ICAEW
REPRESENTATION 78/22

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

Issued 23 September 2022

ICAEW welcomes the opportunity to comment on the consultation paper, *PCP 2022/2 Presumptions of the definition of "acting in concert" and related matters*, published by the Takeover Panel on 26 May 2022, a copy of which is available from this link and whose Appendix E was updated and presented in a webinar on 29 June 2022. The webinar slides are available from this link.

For questions on this response, please contact our Corporate Finance Faculty at CFF@icaew.com quoting REP 77/22.

This response of 23 September 2022 has been prepared by the Corporate Finance Faculty, ICAEW's centre of professional expertise in corporate finance. The faculty contributes to policy development and responds to consultations by international organisations, governments, regulators and other professional bodies. It provides a wide range of services, information, guidance, events and media to its members, including its highly regarded magazine Corporate Financier and its popular series of best-practice guidelines. The faculty's international network includes member organisations and individuals from major professional services groups, specialist advisory firms, companies, banks and alternative lenders, private equity, venture capital, law firms, brokers, consultants, policy-makers and academic experts. More than 40 per cent of the faculty's membership are from beyond ICAEW.

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OVERARCHING POINTS

1. ICAEW is grateful to the Executive for providing opportunities for market participants to hear and understand the detail behind the proposals in PCP 2022/2. Our members' discussion with the Executive was helpful to our evaluation of the impact of the proposed amendments to the presumptions to the definition of 'acting in concert'.
2. We accept that the intention of the proposed amendments is to reflect the Executive's rationale and current practice in its approach for determining whether a party is 'acting in concert'. We broadly accept the proposed amendments, but we do have concerns that they may create a regulatory barrier and are likely to disproportionately affect smaller companies, or ones with scarce inhouse resource. In this respect, we suggest the following:
3. The significant complexity introduced by the collective new presumptions result in circumstances that are challenging to retain even by seasoned practitioners and will be incredibly difficult for parties to absorb and understand without engaging an experienced adviser. The diagrams in the webinar slides that were presented on 29 June, and that are currently included on the same webpage as the consultation paper, should ideally be cross-referred to from the Code, in the definition of acting in concert.
4. We also consider that a Practice Statement would help make more explicit where there may be flexibility in the Executive's approach around parties' economic interests and their impact on acting in concert. Commentary would be helpful for the market on typical considerations when there are separate investing entities acting in concert with each other, such as sovereign wealth funds or private equity funds.

ANSWERS TO SPECIFIC QUESTIONS

Q1 Should the threshold at which the presumption of acting in concert is engaged be raised from 20% to 30%?

5. Yes, it should.

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?

4. We agree that the two situations should 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?

6. In our members' experience, ownership of non-voting equity and or aggregated disparate interests, are examples of situations where economic exposure is a misleading indicator of control. We accept however that this may arise in few situations, and we agree that the situations described in Q3 and Q4 should be presumed to be acting 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?

7. Yes, the new presumptions (1) and (2) should apply as proposed.

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

8. Yes, long derivative or option positions should be taken into account as proposed.

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?

9. We agree that any company under the same control as A or B should also be presumed to be acting in concert with A and B.

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"?

10. Please refer to our overarching comments in this response.

Q9 Should a fund manager be treated as interested in shares which it manages on a discretionary basis?

11. Yes, they should.

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?

12. Yes, the client should be treated as proposed.

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?

13. We have no comments.

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"?

14. We agree that an investor in a fund should be presumed to be acting in concert as proposed.
15. Proposed new Note 7 should ideally state the factors that, as described in paragraph 3.49 of the PCP, the Executive is likely to take into account to determine whether investors in an existing company which becomes an offeror should be treated as acting in concert with the offeror.

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)?

16. Yes, an investment manager or investment adviser should be presumed to be acting in concert in the proposed situations. We have no comments regarding 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?

17. We have no comments on the proposed new paragraph (4).

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?

18. Yes, Note 6 should be amended as proposed. Would the Panel consider including a cross-reference to the positive obligation in Note 6(b) to consult the Panel in the appropriate checklist?

Q16 Do you have any comments on the proposed new definition of a "fund manager"?

19. We note that the proposed new definition refers to an 'entity' and query whether there are any persons that are intended to be outside of the definition.

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?

20. We agree that Rule 7 and the Notes thereon should 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?

21. We agree that Note 7 on Rule 7.2 should 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?

22. We have no comments.

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?

23. Yes, Rule 4.4 should be amended as proposed.

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?

24. We agree that the current presumption (2) should be amended as proposed.

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?

25. We agree that presumption (3) should be amended as proposed.

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?

26. We agree that presumption (9) should be amended as proposed.