

## P325 – PROPOSED LEGAL TEXT

### SECTION C: BSCCO AND ITS SUBSIDIARIES

#### 4. GOVERNANCE OF BSCCO

*Insert new paragraph 4.11 to read as follows:*

##### **4.11 Investment Proposal Consultations**

**4.11.1** Should BSCCo wish to establish a Permitted Affiliate for the purposes of pursuing an investment proposal resulting from a Scoping Activity ("**Investment Proposal**"), it must first offer the investment to Parties in accordance with the procedures set out in Annex C-3.

#### 6. BUSINESS STRATEGY AND ANNUAL BUDGET

##### **6.1 Introduction**

*Amend paragraph 6.1.1 to read as follows:*

6.1.1 For each BSC Year (the "**Plan Year**") BSCCo shall have:

- (a) a Business Strategy, setting out the principal activities which BSCCo expects to be carrying out in the Plan Year and each of the two following BSC Years, on the basis of the functions and responsibilities which are or have been assigned to BSCCo under or pursuant to the Code but excluding the activities of Permitted Affiliates, except:

(i) as contemplated in paragraph 1.3.1 of Annex C-1; or

(ii) in paragraph 1.4.1 of Annex C-3; and

- (b) an Annual Budget, setting out the expenditure which BSCCo considers reasonably necessary in order to carry out such activities in the Plan Year,

each established and from time to time amended in accordance with this paragraph 6. In addition the Business Strategy may, but is not required to, include a component detailing the investigation of non-BSC activities that BSCCo anticipates arising during the forthcoming BSC Year ("**Scoping Activities**").

##### **6.4 Annual Budget**

*Amend paragraph 6.4.1 to read as follows:*

6.4.1 At the same time as preparing each draft of the Business Strategy under paragraph 6.3, BSCCo shall prepare or revise, and submit to the persons to whom each draft Business Strategy is submitted, a draft Annual Budget for the Plan Year. In any Plan Year in which Scoping Activities are included in the Business Strategy, the Annual Budget shall include a component for funding those Scoping Activities ("**Scoping Fund**").

## 10. PERMISSIBLE ACTIVITIES UNDERTAKEN BY PERMITTED AFFILIATES

### 10.1 General

Amend paragraph 10.1.1 to read as follows:

10.1.1 In respect of each Permitted Affiliate:

- (a) BSCCo shall be entitled to subscribe for, acquire or hold any share or other security in a Permitted Affiliate and paragraph 3.4.5(b) shall not apply;
- (b) BSCCo shall not dispose of any legal or beneficial interest in any shares or other security in a Permitted Affiliate undertaking activities and functions specified in paragraph 1 of Annex C-1 except:
  - (i) to the CfD Counterparty and/or the CM Settlement Body and/or to any nominees of the CfD Counterparty and/or the CM Settlement Body; or
  - (ii) where otherwise directed to do so by the Secretary of State,
 in which case paragraph 3.4.5(c) shall not apply;
- (c) the Panel shall have no rights of approval or disapproval in respect of claims or proceedings by or against a Permitted Affiliate, or waivers or settlements of such claims, and paragraph 3.4.3(e) shall not apply; and
- (d) paragraph 7 shall not apply.

10.1.2 Each Party and the Panel shall not (whether by action, omission or withholding of consent) prevent or restrict a Permitted Affiliate from performing all activities and functions and assuming all responsibilities and duties set out in Annex C-1 and/or Annex C-3.

10.1.3 Paragraphs 5.1. and 5.2 shall not apply to a Permitted Affiliate and, subject to paragraph 10.1.4, each Party (to the fullest extent permitted by law) waives any claim in damages or any other claim of a financial nature against a Permitted Affiliate and releases each Permitted Affiliate from any liability in respect of any breach by such Permitted Affiliate of any provision of the Code or in tort (including negligence) or otherwise.

10.1.4 Nothing in paragraph 10.1.3 shall exclude or limit the liability of a Permitted Affiliate for:

- (a) death or personal injury resulting from the negligence of such Permitted Affiliate; or
- (b) fraud or fraudulent misrepresentation; or
- (c) any claim against that Permitted Affiliate brought by a Party (acting in a capacity other than as a Party) solely to the extent that such Party has a right to bring a claim under:
  - (i) an EMR Legal Requirement; or
  - (ii) the arrangements established between a Permitted Affiliate and any Parties who have invested in that Permitted Affiliate.

10.1.5 BSCCo may amend any BSC Agent Contract to include the supply of services to support Permissible Activities.

- 10.1.6 Nothing in this paragraph 10 shall affect or limit BSCCo's obligation to discharge its functions and responsibilities pursuant to the Code.

## 10.2 Ring-Fencing of Permitted Affiliates

Amend paragraph 10.2.1 to read as follows:

- 10.2.1 Without prejudice to paragraphs 3.4 and 3.5, but subject to paragraph 10.1, the following provisions shall apply (as relevant) to BSCCo and to each Permitted Affiliate:
- (a) without prejudice to paragraph 3, BSCCo shall not transfer, lease, licence, or lend any sum or sums, asset (including non-financial resources), right, or benefit to a Permitted Affiliate except by way of:
    - (i) a payment properly due for any goods, services, or assets provided on an arm's length basis and on normal commercial terms; or
    - (ii) a transfer, lease, licence, or loan of any sum or sums, asset, right, or benefit that is on an arm's length basis and on normal commercial terms;
  - (b) except as permitted in paragraph 10.2.1(a), BSCCo shall not enter into any borrowing for or on behalf of a Permitted Affiliate where the term "borrowing" has the same meaning as that term in accordance with paragraph 3.4.4;
  - (c) BSCCo and each Permitted Affiliate shall implement agreed contractual arrangements to ensure that:
    - (i) where any common or shared costs between BSCCo and a Permitted Affiliate are incurred these costs are allocated reasonably and equitably, provided that in determining such allocation a Permitted Affiliate shall not be obliged to pay in excess of the established market rate, if applicable; and
    - (ii) where BSCCo incurs any costs (including costs in respect of any liabilities incurred by BSCCo) that arise as a consequence of services provided by BSCCo, or on BSCCo's behalf by a BSC Agent, to a Permitted Affiliate, such costs shall be recoverable from the Permitted Affiliate on a cost recovery basis; and
  - (d) Other than as agreed in respect of an IPA under Annex C-3, Parties shall have no liability or obligation to provide financial support to a Permitted Affiliate in respect of its performance of Permissible Activities.

## ANNEX C-1: PERMISSIBLE ACTIVITIES

### 3 Permitted Affiliates established pursuant to Annex C-3

*Insert a new paragraph 3 to read as follows:*

#### 3.1 General

3.1.1 A Permitted Affiliate may be established or acquired to perform (either itself or through a service provider) all activities and functions and assume all responsibilities and duties relating to an Investment Proposal approved in accordance with the provisions of Annex C-3 (such Permitted Affiliate being an "IPA").

3.1.2 An IPA shall use its profits only:

(a) by way of re-investment in the activity for which it was established; or

(b) by way of payment of a return to investors (other than BSCCo) in that IPA.

3.1.3 For the avoidance of doubt BSCCo shall not be entitled to a return on its investment in an IPA.

3.1.4 Paragraph C.7.3.1 shall not apply to an IPA.

Insert new Annex C-3 to read as follows:

### **ANNEX C-3: PROCEDURES FOR INVESTMENT PROPOSALS**

## **1 CONSULTATION ON INVESTMENT PROPOSALS**

### **1.1 Introduction**

1.1.1 This Annex C-3 sets out the basis and procedures which should be used for the raising of an Investment Proposal by BSCCo in accordance with Section C4.11.

### **1.2 Investment Proposal Consultation Requirements**

1.2.1 BSCCo shall, should it wish to establish a Permitted Affiliate pursuant to Section C.4.11, prepare and send to all Parties an Investment Proposal including such information that it considers is sufficient to allow Parties to make an investment decision, but which must include the following:

- (a) details of the investment sought from Parties;
- (b) details of the operating model proposed, including an overview of the implementation process required by paragraph 2;
- (c) projected profitability;
- (d) payback mechanism;
- (e) whether a third party investor is or may be involved in the Investment Proposal and, if so, an explanation of their interest (to the extent possible subject to any obligations of confidentiality owed by BSCCo to the third party investor);
- (f) details on the terms of acceptance to invest, as well as a form of acceptance document by which Parties may communicate to BSCCo their agreement to invest and a date by which they must respond; and
- (g) details on how to object to an Investment Proposal including a time limit for making such objection which shall be no less than 5 Working Days after publication by BSCCo of an Investment Proposal.

1.2.2 An Investment Proposal should explain the consequences of the following two scenarios:

- (a) that if the threshold set out in paragraph 1.4.1 is met, then all the costs associated with that activity will be BSC Costs which shall be recoverable by BSCCo as BSCCo Charges pursuant to Section D; or
- (b) that if the threshold set out in paragraph 1.4.1 is not met, and provided the conditions in paragraph 1.6.1 are met, then the activity may be funded outside the Code.

1.2.3 All Parties shall keep the information contained in an Investment Proposal, and the fact an Investment Proposal has been issued, confidential. BSCCo may put in place such measures as it deems appropriate to prevent unauthorised disclosure, including limiting access to the Investment Proposal to named individuals and preventing access to the information other than through a data room.

### **1.3 Investment Proposal Responses**

1.3.1 For each Investment Proposal BSCCo shall aggregate responses from Parties and announce the results within one (1) Working Day of the deadline for responses to it. The announcement shall confirm how many Parties have accepted the Investment Proposal and the quantum of Actual Voting Share represented by these Parties.

## **1.4 BSC Funding**

1.4.1 If an Investment Proposal:

(a) has been accepted by at least ten (10) Parties comprised in Voting Parties which hold at least 30% of the total Actual Voting Share as at the deadline for accepting/objectioning to it; and

(b) no objections to it have been received by the deadline specified pursuant to paragraph 1.2.1(g),

then all of the costs incurred in pursuing, developing and establishing that opportunity will be BSC Costs which shall be recoverable by BSCCo as BSCCo Charges pursuant to Section D. BSCCo shall confirm that fact in its announcement pursuant to paragraph 1.3.1, and accordingly amend its Business Strategy and Annual Budget for the then current year in order to reflect the additional activity and costs that will be funded through these charges.

## **1.5 Audit**

1.5.1 Any Party may, within five (5) Working Days of an announcement pursuant to paragraph 1.3.1, require an audit to be undertaken to confirm whether the relevant minimum thresholds have been achieved for BSC funding pursuant to paragraph 1.4.1. BSCCo may commence work on the new opportunity, including incurring third party advisor costs, pending the completion of the audit, during this period, but shall not make irrevocable commitments to invest.

## **1.6 Private funding of an Investment Proposal**

1.6.1 If a proposal to fund a new activity through BSCCo Charges is not adopted by Parties pursuant to paragraph 1.4, but one or more Parties has expressed an interest in investing in that proposal ("Interested Parties"), then BSCCo may in its sole discretion seek an investment from those Interested Parties outside the terms of the Code, and from non-Parties, on the following basis:

(a) Interested Parties shall be given the first opportunity to provide all of the sought investment; and

(b) If the Interested Parties have not offered enough investment to meet BSCCo's projected requirements then BSCCo may seek additional investment from third party investors (who should not be offered substantially more preferential terms to those agreed with Interested Parties).

## **2. IMPLEMENTATION OF INVESTMENT PROPOSALS**

### **2.1 Permitted Affiliate to implement Investment Proposal**

2.1.1 BSCCo shall be required to acquire or establish a new Permitted Affiliate in accordance with the provisions of paragraph 3 of Annex C-1 to pursue any of the Investment Proposals

agreed pursuant to the terms of paragraph 1 of this Annex C-3. For the avoidance of doubt, such Investment Proposals may not be undertaken by BSCCo.

## **2.2 Use of Scoping Fund**

2.1.1 The Scoping Fund may be used by BSCCo to cover all of its internal and third party advisor costs incurred in investigating and developing an Investment Proposal up to, and including the securing of an agreement with Parties to fund a new activity under paragraph 1.4 or potentially, Interested Parties pursuant to paragraph 1.6. The Scoping Fund may not be used to fund the costs:

- (a) incurred for the purpose of submitting a tender response (other than a qualification response); or
- (b) of setting up or operating an IPA (in each case, other than as permitted in this Annex C-3).

**ANNEX X-1: GENERAL GLOSSARY (Version 77.0)***Insert the following new definitions in alphabetical order:*

<b><u>"Interested Parties":</u></b>	<u>has the meaning given to that term in paragraph 1.6 of Annex C-3;</u>
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<b><u>"Investment Proposal":</u></b>	<u>has the meaning given to that term in Section C4.11;</u>
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<b><u>"IPA":</u></b>	<u>has the meaning given to that term in paragraph 3.1.1 of Annex C-1;</u>
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<b><u>"Scoping Activities":</u></b>	<u>has the meaning given to that term in Section C6.1.1;</u>
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<b><u>"Scoping Fund":</u></b>	<u>has the meaning given to that term in Section C6.4.1;</u>
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