King & Spalding
Client Alert

JANUARY 23, 2023

For more information, contact:

William Charnley
+44 20 7551 7534
wcharnley@kslaw.com

Marcus Young
+44 20 7551 7590
myoung@kslaw.com

Faye Wiles
+44 20 7551 2181
fwiles@kslaw.com

King & Spalding

London
King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500

UK Takeover Code: Changes to Definition of "Acting in Concert"

Incoming alterations to the presumptions of the definition of "acting in concert"

The Takeover Panel in the UK has announced a number of changes to the definition of "acting in concert" in the City Code on Takeovers and Mergers, which will take effect on 20 February 2023 and apply to all companies and transactions from that date[1].

The Code definition of "acting in concert" currently states that persons will be acting in concert where:

"…pursuant to an agreement or understanding (whether formal or informal), [such persons] co-operate to obtain or consolidate control … 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 with each other."

This definition has the effect of allowing the Takeover Panel to treat persons who are, or are presumed to be, acting in concert as a single person for the purpose of the Code rules. This concept is of particular significance in connection with Code Rules 5, 6, 8, 9 and 11 in determining (1) when a mandatory takeover offer may be required, (2) the minimum level or form of consideration to be offered on an offer, and (3) restrictions on and the disclosure of dealings.

Under the Code, certain categories of persons will be presumed to be acting in concert with other persons in the same category, unless the contrary can be established by such persons. The Code sets out each of these categories within the definition of "acting in concert". It is the presumptions of who is acting in concert which are to be amended pursuant to RS 2022/2.

Proposed Changes

The most significant change is to current presumption 1 in respect of group companies, which currently reads as follows:

"*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)".

From 20 February 2023 presumption 1 will be replaced by two new presumptions 1 and 2:

"*(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 ("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."

These changes have the effect of:

- raising the threshold at which companies will be presumed to be acting in concert if one controls the other, or is under the same control as the other, from 20% to 30%;

- applying to interests in shares carrying voting rights (whether or not the shares are also equity share capital) and to equity share capital (whether or not the shares also carry voting rights); and

- applying to all entities that may control shares (including individuals, limited partnerships, trusts and others) not just corporates.

In practice the changes are largely codifying the Takeover Panel's existing practice, and amendment of the associated company threshold to 30% brings this into alignment with the Code's current definition of "control".

In considering the application of new presumptions 1 and 2, it is noted that the Panel will not dilute indirect interests in voting rights but will dilute indirect equity interests, in effect meaning that:

- under new presumption 1: interests of either (i) more than 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. For example: 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:

- under new presumption 2: interests of 30% or more of a company's equity share capital do dilute through links in the chain. For example: 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".

As is currently the case, these categories remain "presumptions" capable of being rebutted by reference to the facts of any particular case, however it is worth noting that the Panel stated in Public Consultation Paper 2022/2[2] that, in respect of new presumption 1 and 2 "the evidence required to satisfy the Takeover Panel that either presumption should be rebutted in any particular case is likely to be high".

For further details on the Takeover Panel's approach to concert parties see RS 2022/2, which sets out guidance on the circumstances in which new presumptions 1 and 2 may be rebutted, the application of the presumptions to joint ventures, portfolio companies of private equity firms and government-owned entities. It also contains illustrative examples of how new presumptions 1 and 2 will apply to shareholdings representing shares carrying voting rights (Appendix D), shareholdings representing equity share capital (Appendix E), and a consortium offer (Appendix F).

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	

[1] Response Statement RS 2022/22

[2] Presumptions of the Definition of "Acting in Concert" and Related Matters, Public Consultation by the Code Committee, dated 26 May 2022 (PCP 2022/22)