TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to a referral by the Takeovers Executive to the Takeovers and Mergers Panel (the "Panel") for a ruling on whether a mandatory general offer obligation would arise as a result of an involuntary disposal of an interest in Jinke Smart Services Group Company Limited, and, if so, whether a waiver may be granted

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Purpose of the hearing

1. The Panel met on 25 July 2022 to consider a referral by the Takeovers Executive under Section 10.1 of the Introduction to the Code on Takeovers and Mergers (the "**Takeovers Code**") and Share Buy-backs (together, the "**Codes**"), which relates to particularly novel, important or difficult points at issue.

2. The Panel was asked to consider the following:

   (A) whether an obligation to make a mandatory general offer ("**MGO**") under Rule 26.1 of the Takeovers Code ("**Rule 26.1**") (and a reference to "**Rule**" shall mean a Rule of the Takeovers Code) would be triggered upon the Seller Forced Disposal (as defined in paragraph 30)?

   (B) what is the appropriate offer price if an obligation to make the MGO is triggered under the following hypothetical situations:

      (i) if there has been no acquisition of Shares (as defined in paragraph 4) by the Purchaser (as defined in paragraph 11) or its concert parties during the six-month period immediately preceding the commencement of the offer period ("**Relevant Period**")?

      (ii) if any of the Trustee Share Purchases (as defined in paragraph 28) occurred within the Relevant Period:

         (a) whether the EBT (as defined in paragraph 13) is considered a concert party of the Purchaser?

         (b) if the EBT is a concert party of the Purchaser, whether the Executive should grant its consent under Rule 26.3(b) to dispense with the highest price of the Trustee Share Purchases for the purposes of determining the offer price of the MGO?

   (C) if the Panel agrees that an MGO would be triggered upon the Seller Forced Disposal, whether it would be appropriate to grant a special waiver to the Purchaser from complying with the MGO obligation until such time that the Purchaser acquires any Share?

3. The Panel was asked by the Purchaser to consider whether it would agree to delay publishing its decision for one month as the Purchaser would need a

reasonable period to consider the decision and its potential implications regarding its investment in the Company.

Key parties

The Company

4. Jinke Smart Services Group Company Limited (金科智慧服務集團股份有限公司) ("**Company**") is a joint stock company incorporated in the People's Republic of China ("**PRC**") with limited liability and the H shares ("**Shares**") of which are listed on the Main Board of The Stock Exchange of Hong Kong Limited ("**Stock Exchange**") (stock code: 9666). The Company was listed on the Stock Exchange in November 2020.

5. As at 30 June 2022, the Company had a total of 652,848,100 Shares in issue. The Company together with its subsidiaries ("**Group**") are principally engaged in the provision of space property management services, community valued-added services, local catering services and smart living technology solutions in the PRC.

Jinke Property – the Seller

6. Jinke Property Group Company Limited (金科地產集團股份有限公司) ("**Jinke Property**" of "**Seller**"), together with its subsidiaries, "**Seller Group**") is a joint stock company established in the PRC with limited liability, the shares of which are listed on the Shenzhen Stock Exchange (stock code: 000656.SZ). Jinke Property is the Company's controlling shareholder, holding 197,977,875 Shares, representing approximately 30.33% of the issued share capital of the Company.

Mr. Huang – the founder and controller of the Seller

7. Mr. Huang Hongyun (黃紅雲) ("**Mr. Huang**" or "**Founder**") is the founder and the controller of the Seller. Mr. Huang together with his concert parties held in aggregate approximately 29.99% of the issued share capital of the Seller at the time of the 2021 Acquisition (as defined in paragraph 19) (reduced to approximately 25.84% as at 8 July 2022).

Mr. Zhou – the chairman of the board of directors of the Seller

8. Mr. Zhou Da (周達) ("**Mr. Zhou**") has been the chairman of the board of directors of the Seller since January 2021.

Seller Management ESOP

9. Tianjin Zhuoyue Gongying Jinke Management Consulting Partnership (Limited Partnership) ("**Seller Management ESOP**") is the pooling entity of the Seller's management used for the purpose of holding Shares under an employee share ownership plan. The Seller Management ESOP is managed by its general partner, who is an employee of the Seller.

10. The Seller Management ESOP acquired Shares before the listing of the Shares on the Stock Exchange (the "**Company's IPO**") using funds contributed by its partners, who were employees of the Seller at the time of their contribution of funds to the Seller Management ESOP. The Seller Management ESOP has been holding Shares representing approximately 2.71% of the issued share capital of the Company since the Completion Date (as defined in paragraph 20).

Broad Gongga – the Purchaser

11. Broad Gongga Investment Pte. Ltd. ("**Broad Gongga**" or "**Purchaser**") is a special purpose vehicle controlled by Boyu Capital Advisory Company Limited ("**Boyu**"). Boyu is a China-focused alternative asset management firm.

12. The Purchaser holds Shares representing approximately 22% of the issued share capital of the Company as a result of the acquisition from the Seller (see paragraph 19). In addition, Boyu, through another vehicle controlled by it, holds additional Shares representing approximately 0.53% of the issued share capital of the Company.

EBT, the Trustee, Mr. Xia and Mr. Xu

13. On 9 September 2021, the Company announced its intention to adopt a share award scheme ("**Share Award Scheme**") to recognize and reward employees who contributed or will contribute to the growth and development of the Group. For the purpose of the Share Award Scheme, the Company will establish an employee benefit trust ("**EBT**") and instruct a trustee of the EBT to purchase from time to time Shares not exceeding 2% of the issued share capital of the Company from the open market, which shall then be applied towards the Share Award Scheme.

14. The Company has engaged ComputerShare Hong Kong Trustee Limited ("**Trustee**") as the trustee of the EBT.

15. The board of directors of the Company ("**Board**") has authorized: (a) Mr. Shaofei Xia ("**Mr. Xia**"), an executive director, the chairman and the chief executive officer of the Company; and (b) Mr. Guofu Xu ("**Mr. Xu**"), another executive director, the Board secretary and the chief financial officer of the Company, to manage the EBT and the Trustee. In addition, Mr. Xia and Mr. Xu are also responsible for deciding the time, quantum and price of any Share purchases to be made by the Trustee on behalf of the EBT.

16. Mr. Xia and Mr. Xu held various positions in the Seller prior to them joining the Company in September 2014 and May 2020 respectively. They no longer hold any position in the Seller, but each of them remains holding indirectly approximately 0.02% shareholding interests in the Seller.

Company Management ESOP

17. Tianjin Hengye Meihao Management Consulting Partnership (Limited Partnership) ("**Company Management ESOP**") is the pooling entity of the Company's management used for the purpose of holding Shares under an employee share ownership plan. The Company Management ESOP is managed by its management committee and its general partner. Members of the management committee and the ultimate owner of the general partner are employees of the Company (not including Mr. Xia or Mr. Xu).

18. The Company Management ESOP has been holding Shares representing approximately 7.74% of the issued share capital of the Company since the Completion Date.

Background facts

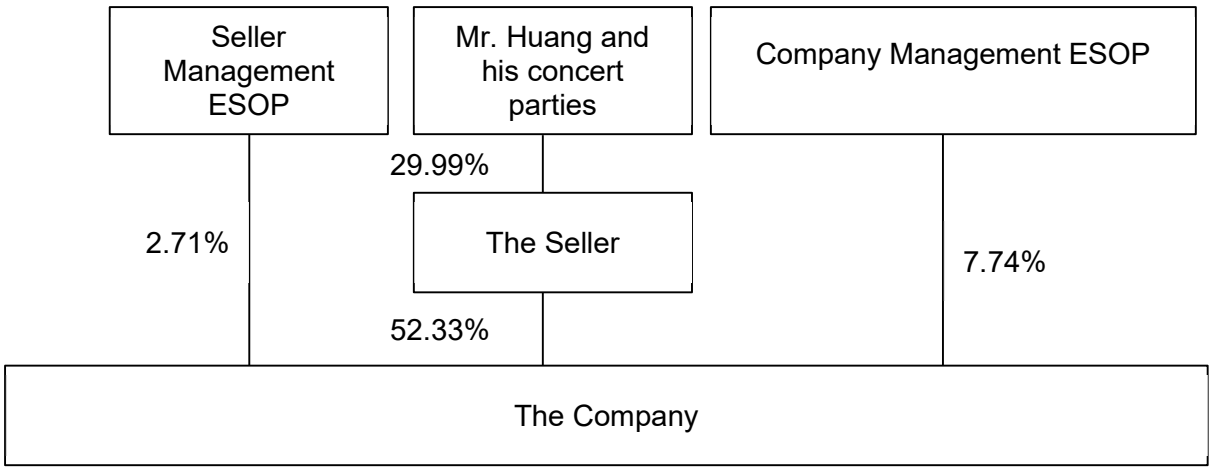
19. On 15 December 2021, the Purchaser entered into a share purchase agreement

("**Share Purchase Agreement**") with the Seller to acquire 22% of the voting rights of the Company (143,626,500 Shares) ("**Initial Stake**"), out of the Seller's then existing 52.33% shareholding interest in the Company ("**2021 Acquisition**") at an aggregate price of HK$3,734,289,000 (HK$26 per Share) ("**Purchase Price**").

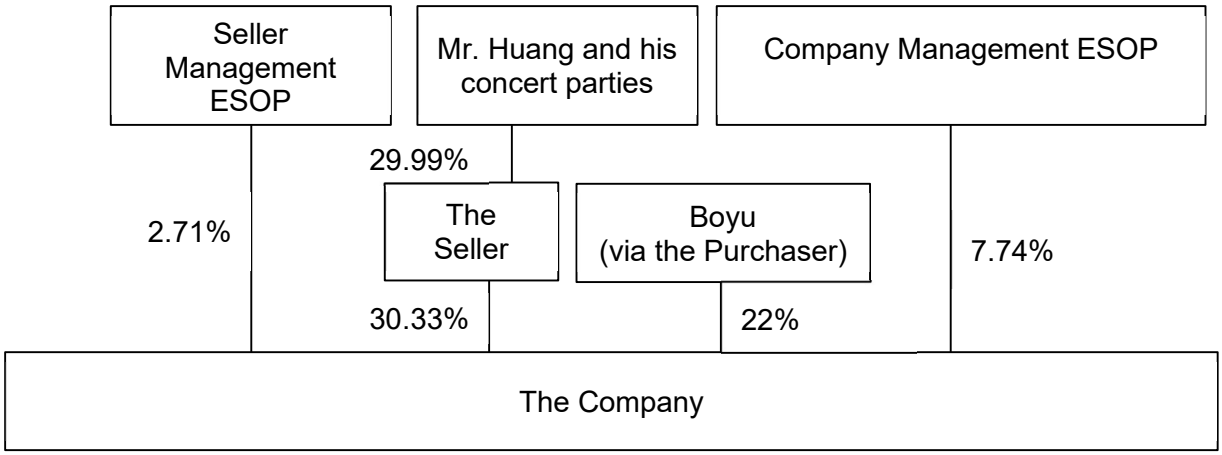
20. The 2021 Acquisition was completed on 21 December 2021 ("**Completion Date**").

21. The simplified shareholding structures of the Company immediately before and after the completion of the 2021 Acquisition are as follows:

Immediately before completion of the 2021 Acquisition



Immediately after completion of the 2021 Acquisition



22. On the same date as the Share Purchase Agreement, the Seller and the Purchaser also entered into a supplementary agreement ("**Supplementary Agreement**") and the Purchaser entered into a cooperation agreement ("**Cooperation Agreement**") with the Founder, Mr. Zhou and Mr. Xia.

23. Under the Share Purchase Agreement, the Supplementary Agreement and the Cooperation Agreement, the relevant parties agreed the following:

(i) a put option, whereby the Purchaser is entitled to require the Seller to buy

back the Initial Stake at an agreed price or to compensate the Purchaser based on an agreed formula, if certain events occur, including certain agreed future financial targets of the Company are not met, any breach of certain specified obligations of the Seller towards the Purchaser or where the Purchaser exercises its right to demand a repurchase within a six-month period commencing 120 days after the completion of the 2021 Acquisition.

(ii) a call option ("**Call Option**"), whereby, conditional on the Purchaser holding not less than 45% of the Initial Stake, the Purchaser is entitled to require the Seller to transfer certain additional Shares to the Purchaser, or a third party designated by it, at an agreed price, if certain events occur, including the Company failing to meet certain of its debt obligations as they fall due or the Company failing to meet certain agreed future financial targets. The Purchaser is also entitled to require the Seller to take all necessary actions (including procuring the Seller's nominated directors to resign and to vote in favour of any persons nominated by the Purchaser or such third party) to assist the Purchaser, or the designated third party, to obtain control of the board of directors of the Company if the Purchaser exercises the Call Option.

(iii) a share transfer restriction, whereby each of the Seller, the Founder and certain management personnel (including Mr. Zhou and Mr. Xia) ("**Management**") agrees not to dispose of any of its shareholding interest within an agreed period without the consent of the Purchaser.

(iv) the Seller shall procure that the Company Management ESOP and the Seller Management ESOP (collectively, "**ESOP Entities**") shall not dispose of any Shares during the period from the Completion Date to 31 March 2022 and that they shall not dispose of any Shares below an agreed floor price during the period from 1 April 2022 to 31 December 2022.

(v) a consent right ("**Consent Right**"), whereby, conditional on the Purchaser holding not less than 45% of the Initial Stake, the Seller undertakes to procure the Company not to conduct a list of defined material transactions unless the Seller has reached prior agreements on such proposed material transactions with the Purchaser.

(vi) a change in control event call option ("**Change in Control Call Option**"), whereby, conditional on the Purchaser holding not less than 45% of the Initial Stake, the Purchaser is entitled to require the Seller to transfer additional Shares to the Purchaser, or a third party designated by the Purchaser, at an agreed price, so that the Purchaser, or such designated third party, shall become the single largest shareholder of the Company, if certain events occur at any time up to 31 December 2026, including the Company failing to meet certain of its debt obligations as they fall due or the Company failing to meet certain agreed future financial targets. The Purchaser is also entitled to require the Seller to take all necessary actions (including procuring the Seller's nominated directors to resign and to vote in favour of any persons nominated by the Purchaser or such third party) to assist the Purchaser, or the designated third party, to obtain control of the board of directors of the Company if the Purchaser exercises the Change in Control Call Option.

(vii) a share transfer restriction on the Purchaser ("**Purchaser's Restriction on Transfer**"), whereby, conditional on the Purchaser holding not less than 45% of Initial Stake, the Purchaser agrees not to transfer any of its Shares

to any third party if such transfer would result in such third party becoming the controlling shareholder of the Company, provided that such restriction shall not apply to any sale on the open market through the automated clearing system where the identity of the buyer is not known. In addition, the Purchaser also undertakes: (a) not to entrust any of the voting rights of its Shares to any third party; (b) provide the Seller with a right of first refusal in the event that the Purchaser wishes to dispose of any of its Shares at a price below its acquisition price within a specified period; and (c) not to acquire any Shares or take any step to become the single largest shareholder of the Company (other than pursuant to the exercise of the Call Option or the Change in Control Call Option).

(viii) the Founder, Mr. Zhou and Mr. Xia shall procure that, during the 120-day period following the Completion Date, the Management will collectively acquire Shares for a total price of no less than RMB100 million ("**Management Acquisition Obligation**"). The Management did not fulfil such acquisition obligation.

(ix) the Founder shall, and shall procure that, during the 120-day period following the Completion Date, his children and his controlled entities will, collectively acquire Shares for a total price of no less than RMB200 million ("**Founder Acquisition Obligation**"). The Founder did not fulfil such acquisition obligation.

(x) the Founder agrees not to sell any Shares, and the Founder, Mr. Zhou and Mr. Xia each agree that the Management would not sell any Shares, within 3 years of the Completion Date, provided that such restriction would not apply to any Shares already held by the Management as at 15 December 2021 ("**Disposal Restriction 1**").

(xi) the Founder agrees not to sell more than 20% of his Shares, and the Founder, Mr. Zhou and Mr. Xia each agree that the Management would not sell more than 20% of their aggregate Shares, in each year between the third anniversary and the fifth anniversary of the Completion Date, provided that such restriction shall not apply to any Shares already held by the Management as at 15 December 2021 ("**Disposal Restriction 2**").

(xii) subject to the Disposal Restriction 1 and Disposal Restriction 2, the Founder, Mr. Zhou and Mr. Xia agree that the Purchaser shall have a right of first refusal if any of the Founder or the Management wish to sell any Shares within 3 years of the Completion Date, except that such right shall not apply to any disposal of Shares conducted under the electronic clearing system where the identity of the buyer is not known.

24. On 16 June 2022, the Purchaser entered into a termination agreement whereby Mr. Xia would cease to be bound by the Cooperation Agreement and he would no longer be treated as a member of the Management ("**Termination**"). Upon the Termination, Mr. Xia would cease to have any relationship with the Purchaser.

25. On 15 December 2021, the Purchaser, as lender, entered into a US$156,800,000 ("**Loan**") facility agreement ("**Facility Agreement**") with Chongqing Jinke Enterprise Management Group Company Limited (a wholly owned subsidiary of the Seller), as borrower, and the Seller, as the guarantor of the Loan.

26. The Seller entered into three share pledge agreements ("**Share Pledge Agreements**") with the Purchaser whereby the Seller pledged a total of

107,797,875 Shares (representing approximately 16.51% of the total share capital of the Company) in favor of the Purchaser as security for the Seller Group's obligations under the Share Purchase Agreement, the Supplementary Agreement, the Facility Agreement and the Share Pledge Agreements (collectively, together with the Cooperation Agreement, the "**2021 Acquisition Agreements**").

27. Pursuant to a share pledge dated 15 December 2021 between the Company Management ESOP and the Purchaser, the Company Management ESOP pledged 14,865,238 Shares (representing approximately 2.28% of the total share capital of the Company) in favor of the Purchaser to secure the Seller Group's obligations under the 2021 Acquisition Agreements (excluding the Cooperation Agreement).

28. After the establishment of the EBT in September 2021, the Trustee has on numerous occasions during the period between December 2021 and May 2022 purchased in aggregate no less than 4,315,000 Shares, representing approximately 0.66% of the total share capital of the Company, in accordance with instructions given to it by Mr. Xia (together with any other purchases of Shares by the Trustee (if any), "**Trustee Share Purchases**").

29. From January 2022 until June 2022, the Purchaser, through its legal advisers, has been consulting the Executive on various Takeovers Code issues in relation to its holding of Shares. The consultation included, in particular, seeking the Executive's confirmation that no MGO obligation would be triggered if it acquires additional Shares under certain specified scenario and whether the Trustee Share Purchases would be relevant in determining the possible offer price and, if it is relevant, whether a dispensation may be granted under Rule 26.3(b).

30. In addition, the Purchaser consulted the Executive on whether an MGO obligation would be triggered if the Shares held by the Seller is reduced to a level that is below the ownership percentage of the Purchaser as a result of any foreclosure sale of the Seller's Shares by the Seller's other creditors who have security interests over such Shares, to parties other than the Purchaser ("**Seller Forced Disposal**").

31. Whilst it is not the normal practice of the Executive to consider hypothetical questions, the Executive feel that it would do so under these circumstances taking into account the potential important implications of the application of Note 1 to Rule 26.1, the fact that the Seller is in financial difficulties, the current state of the PRC property market, and the potential need for the Purchaser to take urgent steps to make an MGO upon a Seller Forced Disposal.

Boyu's case

32. Although the Purchaser and the Seller may be presumed or deemed to be acting in concert under the Takeovers Code, they are not in substance seeking to consolidate control of the Company and should not face the consequence as though they were actively cooperating with each other to consolidate control.

33. The 2021 Acquisition Agreements do not impose any obligation on the Purchaser to "actively cooperate" with the Seller to consolidate the Seller's control of the Company.

34. Although the Purchaser may be presumed to be acting in concert with the Seller due to their respective shareholding level in the Company or as a result of their

contractual arrangements, such as the lock-up arrangements under the 2021 Acquisition Agreements, the Purchaser and the Seller are not "true" concert parties who are actively cooperating to obtain or consolidate control, as per the definition of "acting in control" under the Takeovers Code.

35. The lack of active cooperation between the Purchaser and the Seller is demonstrated by the fact that the Purchaser and the Seller have held different views from each other on many issues related to the Company's business.

36. A Seller Forced Disposal is not a final step in the Purchaser's plan to gain control of the Company. The Purchaser has no master plan which would lead to the Purchaser gaining control of the Company through a Seller Forced Disposal. A Seller Forced Disposal would involve numerous events outside the control of the Purchaser.

37. The Purchaser has not taken any action to cause a Seller Forced Disposal. On the contrary, the acquisition of Shares by the Purchaser from the Seller has been to improve the Seller's liquidity, decrease its risk of insolvency and reduce the possibility of a Seller Forced Disposal. As the Seller has been the Company's largest source of business, it is simply not in the Purchaser's interest to see the Seller go into insolvency. The Purchaser believe that the Seller's financial conditions deteriorated as a result of the change in macro-economic conditions since December 2021.

38. Paragraph 2 of Note 1 to Rule 26.1 does not impose an MGO obligation on the Purchaser, as a Seller Forced Disposal is not a sale or acquisition by either the Seller or the Purchaser.

39. Paragraph 2 of Note 1 to Rule 26.1, provides that:

"*There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more.*"

40. Boyu argued that an obligation to make an MGO under Note 1 should only be triggered where the voting rights are transferred by an existing member of the concert group or to the party on which the MGO obligation attaches. This is evidenced by the specific example given in Note 1, namely "*the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person.*"

41. A Seller Forced Disposal is a sale executed by the PRC court upon application by third party creditors. It is not a sale or acquisition by either the Seller or the Purchaser. Where any sale of shares instigated by the Seller would, as a matter of contract, require the Purchaser's consent under the 2021 Acquisition Agreements, a Seller Forced Disposal falls outside the scope of such consent right as it is made by the court (upon application by third party creditors) and not by the Seller. Accordingly, a distinction should be drawn between a change to the make-up of a concert group which is caused by an action of a concert party member (per Note 1 to Rule 26), as opposed to a change caused by an action of a third party over which no member of the concert party has any control.

42. The Executive argued that in any situation where a junior member of a concert group becomes the leader of a concert group, even if by one single voting right, the Executive would consider such change to be "significant", therefore triggering Note 1 to Rule 26.1.

43. Although the Purchaser may become the single largest shareholder within the concert group as a result of a Seller Forced Disposal, it does not inherently follow that the Purchaser would become the new "leader" of the concert group or that the balance of the group would be changed significantly. After a Seller Forced Disposal, the Purchaser would continue to hold its existing 22% stake, whereas (assuming maximum enforcement) the Seller's stake would decrease from approximately 30% to approximately 16.5% and the concert group's total stake in the Company would be reduced overall, from approximately 53% to approximately 38.5%. The underlying agreements between the Purchaser and the Seller would not change as a result of the Seller Forced Disposal. Further, the Purchaser would not gain any additional voting rights or any increased ability to direct the Seller as to how to vote its Shares.

44. Whilst the Executive may presume that the Seller and the Purchaser are concert parties as they fall within class 1 of the definition of "acting in concert" under the Takeovers Code and/or deem that the Seller and the Purchaser are concert parties as a result of the transfer restrictions set out in the 2021 Acquisition Agreements, the Seller and the Purchaser are not, in fact, actively cooperating to consolidate control of the Company.

45. This is an appropriate case for the Panel to exercise its discretion under section 2.1 of the Introduction to the Codes, which provides that:

"*the Executive and the Panel may each modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or other inappropriate, manner.*"

46. If the Panel agrees that an MGO obligation would be triggered by a Seller Forced Disposal, the appropriate offer price for such general offer should be no higher than the most recent purchase price paid by the Purchaser, even if such purchase was before the relevant six-month period. There could be a long period of time between the Purchaser's last purchase of Shares and the trigger of the MGO and the Purchaser should not be forced to take the risk of market price movement during such a long period of time.

47. Mr. Xia entered into the Cooperation Agreement in his own individual capacity – in other words, he wears two hats. Mr. Xia's mandate as a manager for the EBT is different and is for the benefit of the Company's management employees. It is not appropriate to link Mr. Xia's agreement with the Purchaser (entered into in his personal capacity) with Mr. Xia's instructions given to the trustee of the EBT in respect of any Trustee Share Purchases. Accordingly, the Trustee Share Purchases should not be taken into account for the purpose of determining the highest price paid by the Purchaser (or its concert parties) for Shares within the six-month period prior to an MGO.

48. The only relationship between the ESOP Entities and the Purchaser is the lock-up undertakings given by the ESOP Entities to the Purchaser in December 2021 whereby the ESOP Entities agreed to certain lock-up undertakings in respect of the Shares held by them as well as to certain undertakings that they would not dispose of their Shares below an agreed floor price. As such, the ESOP Entities

should not be considered to be concert parties to the Purchaser simply because of a lock-up agreement between them.

49. The offer price for the MGO should not be based on the volume weighted average price ("**VWAP**") of the shares on the last trading day prior to the Purchaser becoming the leader of the concert party group, as proposed by the Executive based on the decision of the Panel in relation to Maanshan Iron & Steel Company Limited in July 2019 ("**Maanshan Decision**").

50. The present case should be distinguished from the Maanshan Decision in that the MGO in the Maanshan Decision was triggered by positive action taken by the offeror so the offeror had control of the timing of the triggering event. Whereas the Seller Forced Disposal would not be triggered by any acquisition of Shares by any of the Purchaser or its concert parties and the Purchaser would not have control over the timing of the Seller Forced Disposal.

51. The offer price should be no higher than the most recent purchase price of any Shares by the Purchaser or its concert parties prior to the triggering event, regardless of when such purchase was done, as the Purchaser should not have to take the risk of market price movement during the period between such purchase and the Seller Forced Disposal that triggers the MGO.

52. Even if the Maanshan Decision is applied to an MGO triggered by the Seller Forced Disposal, the offer price should be the VWAP on the last trading day before the day when the news of the potential Seller Forced Disposal is announced to the market in accordance with Rule 3.7, rather than the day when the Purchaser becomes the leader of the concert group as a result of the Seller Forced Disposal. This is because the court process leading to the Seller Forced Disposal could take several years and the Purchaser should not have to accept market risk over such a period.

53. The EBT should not be considered a concert party of the Purchaser even though Mr. Xia is the manager of the EBT. Mr. Xia entered into the Cooperation Agreement in his own individual capacity. His mandate for the EBT is different and is for the benefit of the Company's management employees. It is not appropriate to link Mr. Xia's agreement with the Purchaser (entered into in his own individual capacity) with Mr. Xia's instructions given to the Trustees. The share dealing restrictions and the share acquisition obligations that he agreed to with the Purchaser do not extend to the Shares held by the EBT.

54. The only relationship between the ESOP Entities and the Purchaser is the lock-up undertakings given by the ESOP Entities to the Purchaser in December 2021. The Purchaser has no ability to control how the ESOP Entities exercise the voting rights attached to their Shares. Therefore, the ESOP Entities should not be treated as concert parties to the Purchaser.

The Executive's case

55. The Executive considers that the issues at play are complex and difficult. The decision will require a careful balancing between (a) the interests of the Purchaser in the context of its obligations under the Codes; and (b) the interests of the minority shareholders of the Company.

56. Rule 26.1 lies at the heart of the Takeovers Code and sets out the circumstances when an MGO obligation is incurred.

57. Note 1 to Rule 26.1 provides that:

"The majority of questions which arise relate to persons acting in concert. The definition of "acting in concert" contains a list of persons who are presumed to be acting in concert unless the contrary is established. The following Notes illustrates how this Rule 26 and definition are interpreted by the Executive.

There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more."

58. Note 1 can apply even when no single member of a concert group holds 30% or more of the voting rights in a company, as was clearly established in the Panel decision regarding Wing Hang Bank, Limited in August 2008.

59. Further, pursuant to the second paragraph of Note 1, it is clearly contemplated that a change to the make-up of a concert group can occur not just from the transfer of voting rights between members of a concert group, but can also occur when voting rights are transferred to non-concert parties. Therefore, the fact that voting rights are transferred from one member of the concert group to a non-concert party will not preclude the application of Note 1.

60. The Executive also notes that in order for Note 1 to apply as a result of a change in the balance of a concert group, such change must have changed significantly. The Executive does not associate the word "significantly" in a quantitative sense in terms of voting rights. In any situation where a junior member of a concert group becomes the leader of a concert group, even if it is by one single voting right, the Executive would consider such change to be "significant", and thus triggering Note 1. This is consistent with the Executive's approach in treating situations where a junior member of a concert group increases its interests in a company so that it holds one voting right less than the leader of a concert group, and in such situation, the Executive will still confirm that no MGO is triggered under Note 1. In simple terms, the Executive considers that a change in the balance of a concert group is "significant" when there is a new leader within the concert group, even if by one single voting right.

61. The Purchaser currently holds approximately 22% of the issued share capital of the Company and the Seller holds approximately 30.33%. The Purchaser and the Seller are presumed to be acting in concert with each other under Class (1) of the definition "acting in concert" of the Takeovers Code.

62. The disclosure of interests forms filed by the Seller and the Purchaser as a result of the 2021 Acquisition in accordance with the requirements under the Securities and Futures Ordinance (Cap. 571) referred to them as parties to a "concert party agreement". Each of the Seller and the Purchaser is deemed to be interested in the aggregate holding of shares in the Company which are subject to such agreement.

63. The Executive also considers that the ESOP Entities are acting in concert with the Purchaser and the Seller, but they are less relevant in the context of the issues.

64. In addition, the Executive considers that the relevant terms of the 2021 Acquisition Agreements, such as the put option rights, the Call Option Rights, the transfer restrictions on the Seller, the Founder, the Management and the Purchaser and the share pledge, further demonstrate that there is an intention between the Purchaser and the Seller to co-operate with each other to consolidate control of the Company and their concert party relationship. Further, there are express provisions within the 2021 Acquisition Agreements which clearly pave the way for the Purchaser to become the largest shareholder in the Company should it desire to do so.

65. It is established principle under Note 1 to Rule 26.1 that where there is a change in the leadership of a concert group (that together holds more than 30% of the voting rights in a company), the new leader will be required to make an MGO even if that new leader does not itself hold 30% of the voting rights.

66. Under the Seller Forced Disposal, the Purchaser will become the new leader of the concert group when its shareholding becomes more than that held by the Seller. Therefore, such a change in leadership will constitute a significant change in the balance of the concert group as provided under Note 1 to Rule 26.1.

67. As per the language of Note 1 to Rule 26.1, the Executive will consider the criteria set out in Note 6(a) and Note 7:

(i) *Note 6(a)(i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly*

The Seller Forced Disposal would result in the Purchaser having a greater shareholding interest and voting rights in the Company when compared to that of the Seller. The Purchaser will as a result become the leader of the concert group and the balance has changed significantly.

(ii) *Note 6(a)(ii) the price paid for the shares acquired*

This is not applicable in the current context.

(iii) *Note 6(a)(iii) the relationship between the persons acting in concert and how long they have been acting in concert*

The concert group has been in existence since December 2021.

(iv) *Note 7 vendor of part only of a shareholding*

This is not directly applicable in the current context.

68. General Principle 2 of the Code states that "*if control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required.*" General Principle 2 implies that control merely needs to change in order for a general offer obligation to be triggered, regardless of how the change occurs. This is consistent with the approach taken by the Panel and the Executive over the years in looking at the substance or effect of a transaction, rather than the form of a transaction. Therefore, the Executive considers General Principle 2 to favour the position that the Purchaser is required to make an MGO following a Seller Forced Disposal.

69. It was argued by Boyu that a Seller Forced Disposal is not a voluntary act of the

Purchaser and it is not a final step in the Purchaser's plan to gain control of the Company and a Seller Forced Disposal would involve numerous events outside the control of the Purchaser. Whilst the Executive agreed that a Seller Forced Disposal is not within the control of the Purchaser, the Purchaser has fallen into the current circumstances through its own voluntary actions by entering into the 2021 Acquisition with knowledge that the Seller had granted security over part of its remaining stake to third party creditors, and enforcement of such security could potentially result in the Purchaser becoming the single largest shareholder of the Company.

70. Rule 36 of the Takeovers Code states:

"In addition to the offeror, each of the principal members of a group of persons acting in concert with him may, according to the circumstances of the case, have the obligation to extend an offer.

The prime responsibilities under Rules 23, 24 and 26 normally attach to the person who makes the acquisition which imposes the obligation under the relevant rule. If such person is not a principal member of the group acting in concert, the relevant obligation may attach to the principal member or members and, in exceptional circumstances, to other members of the group acting in concert. This could include a member of the group who does not hold any shares when the obligation arises."

71. Rule 36 clearly contemplates that in exceptional circumstances, an MGO obligation under Rule 26.1 can be imposed on other members within a concert group. Rule 36 goes on to state that it is even possible for a member of a concert group that do not hold any voting rights to be obliged to make an MGO.

72. It is clear that the intention of Rule 36 is to impose an obligation on a member of a concert group to make an MGO due to the actions of other members of that concert group.

73. Therefore, Rule 36 is further evidence to support the position that the "involuntary" nature of the Seller Forced Disposal should not automatically dispense the Purchaser's obligation to make an MGO under Note 1 to Rule 26.1.

74. Nevertheless, the Executive understands that the Seller Forced Disposal would not involve any action by the Purchaser and the perceived unfairness if the Purchaser would be required to make a general offer as a result of actions by independent third parties that are out of its control.

75. Under the circumstances, the Executive would propose that the Purchaser would only be required to make the MGO if the Purchaser actually acquires any voting rights of the Company following the Seller Forced Disposal.

76. Under such proposal, the Purchaser would not be required to make an MGO purely as a result of actions by independent third parties beyond its control.

77. In making this proposal, the Executive is trying to balance the interests of the Purchaser and the interests of the shareholders of the Company.

78. Rule 26.3(a) provides that *"Offers made under this Rule 26 must, in respect of each class of equity share capital involved, be in cash or be accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for shares of that class of the offeree company during the*

offer period and within 6 months prior to its commencement."

79. Rule 26.3(b) provides that *"The Executive's consent is required if the offeror considers that the highest price should not apply in a particular case."*

80. Hence, the highest price paid for the dealings made by the Purchaser and its concert parties during the Relevant Period should be the offer price for the MGO unless the Executive consent to the disapplication of Rule 26.3(a) pursuant to Rule 26.3(b).

81. The Maanshan Decision involved a restructuring among state-owned enterprises involving zero consideration. The Panel at the Maanshan Decision decided that the appropriate price for the general offer triggered by such restructuring should be based on the VWAP price of the shares of Maanshan Iron & Steel Company Limited on the last trading day prior to the publication of the initial Rule 3.7 announcement. The reason behind such decision was that it represented the latest available VWAP price of the shares in question that was free from any impact that might have been brought about by the possibility of a general offer resulting from the proposed restructuring.

82. Similar to the case in Maanshan Decision, the change in control in the present case does not involve any apparent consideration. The Executive considers that the Maanshan Decision should be applied with slight modification. The appropriate price for the general offer resulting from the Seller Force Disposal should be based on the VWAP of the Shares on the last trading day prior to the Purchaser becoming the leader of the concert group.

83. In view of the fact that the Seller Forced Disposal is hypothetical at this juncture, the present case constitutes a "look forward" scenario. A VWAP price would also mitigate the risk of possible manipulation of the closing price of the Shares.

84. The Executive recognizes that, as stipulated under Note 20 to Rule 26.1, the mere establishment and operation of an EBT will not by itself give rise to a presumption that the trustees of an EBT are acting in concert with the directors and/or the controlling shareholder of the company in question.

85. The Executive is satisfied that the Purchaser was not involved in the establishment of the EBT and the appointment of the Trustee nor was aware of the timing, specific size or purchase price of any of the Trustee Share Purchases.

86. The Executive has no doubt that Mr. Xia was acting in concert with the Purchaser prior to the Termination – taking particular account of the Management Acquisition Obligation, the Disposal Restriction 1 and Disposal Restriction 2. Even though the Management Acquisition Obligation was not fulfilled by Mr. Xia, such obligation constitutes arrangements to consolidate control of the Company.

87. The dealing restrictions provided under the Disposal Restriction 1 and Disposal Restriction 2 would also fall under the ambit of Note 8 to Rule 22 of the Takeovers Code.

88. Note 8 to Rule 22 provides that:

"For the purpose of this Note 8, an arrangement includes any arrangement involving rights over shares, any indemnity arrangement, and any agreement or understanding, formal or informal, of whatever nature, relating to relevant securities which may be an inducement to deal or refrain from dealing.

If any person is party to such an arrangement with any offeror or an associate of any offeror, whether in respect of relevant securities of that offeror or the offeree company, not only will that render such person an associate of that offeror but it is also likely to mean that such person is acting in concert with that offeror; in that case Rules 21, 23, 24, 25 and 26 and paragraph 4 of Schedule I will be relevant."

89. Given that the Disposal Restriction 1 and Disposal Restriction 2 involve a restriction on selling of Shares, Mr. Xia falls within the ambit since such agreements amount to "agreement to refrain from dealing" as envisaged under Note 8 to Rule 22.

90. As Mr. Xia is the manager of the EBT and the Trustee Share Purchases were made by the Trustee in accordance with his instructions, the Executive finds it difficult to disassociate the EBT from Mr. Xia. On this basis, the Executive considers that the EBT was also acting in concert with the Purchaser, or at the very least, the Trustee Share Purchases should be attributed as dealings by a concert party of the Purchaser. Therefore, price paid by the EBT in acquiring the Shares within the Relevant Period would need to be taken into account in determining the appropriate offer price in accordance with Rule 26.3.

91. The Executive accepts that Mr. Xia ceased to be a concert party of the Purchase upon the Termination.

The decision and the reasons for it

92. It is accepted fact that the Purchaser and the Seller are members of class (1) of the definition of acting in concert under the Code and they are presumed to be acting in concert.

93. The Panel does not agree with the argument put forward by Boyu that the Seller and the Purchaser are not, in fact, actively cooperating to consolidate control of the Company.

94. The 2021 Acquisition Agreements contain various provisions which clearly indicate that Purchaser and the Seller have every intention to consolidate control of the Company amongst them. The Call Option, Consent Right, Change in Control Call Option, Purchaser's Restriction on Transfer as well as the Share Pledge Agreements are clear examples of such intention.

95. The Call Option and the Change in Control Call Option give the Purchaser the right to acquire control of the Company upon the occurrence of certain events. The Consent Rights require the Seller and the Purchaser to reach consensus before the Company can undertake certain material decisions.

96. In addition, the Share Purchase Agreement contains an express term that the Seller and the Purchaser acknowledge that they would be treated as parties acting in concert under the Takeovers Code as a result of the provisions contained in the 2021 Acquisition Agreements.

97. There is no doubt that the Purchaser entered into the 2021 Acquisition with full knowledge that it would become a concert party with the Seller.

98. The argument put forward by the Purchaser that they are not actively cooperating with the Seller in consolidating control is not supported by the facts. The 2021 Acquisition Agreements clearly demonstrate that the Purchaser and the Seller have put into place various rights and obligations, such as the Purchaser's

Restriction on Transfer, the Call Option, Consent Rights, Change in Control Call Option and the Share pledges under the Share Pledge Agreements, intended to allow the Seller and the Purchaser to retain control of the Company within such parties.

99. Note 1 to Rule 26.1 also contemplates that the balance of a group may be changed significantly as a result of a sale of all or a substantial part of a concert group member's shareholding to a person who is not a member of the concert group. It shows that the transfer of voting rights does not have to be restricted to members of the concert group in question for Note 1 to Rule 26.1 to be applicable.

100. The fact that the Seller Forced Disposal will not arise as a result of a sale by the Seller (as described in the example used in Note 1 to Rule 26.1) but rather as a result of an enforcement of a security over the Shares should not affect the application of Note 1 to Rule 26.1. As stated clearly in Note 1, the reference to a sale of voting rights was by way of an example and should not be construed to be limiting the application of Note 1 to the transfer of voting rights by way of sale only. In any event, the Seller Forced Disposal would be a result of the creditors of the Seller enforcing their security interests over the Shares in question. The security was created by the Seller in favour of the relevant security owner as security towards certain financial obligations owed to the security owner. The enforcement of the security over the Shares would result in the reduction of all or part of such financial obligations. It would be similar to a sale by the Seller of the Shares in that the Seller's financial obligation to the relevant security owner would be reduced correspondingly.

101. Under the Seller Forced Disposal scenario, the Purchaser would become the single largest shareholder and hence the leader of the concert group (see paragraph 60).

102. In addition, the terms of the 2021 Acquisition Agreements would also provide the Purchaser with various rights upon the occurrence of the Seller Forced Disposal, including the Call Option, Change in Control Call Option and the right to exercise its security over the Shares pledged to the Purchaser under the Share Pledge Agreements. Such rights would allow the Purchaser to acquire control of the Company.

103. As a result, there is no doubt that the Purchaser would become the leader of the concert group.

104. General Principle 2 provides that *"If control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required."*

105. It is obvious that General Principle 2 envisages that a general offer will follow when there is a change in the control of a company.

106. Boyu argued that the Purchaser has not taken any action to cause a Seller Forced Disposal and they should not have to be forced to make an MGO as a result of actions taken by independent third parties beyond their control.

107. The Executive recognized that a strict application of Rule 26.1 may be viewed as unfair (as argued by Boyu) to the Purchaser since the Seller Forced Disposal would result from actions by third party creditors of the Seller and not as a result of actions by the Purchaser.

108. It is against such possibly perceived unfairness that the Executive proposed that

the Purchaser's obligation to make the MGO, which would result from the Seller Forced Disposal, be delayed until such time if the Purchaser actually acquires any voting right after the Seller Forced Disposal.

109. The proposal made by the Executive, if followed, would effectively be a special waiver of the Purchaser's obligation to make the MGO, which special waiver would be invalidated immediately upon the Purchaser acquiring any voting right (even if one voting right) and, hence, the obligation to make the MGO would be revived.

110. The attractiveness of such a proposal by the Executive is that even though the Purchaser would not have to be forced to comply with the MGO obligation based solely on actions by independent third parties, i.e. creditors of the Sellers enforcing the security interests over certain pledged Shares, beyond its control, the Purchaser would still have to make the MGO if and when the Purchaser (or any of its concert parties) choose to acquire any additional voting rights of the Company following the Seller Forced Disposal.

111. It is well established that waivers from compliance with the Takeovers Code are concessions which are granted only in a comparatively narrow range of circumstances.

112. Note 6 (a) to Rule 26.1 provides that:

"In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:-

(i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;

(ii) the price paid for the shares acquired;

(iii) the relationship between the persons acting in concert and how long they have been acting in concert.

The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:-

(i) the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies;

(ii) the acquirer is a member of a group of persons comprising an individual, his close relatives and related trusts, and companies controlled by him, his close relatives or related trusts, and the acquirer has acquired the voting rights from another member of such group of persons."

113. Based on the information available so far, the change of control that would result from the Seller Forced Disposal would mean that the Purchaser would become the new leader of the concert group and its relationship with the Seller would have been relatively short. The Purchaser and the Seller would also not meet the close relationship described in the second paragraph of Note 6 to Rule 26.1. Therefore, Note 6 to Rule 26.1 would mean that a waiver for the MGO would not be appropriate under normal circumstances.

114. Section 2.1 of the Introduction to the Codes provides that:

"In addition to the General Principles, each of the codes contains a series of Rules, some of which are effectively expansions of the General Principles and examples of their application and others are rules of procedures designed to govern specific types of takeovers, mergers or share buy-backs. Although the Rules are expressed in more detailed language than the General Principles, they, like the General Principles, are to be interpreted to achieve their underlying purposes. Accordingly, each of the Codes, through the General Principles, may apply to situations not specifically covered by any Rule. Therefore, the spirit of the Rules must be observed as well as their letter and the Executive and the Panel may each modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or otherwise inappropriate, manner."

115. The Panel, however, considered the special circumstances that would lead to the Seller Forced Disposal. In particular, the Panel took into account the following factors:

(i) the Purchaser (or any of its concert parties, including, in particular, the Seller) would have no control in the enforced disposal of the Shares under the Seller Forced Disposal;

(ii) it is apparent that the Purchaser would not have anticipated the possibility of the Seller Forced Disposal within a relatively short period of time following the 2021 Acquisition, as evidenced by the Purchaser agreeing to provide the Loan and the fact that the Seller Forced Disposal would also lead to an adverse financial consequence to the Company due to the business relationship between the Company and the Seller;

(iii) the perceived unfairness to the Purchaser that the MGO may bring about even though the Purchaser (or any of its concert parties) would have taken no part in the Seller Forced Disposal and the fact that the aggregate voting rights held by the concert group would be reduced by the exact number of Shares disposed of under the Seller Forced Disposal; and

(iv) it is assumed that the Purchaser, the Seller, the Founder or anyone acting in concert with any of them would not acquire any voting rights in connection with the Seller Forced Disposal.

116. The Panel considered that the circumstances and the information before the Panel are such that they would qualify for special consideration as the strict application of Rule 26.1 would lead to a result that would be viewed as inappropriate.

117. Therefore, the Panel decided that a special waiver ("**Special Waiver**") from the MGO obligation that would result from the Seller Forced Disposal would, in principle, be appropriate on the following basis:

1. the Special Waiver would only remain valid for so long as the Purchaser (or any of its concert parties) do not acquire any (even if one) voting rights in the Company (including, without limitation, by way of acquiring any existing Shares or enforcing its rights as a security owner over any Shares pledged under any of the Share Pledge Agreements (except to the extent that the Purchaser is purely selling the Shares so pledged as a security

owner to any third party who is independent from the Purchaser or any of its concert parties) or by way of subscription of new Shares, whether at the time of the Seller Forced Disposal (whether as part of the Seller Forced Disposal or otherwise) or at any time thereafter ("**Acquisition of Voting Right Event**"). The effect of the Special Waiver having been invalidated by any such acquisition of voting rights would be that the Purchaser would immediately be required to comply with the MGO obligation upon any such acquisition in accordance with the facts (including, in particular, the price paid for such acquisition) that may be subsisting at the time when the Special Waiver is invalidated;

2. the Acquisition of Voting Right Event would exclude any deemed acquisition for the purpose of the Takeovers Code under Rule 32.1 upon any share buy-backs which may be conducted by the Company **PROVIDED** that the Purchaser (or any of its concert parties) have not been involved in any way in causing the Company to undertake such share buy-backs. The effect of such exclusion would mean that any share buy-backs by the Company would not in itself automatically result in the Special Waiver being invalidated (as referred to in item 1 above), but, for the avoidance of doubt, any MGO obligations which may result from any trigger or creeper thresholds having been reached or exceeded as a result of any such share buy-backs in accordance with the Takeovers Code will continue to be applicable;

3. the Acquisition of Voting Right Event would not be affected by any disposal of voting rights by the Purchaser (or any of its concert parties) at any time before any acquisition of voting rights referred to in item 1 above such that any acquisition of voting rights by the Purchaser (or any of its concert parties) following the Seller Forced Disposal would invalidate the Special Waiver, notwithstanding the fact that the Purchaser (or its concert parties) may have disposed of voting rights (even if the disposal could be more than the voting rights that are the subject of the acquisition in question) after the Seller Forced Disposal in question but before acquiring any voting rights in the Company;

4. the appropriate general offer price, as well as any other requirements or waivers under the Takeovers Code, that may be applicable to an MGO triggered by any acquisition of voting rights referred to in item 1 above would be determined based on the facts, including, in particular, the relevant acquisition price of the voting rights, that may be subsisting at the relevant time;

5. the appropriate general offer price that may be applicable to an MGO triggered by any acquisition of voting rights referred to in item 1 above would take into account the price paid by the Trustee in any Trustee Share Purchases prior to the Termination (if they fall within the Relevant Period);

6. the Acquisition of Voting Right Event would not lapse as a result of time but the Acquisition of Voting Right Event would lapse if, and when, the Purchaser ceases to be the leader of the concert group the members of which hold in aggregate not less than 30% of the then aggregate voting rights of the Company. The effect of the Acquisition of Voting Right Event lapsing as a result of such development would be that the Special Waiver would no longer be subject to the Acquisition of Voting Right Event qualification (so that the Purchaser would not be required to make an MGO in accordance with item 1 above);

7. there are no other material factors that may exist at the time of the Seller Forced Disposal which were not presented to the Panel, in particular, anything which would be material in the context of the factors referred to in paragraph 115;

8. the Special Waiver should not affect any aspects of the applications of the Codes on the MGO that may result from the Seller Forced Disposal, save and except as expressly provided for in items 1 to 7 above.; and

9. the Purchaser would need to apply to the Executive as and when a Seller Forced Disposal occurs or is imminent and the Executive would consider the granting of the Special Waiver in accordance with the principles decided by the Panel and referred to in items 1 to 8 above.

118. As the Seller Forced Disposal has yet to occur and the referral to the Panel is on the basis of a hypothetical Seller Forced Disposal, the Panel does not think it is appropriate for the Panel to grant a waiver in respect of a hypothetical situation.

119. The Purchaser should make a formal application to the Executive for the granting of the Special Waiver once the Seller Forced Disposal is imminent. The Panel agrees that the Special Waiver for the Seller Forced Disposal on the basis as described in paragraph 117 would, in principle, be appropriate.

120. The Panel has no doubt that Mr. Xia was acting in concert with the Purchaser as demonstrated by the various agreements, including the Management Acquisition Obligation, the Disposal Restriction 1 and the Disposal Restriction 2, that he had undertaken under the relevant 2021 Acquisition Agreements. As a result, the Trustee Share Purchases made before the Termination would need to be considered in determining the appropriate offer price for the MGO if such Trustee Share Purchases fall within the Relevant Period.

121. The Purchaser also asked the Panel to consider delaying the publication of its decision by one month. As set out in section 16.1 of the Introduction to the Codes, irrespective of the outcome of a matter, it is the policy of the Panel to publish its decisions as soon as reasonably practicable, so that their activities may be understood by the public. In normal circumstances, publication would follow within about two weeks of a hearing. In the present case, as the referral is based on a hypothetical situation and in order to give the Purchaser time to consider this decision, it was agreed that this decision will be published no earlier than the expiry of one month from the day of the hearing.

16 August 2022

Parties present at the hearing:

The Takeovers Executive

Boyu Capital Advisory Company Limited

Freshfields Bruckhaus Deringer, Hong Kong legal advisers to Boyu Capital Advisory Company Limited