

INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS

PART B: STANDARD LICENCE CONDITIONS

Appendix 9

Definition of “Close Links”

1.0 Introduction

1.1 The concept of ‘Close Links’ is referred to in the Act, including articles 6(8) and 18(2) as well as in a SLCs 1.06(k) and 7.30(f) of Part BI and SLC 1.09(j) of Part BII of these Rules.

2.0 Establishment of Close Links between a Licence Holder and Other Persons

2.1 A Licence Holder is closely linked with:

- a. any person who is or, if he were an undertaking, would be the Licence Holder’s parent undertaking;
- b. an undertaking which is a subsidiary undertaking of the Licence Holder;
- c. an undertaking which is or, if any person falling within paragraph (a) were an undertaking would be a fellow subsidiary undertaking; and
- d. any person in accordance with whose directions or instructions the directors of the Licence Holder are accustomed to act;
- e. two or more natural or legal persons which are permanently linked to the Licence Holder by a control relationship;

and any reference to the Licence Holder's close links with any person shall be construed accordingly.

3.0 Interpretation

3.1 In this Appendix:

“undertaking” means –

- a. a body corporate or a partnership; or

- b. an unincorporated association carrying on a trade or business with or without a view to profit.

“group undertaking”, in relation to another undertaking, means an undertaking which is -

- a. a parent or subsidiary undertaking of that other undertaking; or
- b. a subsidiary undertaking of any parent undertaking of that other undertaking;

and any reference to a group shall be construed accordingly.

3.2 An undertaking is a parent undertaking in relation to another undertaking (a "subsidiary undertaking") if-

- a. it holds a majority of the voting rights in the undertaking; or
- b. it is a member of the undertaking and has a right to appoint or remove a majority of its board of directors or persons entrusted with the administration of the company or
- c. it has a right to exercise a dominant influence over the undertaking
 - i. by virtue of provisions contained in the undertaking's memorandum or articles, or
 - ii. by virtue of a control contract (as defined in para. 3.19 of this Appendix); or
- d. it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking; or
- e. it is a member of the undertaking, no other person is the undertaking's parent by virtue of any of subparagraphs (a) to (c) above, and at all times since the beginning of the undertaking's immediately preceding financial year, a majority of the undertaking's board of directors have been directors who were appointed solely as a result of the exercise of its voting rights; or

- f. it has a participating interest in the undertaking and either actually exercises a dominant influence over the undertaking or it and the undertaking are managed on a unified basis; or
- g. it has a participating interest in the undertaking which either entitles it to 20 per cent or more of the voting rights in the undertaking or comprises 20 per cent or more of the shares in the undertaking;
- h. that other undertaking is a subsidiary undertaking of the parent undertaking which is at the head of those undertakings.

3.3 For the purposes of para. 3.2 above, an undertaking shall be treated as a member of another undertaking if –

- a. any of its subsidiary undertakings is a member of that other undertaking; or
- b. any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings.

Subject to para. 3.4 below, a parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings

3.4 An undertaking (“A”) shall not be treated as a parent undertaking of an undertaking (“B”) by reason only that another undertaking which is A’s subsidiary undertaking by virtue of sub-paragraph (l)(g) above is a parent undertaking of B.

3.5 Subject to para. 3.6 below, “fellow subsidiary undertakings” are, for the purposes of these Rules, undertakings which –

- a. are subsidiary undertakings of the same parent undertaking; but
- b. are not parent undertakings or subsidiary undertakings of each other.

3.6 Two subsidiary undertakings of the same parent undertaking are not fellow subsidiary undertakings if either of them is a subsidiary undertaking by virtue only of para. 3.2(g) of these Rules.

3.7 For the purposes of these Rules, a “participating interest” is an interest held by an undertaking in the shares of another undertaking which it holds on a long term basis for the purpose of securing a contribution to its activities by the exercise of control or influence arising from or related to that interest.

- 3.8 A holding of 20 per cent. or more of the shares of an undertaking shall be presumed to be a participating interest unless the contrary is shown.
- 3.9 The reference in para. 3.7 above to an interest in shares includes:
- a. an interest which is convertible into an interest in shares; and
 - b. an option to acquire shares or any such interest; and
 - c. an interest or option falls within (a) or (b) of this paragraph notwithstanding that the shares to which it relates are, until conversion or the exercise of the option, unissued.
- 3.10 For the purposes of paragraphs 3.8 and 3.9:
- a. an interest held on behalf of an undertaking shall be treated as held by it;
 - b. there shall be attributed to an undertaking any interests held by any of its subsidiary undertakings; and
 - c. the reference in sub-paragraph (1) of this paragraph 4 to the purpose of securing a contribution to the activities of an undertaking shall be taken to include the purpose to secure a contribution to the activities of any of its subsidiary undertakings and of the group as a whole.
- 3.11 References in this Appendix to shares -
- a. in relation to an undertaking with share capital, are to allotted shares;
 - b. in relation to an undertaking with no share capital, are to rights to shares in the capital of the undertaking;
 - c. in relation to an undertaking without capital, are to interests –
 - d. conferring any right to share in the profits or liability to contribute to the losses of the undertaking; or
 - e. giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up.
- 3.12 References in this Appendix to “voting rights in an undertaking” are references to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters,

- 3.13 In relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to holding a majority of the voting rights in the undertaking shall be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution.
- 3.14 For the purposes of this Appendix, the voting rights in an undertaking shall be taken to be reduced by any rights held by the undertaking itself.
- 3.15 In para. 3.2(b) of this Appendix, the reference to the right to appoint or remove a majority of the board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters.
- 3.16 An undertaking shall be treated *as* having the right to appoint a person to a directorship if-
- a. a person's appointment to such directorship follows necessarily from his appointment as director of the undertaking; or
 - b. the directorship is held by the undertaking itself.
- 3.17 A right to appoint or remove a director which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.
- 3.18 For the purposes of para. 3.2(c) of this Appendix, an undertaking shall not be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the operating and financial policies of that other undertaking which its directors are obliged to comply with, whether or not they are for the benefit of that other undertaking.
- 3.19 In para. 3.2(c) of this Appendix, "*control contract*" means a contract in writing conferring such a right as is referred to in para. 3.18 which:
- a. is of a kind authorised by the memorandum or articles of the undertaking in relation to which the right is exercisable; and
 - b. is permitted by the law under which the undertaking is established.

Nothing in this paragraph affects the construction of the expression "actually exercises a dominant influence" in para. 3.2(f) of this Annex.

- 3.20 Rights which are exercisable only in certain circumstances shall be taken into account for the purposes of this Appendix only –
- a. when the circumstances have arisen, and for so long as they continue to exist; or
 - b. when the circumstances are within the control of the person having the rights.
- 3.21 Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account for the purposes of this Appendix.
- 3.22 Rights held by a person in a fiduciary capacity shall be treated for purposes of this Appendix as not held by him.
- 3.23 Rights held by a person as nominee for another shall be treated for those purposes as held by the other. Rights shall be regarded as held by a person as nominee for another if they are exercisable only on that other's instructions or with his consent or concurrence.
- 3.24 Rights attached to shares held by way of security shall be treated for the purposes of this Appendix as held by the person providing the security -
- a. where, apart from the right to exercise them for the purposes of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with instructions; and
 - b. where the shares are held in connection with the granting of loans as part of normal business activities and, apart from the right to exercise them for the purposes of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.

For the purposes of this paragraph, rights shall be treated as being exercisable in accordance with the instructions, or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.

- 3.25 Rights shall be treated for the purposes of this Appendix as held by a parent undertaking if they are held by any of its subsidiary undertakings.
- 3.26 Nothing in paragraphs 3.22 to 3.24 and of this Appendix shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.

N.B. Subject to any specific provision contained in this Appendix, expressions used herein, which are appropriate to companies, shall be construed, in relation to an undertaking which is not a company, as referring to the corresponding persons, officers documents or organs, as the case may be, appropriate to undertakings of that description.
