SFC 證監會

TAKEOVERS BULLETIN

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An SFC newsletter to help participants in Hong Kong's financial markets
better understand the Codes on Takeovers and Mergers and Share Buy-backs

Season's greetings

We wish all our readers a happy and healthy 2015!

Takeovers Panel upholds the Executive's ruling in respect of China Oriental Group Company Limited

On 25 September 2014, the Takeovers and Mergers Panel (Takeovers Panel) upheld our ruling that the completion of certain transactions on 30 April 2014 between ArcelorMittal and counterparties involving shares of China Oriental Group Company Limited (China Oriental) did not give rise to a mandatory general offer obligation under the Takeovers Code.

Following a general offer by ArcelorMittal for shares in China Oriental in 2008, ArcelorMittal and Mr Han Jingyuan, Chairman of China Oriental, held 47% and 45% of shares in China Oriental, respectively. As a result, the minimum public float requirement under the Listing Rules of The Stock Exchange of Hong Kong Limited was not satisfied.

To satisfy the requirement, ArcelorMittal subsequently sold 9.9% and 7.5% of its shares in China Oriental to ING Bank (ING) and Deutsche Bank (DB) respectively. As part of these transactions, ArcelorMittal granted ING and DB put options entitling them to sell back the shares of China Oriental to ArcelorMittal at the original purchase price (with adjustments). The put option granted by ArcelorMittal was fully cash collaterised and was structured in a way that ING and DB acquired the shareholding interest in China Oriental without any financial outlay.

Highlights

The put options expired on 30 April 2014 and ArcelorMittal proposed to extend the put option arrangement with ING for one year on amended terms. It also proposed to close the arrangement with DB and enter into an arrangement with Macquarie Bank Limited (Macquarie) which was similar to the amended arrangement with ING. These transactions were to be completed simultaneously. ArcelorMittal (holding 29% of China Oriental at the time) consulted us and we confirmed on a consultation basis that a mandatory general offer would not be triggered as a result of these transactions.

As a result of the new arrangements between ArcelorMittal and the counterparties, ie, ING and Macquarie, the independent non-executive directors of China Oriental applied to us for a formal ruling that a mandatory general offer had been triggered by ArcelorMittal. We ruled on 21 August 2014 that ArcelorMittal had not triggered a mandatory general offer. On 1 September 2014, the independent non-executive directors of China Oriental applied to the Panel to review our ruling.

The Panel met on 25 September 2014 to consider the matter and concluded that the completion of the agreements between DB and ArcelorMittal on the one hand and ArcelorMittal and Macquarie on the other did not result at any time in ArcelorMittal acquiring additional voting rights as these voting rights were passed directly from DB to Macquarie.

The Panel also ruled that: (i) Macquarie and ArcelorMittal are presumed to be acting in concert by virtue of the financial arrangements between them; (ii) the presumption had not been rebutted; and (iii) given the similarity of the arrangements, it would follow that both ING and DB were also parties presumed to be acting in concert with ArcelorMittal.

Since ArcelorMittal and its concert parties, i.e. DB, ING and Macquarie, held a combined 47% stake in China Oriental throughout the existence of such arrangements, the Panel concluded that the arrangements did not increase the concert parties' aggregate holding; and did not cause any member of the concert group to cross a mandatory offer trigger point, or any significant change to the concert group with the substitution of Macquarie for DB. As a consequence, a mandatory general offer obligation had not arisen.

The Panel issued its written ruling on 14 October 2014. A copy of the Panel's decision can be found in the "Regulatory functions - Listing & takeovers – Takeovers & Mergers – Decisions & statements - Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" section of the SFC website.

Dismissal of judicial review against Takeovers Panel

In November 2014, the Court of First Instance (CFI) dismissed a judicial review of the Takeovers Panel's decision not to stay disciplinary proceedings instituted by us.

The applicants of the judicial review – A, B and C – whose names are suppressed by the order of the court, are also defendants in a criminal trial scheduled to be heard at the High Court in March 2015. The applicants, together with two other persons, are the subject of disciplinary proceedings before the Takeovers Panel over an alleged breach of Rules 26.1(c) and (d) of the Takeovers Code.

In October 2013, A, B and C applied to the Takeovers Panel for a stay of our disciplinary proceedings until the completion of the criminal trial. The Chairperson of the Takeovers Panel refused their application in February 2014 following an oral hearing. Subsequently, the applicants applied for judicial review of the Chairperson's decision.

The substantive hearing for the judicial review was held in September 2014. In rejecting the judicial review, the CFI pointed out there is no real risk of prejudice to the criminal trial if the disciplinary proceedings continue.

The Court also found the Chairperson of the Takeovers Panel did not err in law and was satisfied that the Chairperson's decision was not unreasonable.

Following the landmark decisions by the Court of Final Appeal (CFA) in Tiger Asia Management LLC (2013) and the Securities and Futures Appeals Tribunal (SFAT) in Sun Hung Kai International Limited (2014), this judgment re-emphasises the important role of the SFC in carrying out its statutory duties. These duties include maintaining the fairness, transparency and competitiveness of Hong Kong's securities and futures industry, and most importantly minimising crime and misconduct in the industry. The judgment also upholds the notion that the Court should not prevent the SFC, being a public body, from carrying out its statutory and public duties unless there are clear and strong grounds for doing so.

The Executive's disciplinary proceedings against A, B and C are continuing.

A copy of the judgment and the CFA's judgment in Tiger Asia can be found on the Judiciary's website www.judiciary.gov.hk. The SFAT's Reasons for Determination for Sun Hung Kai International Limited can be found on its website at www.sfat.gov.hk.

Wen Yibo publicly criticised for breach of Rule 31.3 of the Takeovers Code

On 4 December 2014, we publicly criticised Mr Wen Yibo (Wen) for acquiring shares in Sound Global Limited (Sound Global) within six months after the close of an offer at above the offer price in contravention of Rule 31.3 of the Takeovers Code.

On 10 September 2013, Sound Global and Sound (HK) Limited issued a joint announcement about the voluntary delisting of Sound Global from the Official List of the Singapore Exchange Securities Trading Limited. To facilitate the delisting, Sound (HK) Limited made a conditional cash offer for all the shares in Sound Global at an offer price of $4.37 (SGD0.7) per share.

The offer closed on 17 January 2014. Between 28 March 2014 and 9 May 2014 Wen and Sound Water (BVI) Limited, a company owned by Wen and his wife, acquired a total of 5,600,000 Sound Global shares at prices ranging from $5.94 to $7.55 per share in a series of on-market purchases. These transactions constitute breaches of a fundamental provision of the Takeovers Code.

Wen admitted the breaches and agreed to the disciplinary action against him by way of public criticism by the Executive under section 12.3 of the Introduction to the Codes. In considering the sanctions to impose, we took into account that the breaches were committed due to Wen's inadvertent oversight and that he cooperated in the enquiry process.

We wish to remind all those involved in takeovers and mergers in Hong Kong once again of the prohibition imposed by Rule 31.3 of the Takeovers Code. Rule 31.3 affords equality of treatment to shareholders in an offer in accordance with General Principle 1 of the Takeovers Code. The rule provides shareholders with certainty that the offeror will not pay a price higher than the offer price for the shares in the offeree company in the six-month period after the close of the offer, and as a result, it ensures that all shareholders of the offeree company are treated even-handedly. If there is any doubt about the application of the Takeovers Code, we should be consulted at the earliest opportunity.

A copy of the Executive Statement can be found in the "Regulatory functions – Listing & takeovers - Takeovers & Mergers - Decisions & statements – Executive decisions & statements" section of the SFC website.

Quarterly update on the activities of the Takeovers Team

In the three months ended 30 September 2014, we received 13 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), seven whitewashes and 58 ruling applications.

We also referred one case to the Takeovers Panel for a ruling as particularly novel, important and difficult points were at issue.

All issues of the *Takeovers Bulletin* are available under 'Published resources – Industry-related publications – *Takeovers Bulletin*' on the SFC website at www.sfc.hk.

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