

Practice Note 16 (PN16) – Application of the Share Buy-backs Code to the amendment of terms and conditions and the subsequent redemption of convertible securities

The Executive has recently been consulted on a number of occasions about the application of the Share Buy-backs Code (SBC) to proposals by listed companies to change the terms and conditions of their issued convertible securities, typically to allow for earlier redemption than stipulated in the original terms. The Executive therefore sought the Takeovers Panel's views on the application of the SBC to (i) the amendment of terms and conditions of convertible securities; and (ii) the subsequent redemption of convertible securities pursuant to amended terms and conditions.

“Share buy-back” is defined in the Codes on Takeovers and Mergers and Share Buy-backs as *“a buy-back of shares, or an offer to buy back, redeem or otherwise acquire shares of an offeror made by an offeror, including a privatisation, scheme of arrangement or other form of reorganisation that consists in whole or in part of such an offer”*.

For the purposes of the SBC, *“shares”* are defined as *“shares of all classes and securities which carry a right to subscribe or purchase shares issued directly or indirectly by a company or any of its subsidiaries”*.

It follows that the SBC covers redemption of convertible securities by an issuer.

Rule 1 of the SBC provides that a buy-back may only be effected in one of the following ways:

- (1) on-market share buy-back;
- (2) off-market share buy-back approved in accordance with Rule 2 of the SBC;
- (3) exempt share buy-back;
- (4) share buy-back by general offer in accordance with the General Principles and Rules of the Codes.

An *“exempt share buy-back”* is defined as one of the following:

- “(1) an employee share buy-back;*
- (2) a share buy-back made **in accordance with the terms and conditions attached to the shares being bought back**, which either permit or require such share buy-back without the prior agreement of the owners of the shares (emphasis added);*
- (3) a share buy-back made by a company at the request of the owners of the shares bought back **in accordance with the terms and conditions attached to the shares**, which provide the owners of the shares a right to require the company to effect such share buy-back (emphasis added); and*
- (4) a share buy-back that is required by the laws of the jurisdiction in which the offeror is incorporated or otherwise established.”*

The Panel endorsed the Executive's current approach as follows:

- (i) *Amended terms* - An amendment of terms and conditions of convertible securities of the entire class of the relevant convertible securities (regardless of the number of holders) (e.g. changing the redemption date) is not considered to be a redemption and therefore the SBC does not apply. If the amendment only applies to a certain portion of the relevant securities in the class but not all of them, then the position is different.
- (ii) *Redemption pursuant to amended terms* - Any actual redemption of convertible securities pursuant to the amended terms and conditions ~~(original or amended as the case may be)~~ will be considered an "exempt share buy-back" provided that the amended terms and conditions of the convertible securities do not specifically require separate prior approval agreement of the holders of the convertible securities for such redemption. The reason for this is, if a redemption is made in accordance with the amended terms and conditions of the convertible securities, it clearly falls within the meaning of paragraph (2) of the definition of exempt share buy-back.

In other words, the reference to "*terms and conditions attached to the shares*" in the definition of "exempt share buy-back" ~~will not be restricted to the initial terms and conditions at the time of issue, but will also apply~~ applies to terms and conditions that prevail from time to time (i.e. following amendments).

So long as (i) the buy-back/redemption is being made in accordance with the prevailing terms and conditions ~~(original or amended)~~ of the shares/securities being bought back; and (ii) the ~~terms and conditions of the shares/securities (original or amended) do~~ buy-back/redemption by the issuer (including the consideration payable and other key terms of the buy-back/redemption) does not require ~~the separate prior~~ agreement of the owners of the shares/securities being bought back, the buy-back/redemption will be treated as an "exempt share buy-back".

~~29 September 2023~~ 30 June 2026