

## TAKEOVERS AND MERGERS PANEL

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### Panel Decision re: China Motor Bus Co Ltd (“CMB”)

as to

### whether a concert party had been formed

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1. The Panel met on Monday 24 June 2002 to consider a referral by the Executive under section 10.1 of the Introduction to the Takeovers Code for a ruling as to:
  - (1) whether Mr Chee Ying Cheung (“**Mr Chee**”) was acting in concert with Asia Time Investments Limited (“**Asia Time**” or the “**Offeror**”) in relation to CMB; and
  - (2) if so, the possible application of Rule 24.1 of the Takeovers Code.

#### **Salient Facts**

##### *Background*

2. On 17 April 2002, Mr Chee’s private banker approached Yu Ming Investment Management Limited (“**Yu Ming**”) to discuss the possibility of Mr Chee disposing of his shareholding in CMB. At that time, Mr Chee and his wife held around 9.8% of the shares in CMB. Yu Ming is a securities dealer registered under the Securities Ordinance. Mr Tony Fung Wing Cheung (“**Mr Tony Fung**”) and Mr Peter Fung Yiu Fai (“**Mr Peter Fung**”) are directors of Yu Ming.
3. On 19 April 2002, Mr Chee met with Mr Tony Fung and Mr Peter Fung of Yu Ming. At this meeting, there was discussion of a possible voluntary conditional cash offer for CMB by Yu Ming. It was made clear that Yu Ming would only proceed with such offer with the support of Mr Chee (by way of an irrevocable undertaking).
4. On 18 April 2002 Mr Chee bought 1,200 CMB shares at \$66.42 per share. On 19 April 2002 (and following the meeting referred to the paragraph 3 above) Mr Chee bought a further 2,000 CMB shares at \$66.50 per share.

##### *The approach*

5. On 20 April 2002, Yu Ming on behalf of Asia Time (a newly-created private company jointly owned by Mr Peter Fung and Mr Tony Fung), approached CMB with a voluntary conditional cash offer for CMB at \$0.01 per share. As part of the offer, Yu Ming indicated that, after securing board control of CMB, Asia Time intended to distribute substantially all of CMB’s assets back to shareholders. This was a similar structure to that which is currently being proposed by Yu Ming on behalf of another newly-created private company for Pacific Challenge Holdings Limited. Yu Ming also indicated that it would send an offer announcement to CMB in due course.

6. The proposed offer was to be conditional on Asia Time having received acceptances that would result in Asia Time and parties acting in concert with it holding more than 50% of the voting rights in CMB.

*Irrevocable undertaking by Mr Chee*

7. On 23 April 2002, Mr Chee and his wife entered into an irrevocable undertaking to accept the offer by Asia Time in respect of all of their 4,474,600 CMB shares (representing approximately 9.8% of CMB's share capital).

*Draft announcement by Yu Ming*

8. On 26 April 2002, Yu Ming submitted the first draft offer announcement pursuant to Rule 3.5 of the Takeovers Code to the Executive for comment. Since then the offer structure has been revised substantially and a number of further drafts have been submitted to the Executive. Discussions with the Executive on these drafts are ongoing.

*Allegation of acting in concert*

9. On 30 May 2002, CMB complained (through its lawyers) to the Executive that Mr Chee and the Offeror were acting in concert. CMB argued that as a result, the Offeror should offer CMB shareholders the same price (by way of a cash offer) as the highest price paid by Mr Chee for CMB shares in the market in accordance with Rule 24.1 of the Takeovers Code. Rule 24.1 provides that:

*(a) "Purchases before a Rule 3.5 announcement*

*Except with the consent of the Executive in cases falling under paragraph (i) or (ii) below, when an offeror or any person acting in concert with it has purchased shares in the offeree company:-*

- (i) within the 3 month period prior to the commencement of the offer period;*
- (ii) during the period, if any, between the commencement of the offer period and an announcement made by the purchaser in accordance with Rule 3.5; or*
- (iii) prior to the 3 month period referred to in (i), if in the view of the Executive there are circumstances which render such a course necessary in order to give effect to General Principle 1,*

*the offer to the shareholders of the same class shall not be on less favourable terms."*

10. The Executive immediately made enquiries including interviewing the relevant parties. Mr Chee however, despite repeated requests, declined to meet the Executive. On completing these enquiries the Executive considered, on balance, that Mr Chee and the Offeror were acting in concert but also reached the view that it would be appropriate to waive the strict application of Rule 24.1 in the circumstances and allow the offer by Yu Ming to proceed as proposed. However, as the Executive considered there were particularly novel, important and difficult points at issue in this case, it referred this matter to the Panel for its ruling pursuant to section 10.1 of the Introduction to the Takeovers Code.

## Decision

11. The first issue before the Panel was whether Mr Chee was acting in concert with the Offeror in respect of the acquisition or consolidation of control of CMB. Acting in concert is defined in the Definition section of the Takeovers Code as follows:

*“Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate to obtain or consolidate “control” (as defined [in the Code]) of a company through the acquisition by any of them of voting rights of the company.”*

12. The Panel carefully considered the written and oral representations before it, including evidence given by Mr Chee and the other parties during the Panel meeting. Having considered all the evidence, the Panel concluded that there was no concert party relationship between Mr Chee and the Offeror on the basis that the Panel was not persuaded that an agreement or understanding existed between Mr Chee and Yu Ming or the Offeror actively to co-operate to obtain control of CMB.

## Reasons

13. Note 5 to the Definition of acting in concert provides that:

*“Where a shareholder gives an irrevocable undertaking to an offeror to accept his offer ... the giving of the irrevocable undertaking ... will not, of itself and in the absence of any other factor, lead to the presumption that the shareholder is acting in concert with that offeror.”* (emphasis added)

14. In view of this the Panel was urged to conclude that there were ‘*other factors*’ that showed Mr Chee and the Offeror were acting in concert. However, on the basis of the evidence, the Panel was not persuaded that these factors provided sufficient grounds to establish a concert party finding. In particular:

- (1) The fact that Yu Ming would not have proceeded with the offer without Mr Chee’s irrevocable undertaking was not, in the view of the Panel, evidence of concertedness between them. The seeking of support by irrevocable undertakings is a common practice. Whether or not a particular shareholder would give an irrevocable undertaking was likely to be a material consideration for a potential offeror in deciding whether to proceed to make an offer, but does not of itself indicate concertedness on the part of that shareholder.
- (2) The Panel was not persuaded by the argument that Mr Chee’s involvement in a previous attempt in 1998 to break up CMB’s assets and to distribute the proceeds to CMB’s shareholders was evidence that he was ‘*behind*’ the current offer by Yu Ming.
- (3) The Panel was not persuaded by the argument that Mr. Chee had effectively promised the support of other shareholders. On the evidence presented, the Panel was inclined to believe that Mr. Chee had simply indicated that other shareholders were dissatisfied with CMB and, furthermore, had stated that he could not give their support as they were not under his control.

- (4) Having reviewed the evidence presented, the Panel was not persuaded by the argument that the fact that an approach had originally been made by Mr. Chee's private banker to Yu Ming (rather than by Yu Ming to Mr Chee as is typically the situation where irrevocable undertakings are being sought) was determinant of Mr. Chee acting in concert. The approach was made by the private banker not Mr. Chee, without, it seems, reference to Mr. Chee, and, in any event, the evidence indicated that formulating an offer was not a purpose of the approach (but rather the disposal of Mr Chee's shares in CMB). The Panel was satisfied that Yu Ming was already considering CMB as a potential acquisitions target and that the structure for the offer for CMB was originated by it and not by, or on behalf of, Mr Chee.
15. The Panel also concluded that there was no agreement or understanding (formal or informal) between Mr Chee and Yu Ming or the Offeror to actively co-operate to obtain control of CMB. In reaching this view the Panel took into account the following:
- (1) The first contact between Mr Chee and Yu Ming took place on 19 April 2002 at the meeting referred to in paragraph 3 above. Contact since then has been extremely limited.
  - (2) At this meeting Yu Ming presented Mr Chee with a possible opportunity to dispose of his shares pursuant to a general offer by Yu Ming on behalf of a newly-created offeror.
  - (3) Mr Chee was concerned only with disposing of his shareholding in CMB.
  - (4) Mr Chee was not involved in structuring the offer or in the timing of the approach to CMB.
  - (5) The evidence strongly suggested that the acquisition of shares by Mr Chee on 19 April 2002 had not been discussed in advance with Yu Ming.
16. In view of its decision on the first issue, the Panel took the view that it was not necessary for it to consider the application of Rule 24.1 of the Takeovers Code and, accordingly, expressed no view on this.
17. The Panel wish to make it absolutely clear that its decision in this matter was based on the particular facts of this case as represented to the Panel in these proceedings.
18. The Panel noted that an acquisition of CMB shares had been made by Mr Chee after his discussions with Yu Ming on 19 April 2002 and that the Executive was considering other possible regulatory implications of this purchase, which did not form part of the referral to the Panel. The Panel therefore did not proceed to look into that issue itself.

#### **Reminder to public**

19. The Panel notes that, despite repeated requests, Mr Chee declined to meet with the Executive to discuss this matter, principally on grounds of ill-health. Having heard Mr Chee give evidence at the meeting, the Panel would like it to be noted that it

believes that the Executive's decision in relation to concertedness might have been different had it had the benefit of meeting with Mr Chee.

20. The Panel wish to take this opportunity to remind market participants that all those who wish to take advantage of the securities markets in Hong Kong should conduct themselves in matters relating to takeovers and mergers in accordance with the Takeovers Code otherwise they may find themselves subject to sanctions. In particular, the Panel would like to highlight General Principle 10 of the Takeovers Code which provides:

*“All parties concerned with transactions subject to the Codes are required to co-operate to the fullest extent with the Executive, the Panel and the Takeovers Appeal Committee, and to provide all relevant information.”*

21. The Panel wish to emphasise that as the Takeovers Code is non-statutory, its effective enforcement depends heavily on full compliance with General Principle 10 to ensure that the agreed standards of commercial conduct and behaviour embodied therein are maintained.

Dated 10 July 2002