TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to an application by International Capital Network Holdings Limited ("ICN") for a review of a ruling by the Executive that ICN must comply with the provisions of the Takeovers Code in response to an offer by Koffman Securities Limited.

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1. The Panel met on Thursday 31 October 2002 to consider an application under section 9.1 of the Introduction to the Takeovers Code ("**Code**") by ICN for a review of a ruling by the Executive that ICN must comply with the provisions of the Code in response to an offer by Koffman Securities Limited ("**Koffman**" or "**Offeror**").

Salient Facts

The Offer

2. On 5 September 2002 Koffman announced its intention to make a voluntary offer for all the issued shares in ICN ("**Offer Announcement**") at a price of $0.03 per share in cash with a securities exchange alternative ("**Koffman Offer**" or "**Offer**").

ICN's allegations against Koffman

3. ICN, through its financial adviser, advised the Executive that ICN did not consider the Koffman Offer to be bona fide or in accordance with the Code. Given this, ICN stated that it did not propose to take any further action in response to the Koffman Offer until these matters had been investigated fully and any breaches addressed.

4. ICN's refusal to respond centred on the following allegations:

   (a) The Koffman Offer was not bona fide as it formed part of a series of undisclosed arrangements between a group (which ICN alleged held a majority interest of the shares in ICN and was acting in concert in respect of ICN, "**Alleged Concert Party**") and Koffman. ICN alleged that these arrangements may have involved secret benefits for Koffman and members of the Alleged Concert Party that were not available to other ICN shareholders and were also related to a scheduled general meeting of ICN at which it was proposed to alter the composition of ICN's board of directors; and

   (b) The Alleged Concert Party had, at a date preceding the Koffman Offer, triggered a mandatory offer obligation under Rule 26.1 of the Code to make a general offer for all the shares in ICN at a price far exceeding $0.03. Given this, ICN did not believe that shareholders should respond to an offer of $0.03 per share when an obligation to make a much higher offer may have arisen.

5. All allegations as to Koffman's involvement or connection with the Alleged Concert Party were emphatically denied by Koffman and by its financial adviser. Koffman is a securities dealer registered under the Securities Ordinance.

6. Allegations relating to the Alleged Concert Party had been made to the Executive in June 2002. Enquiries by the Executive into the Alleged Concert Party were ongoing at the time of the Panel meeting on 31 October 2002.

Executive's rulings

7. In letters dated 27 September 2002 and 3 October 2002 from the Executive to ICN's financial adviser, the Executive confirmed, amongst other things, the following:

   (a) The Offer Announcement was an announcement of the terms of an offer that triggered various obligations of the offeree board of directors under the Code.

   (b) Unless it was demonstrated to the satisfaction of the Executive or the Panel that Koffman (or its financial adviser) were in breach of the relevant provisions of the Code, a refusal by ICN to comply with Rules 2.1 and 8.4[1] and the other requirements of the Code would not be in the interests of shareholders and would be in breach of the Code.[2]

Application for review

8. On 8 October 2002 ICN's financial adviser applied to the Panel for a review of the rulings of the Executive in their letters of 27 September 2002 and 3 October 2002. The Panel was asked to rule that:

   - The Koffman Offer was not bona fide; and / or
   - ICN's response to the Koffman Offer be deferred until the Panel has been able to establish whether the Alleged Concert Party existed and /or whether there is an existing mandatory offer obligation on the Alleged Concert Party and that arrangements made by the Alleged Concert Party and others, of which the Koffman Offer forms part, are in breach of the Code.

Decision

9. The Panel carefully considered the written and oral presentations before it including the responses to questions posed by Panel members to ICN and Koffman ("**Parties**") and the Executive.

[1] The full text of Rules 2.1 and 8.4 is attached to this decision at Appendix 1.

[2] The Executive drew the attention of the Panel to a possible breach of the Code by an associate of Koffman that had only recently come to the attention of the Executive. It was agreed by all present at the meeting that this matter was irrelevant in the context of the proceedings before the Panel. In view of this the Panel did not enquire into this matter further.

10. The Panel decided that the Koffman Offer was an offer for the purposes of the Code and that ICN must comply with the relevant provisions of the Code as they pertain to the Offer.

Reasons

11. The issue before the Panel was whether the Koffman Offer is an offer that properly falls to be regulated by the Code with the consequence that the relevant Code disciplines and obligations are imposed upon ICN and its directors. There was no dispute raised as to the nature of these obligations or disciplines.

12. ICN, through its financial adviser, sought to establish that the Koffman Offer was initiated by members of the Alleged Concert Party and therefore was so mired in their arrangements and motivations as to undermine fundamentally its integrity as an offer under the Code.

Preliminary issue

13. Prior to considering the substance of the issue before it, the Panel sought submissions from the Executive and the Parties on an issue raised in a letter from the Executive dated 30 October 2002. This raised the question of whether it was necessary or appropriate for the Panel to consider the allegations against the Alleged Concert Parties for the purposes of the current meeting. The Executive did not wish to disclose this evidence unless ordered to do so by the Panel on the grounds that premature disclosure might prejudice the ongoing investigation and be prejudicial to the public interest.

14. ICN, through its financial adviser, had argued strongly in its letter of 29 October 2002 that disclosure was essential for the purpose of this meeting and that it was incumbent upon the Executive to disclose all evidence collected by it and for those persons interviewed by the Executive to appear before the Panel so that the credibility of the evidence might be established.

15. The Panel considered carefully the arguments of ICN and the Executive set out in their respective letters of 29 and 30 October 2002 and the oral submissions made by the Parties and the Executive and, to the extent they bore upon the issue, the written submissions of the Parties and the Executive.

16. The Panel was particularly mindful of the Executive's clearly expressed concerns as to the public interest and, on that basis, decided that it would not order the Executive to release the details of its ongoing investigation.

17. In the light of this decision, if the Panel had elected to proceed on the evidence pertaining to the Alleged Concert Party now before it and without adjourning the meeting for a potentially significant time, it would have had to proceed on the basis of incomplete evidence. In addition, it would be forming a view based in part on allegations against parties who were unaware of the specific allegations against them and unable to respond to them.

18. The Panel considered that it would be grossly unfair to all parties to proceed in such a manner and at variance with basic precepts of natural justice.

19. Having reached this conclusion, the Panel determined that it would not now seek to hear further submissions on the Alleged Concert Party and promptly advised the Parties and the Executive of this decision.

The main issue

20. The Panel was now faced with the question of whether it was possible to consider fairly the matter before it when it was unable to form a view on the credibility of many of the allegations of an Alleged Concert Party on which ICN had built its case. In order to do so the Panel would have to be satisfied that a determination of whether the Koffman Offer was an offer to which the Code applied could be reached fairly and properly without having to have regard to evidence relating to the Alleged Concert Party: a proposition argued by both the Executive and Koffman.

21. The Panel, therefore, invited the Parties and the Executive to present their submissions on what "*bona fide*" means and how it applies within the broad functioning of the Code. The Executive and the Parties' views were also sought on whether an "*alleged breach*" was sufficient to interrupt or stop an offer timetable.

22. ICN, through its financial adviser, focused its arguments, as it had done in its written submission, on the need to establish the true intent of an offer. In its written submission ICN stated its view that *"a bona fide offer must be a genuine effort to effect a merger or takeover"* and *"Further, from the dictionary meaning of "bona fide", an offer to be "bona fide" must also be free from the intent to deceive*".

23. The Executive directed its arguments in seeking to demonstrate that the concept of "*bona fide*" had no place in the evaluation of an offer and to the extent it accepted the admissibility of the term within a Code context it sought to confine the concept to, as described in its written submission, "*a situation of potential or imminent offer before an actual announcement of an offer*."

24. Koffman, through its financial adviser, did not explore the meaning of "*bona fide*" as such but rather concentrated on seeking to establish that its offer could be logically and commercially justified without the need to suppose the existence of any alleged covert arrangements.

25. On the question of the effect of an "*alleged breach*" on an offer timetable ICN, through its financial adviser, emphasised the need in this circumstance for intervention by the Executive or the Panel where the alleged breach was serious and where a full determination of the alleged breach could not be made within the Code timetable or before the happening of certain other events. Little store was placed by ICN and its financial adviser in the efficacy of subsequent disciplinary action to redress a wrong done to shareholders. The Executive was, on the one hand, strongly opposed to intervention in an offer timetable based solely on an allegation. The Executive foresaw in such a doctrine grave potential for abuse in the context of hostile takeovers to the detriment of shareholders. The Executive held firmly to the view that subsequent action, if merited, was from a shareholder's standpoint, preferable to foregoing an opportunity to consider an offer and that a party unwilling

or unable to comply with a subsequent disciplinary finding was just as likely to withhold cooperation at an earlier stage.

"Bona fide"

26. Having carefully considered the submissions of the Parties and the Executive on the meaning and application of "*bona fide*", the Panel was not persuaded by the interpretation suggested by ICN as to what needed to be established about an offer before it could be properly regarded as an offer to which the Code applied.

27. The Panel was not inclined to the view that what constituted an offer for the purposes of the Code should be predicated on an assessment of intent or motivations, that was necessarily subjective and readily open to challenge. In the Panel's view this would have imputed too high a level of subjectivity and potential uncertainty into one of the most basic aspects of the Code.

28. The Panel considered that "*offer*" should be construed in plain English and extended only as required by the comprehensive definition set out in the Code namely:

"Offer includes any takeover and merger transactions however effected including schemes of arrangement which have similar commercial effect to takeovers and mergers, partial offers, and offers by a parent company for shares in its subsidiary and (where appropriate) share repurchases by general offer."

29. The Panel considered that Rule 1.3 provided the necessary guidance as to the only qualification that a board of directors may rely upon before recognising an offer as an offer for Code purposes.

Rule 1.3 provides

"A board which is approached is entitled to be satisfied that the offeror is, or will be, in a position to implement the offer in full."

30. The Panel believes that construing the Code in this manner is consistent with the description of the Code contained in section 1.2 of the Introduction to the Code which identifies the Code as providing *"…an orderly framework within which takeovers mergers and share repurchases are to be conducted.*" A board of directors is afforded the right to satisfy itself that the offer is one that can be implemented in full and is thus able in an orderly, objective and transparent fashion to distinguish offers which are offers for Code purposes and those which are not.

31. The Panel has examined the Koffman Offer in this context and noted that Koffman's financial adviser has confirmed the availability of financial resources sufficient to implement the Offer in full.

Effect of an alleged breach

32. The Panel had invited specific argument from the Parties and the Executive on the question of whether an alleged breach was sufficient reason to interrupt or stop an offer timetable. The Panel carefully considered their responses.

33. The Panel formed the view that to stop or to extend significantly an offer timetable beyond that prescribed in the Code was an action merited only in wholly exceptional circumstances. The Panel or the Executive would generally need to be persuaded that

such an action was the only practicable way of giving effect to the Code in the circumstances in point.

34. In coming to this view the Panel resolved that it needed to focus on the protection of shareholders' interests.

35. ICN, through its financial adviser, argued that shareholders would be best served by stopping or postponing an offer the integrity of which had been seriously questioned and where allegations were outstanding as to a possible pre-existing mandatory offer obligation at a significantly higher price.

36. Koffman, through its financial adviser, argued that permitting the Offer to proceed afforded shareholders the opportunity of choosing to accept or reject an offer that it and its financial adviser maintained was made in full compliance with the relevant provisions of the Code and upon which shareholders are entitled to receive timely and independent financial advice.

37. The Executive emphasised that, were subsequent events to prove that the Executive and shareholders had been misled, appropriate avenues for redress were provided in the Code.

38. The Panel fully agrees with the emphasis placed by the Parties and the Executive on the issue of shareholder protection. In particular, the Panel was mindful of the description of the primary purpose of the Code set forth in section 1.2 of the Introduction to the Code.

    Section 1.2 provides:

    "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."

The Koffman Offer

39. Turning to the particular circumstances of the matter before the Panel, the Panel formed the view that the Koffman Offer met the test it had identified for recognition as an offer to which the Code applied.

40. In the Panel's view there is an offer available to shareholders for consideration that is capable of being implemented in full.

41. The Panel was not persuaded, even having regard to the fact that allegations of breach had been made, that a case had been made out that the only way to afford shareholders the protection they may reasonably expect from the operation of the Code would be to set the offer aside or, at this juncture, seek its deferral for an indefinite period or to modify the Code restrictions placed on ICN by virtue of the Offer.

42. The Panel did not agree with ICN's proposition that pre-emptive action ahead of a conclusion to the Executive's investigations into the Alleged Concert Party provides a greater likelihood or certainty of protection for shareholders than lies both in the application of the relevant provisions of the Code to ICN consequent on the Koffman Offer proceeding and in the Executive concluding its investigation into the Alleged Concert Party and taking such action as it deems necessary or appropriate at that stage in the exercise of its regulatory function.

43. The Panel drew particular support for its view from the fact that as a direct consequence of the application of Code disciplines to ICN, its shareholders would be entitled to receive timely independent financial advice on the Offer and, through those means, to be apprised of the current position of the company in which they are shareholders, the shares of which continue to trade.

44. The Code seeks to provide protection to shareholders through a range of disciplinary procedures and sanctions which may include such remedies as the Panel thinks fit in the event that the Panel finds there has been a breach of the Code or a ruling. It is under these provisions that the Panel believes protection is properly afforded to shareholders in the event that there is a subsequent finding of a breach or breaches of the Code.

General

45. The Panel believed that in fairness to all parties it was obliged to maintain an open mind whether the review before it could in fact be resolved, as had been posited by the Executive and Koffman, without the need to evaluate the evidence proffered in respect of the Alleged Concert Party.

46. The Panel is conscious of the fact that ICN chose to seek to make its case by relying very heavily on establishing the credibility of its allegations regarding the Alleged Concert Party and hence the inferences it invited the Panel to draw. The Panel examined at length whether in determining, for the reasons stated above, not to hear evidence on the Alleged Concert Party it should also adjourn the hearing until the Executive has concluded its investigation. This would enable full evidence to be placed before the Panel and the relevant parties which would include all the members of the Alleged Concert Party who would be invited to attend the hearing in the full knowledge of the allegations made against them.

47. Based on its determination of what constituted the proper test for deciding when an offer should be recognised as an offer for the purposes of the Code, the Panel concluded that it could fairly reach a decision on the subject matter of the review before it without reference to the evidence bearing on the Alleged Concert Party. That evidence was not germane to establishing whether the Koffman Offer satisfied the test identified by the Panel as relevant to determining whether that Offer was one to which the Code applied.

48. The Panel wishes to emphasise its clear view that shareholders are generally best served by being afforded the opportunity to consider an offer and the application to

that offer of the Code's disciplines on disclosure of information and the timely provision of independent financial advice.

49. These Code obligations rest firmly on all parties to a transaction and their professional advisers. Only by ensuring consistent adherence to and application of these disciplines can the integrity of regulation under the Code be maintained.

50. In reaching its decision, the Panel emphasised the importance of the Executive's investigative and regulatory role. While expressing no view on the Alleged Concert Party, the Panel urges the Executive to pursue its enquires with vigour and conclude its investigations as soon as practicable.

Dated 8 November 2002

Appendix 1

Rule 2.1 provides:

> "Board of offeree company
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> A board which receives an offer, or is approached with a view to an offer being made, should, in the interests of shareholders, retain a competent independent financial adviser to advise the board as to whether the offer is, or is not, fair and reasonable. Such advice, including reasons, should be obtained in writing and such written advice should be made known to shareholders by including it in the offeree board circular along with the recommendation of the offeree company's board regarding acceptance of the offer. If any of the directors of an offeree company is faced with a conflict of interest, the offeree company's board should, if possible, establish an independent committee of the board to discharge the board's responsibilities in relation to the offer."

Rule 8.4 provides:

"Timing and contents of offeree board circular

> The offeree company should send to its shareholders within 14 days of the posting of the offer document a circular containing the information set out in Schedule II, together with any other information it considers to be relevant to enable its shareholders to reach a properly informed decision on the offer. The Executive's consent is required if the offeree board circular may not be posted within this period and will only be given if the offeror agrees to an extension of the first closing date (see Rule 15.1) by the number of business days in respect of which the delay in the posting of the offeree board circular is agreed.
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> The offeree board circular must include the views of the offeree company's board or its independent committee on the offer and the written advice of its financial adviser as to whether the offer is, or is not, fair and reasonable and the reasons therefor. Reference is made in this regard to Rule 2. If the offeree company's financial adviser is unable to advise whether the offer is, or is not, fair and reasonable the Executive should be consulted."