

**PCP 2015/3 14 July 2015**

**THE TAKEOVER PANEL**

**CONSULTATION PAPER ISSUED BY  
THE CODE COMMITTEE OF THE PANEL**

**ADDITIONAL PRESUMPTIONS TO THE DEFINITION  
OF ACTING IN CONCERT**

The Code Committee of the Takeover Panel (the “**Panel**”) invites comments on this Public Consultation Paper. Comments should reach the Code Committee by Friday, 11 September 2015.

Comments may be sent by e-mail to:

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Alternatively, please send comments in writing to:

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All responses to formal consultation will be made available for public inspection and published on the Panel’s website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk), unless the respondent explicitly requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure. Personal information, such as telephone numbers or e-mail addresses, will not be edited from responses.

Unless the context otherwise requires, words and expressions defined in the Takeover Code have the same meanings when used in this Public Consultation Paper.

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## **1. Introduction and summary of proposals**

### **(a) Introduction**

- 1.1 In this Public Consultation Paper (“**PCP**”), the Code Committee of the Panel (the “**Code Committee**”) is proposing to introduce three new presumptions to the definition of “acting in concert” in the Takeover Code (the “**Code**”) which are intended to codify existing practices of the Panel Executive (the “**Executive**”).

### **(b) Summary of proposals**

- 1.2 The term “acting in concert” is fundamental to the application of the Code. In effect, persons who are acting in concert are treated under the Code as a single person such that, for example, their interests in shares must be aggregated when considering the application of the mandatory offer requirement in Rule 9.1. Similarly, dealings by persons who are acting in concert with an offeror or the offeree company are treated under the Code as equivalent to dealings by the offeror or the offeree company (or its directors) and as such are relevant when considering the application of rules of the Code which relate to dealings by an offeror or the offeree company in securities of the offeree company, including, for example, Rules 4.2, 4.4, 4.6, 5, 6, 8, 9 and 11.

- 1.3 The general definition of “acting in concert” provides as follows:

“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).”.

- 1.4 Under Note 2 on the definition, an “affiliated person” means, broadly, any undertaking in respect of which any person:

- (a) has or controls a majority of the voting rights;

- (b) has the right to appoint or remove a majority of the directors; or
- (c) has the power to exercise, or actually exercises, dominant influence or control.

1.5 The definition also contains six categories of person who, without prejudice to the general application of the definition, will be presumed to be acting in concert with other persons in the same category. These persons are presumed to have such a degree of common interest with one another that they should, in effect, be regarded as a single person in relation to the offeree company. However, it is possible for any of the presumptions to be rebutted by the persons concerned in consultation with the Panel.

1.6 The Code Committee has been considering the list of persons who are presumed to be acting in concert with each other in the light of the experience and practice of the Executive. The Code Committee is aware that it has been the Executive's practice for a number of years normally to presume certain persons to be acting in concert with each other even though they are not covered by the existing presumptions in the definition. These persons are:

- (a) a person, the person's close relatives, and the related trusts of any of them, all with each other;
- (b) 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
- (c) shareholders in a private company who sell their shares in that company 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.

- 1.7 The Code Committee considers that, whilst practitioners are generally aware of the Executive's practices in respect of these groups of persons, these practices should nonetheless be codified so as to ensure that the position is clear. The Code Committee is therefore proposing to introduce new presumptions into the definition of "acting in concert" in relation to each of these categories of persons.
- 1.8 The Code Committee considers that it is important to note that, if persons are presumed to be acting in concert, there are no immediate consequences for them. However, if one of the persons acquires an interest in shares, that acquisition could have consequences under the Code for that person and the other persons regarded as acting in concert with that person.

**(c) *Invitation to comment***

- 1.9 The Code Committee invites comments on the amendments to the Code proposed in this PCP. Comments should reach the Code Committee by Friday, 11 September 2015 and should be sent in the manner set out at the beginning of this PCP.
- 1.10 The full text of the proposed amendments is set out in Appendix A. Where amendments are proposed, underlining indicates proposed new text and striking-through indicates text that is proposed to be deleted. For ease of reference, a list of the questions that are put for consultation is set out in Appendix B.

## 2. Close relatives

2.1 Presumption (2) of the definition of “acting in concert” makes clear that a company will be presumed to be acting in concert with any of its directors “together with their close relatives and related trusts”. However, there is no specific presumption that persons (other than directors) are otherwise acting in concert with their close relatives.

2.2 Notwithstanding this, the Code Committee understands that it has been the Executive’s practice for many years normally to presume persons to be acting in concert with their close relatives. Although the determination as to precisely which relatives should be considered to be “close relatives” for this purpose has depended on the facts of the particular case and the nature of the family relationship, the Executive’s practice has normally been to start from the presumption that a person is acting in concert with:

- (a) the person’s spouse, civil partner or cohabitant. The Code Committee considers that cohabitants include persons who are not spouses or civil partners but who are living together as if they were;
- (b) the person’s children, parents, brothers, sisters, grandchildren and grandparents, and those of the person’s spouse or partner; and
- (c) the spouse, civil partner or cohabitant of any person referred to in paragraph (b).

However, this list is not definitive such that, in appropriate cases, the Executive may consider other members of a person’s family to be acting in concert with the person. In any cases of doubt, the Executive should be consulted.

2.3 The Executive’s practice has been that this presumption may be rebutted in any particular case if, for example, there has been a breakdown in the

relationship between certain family members or if particular family members have become estranged for some other reason.

- 2.4 The Code Committee agrees with the Executive's practice as set out above and believes that it would be helpful if this were codified in a new presumption (5) of the definition of "acting in concert".
- 2.5 The term "close relatives" is also used in two other provisions of the Code, as follows:
  - (a) Rule 9.6, which requires that when directors and their close relatives and related trusts sell shares to a person as a result of which that person is required to make a mandatory offer under Rule 9, the directors must ensure that as a condition of sale the person undertakes to fulfil the obligation under Rule 9.1 to make a mandatory offer; and
  - (b) Note 1 on Rule 19.2, which, in view of the requirement in Rule 19.2 for a responsibility statement to be made by the directors of an offeror or the offeree company in relation to any document published in connection with an offer, provides that, if detailed supervision of any document has been delegated to a committee of the board, each of the remaining directors must, among other matters, have disclosed to the committee all relevant facts directly relating to himself (including his close relatives and related trusts).
- 2.6 The Code Committee considers that the approach outlined above for determining which family members are a person's close relatives for the purpose of the definition of "acting in concert" should also apply in relation to the application of these provisions and in relation to presumption (2) of the definition of "acting in concert".
- 2.7 As mentioned in paragraph 2.1 above, presumption (2) of the definition of "acting in concert" applies to a company and any of its directors, together with their close relatives and related trusts. The Code Committee considers that, in

order to be consistent, the proposed new presumption (5) of the definition of “acting in concert” in relation to a person and the person’s close relatives should also include the person’s related trusts (and the related trusts of the person’s close relatives). The Code Committee understands that it is the Executive’s practice in applying presumption (2) to include trusts in respect of which a director or a close relative of a director is a settlor, trustee or beneficiary and the Code Committee believes that the same approach should apply in respect of the proposed new presumption (5).

2.8 In the light of the above, the Code Committee proposes:

- (a) to introduce a new definition of “close relatives” into the Definitions Section of the Code, as follows:

**“Close relatives**

A person’s close relatives will normally include:

- (1) the person’s spouse, civil partner or cohabitant;
- (2) the person’s children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (1); and
- (3) the spouse, civil partner or cohabitant of any person described in (2).”;

- (b) to introduce a new presumption (5) into the definition of “acting in concert” as follows:

“(5) a person, the person’s close relatives, and the related trusts of any of them, all with each other;”;

- (c) to make minor amendments to presumptions (2) and (3) of the definition of “acting in concert” and to Rule 9.6 and Note 1 on Rule 19.2, in each case as set out in Appendix A; and

- (d) to make a consequential amendment to Note 3 on the definitions of “Exempt fund manager” and “Exempt principal trader”, as set out in Appendix A.

- Q1. Should the proposed new definition of “close relatives” be introduced?**
- Q2. Should the proposed new presumption (5) of the definition of “acting in concert” in relation to close relatives be introduced?**
- Q3. Should presumptions (2) and (3) of the definition of “acting in concert”, the Note on “Exempt fund manager” and “Exempt principal trader”, Rule 9.6 and Note 1 on Rule 19.2 be amended as proposed?**

### **3. Companies founded by a member of a person's family**

- 3.1 The Code Committee understands that, in relation to a person who founded a company and the descendants of the founder and the members of the descendants' families, it has been the Executive's practice to apply a wider presumption of acting in concert in relation to the members of the family than that which would apply under the proposed new presumption (5). This is on the basis that the Executive's experience suggests that such family members are likely to share a common loyalty to the company and each other and to seek to act in unison. However, particularly in cases where the founder has died, the proposed new presumption (5) would not apply in relation to all such persons – it would not, for example, cause the descendants of the founder's children to be presumed to be acting in concert with each other. In such cases, the Executive's practice has been to start from the presumption that all members of the founder's family are acting in concert with each other.
- 3.2 As with the proposed new presumption (5) in relation to a person and the person's close relatives, it has been the Executive's practice that this presumption may be rebutted in any particular case. This may be because there has been a breakdown in the relationship between certain family members or if particular family members have become estranged for some other reason. Also, the longer ago that the business was founded, the more likely it has been that the Executive has been prepared to treat the presumption as rebutted in relation to particular family members.
- 3.3 The Code Committee agrees with the Executive's practice as described above in relation to companies which were founded by a member of a person's family and believes that it would be helpful if this were codified in a new presumption to the definition of "acting in concert".
- 3.4 In the light of the above, the Code Committee is proposing to introduce a new presumption (6) into the definition of "acting in concert", as follows:

“(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;”.

- Q4. Should the proposed new presumption (6) of the definition of “acting in concert” in relation to companies founded by a member of a person’s family be introduced?**

#### **4. Shareholders in a private company**

- 4.1 Panel Statement 2007/18 of the Hearings Committee relating to its decision in the case of World Television Group plc referred to another presumption of concertedness that has been applied in practice by the Executive for a number of years. This is that the vendors of a private company are presumed to be acting in concert with each other when that company is sold to a company to which the Code applies and they receive, as consideration, new shares in the “Code company”. This is because such persons are likely to have co-operated together, first, in becoming shareholders in the private company and, secondly, in agreeing the sale of the private company to the Code company. Furthermore, it has to date been considered likely that those persons will continue to co-operate together once they become shareholders in the Code company.
- 4.2 The Executive has applied the same practice in relation to the shareholders in a private company 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.
- 4.3 Like the other presumptions in the definition of “acting in concert”, this presumption is capable of being rebutted. The Code Committee understands 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. The presumption may be rebutted at the time of the sale or re-registration of the private company or, if circumstances change thereafter, at any time subsequently.
- 4.4 Where, in the circumstances described in paragraph 4.1 above, the former shareholders in the private company will come to hold 30% or more of the shares carrying voting rights in the company to which the Code applies following completion of the sale, and where the presumption has not been

rebutted, the company subject to the Code can seek a waiver from the Panel of the obligation that would otherwise arise for the vendors of the private company to make a mandatory offer under Rule 9.1 under the “whitewash” procedure set out in Note 1 of the Notes on Dispensations from Rule 9.

- 4.5 The Code Committee agrees with the Executive’s practice in relation to shareholders in a private company as described above.
- 4.6 In the light of the above, the Code Committee proposes to introduce a new presumption (9) into the definition of “acting in concert”, as follows:

“(9) shareholders in a private company who sell their shares in that company 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.”.

- Q5. Should the proposed new presumption (9) of the definition of “acting in concert” in relation to shareholders in a private company be introduced?**

## **5. Assessment of the impact of the proposals**

- 5.1 The amendments proposed in this PCP relate principally to the definition of “acting in concert” and contemplate the introduction of three new categories of persons who will be presumed to be acting in concert with each other. As explained in the relevant Sections of this PCP, the introduction of a presumption of concertedness in relation to each of these categories of persons codifies existing practice and the amendments are being proposed in order to make sure that these practices are widely understood. This is important given that the acquisition of interests in shares by a person acting in concert with another person, or by a person acting in concert with an offeror or the offeree company, can have significant consequences under the Code.
- 5.2 On the basis that the proposed amendments codify existing practice, the Code Committee does not believe that they will place any new burden on parties to an offer, market participants or practitioners.

## APPENDIX A

### Proposed amendments to the Code

#### DEFINITIONS

##### **Acting in concert**

...

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:

...

(2) a company with ~~any of its~~ directors (together with their close relatives and the related trusts of any of them);

(3) a company with any of its pension schemes and the pension schemes of any company ~~covered~~ described in (1);

...

(5) a person, the person's close relatives, and the related trusts of any of them, all with each other;

(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;

(57) a connected adviser with its client and, if its client is acting in concert with an offeror or ~~with the~~ offeree company, with that offeror or ~~with that~~ offeree company respectively, in each case in respect of the interests in shares of that adviser and persons controlling<sup>#</sup>, controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader); ~~and~~

(68) 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 on this definition); and

(9) shareholders in a private company who sell their shares in that company 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.

...

**Close relatives**

A person's close relatives will normally include:

- (1) the person's spouse, civil partner or cohabitant;
- (2) the person's children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (1); and
- (3) the spouse, civil partner or cohabitant of any person described in (2).

...

**Exempt fund manager/Exempt principal trader**

...

***NOTES ON EXEMPT FUND MANAGER AND EXEMPT PRINCIPAL TRADER***

...

3. *The effect of a principal trader or fund manager having exempt status is that presumption (57) 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.*

**Rule 9****9.6 OBLIGATIONS OF DIRECTORS**

**When directors (~~and or~~ their close relatives and or the related trusts of any of them) sell shares to a person (or enter into options, derivatives or other transactions) as a result of which that person is required to make an offer under this Rule, the directors must ensure that as a condition of the sale (or other relevant transaction) the person undertakes to fulfil his obligations under the Rule. In addition, except with the consent of the Panel, such directors should not resign from the board until the first closing date of the offer or the date when the offer becomes wholly unconditional, whichever is the later.**

**Rule 19.2****19.2 RESPONSIBILITY**

...

## **NOTES ON RULE 19.2**

### **1. Delegation of responsibility**

...

*If detailed supervision of any document or advertisement has been delegated to a committee of the board, each of the remaining directors of the company must reasonably believe that the persons to whom supervision has been delegated are competent to carry it out and must have disclosed to the committee all relevant facts directly relating to himself (including his close relatives and his and their related trusts) and all other relevant facts known to him and relevant opinions held by him which, to the best of his knowledge and belief, either are not known to any member of the committee or, in the absence of his specifically drawing attention thereto, are unlikely to be considered by the committee during the preparation of the document or advertisement. This does not, however, override the requirements of the UKLA Rules relating to the acceptance of responsibility for a prospectus or equivalent document where applicable.*

## **APPENDIX B**

### **List of questions**

- Q1. Should the proposed new definition of “close relatives” be introduced?**
- Q2. Should the proposed new presumption (5) of the definition of “acting in concert” in relation to close relatives be introduced?**
- Q3. Should presumptions (2) and (3) of the definition of “acting in concert”, Rule 9.6, the Note on “Exempt fund manager” and “Exempt principal trader” and Note 1 on Rule 19.2 be amended as proposed?**
- Q4. Should the proposed new presumption (6) of the definition of “acting in concert” in relation to companies founded by a member of a person’s family be introduced?**
- Q5. Should the proposed new presumption (9) of the definition of “acting in concert” in relation to shareholders in a private company be introduced?**