The City of London Law Society

The Law Society

PCP 2022/2: Presumptions of the definition of "acting in concert" and related matters

22 September 2022

Introduction

1. The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers.

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Response

Introduction

5. The definition of acting in concert and associated presumptions have become increasingly unwieldy as participants in UK public takeovers have become larger and more complex. As such we welcome the Panel's review of the definition of acting in concert and associated presumptions, and in particular the proposed replacement of the current 20% "associated company" test with a higher 30% threshold in new presumptions (1) (**NP1**) and (2) (**NP2**). Proposed changes to align the drafting of certain provisions more closely with the way in which the Panel currently applies them in practice, as well as the detailed discussion and examples in the PCP, are also helpful in providing greater clarity to market participants.

6. We do have some concerns around the proposed change in approach to funds/consortia of funds. We think that the revised treatment in this context will overlay unnecessary complexity on a deal, in particular in relation to the treatment of limited partners as we discuss below. Whilst we understand the Panel's concerns around regulating economic interest, we would like the Panel to retain flexibility to look at deals where there are no control issues on a case-by-case basis, giving consideration to the underlying mischief that the definition and presumptions are there to protect against.

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

7. Yes – we support this change which we think will be helpful in practice.

8. We note the statement in paragraph 2.62 of the PCP that given the increase of the threshold to 30% the evidence required to satisfy the Panel that NP1 or NP2 may be rebutted in any particular case is likely to be high. In this context it would be helpful for the Panel to provide additional guidance on the approach in certain contexts – in particular:

   - We understand that the new rules are not intended to change the approach taken by the Panel in relation to state-owned entities but it would be helpful if this could be confirmed in the Response Statement. More generally, we think additional guidance on the Panel's approach

to the application of the rules in these types of scenarios would also be likely to be welcomed by the market.

- In the context of joint venture companies, our understanding is that in a scenario where a bidder is presumed to be acting in concert with a joint venture company under NP1 and/or NP2, the Panel would be likely to rebut any presumption under NP2 that its JV partner (and consequently the JV partner's own group) are also acting in concert with the bidder. It would be helpful if this could be confirmed in the Response Statement.

- In addition, it would be helpful if the Panel could clarify its approach to a position where a joint venture company is presumed to be acting in concert with a bidder under NP1 and NP2 but the other party to the joint venture controls the majority of the voting rights in that joint venture company. Paragraph 2.63 of the PCP discusses the rebuttal of NP1 in these circumstances but not the position where NP2 is also engaged. Taking the structure chart set out in Appendix E as an example (but assuming that the percentage interests in equity share capital are mirrored by equivalent interests in voting rights), A would be presumed to be acting in concert with X under both NP1 and NP2. In line with paragraph 2.63 of the PCP (and Appendix D), the NP1 presumption would be likely to be capable of rebuttal as H controls the majority of voting rights in A. In our view, in the context of a joint venture, it is unlikely that A (i.e. the joint venture company) would take any action it considers to be in the interests of a single investor/joint venture party simply by virtue of that person being a significant investor (nor is it likely to have the ability to do so without the consent of H, the controlling joint venture partner). It would therefore be logical in those circumstances for NP2 to be likely be capable of rebuttal as well, as the fact that H in fact controls A is also relevant in the context of the "shoulder to the wheel" analysis. It would be helpful if, in the Response Statement, the Panel could confirm its approach in this context.

- In the context of private equity portfolio companies, our understanding is that historically the Panel has been prepared to rebut a presumption of concertedness where a private equity entity owns between 20% and 50% of the portfolio company. Under the revised rules, we understand that portfolio companies would be treated in the same way as any other company. We acknowledge that approach but it would be helpful to clarify that a similar approach would be likely to be taken by the Panel to joint ventures in terms of rebutting any presumption that other investor(s) in the portfolio company (and their own groups of companies, if applicable) would be in concert with the fund (and also that NP1 and NP2 would be capable of rebuttal in respect of the portfolio company itself where a majority of the voting rights in the portfolio company is held by a third party joint venture partner – see also the previous bullet point).

- See also our responses to Q6, Q12 and Q23 below.

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?

9. Yes.

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?

10. Yes.

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?

11. Yes – although see our response to Q12 below.

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?

12. We agree that NP1 and NP2 should apply to all holders of voting rights or equity regardless of whether they are a company, an individual, a limited partnership or another type of person.

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

13. We do not have any comments on this proposal.

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?

14. Yes.

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"?

NP1

15. We do not have any comments on the drafting of NP1.

NP2

16. In relation to NP2, we have included suggested drafting below which we think would be helpful in making it clearer that the presumption must be applied both up and down the chain:

A company ("Y") and any other company which is interested, directly or indirectly, in 30% or more of the equity share capital of Y, or in which Y is interested, directly or indirectly, in 30% or more of the equity share capital, together with any company which would be presumed under (1) to be acting in concert with either Y or any such other company, all with each other.

17. We would also suggest minor amendments (shown in red) to the additional wording included at the end of the definition of acting in concert as marked below. This is for consistency between paragraphs (a) and (b) and also to reflect the suggested amendments to NP2 above:

For the purposes of presumptions (1) and (2), a reference to:

(a) X, or, as appropriate, a company which controls#, is controlled by or is under the same control as X; and

(b) Y, or, as appropriate, a company which is interested in the equity share capital of Y or in which Y is interested in the equity share capital ~~controls Y or Z~~,

includes any other undertaking (including a partnership or a trust), or any legal or natural person.

The reference in 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.

See also Rule 7.2.

New Note on definitions

18. We do not have any comments on the drafting of the new Note on definitions.

New Note on the definition of "control"

19. We do not have any comments on the drafting of the new Note on the definition of "control".

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

20. Yes.

21. As a general point, we think it would be helpful if the Panel could provide additional guidance in relation to the concepts of "investment manager" and "investment adviser" (either by way of a definition or a description in the Response Statement).

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?

22. Yes.

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?

23. No.

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"?

24. Whilst we recognise the Panel's objective of having a set of rules which can be applied equally to companies and funds regardless of the actual underlying legal structure, there are differences between companies and many types of funds. In particular, there is a practical distinction between holders of non-voting equity capital (who are able to put in place additional control/consent rights through mechanics such as shareholders' agreements whilst still retaining limited liability) and limited partners (who, under applicable law, must typically remain entirely passive in order to retain their limited liability status). Although, in practice, it would be relatively unusual for an investor to hold more than 30% of a fund, in our view the Panel should (consistent with what we understand to be its current practice) be prepared on a case-by-case basis to rebut the presumption in the context of passive fund investors in structures such as limited partnerships where the limited partners are explicitly restricted from involvement in the running of the business (or at least in circumstances where they are interested in 50% or less of the fund). This would be consistent with the position in relation to independent fund managers who have absolute discretion in relation to the management of underlying investments (as referred to in Q10). If the Panel agrees with this suggestion, it would be helpful if this could be acknowledged in the Response Statement.

25. It would be helpful to clarify how aggregation would apply to investors in funds. Where multiple funds with multiple investment managers are treated as acting in concert with a bidder, the rules of aggregation would seemingly require each fund and investment manager to reveal its limited partners and for a third party to aggregate each interest in order to confirm whether any individual investor would have a 30% or more diluted interest in the bidder. This is often highly confidential and commercially sensitive information.

26. The same issues would apply if a bidder wanted to bring in a new fund later on in the process or to syndicate the equity - the information relating to the investors would need to be disclosed in advance of agreeing terms so as to ensure disclosure issues were raised upfront. This would be commercially extremely unattractive for most investment funds and/or investment managers.

27. More generally, we assume that the proposed changes in respect of funds are not anticipated to result in any change to the approach currently taken by the Panel to disclosure under R24.3(b)(iii) and/or 24.3(d)(iii), but it would be helpful if the Panel could confirm this.

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)?

28. Yes.

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?

29. No.

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?

30. We would suggest minor amendments (shown in red) to the revised N6(a) and (b). These are intended to clarify the interaction between N6(a) and NP1[1] as well as the application of N6(b) as discussed in the PCP and to flag the interaction with N7:

6. ~~Consortium offers~~Offers made by a new vehicle or company

(a) Where an offer is made by ~~Investors in a consortium (eg through~~ a new vehicle or company formed for the purpose of making an offer~~)~~, each of the direct investors in the offeror (together with any person that is presumed to be acting in concert with such investor under presumption (1)) will normally be treated as acting in concert with the offeror.

(b) Where such an investor, any person presumed to be acting in concert with the offeror under presumption (1) or (2) as a result of its direct or indirect interest in such an investor, or any person presumed to be acting in concert with the offeror under presumption (5) is part of a larger organisation, the Panel should be consulted to establish which other parts of the relevant organisation will also be regarded as acting in concert with ~~the investor and thus with~~ the offeror.

…

(e) ~~(~~See also Note 7 below in relation to funds, the definitions of c~~C~~onnected fund managers and connected principal traders ~~in the Definitions Section~~ and Rule 7.2.~~)~~

31. More generally, guidance on what would need to be demonstrated in order to remove other parts of the organisation from the concert party (including the different requirements applicable to each band) would be helpful.

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

32. No.

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?

33. We agree with these proposed amendments.

[1] In the context of the interaction between N6(a) and NP1, our understanding (consistent with the example given on p53 of the PCP) is that the Panel's view is that where a person (**A**) is presumed under NP1 to be acting in concert with a direct investor (**B**) in a new bid vehicle, A would also normally be presumed by the Panel under N6 to be acting in concert with the new bid vehicle even where B did not "control" (within the meaning of NP1) that new bid vehicle. The suggested amendments to N6(a) have been drafted on the basis of this understanding. In the context of the interaction between N6(a) and NP2, we understand that NP2 would be applied in the normal way.

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?

34. We agree with this proposal.

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?

35. No.

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?

36. On the basis that we understand this reflects current Panel practice in this area we have no comments on the proposed amendments.

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?

37. Yes. It would be helpful for the Panel to clarify in the response statement that, in the context of an offer, the presumption operates such that whilst the directors of the bidder entity (and their close relatives and related trusts) will be presumed to be acting in concert with the bidder, the presumption does not extend to the directors of other entities in the bidder's group (and their close relatives and related trusts), with the potential exception of the ultimate holding company of the bidder, where that company would also be treated by the Panel as the offeror (e.g. under N1 on R24.3).

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?

38. Yes.

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?

39. Yes. This is also an area where it would be very helpful to provide additional guidance to the market on how this presumption is applied in practice and the circumstances in which the Panel is likely to be persuaded that it can be rebutted.