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UK Takeovers: Changes to concert party presumptions and recap of recent Code developments

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This update outlines important changes that take effect today to the scope of those parties who are presumed to be acting in concert with an offeror or offeree. It also recaps certain changes to the UK Takeover Code and guidance issued by the Takeover Panel over the last 18 months.

Amendments to the concert party presumptions

Background

On 14 December 2022, the Takeover Panel (the "Panel") published RS 2022/2 setting out changes to the scope of those persons who are presumed to be acting in concert with an offeror or offeree. These changes take effect today.

It is particularly important for an offeror (and its advisers) to identify its concert parties at an early stage as, among other things, an offeror's concert party's actions can impact the minimum level and form of consideration that must be offered and may in some cases trigger a mandatory Rule 9 offer for the offeree. This can be a complicated matter, particularly where the offeror is a financial sponsor or a consortium comprised of multiple interested parties.

Given the technical nature of these important changes, the Panel has recorded a webinar explaining them which, along with related slides, can be found here.

Deletion of old presumption (1); replacement with new presumptions (1) and (2)

The UK Takeover Code (the "Code") presumption pursuant to which an offeror's or offeree's "group" companies are presumed to be acting in concert all with each other (which focused on ownership or control of 20% or more of equity share capital) has been deleted, and two new concert party presumptions introduced as follows:

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

In applying these new presumptions, the following should be noted:

– each of new presumptions (1) and (2) needs to be considered and applied separately;

- each of new presumptions (1) and (2) applies to individuals, limited partnerships, trusts and other persons, as well as to companies;
- in respect of new presumption (1), a company 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) a majority of the equity share capital in that other company;
- the threshold at which a concert party relationship is presumed between entities in a structure has been raised from 20% or more to 30% or more;
- unlike old presumption (1) (which applied to equity share capital but not shares carrying voting rights), new presumption (1) applies to shares carrying voting rights (whether or not the shares are also equity share capital) and equity share capital (whether voting or non-voting);
- when identifying concert parties within structures, the "control" (votes or equity) test of new presumption (1) does not dilute up/down the chain, whereas the first limb of new presumption (2) regarding an interest in 30% or more of equity share capital does dilute up/down the chain; and
- in establishing whether new presumptions (1) and/or (2) have been satisfied, interests in the form of long derivative or option positions are counted towards the 30% threshold.

Rebutting the new presumptions

In RS 2022/2, the Panel noted a number of situations where it may be open to considering new concert party presumptions (1) and (2) being rebutted, including with respect to joint venture companies, joint venture partners and government-owned entities. It also commented that the absence of a relationship (beyond being a passive shareholder) or a lack of knowledge of another's positions or intentions is, absent compelling evidence to the contrary, unlikely to lead to an upfront rebuttal of the new presumptions. Not least because the argument that the presumption should be rebutted is likely to be based simply on an assertion as to the absence of a relationship or knowledge.

Investment funds

Old presumption (4) (which provided that a fund manager is presumed to be acting in concert with any person whose investment it manages on a discretionary basis) has been deleted. The Code now provides that: (i) a fund manager is treated as interested in the securities it manages for a client on a discretionary basis, and (ii) a client is not treated as interested in securities it has given an independent fund manager absolute discretion over (or, if the discretion given is not absolute, the client does not exercise any of its retained powers) with respect to dealing, voting and offer acceptance decisions (see new Note 11 on the definition of "interests in securities").

Investors in funds

The Panel's practice of treating funds consistently with companies has been confirmed, with new presumptions (1) and (2) applying to a limited partnership interest in a fund in the same way as non-voting equity share capital in a company. Accordingly, where a fund invests in a new company formed for the purpose of making an offer or acquires an interest in a Code company's shares, new presumptions (1) and (2) apply so as to presume (if the tests are met) an investor in that fund to be acting in concert with that newly formed offeror or the fund itself, respectively (new Note 7 on the definition of "acting in concert").

Note, however, that outside of the scenario involving an investment in a newly formed offeror, the requirement to aggregate multiple indirect interests (together with direct interests) is, for practical reasons, simplified. Here, a fund investor does not have to consider its concert parties under new presumption (2) as a result of its indirect interests if each link in the chain is below 30% (new paragraph (e) to the definition of "acting in concert").

Investment managers and advisers

A new presumption (5) has been included pursuant to which an investment manager or investment adviser to an offeror, an investor in a new vehicle formed for the purpose of making an offer, or an offeree, is presumed to be acting in concert with the offeror or offeree (as appropriate), together with any person controlling or controlled by or under the same control as that investor manager or investment adviser.

Consortium offers

A new Note 6 on the definition of “acting in concert” has replaced the old Note 6. It provides that where the offeror is a new vehicle formed to make the offer (the “consortium offeror”), the consortium offeror is presumed to be acting in concert with each investor in it (regardless of the size of the investor’s interest) and, save in certain circumstances, any person which controls, is controlled by or is under the same control as that investor.

Where the person presumed to be acting in concert with the consortium offeror is part of a larger organization, the Panel may, depending on the size of the investor’s investment in the consortium offeror (the relevant thresholds for which are interests of 10% and 30% (which has been reduced from 50%)) and evidence of independence, agree to disapply the presumption in respect of such persons.

Other recent Code changes

Anonymous order book dealings (June 2022)

On 13 June 2022, the Code was amended to reflect the changes set out in RS 2022/1 relating to purchasing offeree shares through an anonymous order book (published 5 May 2022). Accordingly, the prior restriction in Rule 4.2(b) prohibiting an offeror from purchasing shares in an offeree company through an anonymous order book (save in certain circumstances) was deleted, and the Code now provides that dealings through an anonymous order book system are permitted so long as neither party to the transaction is aware of the other’s identity (Rule 38.2(a)).

Miscellaneous Code amendments (June 2022)

Also on 13 June 2022, the Code was amended to reflect a number of miscellaneous detailed changes set out in RS 2021/1 (published 5 May 2022):

Amendment	Further detail
A new requirement for a potential offeror to disclose any minimum level or particular form of consideration (which it is required to offer under Rule 6 or Rule 11) when first publicly identified (Rule 2.4(c)(iii)).	If it is not practicable for a potential offeror to make enquires of its concert parties (whose purchases are relevant for any required level or form of consideration) before it is publicly identified, relevant details should be announced as soon as practicable and by no later than the potential offeror's Opening Position Disclosure deadline (Note 4 on Rule 2.4). A negative statement is not required if the potential offeror does not have any obligation under Rule 6 or Rule 11.
An expansion of the circumstances in which a potential offeror is required during an offer period to make an immediate announcement if it would be obliged to offer a minimum level or particular form of consideration under Rule 6 or Rule 11 (Rule 7.1 and Note on Rule 7.1).	The prior two limitations in the Note on Rule 7.1 have been deleted and the Rule now applies to any potential offeror whose existence has been referred to in any announcement (whether publicly identified or not) or which is a participant in a formal sale process.
A new restriction on a Rule 9 mandatory offeror (and its concert parties) acquiring interests in the offeree's shares in the 14 days up to and including the unconditional date (or expiry of the acceptance condition invocation notice (Rule 9.4(b))).	A mandatory offeror's "control" position (which may impact whether or not a shareholder accepts the offer) is, in effect, frozen from 14 days prior to the unconditional date.
An amendment to the "chain principle" provision so that the test for Company A having to make a Rule 9 mandatory offer for Company C (as a result of acquiring control of Company B) is a single "significant interest" test (Note 8 on Rule 9.1).	The "significant purpose" test was deleted and, to balance out this deletion, the significant interest test (which measures whether the value of Company C is significant to Company B) was reduced from 50% to 30%.

Recent Panel guidance

Practice Statements

Amendment to Practice Statement No. 20 (February 2022)

The Panel should be consulted about an announcement when there has been an untoward movement in the offeree's share price – i.e. a movement of 10% or more above the lowest share price since: (i) the first active consideration of an offer by a potential offeror; (ii) the receipt by the offeree of an approach by a potential offeror, or (iii) the time at which a potential offeror is first sought (a "10% share price movement").

The Panel's policy is to treat a 10% share price movement as being relevant for determining the latest time by which it should first be notified of a possible offer. If the relevant party has already notified the Panel prior to the 10% share price movement, the Panel will not expect to be consulted again solely because of the 10% share price movement.

The Panel still expects to be consulted each time the offeree is the subject of rumour and speculation or there is a 5% share price movement in the course of a single day.

New Practice Statement No. 33 (June 2022)

The new Practice Statement describes how the Panel interprets and applies certain provisions of the Code in relation to the purchasing of shares in the offeree by an offeror during an offer period, including the attribution of purchased shares to the offeror and the prohibition on purchasing shares from an exempt principal trader connected with the offeror. It also sets out certain practical steps that should be taken to ensure an offeror's compliance with such provisions.

Panel Bulletins

Between October 2021 and July 2022 the Panel published a number of bulletins to remind practitioners and market participants of the operation of specific provisions of the Code in the light of certain issues of which the Panel had become aware. The bulletins (which are summarised below) can be found here.

Panel Bulletin 1: chaperoning meetings (October 2021)

The bulletin follows the Panel becoming aware of cases where management have had calls or meetings with offeror or offeree company shareholders without arrangements for an adviser to attend those meetings or calls, or where the Rule 20.2 confirmations (that no material new information or significant new opinions were disclosed at such calls or meetings) were given without due care and consideration. Accordingly, the bulletin:

- stresses the importance of equality of information between offeree shareholders; and
- reminds offeror and offeree financial advisers of their responsibility for ensuring that no material new information or significant new opinions are provided in meetings or calls with shareholders and that clients are suitably briefed on the requirements of the Code.

Panel Bulletin 2: identifying MBOs with the Panel (October 2021)

The bulletin reminds financial advisers of the importance of early consultation with the Panel in any situation where a transaction might be regarded as a management buy-out or similar transaction (for which there is no prescribed definition in the Code) in order to agree the application of the relevant Code rules.

Panel Bulletin 3: irrevocables and letters of intent (November 2021)

The bulletin follows the Panel becoming aware of cases where a shareholder had sold shares subject to a letter of intent without prompt announcement of the details. Accordingly, the bulletin reminds the market that if a person becomes unable, or no longer intends, to comply with the terms of an irrevocable or letter of intent, they must make a prompt announcement or notify the relevant party to the offer (who must then make prompt announcement) and the Panel.

Panel Bulletin 4: Panel fees and the value of an offer (June 2022)

The bulletin reminds financial advisers how to calculate the value of the offer when working out the document charge due to the Panel. In particular:

- to include only the offeree shares in issue (not shares "to be issued") as at the date of the offer document or Rule 9 waiver circular; and
- to exclude shares in the offeree which are already held by the offeror and which are not being offered for.

Panel Bulletin 5: possible offer announcements (July 2022)

The bulletin reminds financial advisers that the Panel expects:

- a possible offer announcement to be released immediately (within a matter of minutes) once the requirement to make it has been triggered (if needed, a brief announcement can be made immediately and a further announcement with additional details made subsequently); and
- one or more complete draft announcements to be prepared and approved at an early stage and an effective release procedure agreed and in place.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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