



SECURITIES AND  
FUTURES COMMISSION  
證券及期貨事務監察委員會

**Consultation Conclusions  
on proposed amendments to  
the Introduction to the Codes on  
Takeovers and Mergers and  
Share Repurchases and  
proposed procedures for  
hearings under the Codes**

Hong Kong  
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# CONCLUSION PAPER

## Introduction

On 2 November 2007 the Securities and Futures Commission ("SFC") issued a Consultation Paper inviting public comment on proposed amendments to the Codes on Takeovers and Mergers and Share Repurchases ("Codes") and proposed procedures for hearings under the Codes. These proposals were formulated in close consultation with the Takeovers Panel.

The consultation period ended on 14 December 2007. The SFC received 2 responses including one respondent who represents 9 financial institutions. A list of respondents is set out in **Appendix 1** and the responses are published on the SFC website. The Takeovers Panel and the SFC welcome these responses and are grateful to those who have participated.

The respondents generally welcome the proposals and agree that increased transparency is important and would facilitate fair, efficient and timely decision making. Their comments and the Executive's responses to those comments are discussed in this paper. The key conclusions in the Conclusion Paper are as follows:

- Disciplinary hearings instituted under section 12.1 of the Introduction to the Codes will be held in public.
- The Chairman of a disciplinary hearing will be selected, on a case-by-case basis, from a body of suitably experienced litigation counsel/solicitors or retired judges to be called the Disciplinary Chair Committee ("DCC"). The DCC will be a committee of the SFC established under section 8(1) of the Securities and Futures Ordinance (Cap. 571) ("SFO") ("**Section 8 Committee**") which will comprise up to eight permanent members.
- The Chairman of the Takeover Appeal Committee ("TAC") will also be selected from the DCC on a case-by-case basis.
- A Nominations Committee will be formed to nominate members of the Panel, the DCC and the Takeovers Appeal Committee. The Nominations Committee will also be a Section 8 Committee.

The text of the procedural rules and the Introduction to the Codes marked up with the amendments arising from the consultation is set out in **Appendix 2**. The procedural rules and the amendments to the Codes will become effective on 1 April 2008.

The Consultation Paper, the responses and this Conclusion Paper are available on the SFC website at [www.sfc.hk](http://www.sfc.hk).

## **SPECIFIC CONSULTATION AREAS**

1. The respondents generally welcome the proposals and agree that increased transparency is important and would facilitate fair, efficient and timely decision making. They have nevertheless provided a number of comments and sought clarification on a number of matters as discussed in this paper.

### **Disciplinary hearings to be held in public**

<b>Question 1: Do you agree with the proposals to hear disciplinary proceedings in public?</b>
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#### *Comments from respondents*

2. Respondent A agrees with the proposal that disciplinary proceedings before the Panel and appeals to the TAC be held in public, except in the case of exceptional circumstances where it is necessary to preserve commercial confidentiality such as price sensitive information.
3. Respondent B agrees that transparency is important but considers that hearings and the initiation of proceedings should continue to remain confidential until the publication of the Panel's rulings. In this regard the respondent suggests the following:
  - (a) The current policy of the Panel and TAC of publishing important rulings and interpretations of the Codes and the reasons for them already sufficiently facilitates public understanding of the operation of the Codes while at the same time minimises the risks of speculation and market volatility. Holding disciplinary hearings in public might lead to unintended suspicion hanging over the party under investigation as well as media intrusion and speculation about the Panel's eventual ruling resulting in unnecessary market volatility.
  - (b) The procedures should be looked at as a whole to determine whether they are compliant with the Hong Kong Bill of Rights Ordinance 1991 ("HKBOR"). The respondent suggests that the fact that private hearings before the Panel and the TAC are subject to judicial review proceedings which are held in public renders the overall procedure as compliant with the HKBOR. In any event the respondent suggests that the Panel's disciplinary hearings fall outside the scope of Article 10 of HKBOR, as the hearings are not criminal in

nature and the Panel does not determine “*rights and obligations in a suit at law*”.

- (c) Proceedings before the Markets Misconduct Tribunal (“**MMT**”), the Securities and Futures Appeal Tribunal (“**SFAT**”) and the Insider Dealing Tribunal (“**IDT**”) must be held in public as this is prescribed by statute. There is no such statutory requirement for proceedings before the Panel, which is established pursuant to the voluntary Codes.
- (d) A party may waive any entitlement to a public hearing.

*Executive’s response*

- 4. Public hearings are consistent with the principles of open justice as well as public demand for accountability and transparency of the disciplinary process. Open justice imposes a certain self-discipline on all who are engaged in the hearings process, be it parties, witnesses or counsel. It also provides an assurance to the wider public that justice is being administered openly and under public scrutiny. This in turn assists in maintaining public confidence in the Panel and the hearings process under the Codes. Holding hearings in public is consistent with the principle of constitutional justice under which Hong Kong’s courts function as well as the practice in statutory decision making bodies such as the MMT, the SFAT and the IDT. It is also consistent with one of the statutory functions of the SFC which is to promote fairness and transparency in the securities and futures industry.
- 5. The Executive has carefully considered the respondent’s comments but continues to believe that disciplinary hearings before the Panel and appeals before the TAC should be held in public for the following reasons:
  - (a) The majority of disciplinary cases before the Panel do not relate to live transactions or involve price sensitive information as typically some time would have elapsed between the time of the alleged breach and the time the matter is brought before the Panel. Given this there is significantly less risk of market speculation and consequent volatility. In any event, sections 13.3 and 13.4 of the Introduction to the Codes provide for circumstances where a party may wish to present evidence to the Panel which is of a confidential commercial nature. In exceptional cases such as these, the Chairman of a hearing would have the discretion to direct that the hearing or part(s) of the hearing be heard in private if he considered it necessary to preserve commercial confidentiality such as price sensitive information.

- (b) The Executive has considered the concern raised regarding possible public speculation about a person’s conduct which might arise as a result of holding Panel hearings in public. However the Executive believes that the benefits of public hearings outweigh those concerns. In this regard the Executive notes that it is well understood by the public that a person is presumed innocent unless proven guilty.
- (c) The primary reason for the recommendation to hold disciplinary hearings in public is that it facilitates fairness and transparency. Justice must not only be done but must be seen to be done. The Executive noted, in paragraph 9 of the Consultation Paper, that holding disciplinary hearings in public is “*consonant with the fundamental principle*” enshrined in Article 10 of the HKBOR which mirrors Article 6(1) of the European Convention on Human Rights as applied by the Human Rights Act 1998 (s 6(1)) which provides that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. The Executive continues to believe this to be the case.
- (d) The Executive does not consider the availability of judicial review to be relevant to the issue of whether or not to hold Panel proceedings in public.
- (e) Finally with respect to a person’s right to waive a public hearing the Executive notes that as envisaged under section 13.3 of the Introduction to the Codes, hearings may, in exceptional circumstances, be heard in private where the Chairman considers it necessary in order to preserve commercial confidentiality such as price sensitive information. The Executive does not consider it to be appropriate for disciplinary proceedings to be held in private in other circumstances.

**Introduction of new Disciplinary Chair Committee (“DCC”)**

**Question 2: Do you agree with the introduction of a Disciplinary Chair Committee and its function?**

*Comments from respondents*

- 6. Respondent B agrees with this proposal. Respondent A suggests that members of the DCC should have relevant knowledge and experience of takeovers and should have a commercial and financial services/regulatory background.

*Executive's response*

7. The Executive agrees that it is preferable that members of the DCC have relevant commercial knowledge and experience although the Executive does not believe that it is necessary to prescribe a minimum level of knowledge in the Codes. The Executive would prefer to leave this to the discretion of the Nominations Committee. The primary concern is that members of the DCC should comprise duly experienced litigation counsel/solicitors or retired judges as they would be used to dealing with procedural matters and case management and would therefore be able to take a robust approach to ensure the smooth conduct of the proceedings, thereby facilitating fair, efficient and timely proceedings. It is envisaged that when considering whether candidates are "*duly experienced*" and suitable to be members of the DCC, members of the Nominations Committee will give due regard to candidates' experience in commercial as well as legal matters. Other members of the Panel hearing a disciplinary matter would be drawn, on a case-by-case basis, from members of the Panel (who would have significant experience in takeovers and mergers and in the securities and financial markets). This should ensure that the Panel hearing a matter would have relevant knowledge of the Codes, corporate finance and the financial markets.

**Proposals relating to the Takeovers Appeal Committee**

<p><b>Question 3: Do you agree with the proposed changes to the Takeovers Appeal Committee?</b></p>
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*Comments from respondents*

8. Respondent A suggests that the Chairman of the TAC should be selected by the Chief Justice and ought to have held high judicial office. Other members of the TAC should be appointed by the Chairman and should comprise members of the Panel who have not been involved in the matter under review and are otherwise free from conflict.

*Executive's response*

9. The Executive considers that the proposal to select the Chairman of the TAC from the DCC on a case-by-case basis and to select other members of the TAC from members of the Panel (who are market professionals with significant knowledge of the Codes, corporate finance and the financial markets) who have not been involved in the matter under review and are otherwise free from conflict is sufficient to

maintain the independence of the TAC. The Executive notes that this is consistent with the provisions of section 8 of the SFO.

*Comments from respondents*

10. Respondent B suggests that an appeal before the TAC should be an appeal de novo (i.e. a rehearing), taking into account fresh evidence.

*Executive's response*

11. One of the driving forces behind this project is to find ways to improve efficiency in the decision making process in disciplinary cases, thus enhancing fairness. In disciplinary proceedings, the Executive must reach a decision that a person has breached the Codes before it commences disciplinary proceedings. Therefore it might be said that a hearing before the Panel already constitutes a review or appeal. Given that one of the primary reasons for disciplinary proceedings under the Codes is to protect the interests of those who participate in Hong Kong's securities market, the Executive, having consulted the Panel, is not persuaded that de novo appeals should be introduced.

**Nominations Committee**

<b>Question 4: Do you agree with the proposal to form a Nominations Committee?</b>
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*Comments from respondents*

12. Respondent B agrees with this proposal. Respondent A generally agrees with this proposal but is concerned that the nomination process might be viewed as not being independent in so far as the Nominations Committee comprises a high number of officers from the SFC itself. This respondent also suggests there should be Terms of Reference which the Nominations Committee should follow.

*Executive's response*

13. It is proposed that the Nominations Committee comprise the following members: the Chief Executive Officer of the SFC (who will be Chairman), the Executive Director of the Corporate Finance Division of the SFC, the Chairman of the Panel and two members who are not executive staff of the SFC. Given that the majority of members will not be executive staff of the SFC and that the appointment of members of the Nominations Committee will be approved by the Board of the SFC



which consists of a majority of non-executive directors who are independent, the Executive considers that the appointment process is sufficiently independent. Terms of Reference for the Panel, the TAC, the DCC and the Nominations Committee are attached as **Appendix 3** and will be published on the SFC website in due course.

**New procedural rules for Panel hearings and related amendments to the Introduction to the Codes**

**Question 5: Do you agree with the new procedural rules for hearings before the Panel and the Appeal Committee and the related amendments to the Introduction to the Codes?**

*Comments from respondents*

14. The respondents agree in principle with the proposed procedural rules whilst raising a number of comments on specific rules as discussed below. In accordance with Respondent B's submission, in this paper the rules relating to disciplinary hearings are distinguished by the letters "DH", non-disciplinary hearing rules by "NDH" and rules relating to the Takeovers Appeal Committee by "TAC". As many of the procedures are the same across the DH, NDH and TAC rules, the comments apply across the board where appropriate.

*Comments from respondents re: rules of evidence (see section 13.7 of the Introduction to the Codes, DH 13.2, and NDH 10.2) and provision of reasons for preliminary and procedural decisions*

15. Respondent B generally agrees with not applying strict rules of evidence. However, it is suggested that the Chairman and the Panel should be under an express duty to exercise his discretion reasonably and provide reasons for any procedural decision made.

*Executive's response*

16. The Executive considers that it is implicit that the Chairman or the Panel will exercise his or its discretion reasonably and does not consider it necessary to state this explicitly.
17. The Executive does not agree with the suggestion that the Panel and the Chairman should be under an express duty to provide reasons for any procedural decision made. It should be noted that under DH 14.2, NDH 11.2 and TAC 11.2 "... the Panel will provide a copy of its ruling and the reasons for it in writing to the parties

*as soon as practicable following a hearing.*” The Executive considers that this is sufficient. There is a concern that over-prescriptive rules which require reasons to be given for every decision made may be unduly burdensome in respect of minor procedural rulings.

*Comments from respondents re: timetable for written submissions and filing of documents (see DH 4.1)*

18. Respondent B submits that the time limits provided for the service of documents in disciplinary proceedings are too tight. Given the desire not to have to trouble the Panel unnecessarily the respondent suggests that longer periods are provided upfront therefore reducing the necessity for applications for extension.

*Executive’s response*

19. The Executive considers the current proposed time limit of 28 days for a respondent to deliver a submission and supporting documents in response to the Executive’s paper to be sufficient and appropriate. The Executive believes that it is important for the Panel to keep a tight rein on the management of the proceedings by being directly involved in determining and approving the timetable.

*Comments from respondents re: directions by the Panel (see DH 6.2, NDH 5.2 and TAC 6.2)*

20. Respondent B suggests that the rules should clarify that the Executive may respond to the submissions made by the parties only if the Panel so allows.

*Executive’s response*

21. All parties, including the Executive, have a right to be heard. DH 6.2 clearly provides the Chairman with broad powers to give directions to the parties (including the Executive) as follows:

*“The Chairman may give directions in writing to the parties specifying –*

- (a) the dates by which the respondent must deliver its submissions and supporting documents in response to the Executive’s submissions;*
- (b) if considered appropriate, the dates by which the Executive must deliver its submissions and supporting documents in reply to the respondent’s submissions; and*
- (c) the dates by which the Executive and the respondent(s) must file their witness statements;*

*and giving such further directions as he considers appropriate.”*

22. The Executive believes that the above provisions provide the Chairman with sufficient discretion to manage the proceedings including submissions by the Executive and the parties in a fair and timely manner. If the rules were to provide for the parties (and the Executive) to obtain the prior consent of the Chairman each time they wished to make a submission this would be inflexible and might lead to undue delay in the proceedings.

*Comments from respondents re: setting dates for hearings and hearings in the absence of a party (see DH 9, NDH 8 and TAC 8)*

23. Respondent B submits that the proposals tilt too much in favour of the convenience of the Panel and suggests that a party should be given a fair opportunity to attend and to be adequately represented. The following drafting amendments were also suggested:

- (a) DH 9.2 currently provides: “*The Panel or the Chairman may sit at such times and in such places as either it or he deems most convenient and appropriate in all the circumstances.*”

The respondent suggests that DH 9.2 is replaced as set out below:

*“The Panel or the Chairman may sit at such times and in such places as either it or he deems **most likely to provide the parties with a fair and just hearing, taking into account all the circumstances**”.* (emphasis added)

*Executive’s response:* The Executive believes that the guiding principle should be that the Chairman (or the Panel) should carefully examine all the circumstances of the matter including the consequences of delay to the Executive, the parties and the market in order to reach a decision which is fair in all those circumstances. The Executive would prefer to leave this to the discretion of the Panel and does not propose to be over-prescriptive in this regard.

- (b) DH 9.3 currently provides: “*Whilst the Chairman may consult the parties as to their availability before fixing a date, this is solely out of courtesy and convenience. It is not for a party to dictate the date of a hearing, whether original or adjourned.*”

The respondent suggests that DH 9.3 is replaced as follows: “*The Chairman **will consult the parties as to their availability, and the availability of their witnesses and legal and professional advisers before fixing a date**”.* (emphasis added)

*Executive’s response:* It is envisaged that the Chairman will consult the parties and will have the discretion to fix the date he deems convenient,

appropriate and fair, having considered all the circumstances. The Executive therefore does not propose to adopt the amendment as suggested as this would limit the discretion of the Chairman unnecessarily. However for the sake of clarity the Executive proposes to amend DH 9.3 as follows:

*“Whilst the Chairman **will** consult the parties before fixing a date, this is a matter of courtesy and convenience. A party **may not** dictate the date of a hearing, whether original or adjourned.”* (emphasis added)

- (c) DH 9.4 currently provides: *“The Chairman will consider, in his sole discretion, timely requests for an adjournment supported by reasons from the parties, and may require evidence of the circumstances being put forward in support of an application. Adjournments will rarely be granted and late applications for an adjournment will only be considered in the most exceptional circumstances.”*

The respondent proposes that the words *“Adjournments will rarely be granted”* are replaced with *“Adjournments will be granted if this is reasonable in all the circumstances”*.

*Executive’s response:* As already stated in paragraph 23(a) above the guiding principle should be that the Chairman (or the Panel) reaches a decision which is fair in all the circumstances of the matter. It is envisaged that adjournments will rarely be granted and late applications for adjournments will only be considered in exceptional circumstances. Therefore the Executive does not propose to adopt the amendment as suggested.

- (d) DH 9.5 currently provides: *“A party does not have a right to insist that a hearing should be adjourned to a date convenient to a particular witness or legal or professional adviser.”*

The respondent suggests that this paragraph be deleted.

*Executive’s response:* The Executive believes that while the availability of a party and that of its witness and/or adviser will be taken into consideration by the Chairman in determining the hearing date, a party should not dictate when a hearing is held.

*Comments from respondents re: witnesses (DH 13.4 and NDH 10.4)*

24. DH 13.4 currently provides: *“Any party may, subject to the consent of the Chairman, call witnesses at the hearing provided a statement of the evidence of the witness has been previously filed with the Secretary in accordance with the Chairman’s directions.”*
25. Respondent B suggests that parties should also be entitled to request the attendance of the opposing party’s witnesses, or the Panel’s expert adviser(s) for cross-examination. The respondent suggests amended drafting as follows; *“Any party may,*

*subject to the consent of the Chairman, which shall not be unreasonably withheld, call witnesses (including the opposing party's witnesses and the Panel's expert adviser(s)) at the hearing...".* (emphasis added) The respondent also suggests that parties should be entitled to call and cross-examine the Panel's expert adviser(s) at the TAC hearing.

*Executive's response*

26. Parties are at liberty to call any witnesses they wish and the Executive considers that the drafting in DH 13.4 and NDH 10.4 is sufficiently broad to provide for this. More specifically, subject to the Chairman or the Panel ruling otherwise, there is no limit on the number of witnesses a party may call or on the questions a party may ask as there are no rules of evidence. If a witness refuses to attend the hearing, the Panel may draw such adverse inferences as it thinks fit. The legal adviser to the Panel ("**Legal Adviser**") is not a party to the proceedings nor a witness in the proceedings and is therefore not subject to cross-examination by the parties. The Legal Adviser's role is to assist or advise the Panel on legal issues. If the parties have any query on any opinion expressed by the Legal Adviser, they may address the Panel accordingly.
27. In the rare event that the Panel obtains advice from an independent professional adviser or an expert (but not its Legal Adviser) as envisaged in DH 13.5 the Executive would prefer to leave it to the Chairman's discretion as to whether or not to invite that adviser to attend the hearing as a witness as this may not always be practicable particularly if the adviser is based overseas. Should the Panel request the attendance of an adviser or expert witness at the hearing, the adviser or expert would be treated as a normal witness to the proceedings who would be subject to questioning by all parties. It is not therefore necessary, in the Executive's view, to refer to this specifically in the rules.
28. Given that the TAC would rely on the Panel's findings of fact and would not conduct its own review of the merits of such findings, the issue of cross-examining the Panel's expert adviser(s) at hearings before the TAC does not arise.

*Comments from respondents re: section 13.4 of the Introduction to the Codes*

29. Section 13.4 provides as follows:  
*"In general, all parties are entitled to be present throughout the hearing and to see all papers submitted to the Panel. Occasionally, however, a party may wish to present evidence to the Panel which is of a confidential commercial nature. In such*

*exceptional cases, the Panel may, if it is satisfied that such course is justified, be prepared to hear the evidence in question in the absence of some, or all, of the other parties involved. The parties shall be absent during the Panel's deliberation on the case. Representations by shareholders may be presented in writing and are usually heard by the Panel in the absence of those shareholders."*

30. Respondent B suggests that the last sentence of section 13.4 should be amended to reflect the fact that under the procedural rules any party may call witnesses.

*Executive's response*

31. As explained in paragraphs 26 and 27 above, the Executive considers that the drafting of DH 13.4 and NDH 10.4 adequately addresses the procedures concerning witnesses. The Executive proposes to delete the last sentence of section 13.4.

*Comment from respondents re: secretary to the Panel and Legal Adviser (DH 13.5, NDH 10.5, TAC 10.5 and sections 11.13 to 11.17 of the Introduction to the Codes)*

32. Respondent A expressed concerns that if the secretary and Legal Adviser are staff members of the SFC a perceived conflict of interest may arise. Given this the respondent suggests that a suitably qualified partner in a law firm should assume these roles.

*Executive's response*

33. Section 6 of the SFO provides that in pursuing its regulatory objectives and functions, the SFC shall have regard to, among other things, the need to make efficient use of its resources. This would include the decision of when to employ an external secretary or Legal Adviser. As the role of the secretary to the Panel is purely an administrative one the Executive does not believe that the secretary needs to be a legally qualified person. Given the administrative role and that no person acts as secretary to the Panel hearing a matter if that person has participated in the matter at issue the Executive does not consider that a conflict of interest, perceived or otherwise, arises. Turning to the Legal Adviser, given that the Chairman of a disciplinary hearing would be a legally qualified person, the Legal Adviser's role is expected to become less significant. Nevertheless, the Executive notes the respondent's concerns and proposes to amend section 11.14 of the Introduction to the Codes as follows: "*the Chairman of the Panel may appoint a Legal Adviser to the hearing who **will not normally** be a staff member of the SFC*". (emphasis added)

*Comment from respondents re: professional, legal or expert advice*

34. Respondent B suggests that the following drafting relating to professional or expert

advice be added to the rules (DH 13.5, NDH 10.5, TAC 10.5): *“The advice of any professional adviser or expert, together with the instructions by which the advice is sought, is disclosed to the parties **in its entirety** at an early enough stage to ensure that the parties have sufficient time to respond and to produce a report in response if necessary. The adviser shall attend at the hearing unless both parties consider it unnecessary and both parties may question the adviser at the hearing”*. (emphasis added) The respondent also proposes the following additional wording to the Codes in respect of the Legal Adviser’s advice:

Section 11.15 of the Introduction to the Codes: *“The Legal Adviser’s advice, together with the instructions by which the advice is sought, shall be disclosed to the parties at the time it is made”*.

Sections 11.16 and 11.17 of the Introduction to the Codes: *“All the Legal Adviser’s advice (including that on procedure), and the instructions by which that advice is sought, will be disclosed to the parties in order that they may comment on it or adduce evidence in response to it prior to a decision being made.”*

*Executive’s response*

35. Section 11.15 of the Introduction to the Codes currently sets out the duties of the Legal Adviser as follows:

*“The Legal Adviser’s role is to assist/advise the Panel or its Chairman on questions of law or mixed fact and law and to intervene for the purpose either of informing the Panel of any irregularity in the conduct of the proceedings which comes to his knowledge, or of advising when it appears to him that, but for such advice, there is a possibility of a mistake in law being made.”*

36. The duties of the Legal Adviser set out in section 11.15 were prepared having regard to the Practice Note [2000] 4 All ER 895 which sets out the duties of the legal adviser in a Magistrates Court (who will normally be a solicitor) in the United Kingdom. The Practice Note states that *“Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wished on that provisional advice.”* The Practice Note does not envisage the provisional advice being circulated in advance of the hearing although, if the issue is complex and there is sufficient time the Chairman of the Panel may direct the Legal Adviser to circulate the substance of his advice in advance. Section 11.15 also allows for advice to be given orally so long as the substance of such advice (which may impact on the Panel

or its Chairman's substantive decision) can be provided to the parties. The Panel adopts the same approach in respect of the advice given by the Legal Adviser or any professional or expert advisers.

37. In presenting the substance of his advice the Legal Adviser will also give the substance of the question posed. Matters of procedure do not usually give rise to points of law. In the event that the Legal Adviser's advice involves a point of law that is in issue between the parties the substance of the advice would be given to the parties at or before the hearing on that point under the principles set out above.
38. Respondent B suggests that it is proper that the Legal Adviser should be subject to questioning by the parties and therefore suggests the following drafting to DH 13.5, NDH 10.5, TAC 10.5 and section 11.16 of the Introduction to the Codes:

*“The [Legal] Adviser shall attend at the hearing unless both parties consider it unnecessary and both parties may question the adviser at the hearing.”*

*Executive's response:* The Legal Adviser is not a witness in the proceedings and it is not appropriate that he be questioned by the parties or the Executive. The Practice Note does not envisage questioning of the Legal Adviser.

*Comments from respondents re: publication of decisions*

39. Respondent B agrees in principle with the publication of important decisions and considers that this serves the interest of the public in understanding the workings of the Codes. The respondent suggests the following clarifications to the content of the decisions:

- (a) DH 14.2 (see also NDH 11.2 and TAC 11.2) currently provides: *“Following the conclusion of its deliberations the Panel may at its discretion inform the parties of its ruling and a summary of the reasons for the ruling orally. If the Panel decides to deliver an oral ruling, it is the policy of the Panel to hear submissions on sanctions immediately upon delivery of any oral ruling that there has been a breach of the Codes rather than waiting for the full written ruling to be delivered. In any event, the Panel will provide a copy of its ruling and the reasons for it in writing to the parties as soon as practicable following the hearing.”*

The respondent suggests that the last sentence of these paragraphs be replaced with *“In any event, the Panel will provide a copy of its ruling in writing to the parties, stating the reasons for its decision **and the facts upon which its decision is based.**”* (emphasis added)

- (b) DH 14.3 and TAC 11.3: The respondent also suggests the following additional wording: *“No sanction shall be imposed until the party to be*



*sanctioned has received a copy of the ruling, and that party either has decided not to appeal, or the appeals process (including judicial review) has been exhausted.”*

*Executive’s response*

40. The purpose of the last sentence of DH 14.2 is to clarify that the parties will be given a copy of the full reasoned decision (which inevitably will contain details of the facts upon which the decision is based) of the Panel as soon as practicable ***following the hearing***. It is not intended that the full reasoned decision be provided to the parties in advance of the Panel hearing submissions on sanctions. The Executive does not intend to adopt the proposed changes to DH 14.2.
41. In the interests of concluding proceedings in a fair, efficient and timely manner the Executive does not intend to delay a sanctions hearing until the party to be sanctioned has received a copy of the ruling, and that party either has decided not to appeal, or the appeals process (including judicial review) has been exhausted. This process could take many months and is not, in the Executive’s view, desirable or necessary. The parties to be sanctioned would in any event be informed of the Panel’s ruling and a summary of the reasons for the ruling orally in advance of the Panel hearing submissions on sanctions.

*Comments from respondents re: co-option of members, remuneration and the removal of private reprimand as a sanction*

42. Respondent B agrees with the proposals regarding power to co-opt new members (see sections 11.9, 11.12 and 14.7 of the Introduction to the Codes) and remuneration of members (see section 11.6 of the Introduction to the Codes).

*Comment from respondents re: initiating non-disciplinary proceedings before the Panel (see NDH 3.1 and section 9.1 of the Introduction to the Codes)*

43. Respondent B suggests a longer period of notification of one month for a request for a review as, parties may require additional time from the event giving rise to the review, to determine whether a review is necessary and to prepare the grounds of review.

*Executive’s response*

44. The 14 day time limit is a well established practice and accepted by the market as it helps to ensure certainty and timeliness in cases which often relate to live

transactions. The Executive considers it to be essential that the period is not longer than 14 days.

*Comment from respondents re: initiating appeal proceedings before the TAC (see TAC 3.2) and preparing submission in response to an appeal (see TAC 4.1)*

45. Respondent B suggests a longer period for the submission of an appeal of 14 business days after receipt of a written copy of the ruling in question in order to enable parties to properly prepare their grounds of appeal. Similarly, the respondent suggests a period of 14 business days to deliver a submission in response to an application for appeal.

*Executive's response*

46. The Executive considers the 5 day deadline to submit an application for an appeal and a further 5 day deadline for the Executive to respond to such an application to be appropriate given that any such appeal would be limited to the question of whether the sanctions imposed are appropriate.

*Comments from respondents re: representation by advisers (see section 13.6 of the Introduction to the Codes)*

47. Respondent B suggests the following drafting changes in order to be consistent with the procedural rules (DH 13.3, NDH 10.3 and TAC 10.2): *“At hearings before the Panel the matter is usually presented in person by the parties and/or their advisers. Parties may, if they so wish, be represented by their legal advisers, **although this is not usual at non-disciplinary hearings.**”* (emphasis added)

*Executive's response*

48. The Executive agrees with the proposal and has made the appropriate amendments.

*Comments from respondents re: provision of transcript (see DH 13.7, NDH 10.7 & TAC 10.6)*

49. DH 13.7 currently provides (see also NDH 10.7 & TAC 10.6):

*“A recording of the hearing will normally be made for administrative purposes. A transcript of the hearing may also be made. Any party to the hearing may request a soft copy of the transcript, which will normally be provided, subject to confidentiality considerations.”*

Respondent B considers it odd that the provision of a copy of the transcript of the hearing would be subject to confidentiality considerations as the parties are involved in the hearing themselves. The respondent suggests the following amended drafting: *“Any party to the hearing may request a soft copy of the*

*transcript, but to the extent information within the transcript is confidential, should maintain that confidentiality.”*

*Executive’s response*

50. In the event that the Panel hears evidence in the absence of some or all of the parties under section 13.4 of the Introduction to the Codes, the Panel may decide not to provide parties with a full transcript due to confidentiality considerations. DH 13.7 reflects this. The Executive does not therefore think it is appropriate to amend the relevant provisions as suggested.

**ADDITIONAL AMENDMENTS**

51. On further review after considering the comments made by the respondents and following consultation with the Panel, the Executive has decided to make the following additional amendments to the Introduction to the Codes:
- (a) *Section 11.2 of the Introduction to the Codes* - to reflect one of the existing roles of the Panel, we have added a new sentence to section 11.2 as follows:  
*“The Panel also reviews, from time to time upon request by the SFC, the provisions of the Codes and the Rules of Procedure for hearings under the Codes and recommends appropriate amendments to the Codes and the Rules to the SFC.”*
  - (b) *Section 13.5 of the Introduction to the Codes* – this section has been amended to clarify the disclosure obligations of parties or persons attending private and public hearings: *“Parties or persons attending a **private hearing** must not disclose any details of the hearing to any other person, including the media, and must not make use of any information acquired during the course of the hearing for purposes other than those connected with the hearing itself. In the event of a **public hearing**, if the Panel or the Chairman of the hearing directs that **part or parts of the hearing are held in private** under sections 13.3 or 13.4 of this Introduction, the **same restrictions will apply** to parties or persons attending the private part(s) of the hearing. (emphasis added)*

**List of respondents**

**Comments by these respondent are published on the SFC website:**

1. Respondent A - Clifford Chance
2. Respondent B - Linklaters on behalf of:
  - ABN AMRO Bank N.V.
  - Bear Stearns Asia Limited
  - Credit Suisse (Hong Kong) Limited
  - Deutsche Bank AG, Hong Kong Branch
  - Goldman Sachs (Asia) L.L.C.
  - J.P. Morgan Securities (Asia Pacific) Limited
  - Merrill Lynch (Asia Pacific) Limited
  - Morgan Stanley Asia Limited
  - UBS AG

**THE TAKEOVERS AND MERGERS PANEL**

**DISCIPLINARY HEARINGS**

**RULES OF PROCEDURE**

**1. Interpretation**

1.1 Definitions in the Codes also apply to these Rules of Procedure.

1.2 In these Rules –

“Chairman” means the Chairman of the Panel convened to hear proceedings initiated under section 12.1 of the Introduction to the Codes;

“Codes” means the Codes on Takeovers and Mergers and Share Repurchases;

“Panel” means the Panel convened to hear proceedings initiated under section 12.1 of the Introduction to the Codes;

“party”/“parties” means either or both of the Executive and the respondent(s);

“respondent(s)” means the person(s) against whom proceedings are brought by the Executive; and

“Secretary” means the Secretary to the Panel.

**2. Point of contact**

2.1 The Secretary will be the point of contact for all parties in respect of any procedural matter. Unless the Secretary specifies an alternative means of communication, such as e-mail or facsimile, all communications should be addressed to the Secretary to the Takeovers Panel, Securities and Futures Commission, 8/F Chater House, 8 Connaught Road Central, Hong Kong and copied to all parties.

**3. Initiating disciplinary proceedings**

3.1 The Executive will initiate proceedings by submitting a paper setting out its case to the Secretary and to the respondents in the proceedings.

**4. Response submission**

4.1 Respondents to disciplinary proceedings will normally have 28 days to deliver a submission and supporting documents in response to the Executive’s paper.

## DISCIPLINARY HEARINGS

### RULES OF PROCEDURE

#### 5. Membership of the Panel

- 5.1 Following initiation of the proceedings by the Executive a member of the Disciplinary Chair Committee will act as the Chairman of the hearing.
- 5.2 The Chairman will appoint not less than 4 members of the Panel to be members of the hearing.
- 5.3 Members of the Panel should raise with the Secretary any concerns over possible conflicts of interest at the earliest opportunity in accordance with the Conflicts of Interest Guidelines referred to in section 13.1 of the Introduction to the Codes. The Secretary will notify the parties of the names of the Chairman and members of the Panel.
- 5.4 Parties must raise any concerns over possible conflicts of interest at the earliest opportunity.
- 5.5 Issues of conflicts of interest will be considered and ruled upon by the Chairman with reference to the Conflicts of Interest Guidelines.
- 5.6 The Chairman will resolve any concerns over possible conflicts of interest that he may have in accordance with the Conflicts of Interest Guidelines as they apply to the Chairman of the Panel.

#### 6. Directions

- 6.1 In all cases the Chairman may give such preliminary or procedural directions as he considers appropriate for the determination of a matter without the need for a hearing.
- 6.2 The Chairman may give directions in writing to the parties specifying -
  - (a) the dates by which the respondent must deliver its submissions and supporting documents in response to the Executive's submissions;
  - (b) if considered appropriate, the dates by which the Executive must deliver its submissions and supporting documents in reply to the respondent's submissions; and
  - (c) the dates by which the Executive and the respondent(s) must file their witness statements;

and giving such further directions as he considers appropriate.

#### 7. Extensions of time and failure to comply with directions

- 7.1 If a party has reason to seek an extension of time for complying with a direction or time limit, the party should apply in writing setting out the

## DISCIPLINARY HEARINGS

### RULES OF PROCEDURE

reason. Reasonable requests for time extensions will be considered and may be granted in the sole discretion of the Chairman.

- 7.2 If a party fails, without reasonable excuse, to comply with any direction of the Chairman or any time limit, the Panel may proceed as if it had been notified by the party that he will not be serving any document under that direction or in accordance with that time limit. Without prejudice to the powers of the Panel, including the power to receive and consider such evidence as it thinks fit and to draw inferences, the Panel may draw such adverse inferences from the failure to comply with the direction or time limit as it thinks fit. The Chairman may in his discretion accept or reject documents and/or submissions that have been filed late.

#### **8. Statement of agreed facts**

- 8.1 The Panel or its Chairman may direct the parties to deliver a statement of agreed facts. The statement must set out the matters of fact which are not in dispute and state whether any party disputes a fact alleged by another party, with reasons why. The burden of proving a disputed fact rests on the party alleging it.

#### **9. Fixing a date for the hearing**

- 9.1 The Chairman will fix a date, time and place for any hearing.
- 9.2 The Panel or the Chairman may sit at such times and in such places as either it or he deems most convenient and appropriate in all the circumstances.
- 9.3 Whilst the Chairman ~~may will~~ consult the parties ~~as to their availability~~ before fixing a date, this is ~~solely out a~~ matter of courtesy and convenience. ~~It is not for a~~ party ~~to may not~~ dictate the date of a hearing, whether original or adjourned.
- 9.4 The Chairman will consider, in his sole discretion, timely requests for an adjournment supported by reasons from the parties, and may require evidence of the circumstances being put forward in support of an application. Adjournments will rarely be granted and late applications for an adjournment will only be considered in the most exceptional circumstances.
- 9.5 A party does not have a right to insist that a hearing should be adjourned to a date convenient to a particular witness or legal or professional adviser.

#### **10. The burden of proof**

- 10.1 The burden of proving an allegation rests on the party making it.

## **DISCIPLINARY HEARINGS**

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#### **11. The standard of proof**

- 11.1 Proceedings before the Panel are civil in nature. Accordingly, the standard of proof is on the balance of probabilities.

#### **12. Failure of the parties to attend**

- 12.1 If a party fails to be present or represented at a hearing the Panel may, if it is satisfied that the party was duly notified of the hearing and either that no good reason for such absence has been given to it or for the fair and just conduct and determination of the matter, hear and decide the matter before it in the party's absence.
- 12.2 Before deciding to dispose of any hearing in the absence of a party the Panel must consider the representations in writing, if any, submitted by that party.

#### **13. The hearing**

- 13.1 The proceedings of the Panel are informal. The Chairman will conduct the proceedings in the manner he considers suitable for the clarification of the issues before it and generally for the just handling of the proceedings. Unless otherwise directed by the Chairman the hearing will be conducted as follows:
- (a) At the beginning of the hearing the Chairman will make a short opening statement to explain the manner and order of the proceedings.
  - (b) Normally, after a short opening statement by the Chairman, the Executive and the parties will be invited to make short opening submissions to the Panel (normally the Executive will speak first).
  - (c) After the opening submissions, the Executive and then the parties will be invited to present their case (again the Executive will normally speak first). The Executive and the parties will be given an opportunity to address the Panel, to present evidence to the Panel, subject to the service of witness statements (see paragraph 13.4 below) to call witnesses, to question any witnesses and to address the Panel both on the evidence and generally on the subject matter of the hearing.
  - (d) The Panel may ask questions of the parties or their witnesses. Persons answering questions are expected to do so directly and without conferring with their professional or legal advisers.



## **DISCIPLINARY HEARINGS**

### **RULES OF PROCEDURE**

- (e) Finally the parties will be invited to make closing submissions if they wish to do so in the same order as the opening submissions.
- 13.2 At hearings before the Panel, the Panel may, at its full discretion, admit or reject any evidence adduced, whether oral or written. The Evidence Ordinance (Cap. 8) and laws relating to the admissibility of evidence shall not apply.
- 13.3 At hearings before the Panel the matter is usually presented in person by the parties and/or their advisers. Parties may, if they so wish, be represented by their legal advisers.
- 13.4 Any party may, subject to the consent of the Chairman, call witnesses at the hearing provided a statement of the evidence of the witness has been previously filed with the Secretary in accordance with the Chairman's directions.
- 13.5 The Panel or the Chairman may obtain advice from an independent professional adviser or an expert in any relevant area of practice. The substance of the advice will be disclosed to the parties in order that they may comment upon it prior to a decision being made. The Panel or the Chairman may seek to secure the attendance at the hearing of such adviser if it or he considers this to be necessary.
- 13.6 The Panel or its Chairman may request the attendance of witnesses at the hearing.
- 13.7 A recording of the hearing will normally be made for administrative purposes. A transcript of the hearing may also be made. Any party to the hearing may request a soft copy of the transcript, which will normally be provided, subject to confidentiality considerations.
- 14. The decision**
- 14.1 The Panel will deliberate in the absence of the parties.
- 14.2 Following the conclusion of its deliberations the Panel may at its discretion inform the parties of its ruling and a summary of the reasons for the ruling orally. If the Panel decides to deliver an oral ruling, it is the policy of the Panel to hear submissions on sanctions immediately upon delivery of any oral ruling that there has been a breach of the Codes rather than waiting for the full written ruling to be delivered. In any event, the Panel will provide a copy of its ruling and the reasons for it in writing to the parties as soon as practicable following the hearing.
- 14.3 On determining the matter, the Panel may, in its ruling and in accordance with the Introduction to the Codes impose such sanctions and/or make such directions as appear to the Panel to be necessary and appropriate in

## **DISCIPLINARY HEARINGS**

### **RULES OF PROCEDURE**

the circumstances of the case. Where appropriate, the Panel may give directions regarding the effects of the Executive's ruling and/or sanctions (if any) and/or of its ruling and/or sanctions pending the outcome of an appeal (if any) to the Takeovers Appeal Committee.

#### **15. Discrepancies**

- 15.1 Where any discrepancy exists between the provisions of the Introduction to the Codes and these Rules of Procedure, the provisions of the Introduction to the Codes shall prevail.

**THE TAKEOVERS AND MERGERS PANEL**

**NON-DISCIPLINARY HEARINGS**

**RULES OF PROCEDURE**

**1. Interpretation**

1.1 Definitions in the Codes also apply to these Rules of Procedure.

1.2 In these Rules –

“applicant” means any party who applies for a review under section 9.1 or the Executive where it refers a matter to the Panel under section 10.1 of the Introduction to the Codes;

“Chairman” means the Chairman of the Panel convened to hear a matter under sections 9.1 or 10.1 of the Introduction to the Codes;

“Codes” means the Codes on Takeovers and Mergers and Share Repurchases;

“Panel” means the Panel convened to hear a matter under sections 9.1 or 10.1 of the Introduction to the Codes;

“party”/“parties” means either or both of the applicant and/or a party to the hearing; and

“Secretary” means the Secretary to the Panel.

**2. Point of contact**

2.1 The Secretary will be the point of contact for all parties in respect of any procedural matter. Unless the Secretary specifies an alternative means of communication, such as e-mail or facsimile, all communications should be addressed to the Secretary to the Takeovers Panel, Securities and Futures Commission, 8/F Chater House, 8 Connaught Road Central, Hong Kong and copied to all parties.

**3. Initiating proceedings before the Panel**

3.1 The Executive and the Secretary must be notified of a request for a review as soon as possible and, in any event: (a) within such reasonable time as has been stipulated by the Executive; or (b) in the absence of such stipulation, within such time period as is reasonable in all the circumstances of the case, which period shall not be longer than 14 days from the event giving rise to the request for review, unless such period has been extended by the Executive. Any request for a review must be in writing and contain the grounds on which the review is requested.

## NON-DISCIPLINARY HEARINGS

### RULES OF PROCEDURE

#### 4. Membership of the Panel

- 4.1 If the Chairman of the Panel is available he will act as Chairman of the hearing. Where the Chairman is unavailable, he may select one of the Deputy Chairmen of the Panel to act as Chairman of the hearing. Where none of the Chairman or the Deputy Chairmen is available, the Chairman (or, failing that, at least 2 other members of the Panel) may appoint another member who is available to act as Chairman of the hearing.
- 4.2 The Chairman will appoint not less than 4 members of the Panel to participate in the hearing.
- 4.3 Members of the Panel should raise with the Secretary any concerns over possible conflicts of interest at the earliest opportunity in accordance with the Conflicts of Interest Guidelines referred to in section 13.1 of the Introduction to the Codes. The Secretary will notify the parties of the names of the Chairman and members of the Panel hearing the matter.
- 4.4 Parties must raise any concerns over possible conflicts of interest at the earliest opportunity.
- 4.5 Issues of conflicts of interest will be considered and ruled upon by the Chairman with reference to the Conflicts of Interest Guidelines.
- 4.6 The Chairman will resolve any concerns over possible conflicts of interest that he may have in accordance with the Conflicts of Interest Guidelines as they apply to the Chairman.

#### 5. Directions

- 5.1 In all cases the Chairman may give any preliminary or procedural direction as he considers appropriate for the determination of a matter without the need for a hearing. He may also deal with frivolous or vexatious requests that the Panel be convened. In such cases, the Chairman may determine the application or request without a hearing.
- 5.2 The Chairman may give directions in writing to the parties specifying –
- (a) the dates by which the parties must deliver their submissions and supporting documents in response to the applicant's submissions;
  - (b) if considered appropriate, the dates by which the applicants must deliver ~~their~~-its submissions and supporting documents in reply; and
  - (c) the dates by which the parties must file their witness statements;

## NON-DISCIPLINARY HEARINGS

### RULES OF PROCEDURE

and giving such further directions as he considers appropriate.

#### 6. Extensions of time and failure to comply with directions

- 6.1 If a party has reason to seek an extension of time for complying with a direction or time limit, the party should apply in writing setting out the reason. Reasonable requests for time extensions will be considered and may be granted in the sole discretion of the Chairman.
- 6.2 If a party fails, without reasonable excuse, to comply with any direction of the Chairman or any time limit, the Panel may proceed as if it had been notified by the party that he will not be serving any document under that direction or in accordance with that time limit. Without prejudice to the powers of the Panel, including the power to receive and consider such evidence as it thinks fit and to draw inferences, the Panel may draw such adverse inferences from the failure to comply with the direction or time limit as it thinks fit. The Chairman may in his discretion accept or reject documents and/or submissions that have been filed late.

#### 7. Statement of agreed facts

- 7.1 The Panel or its Chairman may direct the parties to deliver a statement of agreed facts. The statement must set out the matters of fact which are not in dispute and state whether any party disputes a fact alleged by another party, with reasons why. The burden of proving a disputed fact rests on the party alleging it.

#### 8. Fixing a date for the hearing

- 8.1 The Chairman will fix a date, time and place for any hearing which in the discretion of the Chairman may be convened at short notice.
- 8.2 The Panel or the Chairman may sit at such times and in such places as either it or he deems most convenient and appropriate in all the circumstances.
- 8.3 Whilst the Chairman ~~may will~~ consult the parties ~~as to their availability~~ before fixing a date, this is solely outa matter of courtesy and convenience. ~~It is not for a~~ party ~~to may not~~ dictate the date of a hearing, whether original or adjourned.
- 8.4 The Chairman will consider, in his sole discretion, timely requests for an adjournment supported by reasons from the parties, and may require evidence of the circumstances being put forward in support of an application. Adjournments will rarely be granted and late applications for an adjournment will only be considered in the most exceptional circumstances.

## **NON-DISCIPLINARY HEARINGS**

### **RULES OF PROCEDURE**

8.5 A party does not have a right to insist that a hearing should be adjourned to a date convenient to a particular witness or legal or professional adviser.

#### **9. Failure of the parties to attend**

9.1 If a party fails to be present or represented at a hearing the Panel may, if it is satisfied that the party was duly notified of the hearing and either that no good reason for such absence has been given to it or for the fair and just conduct and determination of the matter, hear and decide the matter before it in the party's absence.

9.2 Before deciding to dispose of any hearing in the absence of a party the Panel must consider the representations in writing, if any, submitted by that party.

#### **10. The hearing**

10.1 The proceedings of the Panel are informal. The Chairman will conduct the hearing in the manner he considers suitable for the clarification of the issues before it and generally for the just handling of the proceedings. Unless otherwise directed by the Chairman the hearing will be conducted as follows:

(a) At the beginning of the hearing the Chairman will make a short opening statement to explain the manner and order of the proceedings.

(b) Normally, after a short opening statement by the Chairman, the parties will be invited to present their case (the applicant will normally speak first). The parties will be given an opportunity to address the Panel, to present evidence to the Panel, subject to the service of witness statements to call witnesses (see paragraph 10.4 below), to question any witnesses and to address the Panel both on the evidence and generally on the subject matter of the hearing.

(c) The Panel may ask questions of the parties or their witnesses. Persons answering questions are expected to do so directly and without conferring with their professional or legal advisers.

(d) Finally the parties will be invited to make closing submissions if they wish to do so in the same order as the opening submissions.

10.2 At hearings before the Panel, the Panel may, at its full discretion, admit or reject any evidence adduced, whether oral or written. The Evidence Ordinance (Cap. 8) and laws relating to the admissibility of evidence shall not apply.

## **NON-DISCIPLINARY HEARINGS**

### **RULES OF PROCEDURE**

- 10.3 At hearings before the Panel the matter is usually presented in person by the parties and/or their financial advisers. Although not usual, parties may, if they so wish, be represented by their legal advisers.
- 10.4 Any party may, subject to the consent of the Chairman, call witnesses at the hearing provided a witness statement of the evidence has been previously filed with the Secretary in accordance with the Chairman's directions.
- 10.5 The Panel or the Chairman may obtain advice from an independent professional adviser or an expert in any relevant area of practice. The substance of the advice will be disclosed to the parties in order that they may comment upon it prior to a decision being made. The Panel or the Chairman may seek to secure the attendance at the hearing of such adviser if it or he considers this to be necessary.
- 10.6 The Panel or its Chairman may request the attendance of witnesses at the hearing.
- 10.7 A recording of the hearing will normally be made for administrative purposes. A transcript of the hearing may also be made. Any party to the hearing may request a soft copy of the transcript, which will normally be provided, subject to confidentiality considerations.

#### **11. The decision**

- 11.1 The Panel will deliberate in the absence of the parties.
- 11.2 Following the conclusion of its deliberations, the Panel may at its discretion inform the parties of its ruling and a summary of the reasons for the ruling orally. In any event, the Panel will provide a copy of its ruling and the reasons for it in writing to the parties as soon as practicable following the hearing.
- 11.3 Any ruling of the Executive will stand pending determination of the proceedings before the Panel, unless otherwise directed by the Panel or its Chairman.

#### **12. Discrepancies**

- 12.1 Where any discrepancy exists between the provisions of the Introduction to the Codes and these Rules of Procedure, the provisions of the Introduction to the Codes shall prevail.

## TAKEOVERS APPEAL COMMITTEE

### RULES OF PROCEDURE

#### **1 Interpretation**

1.1 Definitions in the Codes also apply to these Rules of Procedure.

1.2 In these Rules –

“appellant(s)” means any party who lodges an appeal to the Takeovers Appeal Committee under section 14.5 of the Introduction to the Codes;

“Chairman” means the Chairman of the Takeovers Appeal Committee convened to hear a matter under section 14.2 of the Introduction to the Codes;

“Codes” mean the Codes on Takeovers and Mergers and Share Repurchases;

“Panel” means the Panel convened to hear proceedings initiated under section 12.1 of the Introduction to the Codes;

“party”/“parties” means either or both of the appellant(s) or the respondent;

“respondent” means the Executive responding to the appeal proceedings;  
and

“Secretary” means the Secretary to the Takeovers Appeal Committee.

#### **2 Point of contact**

2.1 The Secretary will be the point of contact for all parties in respect of any procedural matter. Unless the Secretary specifies an alternative means of communication, such as e-mail or facsimile, all communications should be addressed to the Secretary to the Takeovers Appeal Committee, Securities and Futures Commission, 8/F Chater House, 8 Connaught Road Central, Hong Kong and copied to all parties.

#### **3 Initiating appeal proceedings**

3.1 A party to a hearing before the Panel may appeal to the Takeovers Appeal Committee only on the grounds set out in section 14.2 of the Introduction to the Codes.

3.2 An application for appeal must be made in writing to the Takeovers Appeal Committee not later than 5 business days after the ruling in question. The application must state the full grounds of appeal together with reasons.



## TAKEOVERS APPEAL COMMITTEE

### RULES OF PROCEDURE

#### 4 Response submissions

- 4.1 The respondent will normally be given 5 business days to deliver a submission in response to an application for appeal.

#### 5 Membership of the Takeovers Appeal Committee

- 5.1 Following initiation of the proceedings by an appellant a member of the Disciplinary Chair Committee will act as the Chairman of the hearing.

- 5.2 The Chairman will appoint not less than 2 members of the Panel who have not participated in the disciplinary proceedings in question to be members of the Takeovers Appeal Committee.

- 5.3 Members of the Takeovers Appeal Committee should raise with the Secretary any concerns over possible conflicts of interest at the earliest opportunity in accordance with the Conflicts of Interest Guidelines referred to in section 13.1 of the Introduction to the Codes. The Secretary will notify the parties of the names of the Chairman and members of the Takeovers Appeal Committee.

- 5.4 Parties must raise any concerns over possible conflicts of interest at the earliest opportunity.

- 5.5 Issues of conflicts of interest will be considered and ruled upon by the Chairman with reference to the Conflicts of Interest Guidelines.

- 5.6 The Chairman will resolve any concerns over possible conflicts of interest that he may have in accordance with the Conflicts of Interest Guidelines as they apply to the Chairman of the Panel.

#### 6 Directions

- 6.1 In all cases the Chairman may give any preliminary or procedural direction as he considers appropriate for the determination of a matter without the need for a hearing.

- 6.2 The Chairman may give directions in writing to the parties specifying -

- (a) the dates by which the respondent must deliver its submissions and supporting documents in response to the appellant's submissions;
- (b) if considered appropriate, the dates by which the appellant must deliver its submissions and supporting documents in reply to the respondent's submissions;

and giving such further directions as he considers appropriate.

## TAKEOVERS APPEAL COMMITTEE

### RULES OF PROCEDURE

#### 7 Extensions of time and failure to comply with directions

- 7.1 If a party has reason to seek an extension of time for complying with a direction or time limit, the party should apply in writing setting out the reason. Reasonable requests for time extensions will be considered and may be granted in the sole discretion of the Chairman.
- 7.2 If a party fails, without reasonable excuse, to comply with any direction of the Chairman or any time limit, the Takeovers Appeal Committee may proceed as if it had been notified by the party that he will not be serving any document under that direction or in accordance with that time limit. Without prejudice to the powers of the Takeovers Appeal Committee, including the power to receive and consider such evidence as it thinks fit and to draw inferences, the Takeovers Appeal Committee may draw such adverse inferences from the failure to comply with the time limit or direction as it thinks fit. The Chairman may in his discretion accept or reject documents and/or submissions that have been filed late.

#### 8 Fixing a date for the hearing

- 8.1 The Chairman will fix a date, time and place for any hearing.
- 8.2 The Takeovers Appeal Committee or the Chairman may sit at such times and in such places as either it or he deems most convenient and appropriate in all the circumstances.
- 8.3 Whilst the Chairman may will consult the parties ~~as to their availability~~ before fixing a date, this is solely out a matter of courtesy and convenience. ~~It is not for a~~ party ~~to may not~~ dictate the date of a hearing, whether original or adjourned.
- 8.4 The Chairman will consider, in his sole discretion, timely requests for an adjournment supported by reasons from the parties, and may require evidence of the circumstances being put forward in support of an application. Adjournments will rarely be granted and late applications for an adjournment will only be considered in the most exceptional circumstances.
- 8.5 A party does not have a right to insist that a hearing should be adjourned to a date convenient to a particular witness or legal or professional adviser.

#### 9 Failure of the parties to attend

- 9.1 If a party fails to be present or represented at a hearing the Takeovers Appeal Committee may, if it is satisfied that the party was duly notified of the hearing and either that there is no good reason for such absence has been given to it or

## TAKEOVERS APPEAL COMMITTEE

### RULES OF PROCEDURE

for the fair and just conduct and determination of the matter, hear and decide the matter before it in the party's absence.

- 9.2 Before deciding to dispose of any hearing in the absence of a party the Takeovers Appeal Committee will consider the representations in writing, if any, submitted by that party.

#### **10 The hearing**

- 10.1 The proceedings of the Takeovers Appeal Committee are informal. The Chairman will conduct the hearing in the manner he considers suitable for the clarification of the issues before it and generally for the just handling of the proceedings. Unless otherwise directed by the Chairman the hearing will be conducted as follows:

- (a) At the beginning of the hearing the Chairman will make a short opening statement to explain the manner and order of the proceedings.
- (b) Normally, after the short opening statement by the Chairman, the appellant will make its submissions to the Takeovers Appeal Committee. The respondent will then have an opportunity to make its submissions in response.
- (c) Finally, the parties will be invited to make any closing submissions if they wish to do so in the same order as the opening submissions.

- 10.2 At hearings before the Takeovers Appeal Committee the matter is usually presented in person by the parties and/or their advisers. Parties may, if they so wish, be represented by their legal advisers.

- 10.3 An appeal under section 14.2 is not a rehearing and does not involve a review of the merits of any finding of breach or any finding of fact by the Panel. The hearing will take the form of a review of the written ruling of the Panel and the reasons contained therein for the ruling, and any related submissions both written and oral.

- 10.4 No new evidence may be admitted at hearings before the Takeovers Appeal Committee.

- 10.5 The Takeovers Appeal Committee or the Chairman may obtain advice from, an independent professional adviser or an expert in any relevant area of practice. The substance of the advice will be disclosed to the parties in order that they may comment upon it prior to a decision being made. The Takeovers Appeal Committee or the Chairman may seek to secure the attendance at the hearing of such adviser if it or he considers this to be necessary.

- 10.6 A recording of the hearing will normally be made for administrative purposes. A transcript of the hearing may also be made. Any party to the hearing may

## **TAKEOVERS APPEAL COMMITTEE**

### **RULES OF PROCEDURE**

request a soft copy of the transcript, which will normally be provided, subject to confidentiality considerations.

#### **11 The decision**

- 11.1 The Takeovers Appeal Committee will deliberate in the absence of the parties.
- 11.2 Following the conclusion of its deliberations, the Takeovers Appeal Committee may at its discretion inform the parties of its ruling and a summary of the reasons for the ruling orally. In any event, the Takeovers Appeal Committee will provide a copy of its ruling and the reasons for it in writing to the parties as soon as practicable following the hearing.
- 11.3 On determining the appeal, the Takeovers Appeal Committee may, in its ruling and in accordance with the Introduction to the Codes impose such sanctions and/or make such directions as appear to the Takeovers Appeal Committee to be necessary and appropriate in the circumstances of the case.

#### **12 Discrepancies**

- 12.1 Where any discrepancy exists between the provisions of the Introduction to the Codes and these Rules of Procedure, the provisions of the Introduction to the Codes shall prevail.

## INTRODUCTION

1. **Nature and purpose of the Takeovers Code and Share Repurchase Code**
  - 1.1 The Takeovers Code and the Share Repurchase Code have been issued by the SFC in consultation with the Panel.
  - 1.2 The primary purpose of the Codes is to afford fair treatment for shareholders who are affected by takeovers, mergers and share repurchases. The Codes seek to achieve fair treatment by requiring equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision as to the merits of an offer and ensuring that there is a fair and informed market in the shares of companies affected by takeovers, mergers and share repurchases. The Codes also provide an orderly framework within which takeovers, mergers and share repurchases are to be conducted.
  - 1.3 The Codes do not have the force of law. They are framed so far as possible in non-technical language and should not be interpreted as if they are statutes. The Codes represent a consensus of opinion of those who participate in Hong Kong's financial markets and the SFC regarding standards of commercial conduct and behaviour considered acceptable for takeovers, mergers and share repurchases. This consensus of opinion is reflected in rulings made by the Panel when interpreting the Codes given the diverse range of interests represented by the Panel's members. Similar standards of commercial conduct and behaviour are applied in other leading financial centres.
  - 1.4 Those who wish to take advantage of the securities markets in Hong Kong should conduct themselves in matters relating to takeovers, mergers and share repurchases in accordance with the Codes. If they do not do so they may find, by way of sanction, that the facilities of such markets are withheld in order to protect the interests of those who participate in Hong Kong's securities markets. The Listing Rules expressly require compliance with the Codes.
  - 1.5 The responsibilities provided for in the Codes apply to:-
    - (a) directors of companies that are subject to the Codes;
    - (b) persons or groups of persons who seek to gain or consolidate control of companies that are subject to the Codes;
    - (c) their professional advisers;
    - (d) persons who otherwise participate in, or are connected with, transactions to which the Codes apply; and
    - (e) persons who are actively engaged in the securities market.

- 1.6 In addition, any other persons who issue circulars or advertisements to shareholders in connection with takeovers, mergers or share repurchases must observe the highest standards of care and consult with the Executive prior to the release thereof.
- 1.7 The role and responsibility of financial and other professional advisers is of particular importance given the non-statutory nature of the Codes, and it is part of their responsibility to use all reasonable efforts, subject to any relevant requirements of professional conduct, to ensure that their clients understand, and abide by, the requirements of the Codes, and to co-operate to that end by responding to inquiries from the Executive, the Panel or the Takeovers Appeal Committee. Financial and other professional advisers must therefore have the competence, professional expertise and adequate resources to fulfil their role and to discharge their responsibility under the Codes. If a financial adviser is in any doubt about its ability to meet these requirements, it should consult the Executive in advance. If the Executive considers that a financial adviser is not able to meet these requirements, it may not allow that financial adviser to act in that capacity. In such circumstances the financial adviser may ask the Panel to review the decision of the Executive. Financial advisers must also be mindful of conflicts of interest (see Schedule VII of the Codes).

*Note to section 1.7:*

*Adequate resources*

*A financial adviser advising on a transaction subject to the Codes is expected to allocate to the transaction in question sufficient experienced and competent professional staff with the appropriate involvement of, or reasonable supervision by, a duly approved responsible officer or a suitably experienced senior member of the financial adviser's staff. The supervisor and his staff are expected to devote sufficient time and effort to the transaction to discharge the financial adviser's responsibilities under the Codes.*

- 1.8 The Codes are not concerned with the financial or commercial advantages or disadvantages of a takeover, merger or share repurchase, as the case may be. These are matters for the company and its shareholders.
- 1.9 A company contemplating a takeover, merger or share repurchase should apprise itself of applicable company law requirements, if any, which may affect its ability to conduct the proposed transaction.

## **2. General Principles and Rules**

- 2.1 The Codes share common definitions and the General Principles. The General Principles are essentially statements of good standards of conduct to be observed in takeovers, mergers or share repurchases. The General Principles are expressed in broad general terms and do not define the precise extent or

the limits of their application. The Executive and the Panel apply the General Principles in accordance with their spirit and may modify or relax the effect of the language to achieve their underlying purposes.

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 procedure designed to govern specific types of takeovers, mergers or share repurchases. 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.

- 2.2 To assist the interpretation of the Rules, notes have been inserted, where appropriate, to provide guidance as to how the Executive and the Panel will normally interpret the Codes.
- 2.3 The Executive and the Panel also interpret each of the Codes in the light of previous rulings that have been made under both Codes by the Executive and the Panel, or their predecessor, the Committee on Takeovers and Mergers.

### **3. Amendment of the Codes**

- 3.1 The Codes may be amended or extended from time to time by the SFC in consultation with the Panel.

### **4. Companies and transactions to which the Codes apply**

- 4.1 The Codes apply to takeovers, mergers and share repurchases affecting public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. As a result, although it is generally the nature of the offeree company, the potential offeree company, or the company in which control may change or be consolidated that is relevant, there are also circumstances, specified in Rule 2 of the Takeovers Code, in which it is necessary to consider the treatment of the offeror's shareholders in order to carry out the objectives of the Takeovers Code. The Executive will normally grant a waiver from the requirements of the Share Repurchase Code for companies with a primary listing outside Hong Kong provided that shareholders in Hong Kong are adequately protected.

**4.2** In order to determine whether a company is a public company in Hong Kong the Executive will consider all the circumstances and will apply an economic or commercial test, taking into account primarily the number of Hong Kong shareholders and the extent of share trading in Hong Kong and other factors including:-

- (a) the location of its head office and place of central management;
- (b) the location of its business and assets, including such factors as registration under companies legislation and tax status; and
- (c) the existence or absence of protection available to Hong Kong shareholders given by any statute or code regulating takeovers, mergers and share repurchases outside Hong Kong.

If a company is in any doubt about its status as a public company in Hong Kong, it should consult the Executive at an early stage.

**4.3** The Takeovers Code is concerned with offers for, and takeovers and mergers of, all relevant companies, however effected. These include partial offers, offers by a parent company for shares in its subsidiary and certain other transactions where control (as defined) of a company is to be obtained or consolidated. References in the Takeovers Code to “takeovers” and “offers” include, where appropriate, all such transactions, including share repurchases by general offer as described below. The Takeovers Code does not apply to offers for non-voting, non-equity capital unless required by Rules 13 and 14 of the Takeovers Code.

**4.4** The Share Repurchase Code is concerned with share repurchases of all relevant companies. Share repurchases by general offer will be considered to be offers and the Rules of the Takeovers Code will apply, *mutatis mutandis*, in addition to the Rules of the Share Repurchase Code. Persons engaging in share repurchases by general offer should therefore read the Takeovers Code as well as the Share Repurchase Code.

**4.5** Transactions under either of the Codes may from time to time be subject to the jurisdiction of both the Panel and an overseas regulator. In such cases, early consultation with the Executive is strongly recommended so that conflicts between the relevant requirements of the two jurisdictions may be resolved.

## **5. The Executive**

**5.1** The Codes are administered by the Executive. The Executive undertakes the investigation of takeovers, mergers and share repurchases and monitors related dealings in connection with the Codes. It is available for consultation and to give rulings on all matters to which the Codes apply.



## **6. Consulting the Executive**

- 6.1** When there is any doubt as to whether a proposed course of conduct is in accordance with the General Principles or the Rules, parties or their advisers should always consult the Executive in advance. In this way, the parties can clarify the basis on which they can properly proceed and thus minimise the risk of taking action which might be a breach of the Codes.
- 6.2** Consultations do not attract any fee. They generally take the form of verbal discussions and will not be concluded with any formal ruling from the Executive. Views expressed by the Executive under consultations are preliminary and do not bind the Executive.
- 6.3** While the Executive will respond to questions on interpretation of the Codes, it should not be expected to answer purely hypothetical questions, or to give provisional rulings (e.g. when the parties with an interest in such rulings cannot be identified).
- 6.4** Parties should be aware that consultations will not result in provisional rulings and, where the Codes require parties to consult, they are not precluded from seeking formal rulings and a fee becomes payable whenever a ruling is sought despite the fact that the process starts as a consultation. Where there is a difference in views between the Executive and parties about a Code issue based on preliminary information during or after a consultation, the Executive, mindful of the non-binding nature of consultations, generally urges parties to seek a formal ruling.

## **7. Rulings by the Executive**

- 7.1** While the Executive may sometimes see fit to make a ruling under the Codes of its own volition, a ruling is more often requested by an interested party. A ruling by the Executive normally involves a consideration of all relevant information in relation to the application and a more thorough analysis than that permissible under a consultation. In some cases the Executive may find it necessary to convene an informal meeting or hear the views of other interested parties before making a ruling. The Executive requires prompt co-operation from those to whom enquiries are directed so that decisions may be both properly informed and given as speedily as possible. Rulings may initially be conveyed to parties orally but will always be confirmed in writing in time.

## **8. Applications for rulings**

- 8.1** Any application for a ruling under either of the Codes should take the form of a written submission addressed to the Executive Director, Corporate Finance Division of the SFC. The submission should be comprehensive and contain all relevant information which the Executive will require to render a fully informed decision. Such information should normally include the following:-

(a) Summary

The ruling being sought, and any alternative courses of action, should be clearly described, and the issues for consideration summarised. The relevant sections of the Codes should be identified.

(b) Parties

All parties with a material interest in the submission, and their respective financial and legal advisers, should be identified.

(c) Material Facts

All material facts relevant to the application should be stated and should include, as appropriate, the following information:-

- (i) a description of the proposed transaction including the timetable for implementation, related regulatory requirements and the reasons and commercial rationale for the transaction;
- (ii) where known after reasonable inquiry, a description of the relevant offeror and the offeree company including their places of incorporation, a description of their capital structures, group structures, businesses and assets, and the identities of their controlling and substantial shareholders, accompanied by a structural chart depicting the structure of the relevant offeror and the offeree company and the interests of such shareholders, both before and after implementation of the proposed transaction;
- (iii) a historical chronology of related events;
- (iv) the controlling shareholders' interests in the relevant offeror, the offeree company and the proposed transaction;
- (v) the interest which directors of the relevant offeror and the offeree company have in the proposed transaction;
- (vi) the effect which the proposed transaction will have on the relevant offeror and the offeree company;
- (vii) steps to be taken, if any, to safeguard the interests of any independent shareholders;
- (viii) a description of financing arrangements for the proposed transaction;

- (ix) where known after reasonable inquiry, details of any dealings in securities of the offeree company by the relevant offeror, the directors and substantial shareholders of the relevant offeror and the offeree company, and all persons acting in concert with any of them, for the 6 month period immediately preceding the date of the application; and
  - (x) a description of the terms and conditions of material contracts.
- (d) Issues for Consideration

The issues for consideration by the Executive should be described and analysed, and all arguments advanced in support of the ruling being sought.

**8.2** A crossed cheque payable to the SFC in the amount of the fee, if any, payable pursuant to the Securities and Futures (Fees) Rules should be enclosed with the submission and, where applicable, the submission should include a brief description of the way in which the fee was calculated. A copy of extracts from Parts 3 and 5 and Schedule 2 of the Securities and Futures (Fees) Rules is attached as Schedule IV of the Codes.

**8.3** Each submission should be signed by the applicant and should close with a statement certifying the truth, accuracy and completeness of statements contained in the submission. When the application is filed by an adviser, the statement should confirm that the applicant has authorised the filing of the application by the adviser. Such statement does not relieve the adviser of its obligation to use all reasonable efforts to ensure that its client understands, and abides by, the relevant requirements of the Codes, and that the submission of its client is true, accurate and complete.

## **9. Review of Executive rulings**

**9.1** If a party wishes to contest a ruling of the Executive, he may ask for the matter to be reviewed by the Panel, which will normally be convened at short notice. The Executive will arrange with the Panel and the relevant party a practical time for a Panel meeting taking into account the timetable of the transaction. The party and the Executive must supply succinct statements of their respective cases in advance of the meeting and copies of such statements will be provided to the Executive and the party respectively. The Panel has discretion to entertain a request for review by an aggrieved shareholder, if it is satisfied that such request is not frivolous. When the Executive considers that it is necessary to resolve an issue urgently, the Executive may stipulate a reasonable time within which a request for review must be made; in any other case, the Executive must be notified at the latest within 14 days of the event giving rise to the request for the review. Any request for a review shall contain the grounds on which the review is requested.

## 10. Executive referrals to the Panel

10.1 The Executive may refer a matter to the Panel for a ruling without itself giving a ruling when it considers that there is a particularly novel, important or difficult point at issue.

## 11. The Panel

11.1 The Panel is a committee of the SFC established under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

11.2 The Panel hears disciplinary matters in the first instance, and reviews rulings by the Executive at the request of any party dissatisfied with such a ruling. It also considers novel, important or difficult cases referred to it by the Executive. The Panel also reviews, from time to time upon request by the SFC, the provisions of the Codes and the Rules of Procedure for hearings under the Codes and recommends appropriate amendments to the Codes and Rules to the SFC.

11.3 The Panel consists of up to 40 members not including members of the Disciplinary Chair Committee (see section 11.10 below) drawn from the financial and investment community, at least one of whom should be a non-executive director of the SFC. No Executive Directors or staff of the SFC may be members of the Panel. Members of the Panel are appointed, and may be removed, by the SFC. They normally hold office for a ~~one~~two-year term but may be reappointed at the end of each term. ~~The Panel may co-opt other persons to assist in specific circumstances.~~ Discussions on proposals for review of or amendment to the Codes shall include the Executive Directors and staff of the SFC.

11.4 The Panel will have a Chairman, and one or more Deputy Chairmen. The chairman of each meeting of the Panel will be either the Chairman or a Deputy Chairman of the Panel or, if neither is available, such other member as may be appointed by the Panel. The chairman of each meeting of the Panel will have a deliberative and a casting vote. ~~The quorum for the Panel is five, including a chairman. The Chairman will appoint a Secretary, who will normally be a staff member of the SFC.~~

11.5 Each member of the Panel and, where applicable, his firm, is required to comply with ~~C~~on conflicts of ~~I~~nterest ~~G~~uidelines ~~issued by the SFC from time to time~~referred to in section 13.1 of this Introduction.

11.6 Members of the Panel hearing a matter under sections 9.1, 10.1 or 12.1 of this Introduction will be remunerated at the prevailing rate determined from time to time by the SFC.

11.7 The Panel does not have the power to award costs.

11.8 The quorum for hearings before the Panel is five including the Chairman. If after the commencement of any hearing a member other than the Chairman is absent resulting in an inadequate quorum, that hearing may, with the consent of the parties, proceed with a quorum of four. In the event of equality of votes, the Chairman shall, as provided for in section 11.4 above, have a casting vote.

11.9 The Chairman of a hearing and one other member of the Panel, may, as necessary, and subject to the approval of the Chief Executive Officer of the SFC, co-opt any suitably qualified person to participate as a member of the Panel. Such person will count as part of the quorum.

*Disciplinary Chair Committee*

11.10 The Disciplinary Chair Committee is established under section 8(1) of the Securities and Futures Ordinance (Cap 571) and comprises up to 8 duly experienced and legally qualified persons who are willing to act as Chairman of the Panel in disciplinary proceedings and Chairman of the Takeovers Appeal Committee on a case-by-case basis.

11.11 Members of the Disciplinary Chair Committee will be remunerated at the prevailing rate determined from time to time by the SFC.

11.12 If no member of the Disciplinary Chair Committee is available or eligible to sit in a matter, at least 2 members of the Disciplinary Chair Committee may, subject to the approval of the Chief Executive Officer of the SFC, co-opt any duly experienced and legally qualified person who they consider appropriate, and who is willing to act as a Chairman of the Panel in disciplinary proceedings or the Takeovers Appeal Committee.

*Secretary to the Panel*

11.13 The Panel is assisted by a Secretary who is normally a staff member of the SFC. The duties of the Secretary are to deal with the administrative arrangements for hearings and to carry out such secretarial duties as may from time to time be directed by the Chairman of the Panel or the Takeovers Appeal Committee.

*Legal Adviser to the Panel*

11.14 The Chairman of the Panel may appoint a Legal Adviser to the hearing who will not normally be a staff member of the SFC. The Legal Adviser must not have participated in the matter at issue in the proceedings before the Panel and must raise with the Secretary any concerns over possible conflicts of interest in accordance with the Conflicts of Interest Guidelines referred to in section 13.1 below as if the Legal Adviser were a member of the Panel hearing the matter.

11.15 The Legal Adviser's role is to assist/advise the Panel or its Chairman on questions of law or mixed fact and law and to intervene for the purpose either

of informing the Panel of any irregularity in the conduct of the proceedings which comes to his knowledge, or of advising when it appears to him that, but for such advice, there is a possibility of a mistake in law being made.

11.16 The Legal Adviser to the Panel is not a party to the proceedings or a witness in the proceedings and is therefore not subject to questioning by the parties. The parties may however address the Panel on any opinions expressed by the Legal Adviser.

11.17 The substance of the Legal Adviser's advice on issues of law or mixed fact and law which may impact on the Panel or its Chairman's substantive decision, will be disclosed to the parties in order that they may comment upon it prior to a decision being made. The Legal Adviser's advice on procedural matters need not be disclosed to the respondents.

## **12. Disciplinary proceedings**

**12.1** The Executive may institute disciplinary proceedings before the Panel when it considers that there has been a breach of either of the Codes or of a ruling of the Executive or the Panel.

**12.2** A disciplinary case is one the sole or main purpose of which is to propose that disciplinary action should be taken. Disciplinary action is to be distinguished from requiring compliance with, or requiring that action be taken to remedy a breach of, the Codes or of a ruling of the Executive or the Panel. In any such case, the Executive invites the person concerned to appear before the Panel. If the Panel finds there has been a breach of either of the Codes or of a ruling, it may impose any of the following sanctions:-

~~(a) private reprimand;~~

~~(b)~~(a) issuance of a public statement which involves criticism;

~~(e)~~(b) public censure;

~~(d) reporting the offender's conduct to the SFC or another regulatory authority (for example, the Stock Exchange, the Hong Kong Monetary Authority or any professional body) or an overseas regulatory authority;~~

~~(e)~~(c) requiring licensed corporations, licensed representatives, registered institutions, or relevant individuals, for a stated period, not to act or continue to act in any or a stated capacity for any person who has failed to comply, or has indicated that he does not intend to comply, with either of the Codes or a ruling;

~~(f)~~(d) banning advisers from appearing before the Executive or the Panel for a stated period; and/or

~~(g)~~(e) requiring further action to be taken as the Panel thinks fit.

The Executive or the Panel may report a person to ~~the other~~ regulatory authorities or professional bodies ~~contemplated by section 12.2(d)~~ even though there has been no finding of ~~such~~ a breach if the person so reported is governed by rules, regulations or standards of professional conduct of the relevant regulatory authority or professional body and the Executive or the Panel has reasonable grounds for believing that the conduct of such person may have contravened such rules, regulations or standards of professional conduct.

**12.3** The Executive may itself deal with a disciplinary matter if the party to be disciplined agrees to the disciplinary action proposed to be taken by the Executive.

**12.4** Failure of any licensed corporation, licensed representative, registered institution, or relevant individuals, to comply with either of the Codes, or a ruling, or a requirement not to act for a named person in accordance with section 12.2(~~ec~~) above, is a breach of the Codes and may result in disciplinary proceedings against such corporation, representative, institution, or individual under this section 12. It may (in accordance with the provisions of the relevant Ordinances) also lead to suspension or revocation of the licence or registration of such entity or person.

### ~~13. Meetings of the Panel~~

~~13.1 All meetings of the Panel are informal and private. There are no rules of evidence. A verbatim record may be taken for the benefit of the Panel. The Panel directs its own proceedings and may make any inquiries it deems relevant or appropriate. Parties (i.e. the Executive and the other parties to the proceedings) will be advised of the applicable procedural rules in advance of the date set for the meeting.~~

~~On the application of any party, the chairman of the relevant meeting sitting alone may give such procedural directions as he considers appropriate for the determination of a case.~~

~~13.2 A party is permitted to bring with it to a meeting its financial adviser and/or solicitor. The Panel would not normally allow more than two representatives of the financial adviser or of the solicitor to attend. A party may either present its own case to the Panel or it may have such case presented by its financial adviser on its behalf. If a party wishes to present its case in some other manner, the prior consent of the chairman of the meeting is required. Such consent will only be given in exceptional circumstances.~~

~~13.3 Normally, the parties should set out their case briefly in writing beforehand and the Executive will submit a written summary of the issues, together with its ruling or views. The parties are permitted to call such witnesses as they may feel necessary.~~

~~In general, all parties are entitled to be present throughout the meeting and to see all papers submitted to the Panel. Occasionally, however, a party may wish to present evidence to the Panel which is of a confidential commercial nature. In such exceptional cases, the Panel may, if it is satisfied that such course is justified, be prepared to hear the evidence in question in the absence of some, or all, of the other parties involved. The parties shall be absent during the Panel's deliberation on the case. Representations by shareholders may be presented in writing and are usually heard by the Panel in the absence of those shareholders.~~

~~13.4 The Panel recognises that its authority can only be sustained if its impartiality is beyond doubt. The SFC, in consultation with the Panel, has therefore adopted conflicts of interest guidelines for the Panel. Accordingly, where the Panel determines, by reference to such conflicts of interest guidelines, that a matter is likely to create a conflict of interest for any member of the Panel, that member may not attend the meeting and an alternate may be appointed. The parties are expected to raise any conflicts of interest concerns they might have at the earliest possible opportunity.~~

~~13.5 Following the conclusion of a meeting, the Panel will inform the parties of its ruling and the reasons for the ruling as soon as it completes its deliberations. This will be confirmed to the parties in writing as soon as reasonably practicable and, subject to confidentiality considerations, will normally be published in accordance with section 16 of this Introduction.~~

~~13.6 As meetings of the Panel are private, none of the parties to the meeting, or persons appearing before the Panel, shall disclose any details of the meeting to any other person, including the media, and shall not make use of any information acquired during the course of the meeting for purposes other than those connected with the meeting itself.~~

### **13. Hearings**

13.1 The SFC, in consultation with the Panel, has adopted [Conflicts of Interest Guidelines](#) for the Panel and the Takeovers Appeal Committee. Accordingly, where, by reference to such [Conflicts of Interest Guidelines](#), a matter is likely to create a conflict of interest for any member of the Panel hearing a matter, that member may not participate in the hearing.

#### *Hearings of the Panel*

13.2 All non-disciplinary hearings of the Panel under sections 9.1 and 10.1 of this Introduction are informal and are held in private as they often involve confidential price sensitive information.

13.3 All disciplinary hearings of the Panel under section 12.1 of this Introduction are informal and in the interests of transparency are heard in public save in exceptional circumstances where it (or the Chairman of the hearing) considers



it necessary to hear a matter in private in order to preserve commercial confidentiality such as price sensitive information. Hearings of the Panel which the Chairman has directed to be heard in private are confidential.

**13.4** In general, all parties are entitled to be present throughout the hearing and to see all papers submitted to the Panel. Occasionally, however, a party may wish to present evidence to the Panel which is of a confidential commercial nature. In such exceptional cases, the Panel may, if it is satisfied that such course is justified, be prepared to hear the evidence in question in the absence of some, or all, of the other parties involved. The parties shall be absent during the Panel's deliberation on the case. Representations by shareholders may be presented in writing and are usually heard by the Panel in the absence of those shareholders.

**13.5** Parties or persons attending a private hearing must not disclose any details of the hearing to any other person, including the media, and must not make use of any information acquired during the course of the hearing for purposes other than those connected with the hearing itself. In the event of a public hearing, if the Panel or the Chairman of the hearing directs that part or parts of the hearing are held in private under sections 13.3 or 13.4 of this Introduction, the same restrictions will apply to parties or persons attending the private part(s) of the hearing.

**13.6** At hearings before the Panel the matter is usually presented in person by the parties and/or their financial advisers. Parties may, if they so wish, be represented by their legal advisers although this is not usual at non-disciplinary hearings.

**13.7** There are no rules of evidence.

**13.8** The Panel directs its own proceedings and may make any enquiries it deems relevant or appropriate.

**13.9** Hearings are conducted in accordance with the Panel's Rules of Procedure which are issued by the SFC from time to time. The Rules of Procedure are available on the SFC's website.

**13.10** The Chairman of the hearing may give any preliminary or procedural direction as he considers appropriate for the determination of a matter without the need for a hearing. Any ruling made by the Chairman is a ruling of the Panel.

**13.11** The Chairman of a disciplinary hearing may decide all questions of law (as opposed to Codes issues). The Chairman of such hearing may also decide questions of mixed fact and law in consultation with the other members of the Panel if he thinks necessary. In non-disciplinary hearings questions of law and questions of mixed fact and law will be decided by the Panel collectively.

## **14. The Takeovers Appeal Committee**

**14.1** Like the Panel, the Takeovers Appeal Committee is a committee of the SFC established under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

**14.2** The Takeovers Appeal Committee reviews disciplinary rulings of the Panel for the sole purpose of determining whether any sanction imposed by the Panel is unfair or excessive based upon the Panel's finding of facts.

~~**14.3** The SFC appoints and may remove the Chairman, Deputy Chairman and members of the Takeovers Appeal Committee. The Chairman and Deputy Chairman of the Committee are selected from members of the Securities and Futures Appeal Panel or the Securities and Futures Appeals Tribunal (after its establishment) who have legal training and experience. The other members of the Committee comprise members of the Panel. The Chairman, Deputy Chairman and members of the Committee normally hold office for a one-year term but may be reappointed at the end of each term. The Chairman of the Committee may co-opt other persons to assist it if he thinks fit.~~

~~**14.4** Each meeting of the Takeovers Appeal Committee is presided over by:-~~

~~(a) the Chairman or the Deputy Chairman; or~~

~~(b) another member of the Securities and Futures Appeal Panel or the Securities and Futures Appeals Tribunal (after its establishment) who has legal training and experience and who is designated by the Chairman where he considers it inappropriate that either he or the Deputy Chairman should preside over a particular meeting.~~

~~The quorum for the Committee is three including a chairman. No member of the Panel may participate in a meeting if he participated in the disciplinary proceedings in question. Each member of the Committee is required to comply with conflicts of interest guidelines issued by the SFC from time to time.~~

~~**14.3** The Takeovers Appeal Committee comprises a Chairman who is a member of the Disciplinary Chair Committee and other members of the Panel who are selected on a case-by-case basis. No member of the Panel may participate in a hearing of the Takeovers Appeal Committee if he had participated in the disciplinary proceedings in question.~~

~~**14.4** Members of the Takeovers Appeal Committee will be remunerated at the prevailing rate determined from time to time by the SFC.~~

~~**14.5** An application for appeal must be made in writing to the Takeovers Appeal Committee not later than 5 business days after the ruling in question. The application must state the full grounds of appeal together with reasons.~~

14.6 The quorum for hearings before the Takeovers Appeal Committee is three including the Chairman. If after the commencement of any hearing a member other than the Chairman is absent resulting in an inadequate quorum, that hearing may, with the consent of the parties, proceed with a quorum of two. In the event of equality of votes, the Chairman shall have the casting vote.

14.7 The Chairman of a hearing and one other member of the Panel, may, as necessary, and subject to the approval of the Chief Executive Officer of the SFC, co-opt any suitably qualified person to participate as a member of the Takeovers Appeal Committee. Such person will count as part of the quorum.

14.8 The Takeovers Appeal Committee is assisted by a Secretary who will normally be a staff member of the SFC who did not act as Secretary to the Panel in the same matter.

#### **15. Meetings of the Takeovers Appeal Committee**

~~15.1~~ Proceedings before the Takeovers Appeal Committee are generally conducted in a similar way to those before the Panel.

~~15.2~~ In all cases, notice of appeal must be given within 5 business days of the delivery by the Panel of its written reasons for the decision in question. The Panel will normally suspend publication in full of its findings during this time, although an appropriate interim announcement, including the findings of fact, may be made. If there is no appeal, any publication by the Panel will follow immediately. If there is an appeal, publication is further suspended until the decision of the Takeovers Appeal Committee has been made.

~~15.3~~ If an appeal is upheld, the appellant is consulted on the form of statement, if any, which is to be published. If an appeal is dismissed, normally the findings of the Panel will be published and any actions decided upon will be implemented. In either case, the Takeovers Appeal Committee may make any further comment it thinks fit.

#### **15. Hearings of the Takeovers Appeal Committee**

15.1 Each member of the Takeovers Appeal Committee is required to comply with [Conflicts of Interest Guidelines](#) referred to in section 13.1 of this Introduction.

15.2 All hearings of the Takeovers Appeal Committee are informal and in the interests of transparency are heard in public save in exceptional circumstances where it (or the Chairman of the hearing) considers it necessary to hear a matter in private in order to preserve commercial confidentiality such as price sensitive information.

15.3 Hearings before the Takeovers Appeal Committee are generally conducted in a similar way to those before the Panel; and in accordance with the Takeovers Appeal Committee's Rules of Procedure which are issued by the SFC from time to time. Sections 13.4 to 13.11 of this Introduction apply equally to

hearings of the Takeovers Appeal Committee. The Rules of Procedure are available on the SFC's website.

## **16. Publication of rulings**

**16.1** Irrespective of the outcome of a matter, and Subject-subject to confidentiality considerations of a commercial nature, it is the policy of the Panel and the Takeovers Appeal Committee to publish their rulings, and the reasons for those rulings on the SFC's website, as soon as reasonably practicable, so that their activities may be understood by the public. This includes a ruling of the Panel involving a finding of breach or breaches of the Codes which is pending appeal to the Takeovers Appeal Committee. All rulings will normally be given to the parties as soon as possible following the conclusion of a meeting. Rulings suitable for publication will then be reconstituted as written announcements and will be published as promptly as possible. In easematters where the ruling is price sensitive, or otherwise subject to confidentiality considerations of a commercial nature, the announcement of the ruling will normally be published as soon as the information is no longer price sensitive or commercially confidential, shortly after the conclusion of the meeting and a further announcement giving the reasons for the ruling will be published as soon as practicable thereafter.

**16.2** ~~None of the~~In a private hearing parties or persons appearing before the Panel or the Takeovers Appeal Committee ~~shall~~must not make any announcement of a ruling before the public announcement by the Panel or the Takeovers Appeal Committee. Such parties or persons may comment on the ruling but no announcement by any of them may contain any information about the meeting, or make any reference to the text of the ruling or the reasons for it in terms other than those used in the public announcement issued by the Panel or the Takeovers Appeal Committee.

**16.3** Subject to confidentiality considerations of a commercial nature such as price sensitive information, it is the policy of the Executive to publish an announcement when it initiates proceedings before the Panel under section 12.1 of this Introduction and to publish its important rulings and interpretations of the Codes, and the reasons for them, so that its activities may be understood by the public. There may be announcements of rulings in specific easematters where the rulings are considered to have general application, or statements of policy which may take the form of Practice Notes setting out in greater detail the Executive's practice and interpretation of the Codes.

## **17. Co-operation with other authorities**

**17.1** Information given to the Executive, the Panel or the Takeovers Appeal Committee will be treated in the strictest confidence. Because of the overriding importance of maintaining a fair market and curbing improper activities, this information is made available to the SFC subject to the SFC's own obligations of confidentiality laid down by the Securities and Futures

Ordinance (Cap. 571). Subject to those obligations, the SFC may from time to time give information received by it to other regulatory authorities, so that they can discharge their own duties. Conversely, the Executive may from time to time receive information from other regulatory bodies which is relevant to a matter then current. Co-operation with other regulatory authorities is regarded as an important part of the Executive's and the SFC's functions.

**18. Review by SFC**

- 18.1** As a matter of general policy, the SFC will not normally review or otherwise involve itself in a ruling of the Panel or the Takeovers Appeal Committee.

## THE TAKEOVERS AND MERGERS PANEL

### Terms of Reference

#### 1. Establishment

- 1.1 The Securities and Futures Commission (“SFC”) has established the Takeovers and Mergers Panel (“Panel”) and appointed members of the Panel under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

#### 2. Purpose and functions of the Panel

- 2.1 The SFC has delegated to the Panel the functions specified in the Codes on Takeovers and Mergers and Share Repurchases (“Codes”) including:
- a) hearing any matter referred to it by the Executive which, in the opinion of the Executive, involves a novel, important or difficult issue;
  - b) reviewing rulings made by the Executive at the request of any party dissatisfied with such a ruling;
  - c) hearing disciplinary matters in the first instance; and
  - d) reviewing, from time to time upon request by the SFC, the provisions of the Codes and the Rules of Procedure and making recommendations to the SFC as to any necessary or appropriate amendments to the Codes and the Rules of Procedure.

#### 3. Membership of the Panel

- 3.1 The Panel consists of up to 40 members, (excluding members of the Disciplinary Chair Committee), drawn from the financial and investment community, at least one of whom should be a non-executive director of the SFC. No Executive Directors or staff of the SFC may be members of the Panel.
- 3.2 The Panel will have a Chairman, and one or more Deputy Chairmen.
- 3.3 The validity of any acts or proceedings of the Panel shall not be affected by any vacancy among the membership of the Panel or by any defect in the appointment of any Panel member.
- 3.4 The membership of the Panel will be made available on the SFC website.

**4. Term of appointment**

- 4.1 Each member of the Panel will normally hold office for a two-year term and will be eligible for re-appointment at the end of each term.

**5. Hearings of the Panel**

- 5.1 The Panel will conduct all hearings in accordance with the provisions of the Introduction to the Codes and the Rules of Procedure which are issued by the SFC from time to time. The Codes and the Rules of Procedure are available on the SFC website.

**6. Conflicts of interest**

- 6.1 Members are required to comply with the applicable Conflicts of Interest Guidelines for the Panel and the Takeovers Appeal Committee issued by the SFC from time to time.

## TAKEOVERS APPEAL COMMITTEE

### Terms of Reference

#### 1. Establishment

- 1.1 The Securities and Futures Commission (“SFC”) has established the Takeovers Appeal Committee (“Appeal Committee”) and appointed members of the Appeal Committee under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

#### 2. Purpose and functions of the Appeal Committee

- 2.1 The SFC has delegated to the Appeal Committee the functions specified in Codes on Takeovers and Mergers and Share Repurchases (“Codes”) of reviewing disciplinary rulings of the Takeovers and Mergers Panel (“Panel”) at the request of an aggrieved party for the sole purpose of determining whether a sanction imposed by the Panel is unfair or excessive based on the Panel’s finding of facts.

#### 3. Membership of the Appeal Committee

- 3.1 The Appeal Committee comprises a Chairman who is selected from the Disciplinary Chair Committee (“DCC”) and other members of the Panel who are selected on a case-by case basis.
- 3.2 No member of the Panel may participate in a hearing of the Appeal Committee if he had participated in the disciplinary proceedings in question.
- 3.3 The validity of any acts or proceedings of the Appeal Committee shall not be affected by any vacancy among the membership of the Appeal Committee or by any defect in the appointment of any member of the Appeal Committee.
- 3.4 The membership of the DCC and the Panel will be made available on the SFC website.

#### 4. Term of appointment

- 4.1 Each member of the DCC and the Panel who comprises the Appeal Committee will normally hold office for a two-year term and will be eligible for re-appointment at the end of each term.

#### 5. Hearings of the Appeal Committee

- 5.1 The Appeal Committee will conduct all hearings in accordance with the Introduction to the Codes and the Rules of Procedure which are issued by the SFC from time to time. The Codes and the Rules of Procedure are available on the SFC website.



**6. Conflicts of interest**

- 6.1 Members are required to comply with the applicable Conflicts of Interest Guidelines for the Panel and the Appeal Committee issued by the SFC from time to time.

## DISCIPLINARY CHAIR COMMITTEE

### Terms of Reference

#### **1 Establishment**

- 1.1 The Securities and Futures Commission (“SFC”) has established the Disciplinary Chair Committee (“DCC”) and appointed members of the DCC under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

#### **2 Membership and purpose of the DCC**

- 2.1 The DCC comprises up to eight duly experienced and legally qualified persons. A member of the DCC will be selected, on a case-by-case basis to act as:

- a) Chairman of the Takeovers and Mergers Panel (“Panel”) in disciplinary proceedings; and
- b) Chairman of the Takeovers Appeal Committee.

- 2.2 Members of the DCC who are appointed as Chairman of the Panel or the Takeovers Appeal Committee will conduct all hearings in accordance with the provisions of the Introduction to the Codes and the Rules of Procedures which are issued by the SFC from time to time. The Codes and the Rules of Procedure are available on the SFC website.

- 2.3 The validity of any acts or proceedings of the DCC shall not be affected by any vacancy among the membership of the DCC or by any defect in the appointment of any member of the DCC.

- 2.4 The membership of the DCC will be made available on the SFC website.

#### **3 Term of appointment**

- 3.1 Each member of the DCC will normally hold office for a two-year term and will be eligible for re-appointment at the end of each term.

#### **4 Conflicts of interest**

- 4.1 Members are required to comply with the applicable Conflicts of Interest Guidelines for the Panel and the Appeal Committee issued by the SFC from time to time.

## NOMINATIONS COMMITTEE

### Terms of Reference

#### **1 Establishment**

- 1.1 The Securities and Futures Commission (“SFC”) has established the Nominations Committee and appointed members of the Nominations Committee under section 8(1) of the Securities and Futures Ordinance (Cap. 571).

#### **2 Purpose and functions of the Nominations Committee**

- 2.1 The SFC has delegated to the Nominations Committee the function of nominating members of the Takeovers and Mergers Panel (“Panel”), the Disciplinary Chair Committee (“DCC”) and the Takeovers Appeal Committee (“Appeal Committee”). In performing this function, the Nominations Committee will:
- a) monitor the size, composition, experience and balance of the Panel, the DCC and the Appeal Committee;
  - b) oversee the selection and appointment process and the renewal of appointments process in relation to members of the Panel, the DCC and the Appeal Committee and make recommendations to the SFC in connection with those processes;
  - c) in particular, make recommendations to the SFC in relation to the appointment (and any renewal of appointment) of the following persons:
    - (i) the Chairman of the Panel;
    - (ii) the Deputy Chairmen of the Panel; and
    - (iii) the members of the Panel and the DCC.

#### **3 Membership of the Nominations Committee**

- 3.1 The Nominations Committee will comprise five members and include:
- a) the Chief Executive Officer of the SFC, who will be Chairman;
  - b) the Executive Director of the Corporate Finance Division of the SFC;
  - c) the Chairman of the Panel, and if he is unavailable, one of the Deputy Chairmen of the Panel; and
  - d) two members who are not executive staff of the SFC.

## NOMINATIONS COMMITTEE

### Terms of reference

3.2 The validity of any acts or proceedings of the Nominations Committee shall not be affected by any vacancy among the membership of the Nominations Committee or by any defect in the appointment of a Nominations Committee member.

3.3 The membership of the Nominations Committee will be made available on the SFC website.

### 4 Term of appointment

4.1 Each member of the Nominations Committee will normally hold office until resignation or upon ceasing to hold the position of Chief Executive Officer of the SFC or the Executive Director of the Corporate Finance Division of the SFC or the Chairman or the Deputy Chairmen of the Panel, whichever is earlier. The remaining two members who are not executive staff of the SFC will normally hold office for a two-year term and will be eligible for re-appointment at the end of each term.

### 5 Meetings

5.1 The Chairman of the Nominations Committee may, at his discretion, convene meetings of the members of the Committee at such time and in such manner as he or she considers appropriate in order to conduct any matters that fall within its functions. The Chairman of the Committee shall determine, from time to time, the applicable procedures by which the business of the Committee shall be conducted.

5.2 Any member of the Committee may request that the Chairman of the Committee call a meeting of the Committee.

5.3 The quorum for a meeting of the Committee shall be three.

5.4 All decisions and resolutions of the Committee shall be made by a majority vote of those members present at a meeting of the Committee. In the event of equality of votes the Chairman will have a casting vote.

5.5 The Chairman or the Deputy Chairmen of the Panel, will not, in their capacity as members of the Committee, be involved in any determination relating to his or her appointment, re-appointment or renewal of appointment.