

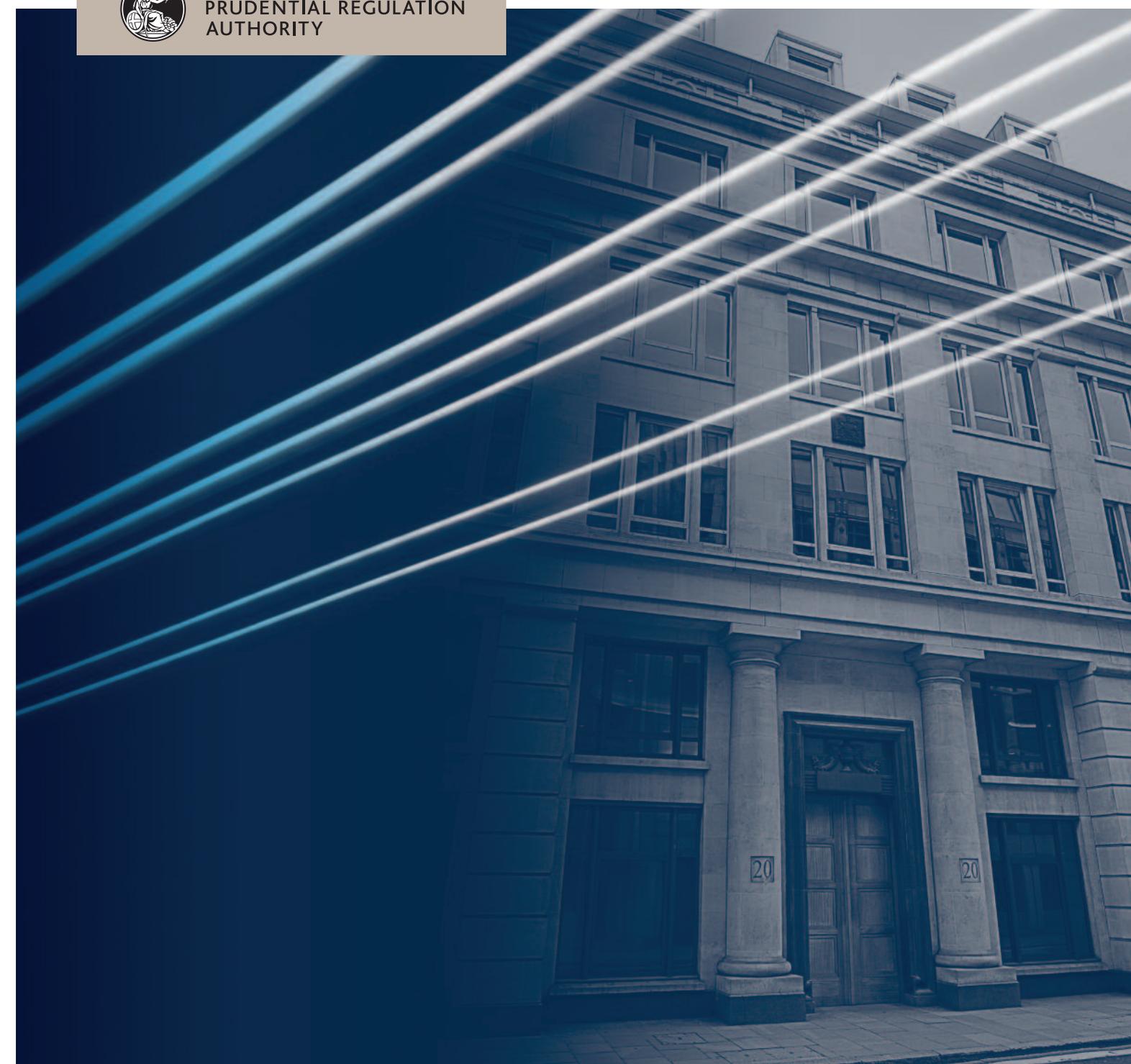
Supervisory Statement | SS33/15

Aggregation of holdings for the purpose of prudential assessment of controllers

August 2015



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY



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1 Introduction

1.1 This supervisory statement sets out the expectations of the Prudential Regulation Authority (PRA) in relation to how one person's holding of shares or voting power should be aggregated with that of another person for the purpose of determining whether those persons have decided to acquire or increase control over a UK-authorized person, such that notice must be given to the PRA in accordance with s 178 of the Financial Services and Markets Act 2000 (FSMA).

1.2 This statement is intended to be read together with the rules contained in the Change in Control and Close Links Parts of the PRA Rulebook. This supervisory statement is relevant to all PRA-authorized firms and, in particular, persons to which the Change in Control Part applies.

2 Aggregation of holdings

2.1 The PRA expects there to be no more than two situations which would require the holdings of two or more persons to be aggregated for the purpose of determining whether they are acquiring or increasing control within the meaning of section 181 or section 182 of FSMA.

2.2 These situations are where: (i) shares or voting power are held, or to be held, by persons acting in concert; and (ii) where one person's holding of voting power is attributed to another person (deemed voting power) in addition to any other voting power held.

2.3 These situations may apply concurrently, for example, where a person, H, could be acting in concert pursuant to section 178(2) of FSMA and have deemed voting power under section 422(5)(a)(i) of FSMA where H has concluded an agreement that obliges him and a third-party shareholder in the firm to adopt, by concerted exercise of the voting power they hold, a lasting common policy towards the management of that firm.

3 Acting in concert

3.1 There is no definition of the phrase acting in concert in FSMA. The Level 3 Guidelines⁽¹⁾ state that, for the purposes of the Acquisition Directive, persons are 'acting in concert' when each of them decides to exercise their rights linked to the shares they acquire in accordance with an explicit or implicit agreement made between them.

3.2 The PRA expects that the relevant persons would therefore:

- (i) hold shares and/or voting power in the firm or a parent undertaking of the firm; and

- (ii) reach a decision to exercise the rights linked to those shares in accordance with an agreement (in writing or otherwise) between them.

3.3 The PRA expects that while the rights 'linked to' for these purposes are most likely going to be voting rights, persons may be acting in concert where they decide to exercise other share-related rights, either in addition to, or instead of, voting rights, in accordance with an agreement made between them.

3.4 The Level 3 Guidelines state that, persons will begin acting in concert when they take the decision to exercise their rights in accordance with an agreement between them. This decision may be taken before or after the time the relevant persons decide to purchase shares in the firm.

3.5 The PRA does not expect such agreements to require persons to always exercise the rights attached to a person's respective shares in the same way. The PRA will consider persons to be acting in concert when, in line with the Level 3 Guidelines, they take the decision to exercise their rights in accordance with any agreement between them.

3.6 Once this decision has been taken, shares or voting rights must be aggregated to determine whether control has been, or will be, acquired. The same analysis applies to increases in control and reductions in control, as set out in sections 182 and 183 of FSMA, respectively. The requirement to aggregate the holdings of shares and/or voting power under section 178(2) of FSMA may apply to existing holdings, as well as to new purchases, of shares and/or voting power.

3.7 Although the term 'acting in concert' has a potentially wide meaning, not all common actions taken by shareholders, in relation to shares or voting power, will require the aggregation of holdings of shares or voting power for the purposes of section 178 of FSMA.

3.8 In particular, there may be circumstances in which persons (who between them hold the percentage level or more of the shares or voting power in a firm or its parent undertaking prompting notification) may engage in a concerted exercise of voting power, without this amounting to acting in concert in a manner requiring aggregation of their holdings.

3.9 'Deemed voting power' is the term used to describe those cases set out in section 422(5)(a) of FSMA in which one person's holding of voting power is attributed to another.

(1) Guidelines published jointly by the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR). The definition provided by the Guidelines is relied upon by the PRA in respect of change in control notifications, and should not be confused with the definition of acting in concert in the Takeover Code.

3.10 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 FSMA applies.

3.11 The cases set out in section 422(5)(a) of FSMA 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 (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.

3.12 The PRA would not generally regard shareholders as acting in concert for the purposes of section 178(2) of FSMA or as having deemed voting power requiring aggregation pursuant to section 422(5)(a)(i) of FSMA simply because they have agreed to vote together on a particular issue, for example:

- (i) rejection of a proposal for the remuneration of directors;
- (ii) appointment or removal of a particular director; or
- (iii) approval or rejection of an acquisition or disposal proposed by the firm's board of directors.

3.13 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 agree to act together for the purpose of voting to enable them to obtain control of the board of a firm. This may not fall within section 422(5)(a)(i) of FSMA, if those shareholders have no lasting common policy towards the firm's management. However, those circumstances are likely to be exceptional.

3.14 An agreement that does no more than require particular management actions to be put to a vote of shareholders, such as major acquisitions, disposals or new issues of shares, would not of itself trigger the requirement to notify. This is because there is no agreement as to how the shareholders will exercise their rights on, or whether the shareholders will adopt a common policy towards, those proposals.

3.15 An agreement that gives certain shareholders veto rights over key decisions by the firm may bring those shareholders within the ambit of section 178(1) of FSMA, regardless of whether they are acting in concert by virtue of their being able to exercise significant influence over the management of the firm.

3.16 Acting in concert covers all agreements as to how to exercise voting power on future issues generally. It would, therefore, require the aggregation of holdings by the parties to the agreement, for the purposes of section 178 of FSMA. It may also fall within the ambit of section 433(5)(a)(i) of FSMA, but this will depend on whether the parties to the agreement have adopted a lasting common policy that relates to the management of the relevant undertaking.

3.17 The PRA considers that acting in concert may also arise as a result of passive shareholder agreements. In these, a shareholder (the passive shareholder) agrees explicitly or implicitly with another shareholder or group of shareholders (the 'active shareholder') that it will not exercise its voting power.

3.18 For example, where the passive shareholder holds 2% of the voting power and the active shareholder holds 9% of the voting power, each would be regarded as having control (11% of the voting power) because their holdings are required to be aggregated under the acting in concert provisions.

3.19 However, persons that acquire shares as part of an investment or hedging programme, and adhere consistently to a stated policy of not voting those shares, would not be regarded by the PRA as having entered into an agreement with other shareholders, and would not be regarded as acting in concert with them.

3.20 There may be circumstances where multiple purchasers of shares, who are each party to a share purchase agreement and whose combined shareholding will fall within section 181(2) of FSMA, are required to give notice pursuant to section 178(1) of FSMA, on the basis that the existence of the agreement means they are acting in concert.

3.21 If it is clear that the only agreement between one or more persons consists in there being parties to the same share purchase agreement, and the terms which relate strictly to the purchase of shares and do not govern or seek to regulate the purchasers' relationship with each other following completion of the share purchase, the purchasers would not be regarded by the PRA as acting in concert for the purpose of requiring notification under section 178 of FSMA.

3.22 If, however, the share purchase agreement contains provisions governing or otherwise regulating the exercise of the rights linked to the shares to be acquired by the purchasers (or the purchasers have entered into, or propose to enter into, a shareholders' or other agreement with similar effect), the proposed acquirers may be regarded by the PRA to be acting in concert as per section 178 of FSMA, depending on the terms of the relevant agreement(s).

3.23 Where there is evidence to suggest that the parties do in fact intend to co-operate in relation to the exercise of voting or other rights relating to the shares they are acquiring, notwithstanding that no provisions to that effect appear in the share purchase or other written agreement, this may warrant the conclusion that there is an implicit agreement between them by virtue of which they are acting in concert.

3.24 Where an agreement is conditional on any necessary approval by the PRA, notice must be given under section 178(1) of FSMA before control is acquired. The point in time at which this occurs may depend on a number of circumstances. In the context of a share purchase agreement that provides for the PRA's approval of the purchaser to be obtained before the acquisition is completed, the purchaser will not usually be required to give a section 178(1) notice prior to entering into the agreement.

3.25 However, there may be circumstances in which control is acquired at the time the agreement is entered into, for example, where the parties have agreed that the purchaser will be entitled (whether by virtue of a power of attorney contained in the agreement or otherwise) to exercise the voting rights attached to the shares being acquired in the period between signing and completion. In that case, the purchaser will need to consider whether to give notice under section 178(1) of FSMA prior to entering into the agreement.

3.26 'Pre-emption' rights, 'drag along' rights and 'tag along' rights are unlikely to trigger the requirement to notify under section 178(1). Bare pre-emption rights will simply indicate each shareholder's (the offeror) agreement to give fellow shareholders an option to purchase these shares, if they wish to sell. The acquisition of shares under these arrangements cannot take place until the offeror decides to sell these shares and other shareholders decide to buy them.

3.27 Shareholders will not usually be regarded as acting in concert in holding or acquiring shares simply by agreeing to give each other future pre-emption rights.

3.28 The existence of 'drag along' and 'tag along' rights in a shareholders' agreement (designed to ensure equivalent treatment of shareholders of the same class in the event an offer is made, or to be made, by a non-shareholder to purchase the shares of any single shareholder in a private company) would not result in the shareholders who have the benefit of those rights being considered as acting in concert in their holding or acquiring of shares.

3.29 The definition of acting in concert in the Takeover Code (the Code) derives from the Takeover Directive.⁽¹⁾ It has relevance in determining whether the relationship between persons with interests in shares carrying voting rights requires those rights to be aggregated for the purpose of assessing

whether the threshold for the making of a mandatory offer to all other shareholders in a company, to which the Code applies, has been reached.

3.30 The notes on the definition in the Code confirm that the Takeover Panel's views in relation to acting in concert '...relate only to the Code and should not be taken as guidance on any other statutory or regulatory provisions'.

3.31 The information in this supervisory statement is given for a different purpose and has no relevance to how acting in concert is to be interpreted in the context of the Code. It is relevant to considering whether the holdings of persons who have reached an agreement in relation to the shares or voting rights 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 FSMA.

(1) 2004/25/EC.