

## TAKEOVERS AND MERGERS PANEL

---

### Panel Decision

**In relation to a referral to the Takeovers and Mergers Panel (the “Panel”) by the Takeovers Executive for a ruling on whether Nam Tai Electronics, Inc. (“NTEI”) is permitted to extend its offer for the shares in Nam Tai Electronic and Electrical Products Limited (“NTEEP”) not owned by NTEI or parties acting in concert with it, having previously announced that such an offer had lapsed**

---

### Purpose of the hearing

1. The Panel met on 14<sup>th</sup> April, 2009 to consider a referral by the Takeovers Executive under Section 10.1 of the Introduction to the Code on Takeovers and Mergers (the “Code”) and the Share Repurchases Code (collectively the “Codes”), which relates to a particularly novel, important or difficult point at issue. The Panel was asked whether it agreed with the Takeovers Executive that NTEI should not be permitted to extend for a further 14 days its offer for the shares in NTEEP, other than those shares held by NTEI or parties acting in concert with it, having previously announced that such an offer had lapsed.

### Background and facts

2. NTEI is a company listed on the New York Stock Exchange. It is the holding company of NTEEP holding directly or through parties acting in concert with it as at 13<sup>th</sup> March, 2009 approximately 74.88% of its issued share capital. The shares in NTEEP are listed on the Hong Kong Stock Exchange and have been since April, 2004.
3. On 24<sup>th</sup> February, 2009 the boards of directors of NTEI and NTEEP announced that NTEI had informed NTEEP of its intention to make a voluntary conditional general cash offer to acquire all the shares in NTEEP, other than those owned by NTEI and parties acting in concert with it, at a price of HK\$1.50 per share, which represented a premium of approximately 168.2% over the closing price of HK\$0.57 per share on 20<sup>th</sup> February, 2009, being the last trading day prior to the temporary suspension of trading in NTEEP shares. The offer was final and not subject to revision. The announcement stated that the offer was subject to the condition that NTEI received acceptances and, or, purchases made after the posting of the initial composite offer document totalling at least 90% of the shares subject to the offer and, should that condition be fulfilled, NTEI would seek to exercise the right to compulsory acquisition so that it would constitute NTEEP as a wholly-owned subsidiary thereby effectively privatising it. The announcement, among other things, also stated that the first closing date of the offer would fall on the twenty-first day from the date on which the initial composite document had been posted. The offer was to be made by Yu Ming Investment Management Limited (“Yu Ming”) on behalf of NTEI.
4. The composite offer document dated 14<sup>th</sup> March, 2009 containing the offer and the response of NTEEP to it was despatched and the offer opened on 16<sup>th</sup> March, 2009. The first closing date of the offer was 6<sup>th</sup> April, 2009, being the twenty-first day following the commencement of the offer. In a note to the expected timetable given in the composite offer document reference is given to the latest date on which the offer could become unconditional, except with the consent of the Takeovers Executive, being 15<sup>th</sup>

May, 2009, the sixtieth day after the composite document was posted. On its front cover and elsewhere in the composite offer document reference is made to the ability of NTEI to extend the offer beyond its first closing date. The independent committee of the board of NTEEP, as advised by an independent finance adviser retained to advise it, recommended acceptance of the offer.

5. By the morning of the first closing date, acceptances had been received for approximately 47% of the shares which were subject to the offer. Given the expectation that generally acceptances are submitted later on during the first closing day, there was an expectation on the part of NTEI and Yu Ming (collectively the "parties") that the offer would become unconditional in respect of acceptances. It appeared to them that from the start the offer had been favourably received by minority shareholders.
6. While the rationale for its decision was not fully described to the Panel, it appears that to accommodate the different time zones where the directors of NTEI were located, the decision was made that in the event the offer failed to attract sufficient acceptances to become unconditional by the first closing date the offer should lapse. No consideration appears to have been given to the extending the offer in the event that acceptances fell below the 90% threshold by a small amount. The offer, therefore, was to succeed or fail on the basis of valid acceptances received by 4.00 p.m. on 6<sup>th</sup> April, 2009.
7. As at 4.00 p.m. on the 6<sup>th</sup> April, 2009, NTEI had received acceptances for 195,899,531 shares in NTEEP, representing approximately 88.46% of the total number of shares subject to the offer. The offer had fallen short by 3,410,076 shares or 1.54% to become unconditional. In line with the decision of the board of NTEI a draft announcement was submitted to the Takeovers Executive before 6.00 p.m. This announcement was cleared before 7.00 p.m. and released shortly thereafter. In the announcement it was stated that "NTEI did not intend to extend the offer. Therefore, the offer lapsed on 6<sup>th</sup> April, 2009". The announcement was signed on behalf of NTEI by its chairman and all its directors took joint and several responsibility for its accuracy and completeness.
8. In the morning of 7<sup>th</sup> April, 2009, Yu Ming approached the Takeovers Executive seeking to extend the offer which had previously been declared to have lapsed, given the high level of acceptances. At the same time trading in the shares in NTEEP was suspended at its request.
9. During the day of 7<sup>th</sup> April, 2009 NTEI discovered that two shareholders, who were previously known to it, using the same stockbroker and holding in aggregate 1,094,000 shares in NTEEP had reportedly instructed their stockbroker to assent their shares to the offer, although they subsequently discovered this had not happened. Had the acceptance of the offer by these shareholders been received before 4.00 p.m. on the previous day, the level of acceptances would have been 89.67%, just short of the 90% acceptance level required for the offer to become unconditional.
10. On 14<sup>th</sup> April, shortly before the commencement of its meeting to hear this matter, the Panel was informed by NTEI that it had identified two shareholders holding in aggregate 1,100,000 shares in NTEEP. One of them, who had 1,000,000 shares, claimed he had been informed by a third party that he did not have to take any action in response to the offer and was unaware of the deadline imposed by the first closing date. The other who had failed to give instructions to his broker by the first closing date indicated that he would accept the offer were it to be extended. Had the shareholder holding 1,000,000 shares in NTEEP assented to the offer before the first closing date and the shares, referred to in paragraph 9 above, been delivered in accordance with the instructions apparently given to the stockbroker concerned, the level of acceptances would have exceeded 90% of the shares subject to the offer. In these circumstances the offer

would have become unconditional allowing NTEI to proceed to acquire compulsorily the balance of the shares in NTEEP subject to the offer.

### **The relevant provisions of the Code**

11. In addition to its primary purpose of affording fair treatment for shareholders who are affected by takeovers and mergers and providing disclosure of timely and adequate information, the Code seeks to impose an orderly framework for the conduct of takeovers. In paragraph 1.2 of the Introduction to the Codes it is stated that:

*“The Codes also provide an orderly framework within which takeovers, mergers and share repurchases are to be conducted.”*

The disciplines imposed on the conduct of takeovers in Hong Kong are designed to achieve as far as possible conditions of certainty. This can be seen in such provisions as those relating to the preliminary announcement of an offer which requires the publication of the full terms and conditions of an offer and confirmation of the sufficiency of the financial resources available to the offeror [Rule 3.5]; the timetable for offers [Rule 15]; the binding nature of statements made during the course of an offer [Rule 18] and the prohibition on the inclusion of subjective conditions, the fulfilment of which depends on the judgment of the offeror or the fulfilment of conditions which are in his hands [Rule 30.1].

12. The Code is not concerned with the commercial aspects of a takeover or merger transaction. This is set out in paragraph 1.8 of the Introduction to the Codes which states that:

*“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”.*

13. Provision is made in the Codes for the exercise of discretion by the Takeovers Executive and the Panel in certain circumstances. This is stated in paragraph 2.1 of the Introduction to the Codes which reads:

*“[T]he 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.”*

14. The 90% acceptance condition of the offer made on behalf of NTEI was in accordance with the requirements of Rule 2.11, which sets out the acceptance condition required for a privatisation proposal effected by way of a takeover offer, as was the offer on behalf of NTEI for NTEEP. Rule 2.11 states that:

*“Except with the consent of the Executive, where any person seeks to acquire or privatise a company by means of an offer and the use of compulsory acquisition rights, such rights may only be exercised if, in addition to satisfying any requirements imposed by law, acceptances of the offer and purchases (in each case of the disinterested shares) made by the offeror and persons acting in concert with it during the period of 4 months after posting the initial offer document total 90% of the disinterested shares.”*

As with other numerical thresholds contained in the Code, it is an absolute requirement. No allowance can be made in its fulfilment if it fails to achieve the relevant threshold by even the most minimal amount.

15. Rule 9.1 sets out the standard of care and responsibility for announcements and documents made or issued during the course of a takeover. The relevant part of the Rule reads as follows:

*“Each document issued or statement made in relation to an offer or possible offer or during an offer period must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented...”*

Further, Rule 9.3 requires all directors to accept jointly and severally full responsibility for the accuracy and completeness of statements made in documents, which includes announcements, issued in the course of a takeover.

16. An offeror is not permitted except in wholly exceptional circumstances to reverse a statement made in connection with the duration of the offer. This is set out in Rule 18.2 and an accompanying note, the relevant parts of which read as follows:

*“No extension statements*

*If statements in relation to the duration of an offer such as “the offer will not be extended beyond a specified date unless it is unconditional as to acceptances” (“no extension statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the stated date except where the right to do so has been specifically reserved....*

Notes to Rule 18:

1. *Firm statements*

*In general, an offeror will be bound by any firm statements as to the duration or finality of its offer...”*

17. Rule 19.1 of the Code sets out the procedure to be followed when announcing the results of an offer. The relevant part of the Rule reads as follows:

*“By 6.00 p.m. (or such later time as the Executive may in exceptional circumstances permit) on a closing date the offeror must inform the Executive and the Stock Exchange of its decision in relation to the revision, extension, expiry or unconditionality of the offer. The offeror must publish an announcement on the Stock Exchange’s website by 7.00 p.m. on the closing date stating whether the offer has been revised or extended, has expired or has become or been declared unconditional (and, in such case, whether as to acceptances or in all respects). A draft of such announcement must be submitted to the Executive and the Stock Exchange by 6.00 p.m. for comment. Such announcement must be republished in accordance with Rule 12.2 on the next business day thereafter...”*

18. Note 1 to the Notes to Rule 30.2 sets out how acceptances to an offer are to be counted towards fulfilling an acceptance condition. The relevant part of the Note reads as follows:

*“An acceptance may not be counted towards fulfilling an acceptance condition unless:-*

(a) *it is received by the offeror's receiving agent on or before the last time for acceptance set out in the offeror's relevant document or announcement and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received; and ..."*

19. Finally, Rule 31.1(a) sets out the consequences of an offer which has lapsed because it has not become or been declared unconditional. The relevant part of Rule 31.1(a) reads as follows:

*"Except with the consent of the Executive, where an offer has been announced or posted but has not become or been declared unconditional, and has been withdrawn or has lapsed, neither the offeror nor any person who acted in concert with it in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within 12 months from the date on which such offer is withdrawn or lapses either:-*

*(i) announce an offer or possible offer for the offeree company (including a partial offer which could result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company), or..."*

### **The cases of the Executive and the parties in summary**

20. The Takeovers Executive took the view that the announcement of 6<sup>th</sup> April, 2009 was in effect a "no extension statement" and should be subject to the requirements of Rule 18.2. In this regard the announcement was clear and precise. It appeared that the parties had considered carefully the issues and their implications before deciding to allow the offer to lapse. There was no suggestion that it was an inadvertent mistake or oversight. Nothing had been done to withdraw immediately the statements made in the announcement following its publication. In this event, only the existence of wholly exceptional circumstances should permit the offer to be extended beyond the date on which it was decided not to extend it and the Takeovers Executive did not believe that such circumstances existed. The Takeovers Executive was also concerned that by allowing a lapsed offer to be re-opened, this would effectively circumvent the requirements of Rule 31.1(a) which prohibits the making of a further offer for NTEEP by NTEI for a period of twelve months from the date its previous offer lapsed, unless the consent of the Takeovers Executive is obtained. Further, by allowing the lapsed offer to re-open, it would undermine the orderly framework for takeovers the Code sought to promote and set an undesirable precedent.

21. NTEI appeared to accept that the 6<sup>th</sup> April, 2009 announcement contained a "no extension statement" of the kind regulated by Rule 18.2. However, it and its financial adviser believed that there existed wholly exceptional circumstances which should permit the statement to be withdrawn and to allow the offer to be extended for a further fourteen days. These circumstances were that the shortfall of 1.54% below the 90% acceptance condition was very marginal; the failure to reach the 90% threshold on the first closing date had been caused by factors beyond the control of minority shareholders; and that the true picture was one of an offer which had succeeded and should be allowed to succeed. An extension would only benefit minority shareholders, who want to accept the offer and now face the prospect of seeing a fall in the value of their shares. Further, no harm could be caused to others as the market had either been closed or trading suspended since the announcement was published. Emphasis was also given to the attractiveness of the offer in relation to NTEEP's previous traded price, its recent trading performance, its lack of net tangible assets and the difficult markets in which the NTEEP group presently operated. The offer was generous and the offeror had not taken advantage of the situation. In short, NTEI wanted to protect minority

shareholders' interest by giving them more time so the offer could succeed.

### **The decision and reasons for it**

22. As a general observation it is apparent that, as stated in the Introduction to the Codes, a takeover in Hong Kong is expected to be an orderly activity and the Code is designed to place disciplines on those who engaged in a takeover. Decisions concerning, and statements about, a takeover are to be made with a high degree of care and other than in wholly exceptional circumstances statements, once made, cannot be retracted.
23. In this instance, NTEI was accustomed to takeover and other corporate activity in Hong Kong. It had, for example, attempted to privatise NTEEP in 2005. So there is no suggestion that it did not know what was required of it under the Code or that its financial adviser, Yu Ming, failed to provide the guidance it is required to give its client on understanding the requirements of the Code. When NTEI decided on 6<sup>th</sup> April, 2009 not to extend the offer in the event it fell short, by whatever margin, of the 90% threshold, it knew or ought to have known the implications of what it was doing.
24. In certain circumstances the Takeovers Executive or the Panel have the discretion to relax or modify a Rule if it operates in an unnecessarily restrictive or burdensome, or otherwise inappropriate, manner. This is not the case here. The operation of the relevant Rule was apparent before NTEI made its decision not to extend its offer for NTEEP and when it made its decision its consequences were those the Rule specifically envisaged. An exercise of its discretion to relax the operation of Rule 18.2 in this instance is not considered by the Panel to be justified. We would add the parties did not request the Panel to exercise its discretion on this basis.
25. Much has been made by NTEI of the attractions of its offer and the unfortunate consequences of its lapsing on minority shareholders. It seems likely that had the offer been extended on 6<sup>th</sup> April, 2009 for a further 14 days, it would have succeeded. However, the Code and, as a consequence, decisions of the Panel are not interested in the commercial merits of a particular transaction which is a matter for a company and its shareholders to decide. The merits of an offer or the consequences of its lapsing are, therefore, not an adequate ground on its own for relaxing or waiving the application of the Rules of the Code.
26. As the Takeovers Executive and the parties recognised, the matter turns on whether there are "wholly exceptional" circumstances which would justify the Panel to permit the offer to be re-opened, notwithstanding the publication of the statement that it would not be extended beyond 6<sup>th</sup> April, 2009. It is difficult to envisage what a wholly exceptional circumstance would be to permit the reversal of a no extension statement which was clearly the result of deliberation by the board in circumstances when it should have been known for some time that it might be called upon to make such a decision. It would likely have to be a matter which was outside the offeror's control and one which was difficult to address in any other way. The fact that acceptances fell short by a small amount of the 90% acceptance condition on the first closing date is in the range of reasonable expectation, so the actual outcome cannot be regarded as exceptional. Inefficiencies in the delivery of acceptances to an offer by brokers and nominee companies or their failure to communicate accurately what their clients should do in response to an offer, which may or may not have occurred in the present case, is not unfortunately a wholly exceptional event in the context of a takeover in Hong Kong. Extending an offer beyond its minimum length would be one way to mitigate problems in this regard. Indeed, it is the obvious first step which was clearly open to NTEI but it decided not to take it or, in all likelihood, even consider it. Certainly the Code recognises that physically accepting an offer can create administrative problems which

is why it disregards incomplete acceptances for inclusion in the calculation of whether an acceptance condition is fulfilled. In the matter before it, the Panel concluded that there did not exist a wholly exceptional circumstance of the kind which would warrant the retraction of the decision not to extend the offer on 6<sup>th</sup> April, 2009, thereby allowing the offer to be re-opened.

27. For the reasons given above, the Panel endorsed the Takeovers Executive's view that the offer should not be re-opened. It follows that, without the consent of the Takeovers Executive, NTEI will not be permitted under the Code to make an offer for the shares in NTEEP for the twelve month period commencing 6<sup>th</sup> April, 2009.
28. As a subsidiary matter, the Panel authorised that its decision, but not the reasons for it, could be contained in an announcement supporting the reinstatement of the trading in the shares in NTEEP on the Hong Kong Stock Exchange in advance of the publication of this decision.

21<sup>st</sup> April, 2009

Parties present at the hearing

The Takeovers Executive

Nam Tai Electronics, Inc.

Yu Ming Investment Management Limited – financial advisers to Nam Tai Electronics, Inc.