1)**); and

(c) the 2% stake held by Fund 1 (which is acting in concert with the Investor under both **new presumption (1)** and **new presumption (2)**).

4.9 However, if:

(a) the Investor held 30%, as opposed to 25%, of the limited partnership interests in Fund 2; and

(b) Fund 1 held 30%, as opposed to 25%, of the limited partnership interests in Fund 3,

all the links in the chain between the Investor and Fund 3 via both Fund 1 and Fund 2 would be in respect of 30% or more of the relevant fund's limited partnership interests. As a result, the Investor would be required to aggregate these indirect interests in Fund 3 in order to determine whether they amounted to 30% or more (which they would, i.e. 24% via Fund 1 and 18% via Fund 2, amounting to 42% in aggregate). Therefore, in this

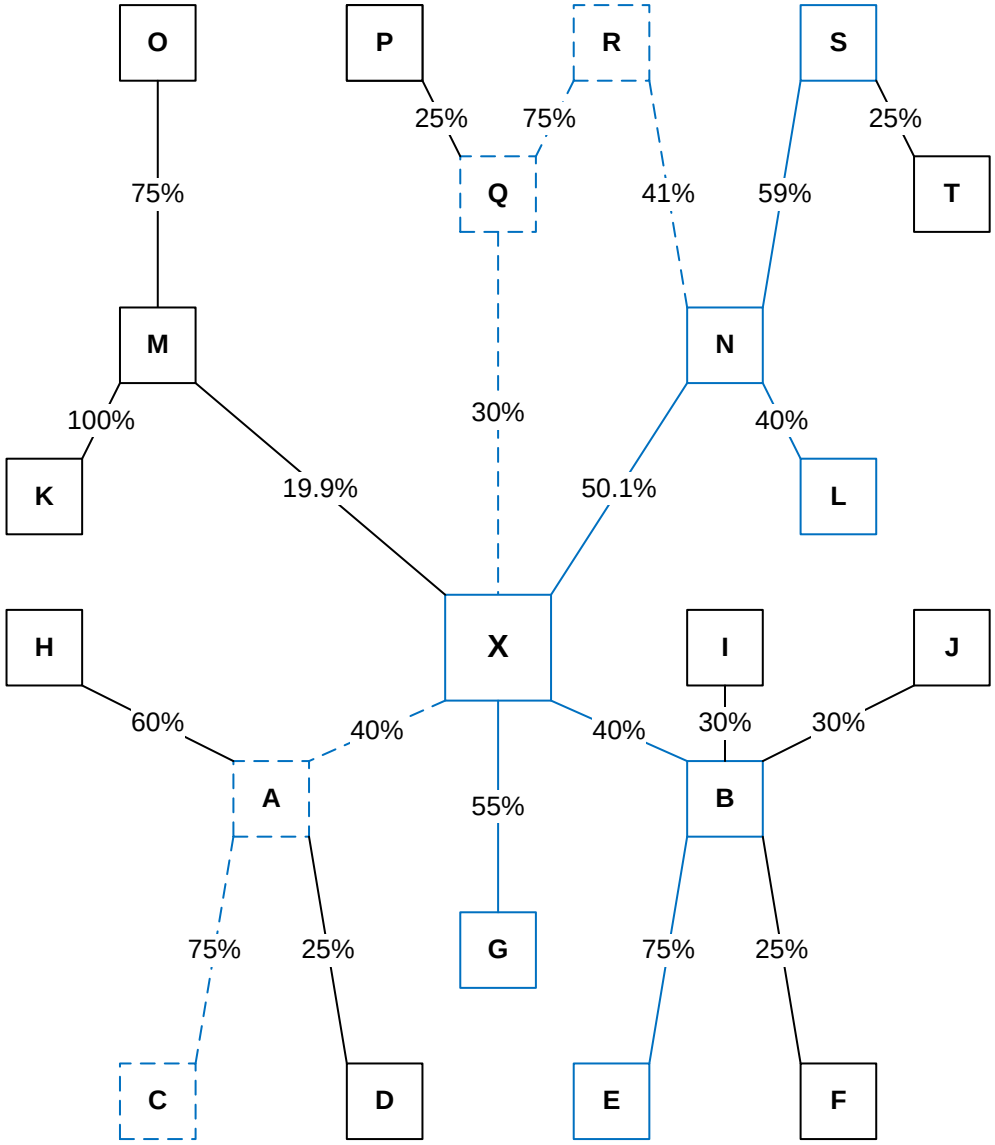
scenario, under the **first limb** of **new presumption (2)**, not only would the Investor and Fund 2 be presumed to be acting in concert, but also the Investor and Fund 3 would be presumed to be acting in concert, with the result that Fund 2 and Fund 3's respective 2% stakes in the Code company would also need to be taken into account (such that the concert party centred on the Investor would have triggered an obligation to make an offer for the Code company under **Rule 9**).

4.10 In the light of the above, and as previously indicated, if there are no funds in respect of which a fund investor holds 30% or more of the limited partnership interests (or companies in respect of which it holds 30% or more of the equity share capital), it will not have to consider whether it is acting in concert with another person under **new presumption (2)** on account of its indirect interests.

APPENDIX D

Companies presumed to be acting in concert with X under new presumption (1) where shareholdings represent <u>shares carrying voting rights only</u>

(see paragraph 2.7(a) of this RS)



Key

___ : 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 new presumption (1)</u>

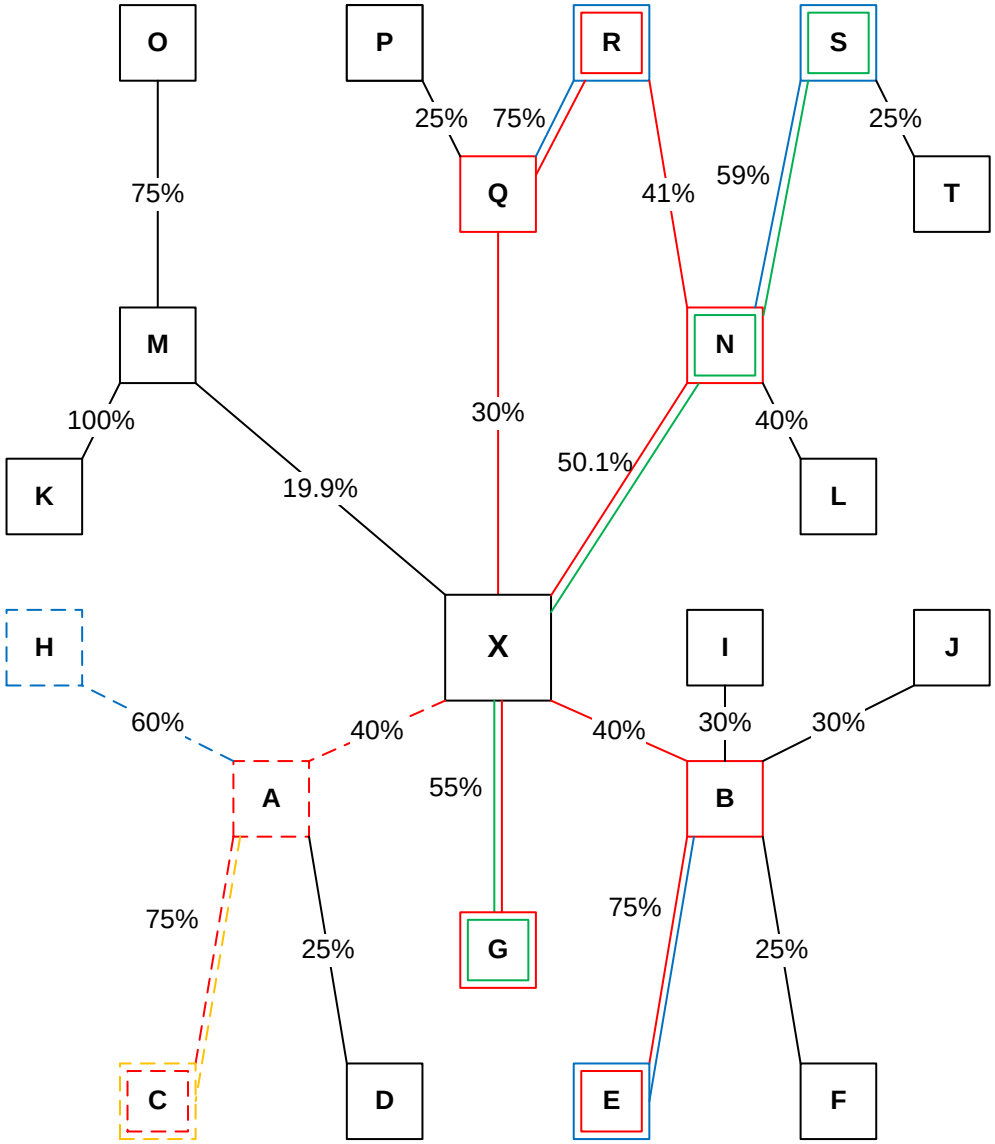
_ _ : as immediately above, but presumption likely to be rebutted

___ : not presumed to be acting in concert with X

APPENDIX E

Companies presumed to be acting in concert with X under new presumptions (1) and/or (2) where shareholdings represent <u>equity share capital only</u>

(see paragraph 2.7(b) of this RS)



Key

___ : 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 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 first limb of new presumption (2)</u>

_ _ : as immediately above, but presumption may be rebutted (see paragraph 2.52 of this RS)

___ : 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 second limb of new presumption (2)</u>

_ _ : as immediately above, but presumption likely to be rebutted

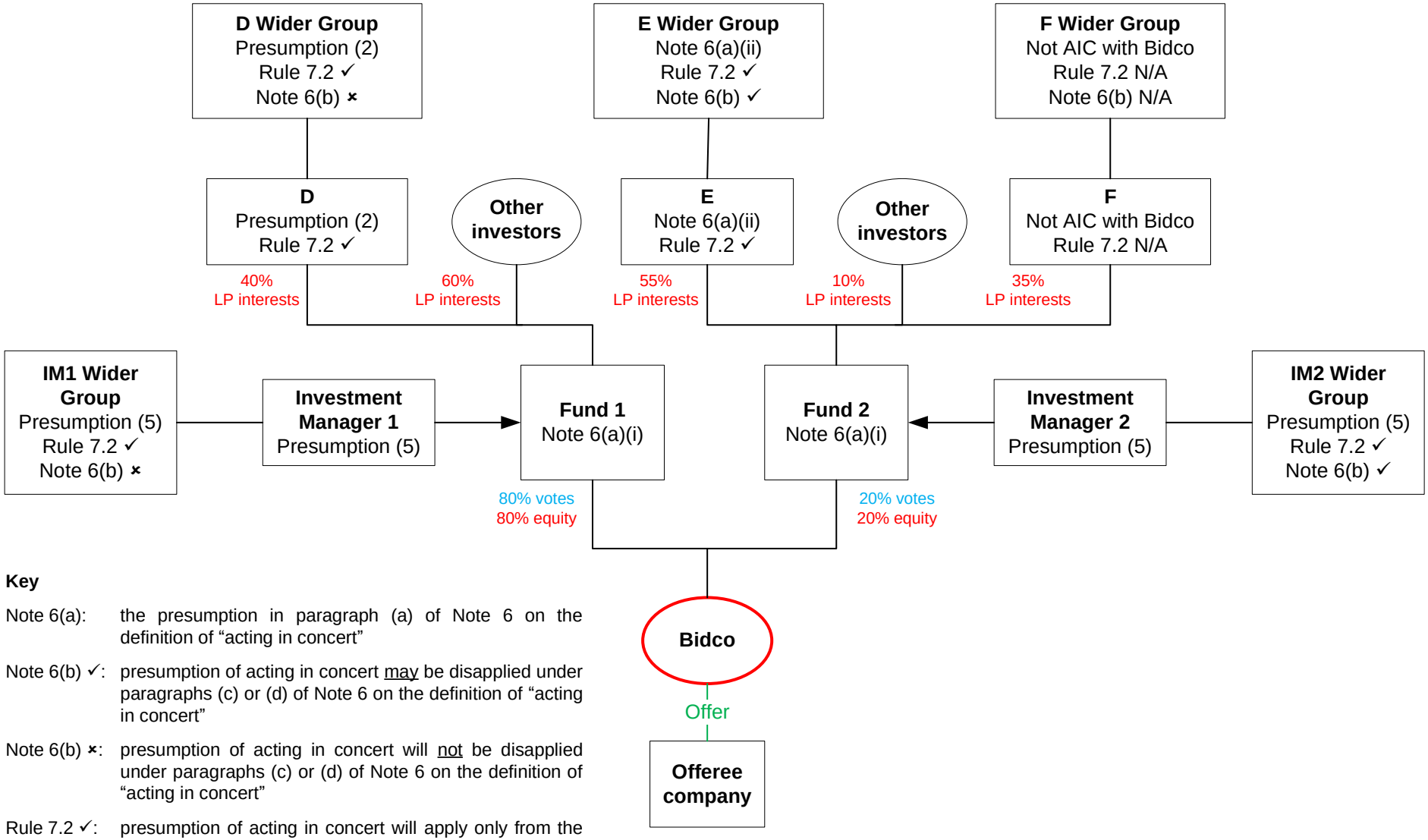
_ _ : presumed to be acting in concert with X in relation to a Code company (including an offeree company for which X is making an offer) <u>under the second limb of new presumption (2)</u>, but presumption rebutted if the presumption that A and X are acting in concert is rebutted

___ : not presumed to be acting in concert with X

APPENDIX F

Scenario F: consortium offer scenario

(see paragraph 3.39 of this RS)



Key

Note 6(a): the presumption in paragraph (a) of Note 6 on the definition of "acting in concert"

Note 6(b) ✓: presumption of acting in concert <u>may</u> be disapplied under paragraphs (c) or (d) of Note 6 on the definition of "acting in concert"

Note 6(b) ×: presumption of acting in concert will <u>not</u> be disapplied under paragraphs (c) or (d) of Note 6 on the definition of "acting in concert"

Rule 7.2 ✓: presumption of acting in concert will apply only from the "Rule 7.2 moment" (see Rule 7.2 itself and Note 7 on Rule 7.2)