

CONTROLLERS INSTRUMENT 2016

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137A (The FCA’s general rules);
 - (2) section 139A (Power of the FCA to give guidance); and
 - (3) section 137T (General supplementary powers).
- B. The rule-making powers listed above are specified for the purpose of section 138G (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 27 May 2016.

Amendments to the Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Supervision manual (SUP) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Controllers Instrument 2016.

By order of the Board
26 May 2016

Annex A

Amendments to the Glossary

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

- controlled undertaking*
- (1) except in SUP, any subsidiary undertaking within the meaning of the Act other than one falling within section 1162(4)(b) of the Companies Act 2006 or section 420(2)(b) of the Act.
- (2) in SUP, an undertaking within the meaning of section 422(6) of the Act.
- controller*
- ...
- (4) *shares* and *voting power* that a *person* holds in a *firm* ("B") or in a *parent undertaking* of B ("P") are disregarded for the purposes of determining *control* in the following circumstances:
- ...
- (d) *shares* held by a *credit institution* or *investment firm* in its *trading book* are disregarded, provided that:
- (i) the *shares* represent no more than 5% of the total *voting power* in B or P; and
- (ii) ~~the *credit institution* or *investment firm* ensures that the~~ *voting power* is not used to intervene in the management of B or P;
- ...
- (f) where a *management company* and its *parent undertaking* both hold *shares* or *voting power*, each may disregard holdings of the other, provided that each exercises its *voting power* independently of the other;
- (g) but (f) does not apply if the *management company*:
- (i) manages holdings for its *parent undertaking* or ~~an *undertaking* in respect of which the a *controlled undertaking* of its *parent undertaking* is a *controller*~~;
- (ii) has no discretion to exercise the *voting power* attached to such holdings; and
- (iii) may only exercise the *voting power* in relation to such

holdings under direct or indirect instruction from:

- (A) its *parent undertaking*; or
 - (B) ~~an *undertaking* in respect of which a *controlled undertaking* of the *parent undertaking* is a *controller*;~~
- (h) ...
- (iii) may only exercise the *voting power* under instructions given in writing, or has appropriate mechanisms in place for ensuring that individual portfolio management services are conducted independently of any other services;
 - (i) *shares* acquired for stabilisation purposes in accordance with the *Buy-back and Stabilisation Regulation* are disregarded, provided that the *voting power* attached to those *shares* is:
 - (i) not exercised; or
 - (ii) otherwise used to intervene in the management of B or P.

Insert the following definition in the appropriate alphabetical position. The text is new and is not underlined.

- deemed voting power* in SUP 11 (Controllers and close links) and SUP 16 (Reporting requirements) (in accordance with section 422 of the *Act*), includes in relation to a *person* ("H") a voting power:
- (a) held by a third party with whom H has concluded an agreement, which obliges H and the third party to adopt, by concerted exercise of the voting power they hold, a lasting common policy towards the management of the *undertaking* in question;
 - (b) held by a third party under an agreement concluded with H providing for the temporary transfer for consideration of the voting power in question;
 - (c) attaching to *shares* which are lodged as collateral with H, provided that H controls the voting power and declares an intention to exercise it;
 - (d) attaching to *shares* in which H has a life interest;
 - (e) held or which may be exercised within the meaning of

- subparagraphs (a) to (d), by a *controlled undertaking* of H;
- (f) attaching to *shares* deposited with H which H has discretion to exercise in the absence of specific instructions from the shareholders;
 - (g) held in the name of a third party on behalf of H; and
 - (h) which H may exercise as a proxy where H has discretion about the exercise of the voting power in the absence of specific instructions from the shareholders.

Annex B

Amendments to the Supervision manual (SUP)

Part 1

In the table below, the word or phrase in column (1) is replaced in each place where it occurs by the word or phrase in column (2), the occurrence references as indicated in column (3), and number of occurrences for each reference as indicated in column (4). Note that references contained in text to be deleted are not included in the occurrence references indicated in column (3) or in the occurrence count in column (4).

(1)	(2)	(3)	(4)
<i>appropriate regulator</i>	<i>FCA</i>	<i>SUP 11 Annex 6G Q1</i> <i>SUP 11 Annex 6G Q5</i> <i>SUP 11 Annex 6G Q9</i> <i>SUP 11 Annex 6G Q12</i> <i>SUP 11 Annex 6G Q13</i>	1 1 1 3 1
control	<i>control</i>	<i>SUP 11 Annex 6G Q1</i> <i>SUP 11 Annex 6G Q2</i> <i>SUP 11 Annex 6G Q4</i> <i>SUP 11 Annex 6G Q7</i> <i>SUP 11 Annex 6G Q11</i> <i>SUP 11 Annex 6G Q13</i>	2 1 5 1 1 2
'deemed voting power'	<i>deemed voting power</i>	<i>SUP 11 Annex 6G Q2</i> <i>SUP 11 Annex 6G Q6</i>	1 1
deemed voting power	<i>deemed voting power</i>	<i>SUP 11 Annex 6G Q2</i> <i>SUP 11 Annex 6G Q6</i> <i>SUP 11 Annex 6G Q9</i>	1 1 1
firm	<i>firm</i>	<i>SUP 11 Annex 6G Q6</i>	1
persons	<i>persons</i>	<i>SUP 11 Annex 6G Q1</i> <i>SUP 11 Annex 6G Q2</i> <i>SUP 11 Annex 6G Q3</i> <i>SUP 11 Annex 6G Q11</i> <i>SUP 11 Annex 6G Q12</i> <i>SUP 11 Annex 6G Q15</i>	1 1 4 1 1 2
share	<i>share</i>	<i>SUP 11 Annex 6G Q12</i>	4

		<i>SUP 11 Annex 6G Q13</i>	1
shares	<i>shares</i>	<i>SUP 11 Annex 6G Q1</i>	1
		<i>SUP 11 Annex 6G Q2</i>	1
		<i>SUP 11 Annex 6G Q3</i>	6
		<i>SUP 11 Annex 6G Q4</i>	5
		<i>SUP 11 Annex 6G Q5</i>	3
		<i>SUP 11 Annex 6G Q6</i>	3
		<i>SUP 11 Annex 6G Q8</i>	2
		<i>SUP 11 Annex 6G Q10</i>	1
		<i>SUP 11 Annex 6G Q11</i>	2
		<i>SUP 11 Annex 6G Q12</i>	3
		<i>SUP 11 Annex 6G Q13</i>	1
		<i>SUP 11 Annex 6G Q14</i>	7
		<i>SUP 11 Annex 6G Q15</i>	2
UK authorised person	<i>UK authorised person</i>	<i>SUP 11 Annex 6G Q1</i>	1
voting power	<i>voting power</i>	<i>SUP 11 Annex 6G Q1</i>	1
		<i>SUP 11 Annex 6G Q2</i>	4
		<i>SUP 11 Annex 6G Q3</i>	1
		<i>SUP 11 Annex 6G Q4</i>	4
		<i>SUP 11 Annex 6G Q5</i>	5
		<i>SUP 11 Annex 6G Q6</i>	6
		<i>SUP 11 Annex 6G Q7</i>	3
		<i>SUP 11 Annex 6G Q8</i>	3
		<i>SUP 11 Annex 6G Q11</i>	5

Part 2

In Part 2 of this Annex, underlining indicates new text and striking through indicates deleted text.

[*Editor's note:* The changes made by Part 1 have already been taken into account in the text of the *SUP 11 Annex 6G* provisions shown below.]

SUP 11 Aggregation of holdings for the purpose of prudential assessment of Annex 6G controllers

Acting in Concert

...

Q3: What does ‘acting in concert’ mean for these purposes?

A: ...

While the rights ‘linked to’ *shares* for these purposes are most likely to be voting rights, *persons* may be ‘acting in concert’ where they decide to exercise other ~~share-related~~ rights related to *shares*, either in addition to or instead of ~~voting rights~~ rights attached to *voting power*, in accordance with an agreement made between them. ...

Q4: Does section 178(2) of the Act have the effect that two or more persons who already hold shares or voting power in a firm or its parent undertaking and who subsequently decide to exercise ~~their voting or other~~ the rights related to shares or voting power in accordance with an agreement between them, are required to give prior notice under section 178(1) of the Act, if their aggregated holdings fall within any of the cases set out in section 181(2) of the Act or increase by any of the steps set out in section 182(2) of the Act?

A: Yes. Section 178(1) of the *Act* applies when a *person* ‘decides to acquire or increase control over a UK authorised person’...’. For the purposes of Part XII of the *Act*, a *person’s* acquisition of *control* of a *firm* is determined by virtue of his holdings of *shares* or *voting power* in that *firm* or in a *parent undertaking* of that *firm*. In determining whether *control* has been acquired, section 178(2) of the *Act* requires the holdings of *shares* or *voting power* of *persons* who are acting in concert to be aggregated. As noted in the response to Question 3, *persons* begin acting in concert when they decide to exercise ~~their voting or other~~ the rights attached to their *shares* or *voting power* in accordance with an agreement between them. ...

...

Q6: What is meant by deemed voting power?

A: *Deemed voting power* is the term used in this guidance to describe those cases set out in section 422(5)(a) of the *Act* in which one *person’s* holding of *voting power* is attributed to another. There may be circumstances in which *deemed voting power* must be aggregated with other ~~(actual or deemed)~~ *voting power* for the purposes of determining whether section 181(2)(b) of the *Act* applies, but the cases set out in section 422(5)(a) may result in the attribution of *voting power* to a *person* (H) without aggregation where H holds no other ~~actual or deemed~~ *voting power* in the relevant *firm* and is not acting in concert with any other ~~person~~ *person* (for example, where H exercises the *voting power* attaching to *shares* deposited with him pursuant to a discretion granted to him in the absence of (1) specific instructions from the actual shareholders, and (2) any agreement with the shareholders as to how he should exercise that *voting power* or any other rights attached to those *shares* - see section

422(5)(a)(vi) of the *Act*).

The provisions of section 422(5)(a) of the *Act* were transposed into the *Act* in order to implement Directive 2004/109/EC (the '~~Transparency Directive~~' *Transparency Directive*). These provisions have direct application to Part XII of the *Act*, and in particular to the meaning of '~~voting power~~' *voting power* for the purposes of that Part, by virtue of section 191G (Interpretation) of the *Act*.

In introducing the cases in which the *voting power* of a third party may be attributed to H, the ~~Transparency Directive~~ *Transparency Directive* refers to the ability 'to acquire, to dispose of, or to exercise voting rights in any of the [relevant] cases or a combination of them.' No new purchase of *shares* is therefore required in order for these attribution provisions to apply.

Q7: Where X holds 10% of the voting power in a firm and X is the subsidiary a controlled undertaking of H, which itself has no holding at all directly in the firm, is H a controller?

A: Yes. This follows from section 422(5)(a)(v) of the *Act*, which provides that *voting power* includes, in relation to a *person* (H), *voting power* held by a ~~subsidiary~~ *controlled undertaking* of H. The *voting power* held by X is attributed to H, making H a *controller*.

For the purposes of section 178 of the *Act*, both H and its ~~subsidiary~~, X would be required to notify and obtain the ~~appropriate regulator's~~ *FCA's* approval prior to acquiring or increasing *control*.

Q7A: Where X holds 10% of the voting power in a firm and X is a controlled undertaking of H, which in turn is a controlled undertaking of A, is A a controller? In this example, A itself has no holding at all directly in the firm.

A: Yes. The *voting power* held by X is attributed to H, in turn attributed to A, meaning that X, H and A would all be *controllers*.

...

Q9: Do the aggregation provisions apply to shareholders agreeing how they will vote on a particular issue, for example, for reasons of good corporate governance?

A: ...

However, there may be circumstances in which voting together on a specific issue would amount to acting in concert for these purposes. Where, for example, shareholders who have no previous agreement in relation to the exercise of ~~their voting rights~~ the rights attached to their *shares* or *voting power* agree to act together for the purpose of voting through the resolution(s) required to enable them to obtain control of the board of a *firm*, that is likely to constitute acting in concert for these purposes, although it may not fall within section 422(5)(a)(i) of the *Act*, if those shareholders have no 'lasting common

policy' towards the *firm's* management.

...

Q15: How does this guidance relate to the definition of 'acting in concert' in the Takeover Code (the 'Code')?

A: ...

This guidance is given for a quite different purpose. It is relevant to considering whether the holdings of *persons* who have reached an agreement in relation to the *shares* or ~~voting rights~~ voting power they do or will hold must be aggregated for the purpose of determining whether they are subject to the requirements for prudential assessment specified in sections 185 et seq of the *Act*. This guidance has no relevance to how 'acting in concert' is to be interpreted in the context of the Code.