Technical Briefing

January 2023

Subject: Takeover Panel publishes changes to 'acting in concert' presumptions

Effective date: 20 February 2023

Impact: Changes provide some welcome clarity on how the presumptions set out in the definition of "acting in concert" apply to funds.

This technical briefing is for information purposes only and its contents do not constitute advice. The BVCA would like to thank all the Legal & Accounting Committee members who helped us produce this document, in particular Clare Gaskell (Simpson Thacher & Bartlett).

Background and summary

In May 2022 the Code Committee of the Takeover Panel published a public consultation paper ("**PCP**") on the presumptions of the definition of "acting in concert" and related matters. The PCP sets out a number of proposed amendments to these presumptions, intended to ensure they reflect properly both changes in the nature of investment markets since they were first introduced and the current practice of the Panel.

In December 2022 the Code Committee of the Takeover Panel published a response statement ("**RS**") setting out the Code Committee's conclusions following the consultation, including the final text of the amendments to the Code.

The amendments to the Code will take effect on **Monday, 20 February 2023**.

Summary of proposed amendments

In summary, the amendments:

- increase the threshold for the presumption of concertedness from 20% to 30%;
- make clear that this applies both to voting rights (which will not "dilute" through a chain of ownership – i.e., an entity that controls 30% or more of the voting rights at each level of ownership down to another entity will be presumed to control that other entity) and to equity share capital (which will "dilute" through a chain of ownership, such that the level of equity ownership is calculated on a "see-through" basis, unless an entity owns 50% or more of the equity share capital at each level of ownership (in which case it will not dilute));

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- apply the presumptions to limited partnerships and other investment funds in the same way as to companies, treating limited partnership interests in a fund as generally analogous to equity share capital in a company;
- make clear that, where a fund is managed by an independent discretionary fund manager, the fund manager (but not the investors in the fund) will, in general, be interested in any securities held by the fund (noting, however, that an investor may still presumed to be acting in concert with the fund if it satisfies the amended presumptions described above);
- specify that investment managers and investment advisers of a bidder or of an investor in a bidder consortium, together with any persons controlling, controlled by or under common control with them, are presumed to be acting in concert with the bidder and (if applicable) that investor; and
- take account not only of shares owned or controlled by a person but also any shares in respect of which it has any long derivative or option positions.

How will the amendments affect private equity?

The application of the presumptions to funds and new presumption regarding investment managers and investment advisers broadly reflect the longstanding practice of the Panel and, as such, are clarificatory rather than evidencing a substantive change in approach.

Portfolio Companies

The amendment in the threshold from 20% to 30% represents welcome recognition that the current threshold captures companies that are not controlled or even materially influenced by a shareholder. Overall the changes will – as the Panel expects – reduce the number of other portfolio companies that are caught within the "concert party" of a bidder backed by a PE/VC firm and, therefore, those who need to receive a stop notice (i.e., the notice sent by a PE/VC firm to its portfolio companies once an offer or possible offer is announced requiring such portfolio companies to (amongst other things) not trade in the target's shares).

However, even the amended threshold will capture non-controlled portfolio companies, including some that have third party controlling shareholders (in such cases, the RS says it is possible that the presumption of concertedness may be rebutted, but this will require consultation with the Panel). In addition, the complexity of the rules regarding voting rights and equity share capital, including the approach to "dilution" through the chain of ownership, means that PE/VC firms are faced with the task of reassessing the data available to them and determining on a case-by-case basis whether portfolio companies can be removed from their concert party lists.

In the RS, the Code Committee confirmed that, as a general rule, portfolio companies will only be presumed to be acting in concert from the earlier of the offeror or target being publicly

identified as such and the portfolio company being made aware of the possible offer. That being said, any dealings in the 12 months before the offer period by a portfolio company that is presumed to be acting in concert are to be disclosed in the offer document and the Panel may investigate if there are unexpected/unusual dealings by portfolio companies.

In addition, the RS confirms that there is no presumption that the directors of other companies within an offeror's group (other than the ultimate holding company of a bidco), such as directors of portfolio companies, are acting in concert with the offeror, which is consistent with past Panel practice.

LPs / Investors

The proposed amendments include a new note on the definition of "acting in concert" to provide that where a limited partnership or other investment fund invests in a bid vehicle formed for the purpose of making an offer (or in a new fund formed for the purpose of investing, directly or indirectly, in the bid vehicle), that limited partnership or investment fund will be presumed to be acting in concert with the bid vehicle. There is an existing note in the Code which states that where such an investor's investment is: (i) 10% or less of the equity share capital of the bidder, the Panel will normally waive the presumption of concertedness in relation to other parts of that investor's organisations; or (ii) between 10% and 50%, the Panel may be prepared to waive the presumption of concertedness depending on the circumstances, in each case, provided it is satisfied as to the independence of those other parts from the investor. This can result in, for example, parts of the investor that operate behind information barriers and/or its portfolio companies being excluded from the concert party, which is helpful to minimise the need to send stop notices and gather information on shareholdings and dealings. The amendments decrease the 50% threshold in item (ii) above to 30%, purportedly to align with the 30% threshold applicable to the presumption of concertedness but potentially increasing the size of the concert party in respect of minority investors in a bidder consortium.

Under the new definition of "acting in concert", an investor in an existing fund which is providing equity financing for an offer will be presumed to be acting in concert with the bidder if it will have a "see-through" indirect interest of 30% or more of the bidder's equity share capital or if it owns more than 50% of the limited partnership interests in a fund which is subscribing for equity share capital in the bidder. Other than increasing the threshold from 20% to 30%, this codifies the existing approach by the Panel, whereby PE/VC firms are required to assess the LPs of the fund(s) participating in the offer to determine whether or not any LPs are over the above thresholds.

The Code Committee has made clear that an LP/investor is required to aggregate various different indirect interests via different funds in determining whether it meets the various thresholds to be presumed acting in concert. In particular:

- in the context of **an offer by a new vehicle or company**, indirect interests by an LP/investor via different funds participating in the equity share capital of the new vehicle are to be aggregated to determine if the LP meets the thresholds to be

presumed acting in concert (the Code Committee noted that in practice only a limited number of funds will participate in an offer and, in order for a LP/investor to meet the indirect thresholds (even after aggregation) such LP/investor must have an interest of at least 30% in one of the funds); and

- **outside the context of an offer**, if an investor invests in a fund which in turn invests in another fund or company, the investor's indirect interest in the latter fund or company will only be taken into account in determining if it is presumed to be acting in concert with such fund or company if each link in the chain of interests is 30% or more. This clarification in the RS stems from the practical difficulties associated with the aggregation requirement given there could be several different funds invested in a listed entity.

As described above in respect of portfolio companies, the RS also makes clear that passive investors will only be presumed to be acting in concert from the earlier of the offeror or target being publicly identified as such and the passive investor being made aware of the possible offer. That being said, any dealings by a passive investor that is presumed to be acting in concert in the 12 months before the offer period are to be disclosed in the offer document and the Panel may investigate if there are unexpected/unusual dealings by passive investors.

The RS clarifies that where an investor in a fund has an indirect interest in 30% or more of the share capital of an offeror or holds 50% or more of the interests in a fund investing in an offeror, then the invest

or's identity, interest in the offeror and basic details need to be disclosed in the offer document.

Finally, the RS confirms that a main fund vehicle and any parallel fund vehicles will, so long as they are managed as a single composite fund on a unified basis, be treated as a single "fund" for the purpose of the analysis described above.

Co-investments

In an update from the PCP and in response to the BVCA's Legal and Accounting Committee's submission, the Code Committee has made clear in the RS that a PE/VC firm will not be presumed to be acting in concert with another PE/VC firm that is a shareholder of an offeror, solely because both firms are investors in an unrelated portfolio company.

Next steps

The amendments to the Code as set out in full in the RS will be implemented and take effect on Monday, 20 February 2023.