Guidance Note

UPSTREAM ACQUISITIONS

7 April 2026

TAKEOVERS PANEL
TE PAE WHITIMANA

Contents

1 Introduction

1.1 An upstream acquisition is a transaction (whether in New Zealand or overseas) that may indirectly affect control of a Code company.[1] Where an upstream company (an **Upstream Company**) holds or controls voting rights in a Code company (a **Downstream Code Company**), an acquisition of effective control of that Upstream Company may be restricted by rule 6 of the Code.

1.2 This Guidance Note outlines the Panel's approach to the application of the Code in the context of upstream acquisitions. Specifically, this Guidance Note addresses when an upstream acquisition may have Code implications, how acquirers can comply with the Code and the exemptive relief the Panel may consider when compliance is impractical or impossible.

1.3 This Guidance Note also includes the following appendices:

(a) **Appendix A:** a flow chart illustrating the Panel's upstream exemption policy.

(b) **Appendix B:** a series of case studies and examples illustrating the Panel's approach to prior upstream acquisitions and exemptions.

1.4 Parties contemplating any of the transaction structures discussed in this Guidance Note are encouraged to consult the Panel executive in advance.

2 Application of the Code

Introduction

2.1 The Code was drafted on the premise that parties should not be able to use upstream transactions to achieve outcomes that could not be achieved through transactions which directly involve voting securities of the Code company. In other words, the Code is drafted so that the fundamental rule cannot be avoided merely because voting control in a Code company is acquired indirectly. Accordingly, the Code will apply to certain upstream transactions.

2.2 However, not all increases in control in an Upstream Company will have Code implications. Principally, upstream acquisitions have Code implications where the Upstream Company holds or controls more than 20% of the total voting rights in a Downstream Code Company (the **Downstream Voting Rights**).[2] While the application of the Code to the upstream transaction will be fact-specific, the Code will generally apply where an upstream person (the **Upstream Acquirer**) obtains effective control of the Upstream Company.[3] Where this occurs, the Upstream Acquirer must comply with the Code whether or not the acquisition was undertaken for the purpose of obtaining control of the Downstream Voting Rights.

2.3 Market participants are encouraged to read this Guidance Note in conjunction with the Panel's *Guidance Note on Control and Association*, and *Codeword 7*, which provide examples of some upstream acquisition scenarios. The Panel's *Guidance Note on Exemptions* may also be of assistance.

[1] See the meaning of Code company in section 2A of the Takeovers Act 1993.
[2] In addition to this 'base' scenario, where an Upstream Acquirer (or its associates) already holds or controls voting rights in the Downstream Code Company, the percentage of Downstream Voting Rights held or controlled by the Upstream Company may be 20% or less, as the Code applies to the combined post-acquisition control percentage which would include any other voting rights held or controlled by the Upstream Acquirer and its associates.
[3] As discussed below, certain increases in the extent of the control of the Downstream Voting Rights may also trigger Code implications, as may joining another person in sharing in the control of the Downstream Voting Rights.

How the Code may apply

2.4 Where control of an Upstream Company is acquired by an Upstream Acquirer (for example, on completion of the upstream transaction) then the Upstream Acquirer may become the effective controller of the Downstream Voting Rights.

2.5 Whether an upstream acquisition results in an Upstream Acquirer becoming the effective controller of the Downstream Voting Rights depends on a number of factors:

(a) There are clear cases where effective control of the Downstream Voting Rights will be achieved – for example, where the upstream transaction (e.g., a takeover of the Upstream Company) results in the Upstream Acquirer holding or controlling 100% of the voting rights in the Upstream Company.

(b) An acquisition which results in the Upstream Acquirer holding or controlling more than 50% of the voting rights of an Upstream Company will likely result in the Upstream Acquirer obtaining effective control of the Downstream Voting Rights. However, it is possible that, in some circumstances, this may not be the case.

(c) It is also possible, that in some circumstances, an Upstream Acquirer becoming the holder or controller of 50% or less of the voting rights of an Upstream Company will result in the Upstream Acquirer obtaining effective control of the Downstream Voting Rights.

2.6 In any event, the key question is whether effective control was acquired. Relevant factors to determining whether control was acquired may include voting agreements, shareholders' agreements and the Upstream Company's constitution. Such arrangements may limit or increase the Upstream Acquirer's ability to exercise control over the Downstream Voting Rights.

2.7 Where the Upstream Acquirer becomes the controller of sufficient voting rights to control, in practice, the composition of the board of the Upstream Company, this will likely be treated as effective control of the Downstream Voting Rights.

2.8 Other less obvious circumstances where the Code may apply include:

(a) **Changes in joint venture interests:** If an incorporated joint venture controls the Downstream Voting Rights, a change in participating interests, such as admitting a new joint venture party or one party acquiring part or all of another's interest, may have Code implications as a result of the operation of rule 6(2)(b) of the Code.

(b) **Further acquisitions by an existing controller:** Where an Upstream Acquirer already has effective (but not full) control of the Upstream Company and acquires a further interest, the deeming provisions in rule 6(2)(c) of the Code may result in the Code applying.

2.9 The examples set out above are not exhaustive. Parties considering transactions of this nature are encouraged to contact the Panel executive to discuss how the Code may apply in their specific circumstances.

Prior shareholder approval or downstream takeover

2.10 Absent an exemption, in order to comply with the Code, before the Upstream Acquirer gains control of the Upstream Company (and therefore of the Downstream Voting Rights), the acquirer must have either:

(a) obtained approval from the Downstream Code Company's shareholders by way of an ordinary resolution under rule 7(c) of the Code; or

(b) become the holder or controller of the Downstream Voting Rights directly (in a Code compliant method, e.g., through a takeover) such that the Upstream Company no longer holds or controls the Downstream Voting Rights.

2.11 Under option (a), the rule 7(c) approval by the Downstream Code Company's shareholders would need to have been obtained before the upstream acquisition is completed (or any earlier acquisition of control of the Downstream Voting Rights occurs).

2.12 Under option (b), acquisition of the Downstream Voting Rights would need to be contemporaneous with, or in advance of, the acquisition of control of the Upstream Company. This would likely involve the Upstream Company having sold the securities to which the Downstream Voting Rights are attached (the **Downstream Voting Securities**) to the Upstream Acquirer under a full takeover of the Downstream Code Company under rule 7(a) of the Code, a scheme of arrangement or other Code compliant method. Expressed differently, the Upstream Company would have to have ceased to hold or control the Downstream Voting Rights before (or at the same time as) the Upstream Acquirer obtains control of the Upstream Company.

2.13 However, the Panel recognises that both compliance options may be impractical, if not impossible, in some circumstances. In these situations, the alternative to complying with the Code's requirements is to obtain an exemption from those requirements.

3 Application for exemption

3.1 This section outlines how the Panel is likely to exercise its discretion to grant exemptions. A flow chart illustrating this policy is set out in **Appendix A** of this Guidance Note.

3.2 Where appropriate, the Panel may keep an exemption confidential on the grounds of commercial confidentiality. Generally, the confidentiality would only last as long as appropriate and necessary for the purposes of the transaction.

Unconditional exemption

3.3 The Panel will normally grant an unconditional exemption from rule 6(1) of the Code for an Upstream Company, where the upstream acquisition would result in the Upstream Acquirer becoming the controller of more than 20% of the total voting rights in a Downstream Code Company, if acquiring control of the Downstream Voting Rights would not reasonably be regarded as a significant purpose of the upstream acquisition (the **No Downstream Purpose Test**).

3.4 There are two key enquiries in relation to the No Downstream Purpose Test:

(a) First, whether the value of the Downstream Voting Securities[4] is less than 25% of the enterprise value of the Upstream Company (or such other valuation methodology that the Panel considers may be appropriate in the circumstances (the **Value Test**)).[5]

(b) As a secondary question, whether the Upstream Company is listed on a "recognised exchange" as described below (the **Listing Standard**).

3.5 If the Value Test and the Listing Standard are met, then the No Downstream Purpose Test will be prima facie satisfied. However:

(a) The Value Test and the Listing Standard are only proxies for purpose.

[4] The starting point for valuing the Downstream Voting Securities will typically be a suitable Volume-Weighted Average Price (**VWAP**) figure. However, VWAP may not be appropriate in all circumstances. Examples include where the Downstream Code Company is not listed or where it is not appropriate to attach a minority discount to the Downstream Voting Securities (for example, where the Downstream Voting Securities carry effective control over the Downstream Code Company).

[5] For the purposes of determining the enterprise value, the Panel expects that debt in the Downstream Code Company consolidated in the Upstream Company will be excluded and, where a company is listed, an assessment of its enterprise value will involve an assessment of its market capitalisation. If a company is not listed, the Panel will decide the appropriate methodology.

(b) If the Panel considers that a significant purpose of the upstream acquisition is to acquire control of the Downstream Voting Rights, the meeting of the Value Test and/or the Listing Standard will likely be disregarded.[6]

(c) If the Value Test is met but the Listing Standard is not, the Panel may still consider that the No Downstream Purpose Test is satisfied. However, this may affect the conditions that may attach to an exemption.

3.6 Where the value of the Downstream Voting Securities is more than 25% of the enterprise value of the Upstream Company, it is possible that the failure to meet the Value Test may be disregarded if the Panel is satisfied that it is not a significant purpose of the acquisition to acquire control of the Downstream Voting Rights.

3.7 "Recognised exchanges" include the New Zealand Exchange Limited and foreign exchanges in jurisdictions with a comparable level of investor protection to New Zealand. The Panel has identified the following foreign exchanges to be "recognised exchanges": the Australian Securities Exchange, Deutsche Börse AG, Euronext Amsterdam NV, Euronext Paris SA, Borsa Italiana S.p.A, JSE Limited, Bursa Malaysia Berhad, London Stock Exchange plc, The NASDAQ Stock Market Inc, New York Stock Exchange Inc, Singapore Exchange Limited, The Stock Exchange of Hong Kong Limited, SIX Swiss Exchange, Tokyo Stock Exchange and The Toronto Stock Exchange Inc.

3.8 If the No Downstream Purpose Test is satisfied, the Panel is likely to grant an exemption which is subject to no (or very limited) conditions. Specifically:

(a) Where both aspects of the No Downstream Purpose Test are met, the exemption will likely be unconditional.

(b) Where the Listing Standard is not met, but the No Downstream Purpose Test is nonetheless satisfied, the exemption will likely include a condition that the material terms of the upstream acquisition are disclosed to shareholders of the Downstream Code Company on or before the date on which the Upstream Acquirer obtains control of the Downstream Voting Rights.

Conditional exemption

3.9 If the No Downstream Purpose Test is not satisfied, the Panel is unlikely to grant an unconditional exemption. However, the Panel will normally grant a conditional exemption in these circumstances. The exemption would likely be subject to the condition that the Upstream Acquirer elects, and undertakes, one of the following options (each a **Compliance Option**), being to either:

(a) decrease the Upstream Company's holding or control of securities carrying voting rights in the Downstream Code Company to 20% or less by no later than 12 months after the upstream acquisition becomes unconditional, and ensure that, pending the decrease occurring, the Upstream Company does not exercise any more than 20% of the total voting rights (the **Control Reduction Option**);[7] or

(b) make a full Code offer for the voting securities in the Downstream Code Company not already held or controlled by the Upstream Acquirer or the Upstream Company within 40 working days after the upstream acquisition becomes unconditional (the **Follow-on Offer Option**).

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[6] Other factors that may indicate an Upstream Acquirer's purpose include:
(a) public statements that indicate the Upstream Acquirer's intentions one way or the other;
(b) the fact a previous offer has been made by the Upstream Acquirer for the Downstream Code Company (which could indicate that the downstream acquisition was a significant purpose);
(c) any association or aggregation of voting rights or other interests or entitlements in the Downstream Code Company caused by the upstream acquisition (which will likely suggest a significant purpose to acquire the Downstream Voting Rights); and/or
(d) cross shareholdings or board memberships between any of the Upstream Acquirer, the Upstream Company, the Downstream Code Company and any of their associates (again, this could indicate that a significant purpose was to acquire the Downstream Voting Rights).

[7] This assumes that the Upstream Acquirer (and/or any of its associates) did not hold or control any voting rights in the Downstream Code Company prior to the upstream acquisition. If there are any such voting rights, the 20% figure may need to be adjusted.

3.10 It will generally be a requirement that the election of the Compliance Option be notified to the Panel and to the Downstream Code Company (and the registered exchange, if either of the Upstream Company or the Downstream Code Company has equity securities quoted on a New Zealand registered exchange) on or before the later of:

(a) 10 working days after the follow-on offer price is determined (see below for details about the determination of the follow-on offer price); or

(b) the working day after the upstream acquisition becomes unconditional.

3.11 This timing allows the election of the Compliance Option to be made after the follow-on offer price is determined. However, the election of a Compliance Option could be made at any time in advance of the follow-on offer price being determined.

Requirements of the Control Reduction Option

3.12 If the Control Reduction Option is elected, the Upstream Acquirer must undertake to the Panel that it will procure the Upstream Company to decrease its holding so that the Upstream Acquirer (and its associates) would hold or control no more than 20% of the total voting rights in the Downstream Code Company after the decrease. This must normally be achieved no later than 12 months after the upstream acquisition becomes unconditional. The Upstream Acquirer will likely also have to undertake to the Panel that, pending the decrease occurring, it will ensure that it, the Upstream Company and any associate of either of them, will not exercise any voting rights in the Downstream Code Company above the permitted 20% level.

3.13 If the Downstream Voting Securities are divested, any acquirer(s) of the Downstream Voting Securities must also comply with the Code. For example, under rule 6(1)(a), if the Downstream Voting Securities conferred a control percentage of 25%, they could not be sold to an associate of the Upstream Acquirer unless the associate obtained the approval of the Downstream Code Company's shareholders in accordance with rule 7(c) of the Code.

Requirements of the Follow-on Offer Option

3.14 The Panel will typically require that the consideration for the follow-on offer must be cash (or include a cash alternative) and must be determined as follows:

(a) If the Panel is satisfied that the price effectively being offered to the Upstream Company's shareholders for the Upstream Company's Downstream Voting Securities can be clearly and accurately determined from the upstream offer consideration (the **See-through Price**), the follow-on offer consideration will not be less than the See-through Price. Only in rare cases will the See-through Price be able to be clearly and accurately determined, for example, where the only assets of the Upstream Company were the Downstream Voting Securities.

(b) Where the See-through Price cannot be accurately determined, the follow-on offer consideration will be not less than the fair and reasonable value of each Downstream Voting Security, as determined by an independent expert that is appointed by the Panel.

(c) The Panel expects that, where there is only one class of Downstream Voting Securities, the fair and reasonable value per Downstream Voting Security will be calculated by:[8]

(i) first assessing the value of all the Downstream Voting Securities; and

(ii) then allocating that value pro rata among all Downstream Voting Securities.

[8] Where there are multiple classes of Downstream Voting Securities, the price and terms for each class must be fair and reasonable as between classes (and certified as such by an independent adviser) under rule 8(3). In determining the fair and reasonable price, the same general approach must be followed – i.e., a proportionate division of the aggregate value of the Downstream Voting Securities, with the same consideration and terms and conditions being offered to all holders in each class. In addition, if there are other classes of equity securities, an offer will have to be made for them in accordance with the Code.

3.15 In relation to the Follow-on Offer Option, the following additional conditions of an exemption would likely apply:

(a) The offeror must pay the reasonable fees, costs and expenses of the independent expert in relation to its determination of the follow-on offer price, provide the expert with any requested information and agree to any of the expert's usual terms and conditions.

(b) The offeror must include with the offer document that is sent to shareholders for the follow-on offer a copy of the independent expert's valuation and an explanation of how the follow-on offer price was derived.

(c) Any other terms and conditions of the follow-on offer, included by the offeror in the offer document, must be in a form approved by the Panel.

3.16 The other terms and conditions of the follow-on offer (referred to in paragraph 3.15(c)) that the Panel may approve could include:

(a) the usual conditions of takeover offers that are made pursuant to the Code (the Panel would need to have approved the wording of these and all other conditions); and

(b) that the requisite regulatory approvals (such as from the Overseas Investment Office or Commerce Commission) are obtained, and that the Upstream Acquirer will use its best endeavours in good faith to obtain all such approvals.

3.17 However, the Panel is unlikely to agree to any minimum acceptance condition being included in the follow-on offer, other than that required by rule 23 of the Code.

3.18 Also applicable to the follow-on offer conditions are rules 25(1) and 25(1A) of the Code, together with the Panel's guidance on restrictive conditions, set out in the *Guidance Note on Offer Documents*.

3.19 The Panel is unlikely to impose a condition to an exemption that the follow-on offer succeeds.

Appointment of an independent expert

3.20 The independent expert would likely be appointed by the Panel as follows:

(a) The Upstream Acquirer would request that the Panel appoints an independent expert.

(b) The request should include a list of the advisers from whom the Upstream Acquirer has already received advice in relation to the upstream acquisition and the resulting downstream acquisition. The Upstream Acquirer should not make any suggestions as to who it thinks would be appropriate for appointment by the Panel. However, the Upstream Acquirer should also advise the Panel of any firms that it considers might be conflicted, and why it considers they may be conflicted.

(c) The Panel would then undertake a closed tender process inviting applications from experts that it considers suitable. The Panel would approach those experts on a confidential basis. The independent expert would be selected on the basis of independence and appropriate qualifications and experience (as to these matters, see the *Guidance Note on Independent Advisers*). The Panel would also take each expert's quoted fees into account when selecting the expert for appointment.

(d) Once the Panel has selected an independent expert, the Upstream Acquirer would be required to engage the expert on the basis of the conditionality described at paragraph 3.15(a) above.

3.21 At least 10 working days should be allowed for the appointment process and 20 working days for the valuation to be undertaken by the appointed expert. The expert will undertake a valuation on the basis of all available information at the time of the valuation and assess the valuation at (or as close as possible to) the date on which the follow-on offer is to be made.

3.22 A follow-on offer would likely need to be made within 40 working days after the upstream acquisition becomes unconditional. Accordingly, it would be advisable for the Upstream Acquirer to approach the Panel for an exemption as early as possible.

3.23 To ensure compliance timeframes are met, if the Panel grants a conditional exemption to the Upstream Acquirer requiring that they elect a Compliance Option, it may be pragmatic to request that the Panel appoints an independent expert at that time.

Market disclosure

3.24 To ensure the market for shares in the Downstream Code Company is adequately informed, the Upstream Acquirer will generally be required to notify the Panel and the Downstream Code Company (and, if either the Upstream Company or the Downstream Code Company has its ordinary shares quoted on a New Zealand registered exchange, that registered exchange) which Compliance Option it elects, no later than either:

(a) 10 working days after the follow-on offer price is determined; or

(b) the working day after the upstream acquisition becomes unconditional.

3.25 If the Follow-on Offer Option is elected, the notification must include full details of both the upstream and downstream acquisitions, including the timing and consideration for the acquisitions (the consideration for the downstream acquisition must be disclosed only if that consideration has been determined at the time of the announcement).

4 Rule 64 of the Code – prohibition on misleading or deceptive conduct

4.1 Rule 64 of the Code prohibits misleading or deceptive conduct in relation to Code-regulated transactions or events.[9]

4.2 Any statements, actions or other conduct by any person in relation to the Downstream Code Company (and potentially the upstream acquisition) would be subject to the rule 64 prohibition.

4.3 Particular care should be taken over "last and final statements". For example, if the Upstream Acquirer was to state that it was going to elect the Control Reduction Option, that would constitute a last and final statement that is subject to rule 64. The Panel would likely find that rule 64 had been breached if the Upstream Acquirer did not then elect the Control Reduction Option.

4.4 Likewise, other persons including shareholders and directors are subject to the rule 64 prohibition against misleading or deceptive conduct.

4.5 The Panel's policy on last and final statements is set out in the *Guidance Note on Misleading or Deceptive Conduct*.

[9] Rule 64 provides that:
(1) A person must not engage in conduct that is-
(a) conduct in relation to any transaction or event that is regulated by [the] Code; and
(b) misleading or deceptive or likely to mislead or deceive.
(2) A person must not engage in conduct that is-
(a) incidental or preliminary to a transaction or event that is or is likely to be regulated by [the] Code; and
(b) misleading or deceptive or likely to mislead or deceive.

Schedule: Version control, disclaimer and copyright

Version Control

This version (Panel document reference number 1007053.1) was published on 7 April 2026.

The version history of this Guidance Note is, in summary:

Date of version	Principal changes from previous version	Document reference number
7 April 2026	Incorporated new guidance on upstream acquisitions where the upstream acquirer already has effective control and general updates to the structure and wording used in the Guidance Note.	#1007053.1
5 November 2021	Incorporated new guidance on the Purpose Test for granting unconditional exemptions, a new case study, and general wording updates throughout the Guidance Note.	#414427
14 April 2014	N/A – This was the first version of the Guidance Note.	#380050

Disclaimer

All reasonable measures have been taken to ensure the information in this Guidance Note is accurate and current. The Takeovers Panel may replace or update this Guidance Note at any time and you should ensure that you have the most recent version of this Guidance Note by checking www.takeovers.govt.nz.

The information is not legal advice. It is not intended to take the place of specific legal advice from a qualified professional. The information does not replace or alter the laws of New Zealand and other official guidelines or requirements. As with all matters that come before the Panel, any examples referred to in this Guidance Note are illustrative only, may not state all relevant facts which are material when contrasted to future matters and the Panel is not bound by its own precedents.

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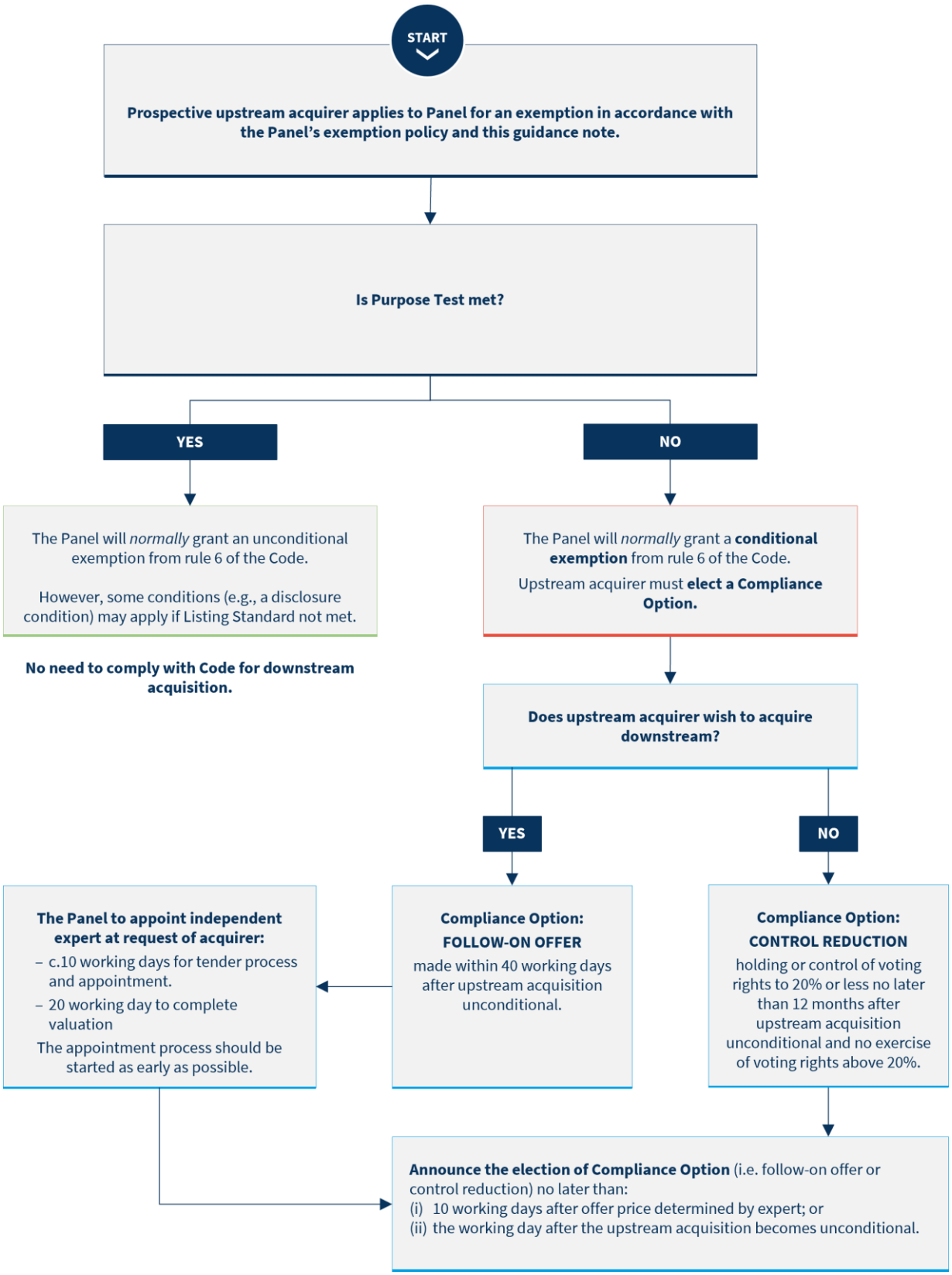
APPENDIX A
THE PANEL'S UPSTREAM EXEMPTION POLICY



Appendix B Case Studies and Examples of Declined Exemptions Involving Rule 6(2) of the Code

The following case studies and examples are illustrative only. Not all of the facts which may have been relevant to the Panel's decision have been included. Market participants are encouraged to consult with the Panel in relation to any potential fact situation.

1 Case Studies

Case study: AMP / AXA Asia Pacific / AMP NZ Office

1.1 In 2011, the Panel granted an exemption from rule 6(1) of the Code to AMP Limited (and certain of its related entities) (**AMP**) in relation to the proposed merger of AMP with the Australasian business of AXA Asia Pacific Holdings Limited (**AXA**). One component of AXA's business was a funds management operation that held approximately 2.8% of the shares in AMP NZ Office Limited (**ANZO**), an NZX-listed Code company. At the time of the proposed merger, AMP (through a subsidiary) already held or controlled a percentage of voting rights in ANZO that was, when aggregated with one of AMP's associates, slightly more than 20%. Therefore, the merger would have resulted in AMP becoming the holder or controller, through the upstream acquisition of AXA, of an increased percentage of voting rights in ANZO in breach of rule 6(1) of the Code.

1.2 The exemption involved the application of the Value Test as a proxy for the No Downstream Purpose Test (see paragraph 3.4(a) above). The Panel decided that the proposed transaction fell squarely within the policy for an unconditional exemption under the Guidance Note. In terms of the Value Test, the value of AXA's holding in ANZO represented less than 0.1% of AXA's business and, following the merger, the holding would equate to approximately 0.2% of AMP's business. Therefore, in each case the value of the interest held by the upstream company in ANZO as a result of the merger was significantly less than the 25% threshold set out in the Guidance Note.

1.3 See the Takeovers Code (AMP NZ Office Limited) Exemption Notice 2011.

Case study: Opus International Consultants Limited

1.4 The Panel approved the granting of an unconditional exemption from rule 6(1) of the Code in relation to the proposed acquisition of 100% of the voting rights in Opus Group Berhad (**OGB**) by Faber Group Berhad (**Faber**), with both being Malaysian companies - see the diagram below (the **Proposed Transaction**). In granting its exemption, the Panel applied its policy for dealing with upstream acquisitions.

1.5 The Proposed Transaction had downstream implications on the control of voting rights in Opus International Consultants Limited, a New Zealand Code company (**Opus NZ**).

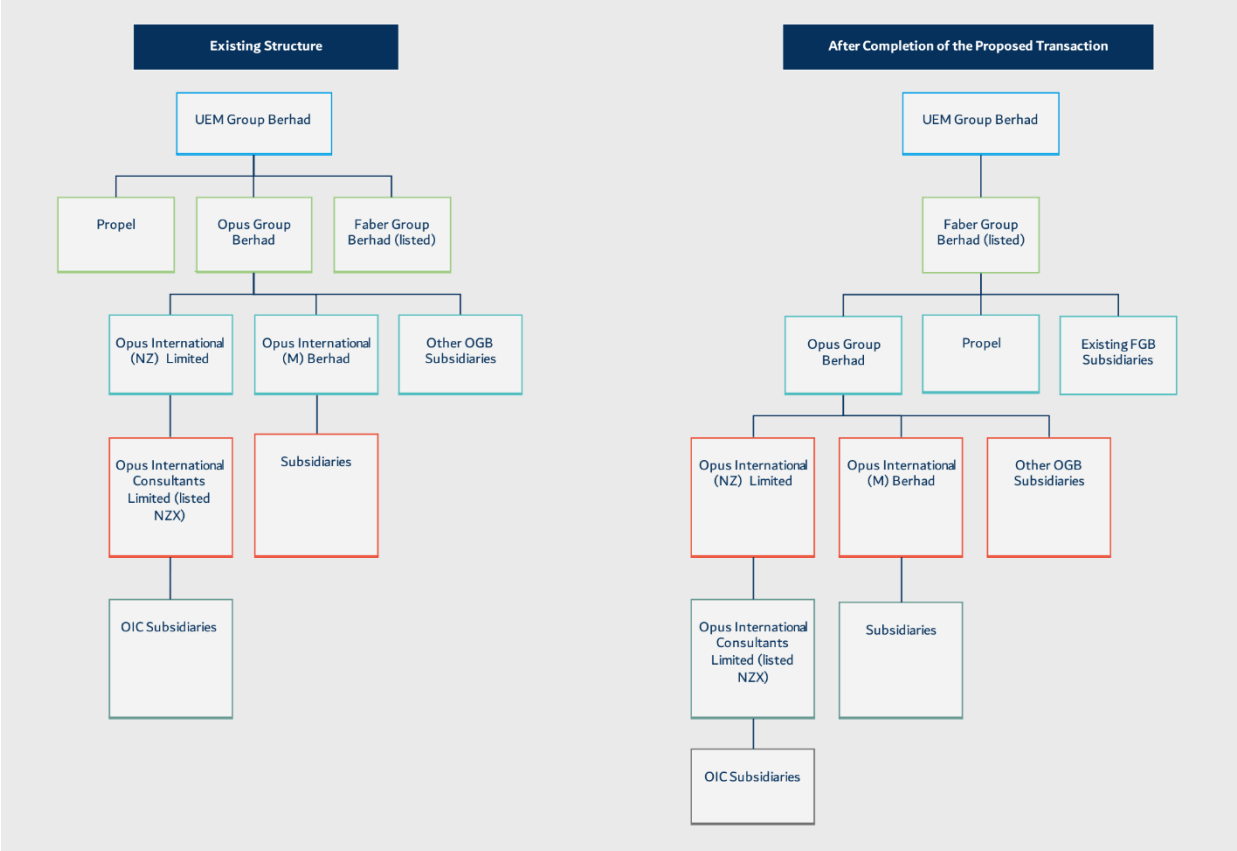
1.6 The acquisition of OGB by Faber would (indirectly, through its wholly owned subsidiaries) result in Faber becoming the controller of more than 20% of the voting rights in Opus NZ and, as such, required compliance with rule 6 of the Code. In the absence of an exemption, Faber would have had to obtain the approval of Opus NZ's shareholders for the Proposed Transaction, by ordinary resolution.

1.7 OGB was not listed on a recognised exchange, and therefore did not meet the Listing Standard. However, the Panel took into account the fact that Faber was listed on a recognised exchange, and information regarding the Proposed Transaction had been disseminated through, and was available on, that exchange.

1.8 The Proposed Transaction did not meet the Value Test, but the Panel considered that a reasonable person would not regard acquiring control of the voting rights in Opus NZ as a "significant purpose" of the Proposed Transaction. In reaching this view, the Panel noted that the Proposed Transaction was, at its most basic, a consequence of the "reverse takeover" of Faber by UEMG Group Berhad (the group parent).

1.9 See the Takeovers Code (Opus International Consultants Limited) Exemption Notice 2014.

Opus International Consultants Structure



Case study: Terra Vitae Vineyards Limited

1.10 Terra Vitae Vineyards Limited (**TVL**) was an unlisted Code company whose shares were traded on the Unlisted Securities Exchange. Villa Maria Estate Limited (**VMEL**) held 21.89% of the shares in TVL (the **VMEL Parcel**). TVL and VMEL were parties to a long-term grape supply and vineyard management agreement (the **Agreement**).

1.11 VMEL was wholly owned by FFWL Limited (in Receivership) (**FFWL**). Indevin Group Limited (**IGL**) proposed to acquire 100% of the shares in VMEL from FFWL, which would result in IGL and certain of its upstream parties gaining effective control of the VMEL Parcel. Accordingly, the proposed acquisition was subject to the Code.

1.12 VMEL was not listed on a recognised exchange, and so did not meet the Listing Standard. However, the Panel was satisfied that acquiring control of VMEL's holding in TVL was not a significant purpose of the proposed transaction, for two reasons. Firstly, the Value Test was met, as the value of the VMEL Parcel represented a small percentage of VMEL's enterprise value, falling significantly under the 25% threshold. Secondly, VMEL's control of TVL flowed largely from the Agreement rather than its holding in TVL.

1.13 The Panel granted IGL and certain of its upstream parties an exemption from rule 6(1) of the Code subject only to a disclosure condition, to provide for TVL's shareholders to be appropriately informed of the material terms of the upstream acquisition.

1.14 See the Takeovers Code (Terra Vitae Vineyards Limited) Exemption Notice 2021.

2 Examples of Declined Exemptions Involving Rule 6(2) of the Code

General Information

2.1 This part of the Guidance Note describes two applications for exemptions that were declined by the Panel on the basis that the relevant transactions did not infringe a deeming rule in rule 6(2) of the Code and therefore could be put into effect without the need for an exemption from the fundamental rule. The applications are illustrative of the Panel's interpretation of rule 6(2).

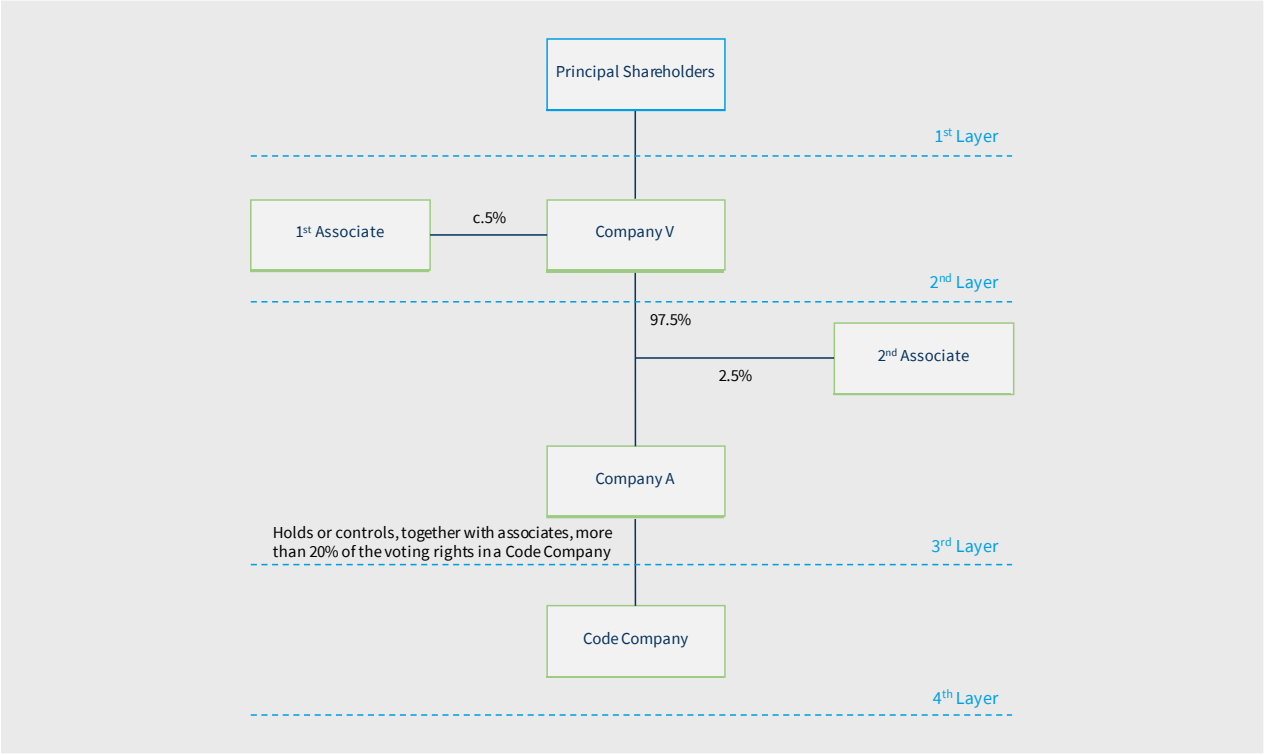
2.2 The names of the parties involved have been omitted to protect commercial confidentiality.

Restructuring of family investment structure – rule 6(2)(b) – joining in control as associates

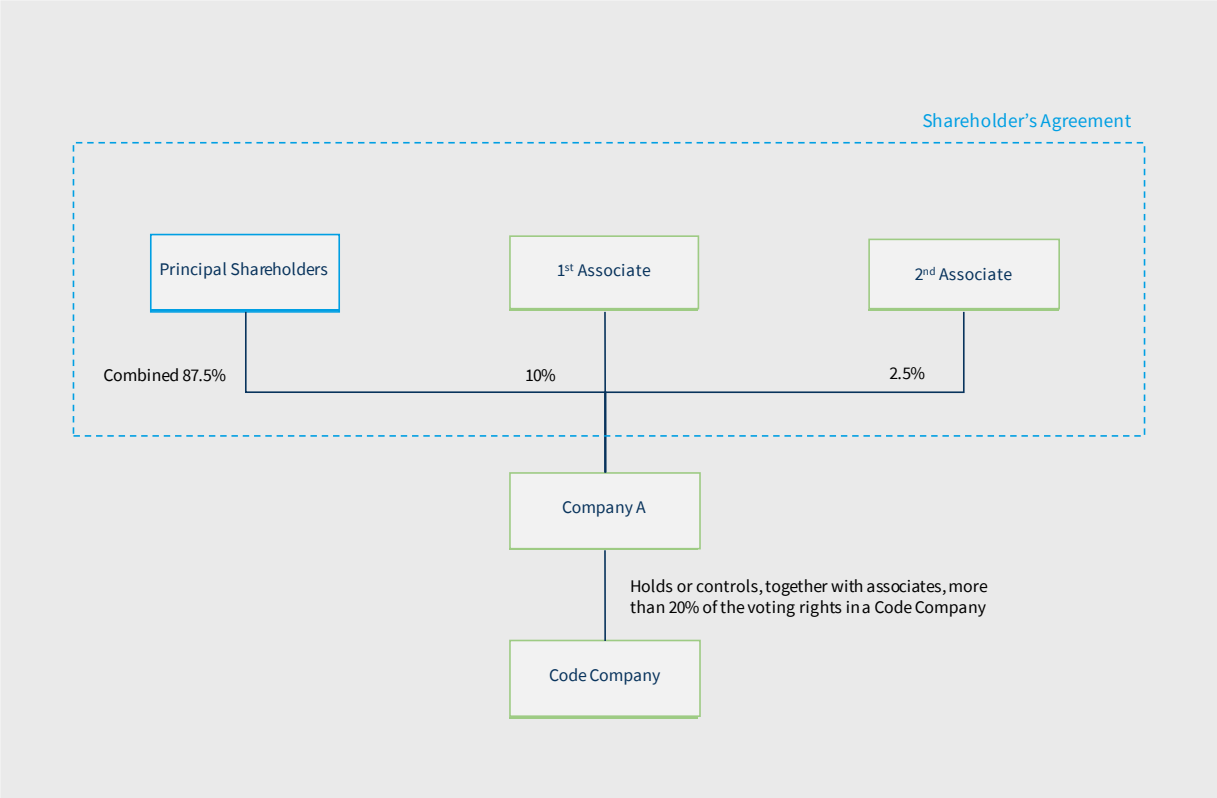
2.3 The diagrams below illustrate the transaction:

Example 1:

Pre-restructure



Post-restructure



Background

2.4 The family's investment interest in the Code company was structured into four layers. The first layer essentially comprised separate entities which operated for the benefit of family members (the **Principal Shareholders**).

2.5 The Principal Shareholders held approximately 95% of the shares in an investment holding company, Company V (the second layer). The remaining 5% of the shares were held by an associate of the family (the **First Associate**). Company V held a range of different investments interests.

2.6 One of those interests was a 97.5% holding in Company A (the third layer). The remaining shares in Company A were held by another associate who was connected to the family (the **Second Associate**). Company A held or controlled, together with its associates, more than 20% of the voting rights in a Code company.

2.7 This structure effectively gave the Principal Shareholders control of more than 20% of the voting rights in the Code company.

Proposed restructuring

2.8 The family wished to simplify the structure. The proposed restructuring involved Company V disposing of its 97.5% interest in Company A to the Principal Shareholders and the First Associate. As a result, the Principal Shareholders would hold a combined 87.5% of the shares in Company A, the First Associate would hold 10% and the Second Associate would continue to hold 2.5%. The shareholders of Company A would then enter into a shareholders' agreement whereby (among other things):

(a) the director of Company A would be nominated by the Principal Shareholders; and
(b) Company A could not enter into significant transactions without the approval of the Principal Shareholders.

The Panel's decision

2.9 The Principal Shareholders sought an exemption from rule 6(1) of the Code to allow the restructuring without obtaining the approval of the shareholders of the Code company.

2.10 The Panel noted that the proposed restructuring was not going to result in the Principal Shareholders increasing the percentage of voting rights that they already controlled in the Code company. The issue for the Panel was whether the First Associate, by becoming a 10% shareholder in Company A, would be deemed by rule 6(2)(b) of the Code to increase its voting control in the Code company above 20%.

2.11 Rule 6(2)(b) provides that if "a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights". The key consideration for the Panel was whether the First Associate was going to join the Principal Shareholders in the control of voting rights held by them in the Code company. The Panel concluded that the shareholder agreement effectively vested effective control in the Principal Shareholders, and therefore, the First Associate would not join them in the control of the voting rights. Accordingly, rule 6(2)(b) did not apply.

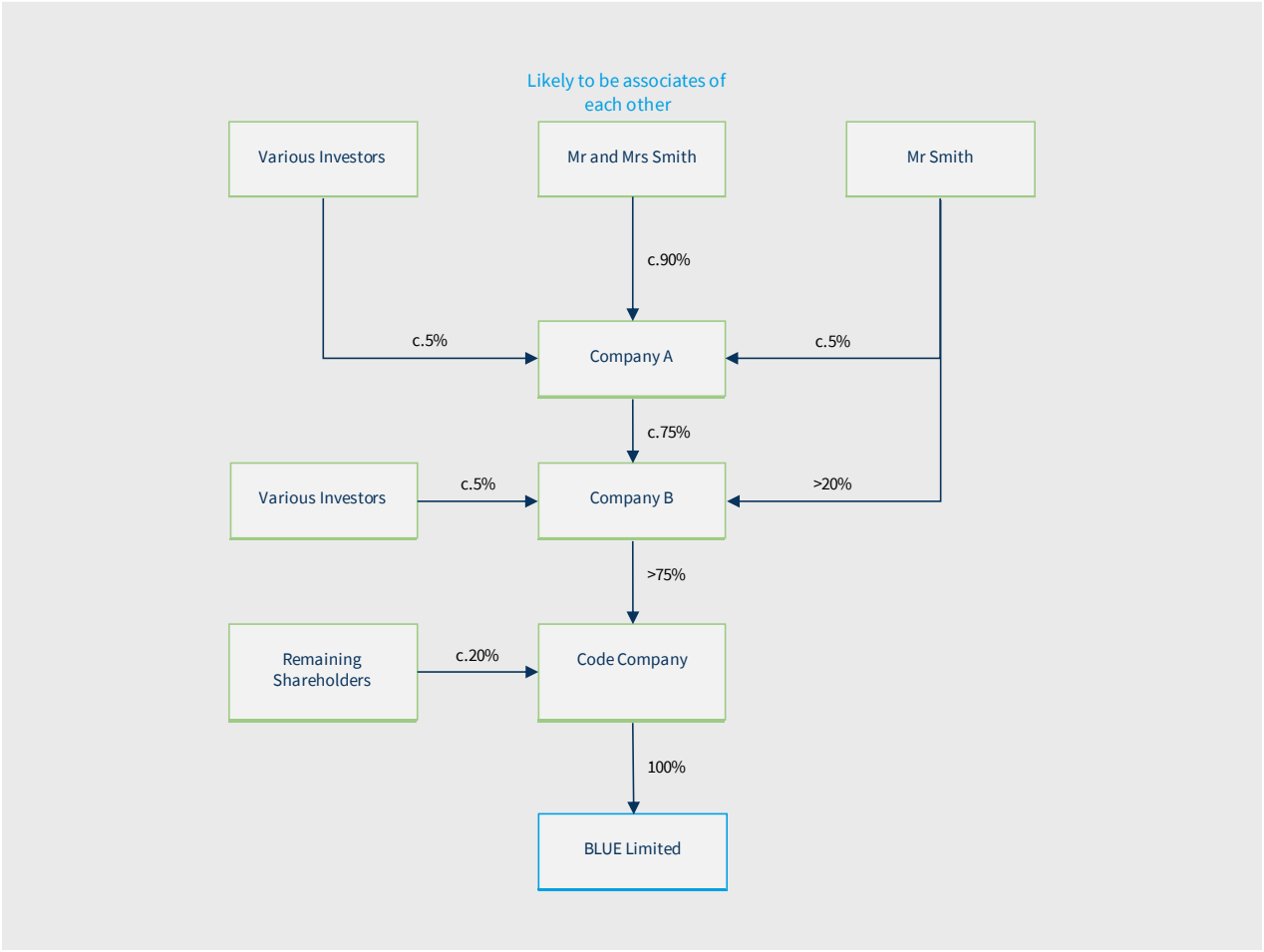
2.12 Given the Code would not have applied to any persons involved in the proposed restructuring transaction, the Panel declined to grant the exemption, on the basis that no exemption was necessary.

<u>Proposed merger – rule 6(2)(c) – upstream companies</u>

2.13 The second example relates to the proposed merger of two upstream companies. This is depicted below in Example 2.

Example 2:

Post-merger



Background

2.14 Mr and Mrs Smith jointly held 90% of the shares in Company A. Mr Smith, held in his own name 5% of the shares, and the remaining shareholders of Company A were various other investors, all of whom were likely to have been associates of the Smiths for the purposes of the Code.

2.15 Company A held approximately 75% of the shares in another company, Company B. Mr Smith held 20% of the shares in Company B and the remaining shares were held by various investors. Mr Smith and these investors were all likely to have been associates of Company A and of the Smiths for the purposes of the Code.

Proposed transactions

2.16 Company B held all the shares in Blue Limited (**Blue**). It was proposed that Company B would merge with a Code company (the **Merger**). The proposed transaction would involve Company B selling all of its shares in Blue to the Code company and the Code company issuing shares to Company B as consideration for the shares in Blue. Company B would also subscribe for additional shares in the Code company. It was expected that after the Merger, Company B would hold more than 75% of the Code company and that the remaining shareholders of the Code company would hold more than 20%.

2.17 Company A was also proposing to make an unrelated business acquisition (the **Proposed Acquisition**) following the Merger. To assist completion of this transaction, the Smiths intended to make a financial contribution into Company A which would result in the Smiths increasing their ownership of Company A by less than 1%.

2.18 Company A and Company B, the Smiths (Mr and Mrs Smith together) and Mr Smith in his own capacity (together, the **Applicants**) were concerned that the Proposed Acquisition, and any potential future share transactions in Company A and Company B, would be caught by rule 6(1) of the Code. An exemption was sought from rule 6(1) in respect of the Proposed Acquisition so that the applicants could obtain certainty as to the application of rule 6(1) in the particular circumstances. The Applicants requested that the Panel decline the exemption on the express basis that the Code was not applicable to the circumstances.

2.19 The Applicants submitted that despite the Proposed Acquisition (or any other similar future transaction) the Smiths already controlled Company A and the less than 1% increase in the Smiths' shareholding in Company A would have no impact on the Smiths' effective control of the Code company if the Merger proceeded.

The Panel's decision

2.20 Rule 6(2)(c) appeared to be the only rule that may have applied to the proposed transactions. Rule 6(2)(c) provides that if "voting rights are held or controlled by a person together with associates, any increase in the extent to which that person shares in the holding or controlling of those voting rights with associates is deemed to be an increase in the percentage of the voting rights held or controlled by that person".

2.21 The issue in question was whether, as a result of the shareholding arrangements relating to Company A and Company B, the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company following the Merger. It was accepted by the Applicants that the Smiths and the other investors were likely to be associates of each other for the purposes of the Code.

2.22 If the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company, rule 6(2)(c) would apply to the proposed transactions, and would have the effect of preventing any of the shareholders in Company A and Company B from increasing their voting rights in Company A or Company B (except in accordance with the Code). This is because an acquisition of voting rights in Company A or Company B would result in the acquirer of those voting rights increasing the extent to which they shared in the control of the voting rights in the Code company. Rule 6(2)(c) would deem that increase to be an increase in the acquirer's voting control in the Code company. That increase would be subject to the Code.

2.23 The Panel noted that there were no shareholder agreements in place in respect of Company A and Company B and that the shareholders in those companies only had their statutory rights as shareholders. Given the structure of Company A and Company B, the Panel considered that the Smiths had complete and unfettered control of

Company A and likewise, Company A and the Smiths (together) had absolute control of Company B. Once the Merger was complete, the Smiths would, in turn, control the voting rights held by Company B in the Code company. Furthermore, the Panel considered that the minority shareholders in the upstream companies (Company A and Company B) did not appear to have any share in the control of the voting rights of those upstream companies, and therefore the Smiths would not share control of the voting rights in the Code company with those minority shareholders as contemplated by rule 6(2)(c) of the Code.

2.24 For these reasons, the Panel declined the application for an exemption on the basis that the Code did not apply so no exemption was necessary.