The Takeover Panel
One Angel Court
London
EC2R 7HJ

23 September 2022

Dear Code Committee,

Re: PCP 2022/2 The Takeover Panel Presumptions of the Definition of "Acting in Concert" and Related Matters, Public Consultation by the Code Committee

We are writing on behalf of the British Private Equity and Venture Capital Association, which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 750 firms, we represent the vast majority of all UK-based private equity and venture capital firms, as well as their professional advisers and investors. Between 2016 and 2020, BVCA members invested over £57bn into around 3,900 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ over 2m people in the UK and 90% of the businesses our members invest in are small and medium-sized businesses.

Overview of BVCA recommendations

The BVCA welcomes the Code Committee's public consultation on the proposed amendments to the Takeover Code ("Code").

Our industry's key message is that the UK is home to a world-leading PE/VC fund management industry. Central to this is ensuring that the UK's laws and regulations, including the Code, work appropriately and efficiently for PE/VC funds.

PE/VC firms and their funds differ from regular corporate groups both in structure and in operation. In structure, most PE/VC firms utilise fund structures in order to collect, manage and deploy investor funds. Often such fund structures will use limited partnerships rather than corporate vehicles more typically used by regular corporate groups. In operation, PE/VC firms are in the business of investing via their fund structures in other businesses (commonly referred to as "portfolio companies"). Such investments in portfolio companies are primarily made as financial investments, with a PE/VC firm having potentially ten or more portfolio companies in any single fund. As a result, unlike a significant investment made by a corporate group, PE/VC firms do not typically control the day-to-day management of a portfolio company even where they own a significant proportion of its equity.

This distinction is important to keep in mind when assessing the impact of the Code on PE/VC firms. In particular, the administrative burden of monitoring and ensuring compliance with certain aspects of the Code can be much more severe for PE/VC firms than for typical corporate groups – this is particularly the case for large PE/VC firms, with multiple strategies and funds. Such firms can have hundreds of portfolio companies at any given time.

Set out below are our responses to the questions set out in PCP 2022/2.

We welcome the opportunity to continue to engage with the Code Committee to ensure that PE/VC firms are able to comply with the Code and the requirements of the Panel in an appropriate and effective manner.

BVCA response to the consultation paper questions

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

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We are generally supportive of the proposal to increase the threshold at which the presumption of acting in concert is engaged from 20% to 30%. The current threshold of 20% is too low in our view and results in companies that are not controlled or even influenced by a person being presumed to be acting in concert with that person.

We note that the 30% threshold is taken from the existing definition of "Control" under the Code. There is an argument that it should not be assumed that a ~30% shareholder in a private company has de facto control (in particular, if it has a consolidated shareholder base (eg, two shareholders, one with 70% of the voting rights/equity share capital and one with the remaining 30%)). This is particularly relevant given the "control" test does not dilute through a chain of entities. Where entity A holds 30% of the voting rights of entity B and entity B holds 30% of the voting rights of entity C, it is very uncommon in our experience for entity A to have any meaningful control over the operations of entity C. However, we understand the Panel's position is that there is sufficient alignment of interests in such a case that entity A should be presumed to be acting in concert with entity C regardless of whether it actually controls entity C.

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?

See question 1 above.

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?

See question 1 above.

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?

See question 1 above.

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?

See question 1 above on the precise level of the threshold.

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

We generally agree that long derivative and options should be taken into account in determining whether the new presumptions (1) and (2) are engaged.

One related point: as currently drafted, we understand certain fixed return equity instruments (eg, non-participating preference shares) would be taken into account in determining whether the new presumptions are engaged. In our view, non-participating preference shares (ie, preference shares which have a fixed preferred return and do not participate in the residual value of the equity share capital) are economically akin to debt instruments and, as such, should not be taken into account for the purposes of the presumptions. This is particularly relevant where a PE/VC firm's credit fund holds such non-participating preference shares and such PE/VC firm's entire universe can be subject to the presumptions as a result of such investment.

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?

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As currently drafted, the new presumption would appear to apply such that it technically captures entities which are clearly unrelated to the offeror. To take an example, if the offeror is indirectly owned by a fund managed by PE Firm 1 and a fund managed by PE Firm 1 owns 30% of a portfolio company, that portfolio company will be presumed to be acting in concert with the offeror. Moreover, if a fund managed by PE Firm 2 also owns 30% of that portfolio company, the universe of entities within the control group of PE Firm 2 will be presumed to be acting in concert with the offeror (by virtue of the inclusion in presumption (2) of the words "together with any company presumed to be acting in concert with either Y or Z under (1)"). Similarly, if a fund managed by PE Firm 2 owns 30% of a different portfolio company and a fund managed by PE Firm 3 also owns 30% of that different portfolio company, the universe of entities within the control group of PE Firm 3 will also captured. This could extend to a large number of PE firms once all their respective portfolio companies are taken into account. As a result, an offeror indirectly owned by a fund managed by PE Firm 1 would be presumed to be acting in concert with a vast network of PE firms and portfolio companies which are not involved in, nor aware of, the offer.

From the appendices to the consultation paper and previous discussions with the Panel, we understand this is not the intention nor how the Panel applies the rule in practice. As a result, we suggest this is made clear in the notes such that the presumptions do not capture other investors in other portfolio companies or their respective other portfolio companies.

Separately, in the past, certain PE/VC firms have availed themselves of the option to deliver to the Panel a confirmation letter in respect of portfolio companies where they hold an interest between 20% and 49.9%, as a result of which such portfolio companies are excluded from the relevant PE/VC firm's concert party. Such letter contains confirmations that: (i) the PE/VC firm does not exercise day-to-day management control over such portfolio companies; (ii) representatives of the PE/VC firm represent a minority of the votes on the boards of the portfolio companies; (iii) such portfolio companies are trading companies which are not direct competitors of the target (nor are they part of a business to make investments in publicly traded securities of UK issuers); and (iv) none of the executives of the PE/VC firm are aware of any investment having been made in the target by such portfolio companies. In the view of our members, the option to deliver such a letter should be retained going forward (for portfolio companies where they hold an interest between 30% and 49.9%).

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"?

No additional comment.

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

We generally agree with this approach.

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?

We generally agree with this approach.

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?

No comment.

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"?

We generally understand the position taken on this. That said, given how fund structures operate in practice, we expect in practice the proposal could lead to certain unintended outcomes. To take an example, should a passive limited partner in a fund meet the thresholds in the new presumptions (1) and/or (2), it would be presumed to be acting in concert with an offeror in which that fund is an investor. If, separately, that limited partner is part of a consortium in relation to a competing offer for the same target, we would not expect actions (eg, share purchases) of that competing offeror to be treated as having been taken by a concert party of the first 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)?

We generally accept the principle of this presumption.

However, a distinction should be made between newly incorporated consortium vehicles established for the purpose of making an offer and previously established vehicles (eg, existing holding companies for portfolio companies). Consortium investors in the latter should not automatically be presumed to be acting in concert; instead the principles in presumptions (1) and (2) should apply.

In addition, as noted above, investors in a consortium holding only fixed return equity instruments (eg, non-participating preference shares) should not be treated the same as other investors (eg, ordinary shareholders that have an interest in the residual value of the equity share capital of the offeror).

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?

We generally agree with this proposal although we note that, in our view, as noted above, the definition of "investor in an offeror consortium" should be clarified further.

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?

No. In our view, where the investment is more than 10% but less than 50%, the Panel should consider waiving any acting in concert presumption in relation to other parts of the organisation (provided it is satisfied as to the independence of those other parts from the investor).

Speaking with our members, for large private equity firms, it is common to have different decision makers / investment committees for different strategies. Such structural features, paired with strict information sharing barriers, should be sufficient evidence for the Panel to waive any presumption of concertedness for such other strategies.

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

No comment.

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?

We generally welcome the proposed amendments to Rule 7.2 and its related Notes.

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?

In our view, the principle set out in Rule 7.2 (ie, that the moment from which the presumption of concertedness should commence for certain persons should be delayed until the potential offeror is first publicly identified or the person is made aware of the potential offer (whichever is earlier) ("**Rule 7.2 moment**")) should be extended to other persons in similar positions. In particular, we consider it appropriate to introduce a concept of "*connected portfolio companies*" and "*connected passive investors*".

Connected portfolio companies

As the Panel knows, the current accepted practice is that PE/VC firms will send stop notices to portfolio companies as soon as practicable after the PE/VC firm is first publicly identified as a potential offeror. It is not possible to take any further precautions prior to such date without jeopordising the confidentiality of the possible offer. As a result, in our view, the presumption of concertedness for such portfolio companies should only apply from the "Rule 7.2 moment".

Connected passive investors

In our view, a distinction should be drawn between active co-investors and passive investors – such as passive limited partners in a fund managed by a PE/VC firm. The former are often actively involved in a potential offer and have knowledge of the potential offer before it is has been publicly announced, whilst the latter often will not be made aware until after announcement in order to preserve confidentiality. In our view, any presumption of concertedness for such passive investors should only apply from the "Rule 7.2 moment".

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?

No comment.

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?

No comment.

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?

We are generally supportive of this proposed amendment. We understand it is expected that this presumption would only apply to directors of the offeror/offeree (and does not extend to directors of members of the concert party, such as directors of other portfolio companies of a PE firm that is an investor in the offeror). In our view, this should be made clear in the Code itself.

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?

No comment.

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?

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No comment.

The BVCA would of course be willing to discuss this submission with you further - please contact Ciaran Harris (charris@bvca.co.uk) at the BVCA.

Yours faithfully,

Victoria Sigeti

Chair, BVCA Legal and Accounting Committee

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