TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to a referral to the Takeovers Panel by the Executive for a ruling as to whether share repurchases constitute disqualifying transactions in relation to whitewash waiver applications.

---

1. The Panel met on 27 March 2000 to consider a referral by the Executive pursuant to Section 10 of the Introduction to the Hong Kong Code on Takeovers and Mergers (the "Code") for a ruling on the interpretation and application of Rule 32 of the Code and Rule 8 of the Code on Share Repurchases (the "Share Repurchase Code") in relation to Regent Pacific Group Limited ("Regent") and, in general, whether share repurchases may constitute disqualifying transactions under paragraph 3 of the Whitewash Guidance Note set out as Schedule VI to the Code. The Executive referred this matter to the Panel pursuant to paragraph 10 of the Introduction of the Code as it considers that there is an important point in question and the decision is likely to establish a precedent for future transactions of a similar nature.

Salient Facts

2. On 15 March 2000, Regent announced that it had entered into a conditional agreement to acquire from Mr. James Mellon, the chairman of Regent, a 100% interest in Interman Holdings Limited, an internet investment company. The consideration for the sale, being HK$634,536,596, will be satisfied by the issue of 226,620,213 new shares in Regent (about 25% of its existing share capital) to Mr. Mellon, at HK$2.80 per share. Upon completion of the acquisition, which is due to take place on 30 June 2000, Mr. Mellon and his concert parties' aggregate shareholding in Regent will increase from 22.5% to 37.8% of the newly enlarged share capital of Regent. One of the principal conditions of the acquisition going ahead, is the grant of a whitewash waiver by the Executive under Note 1 to the Notes on

dispensations from Rule 26 of the Code and the approval of the independent shareholders of Regent.

3. On 17 March 2000, Regent purchased 3,559,000 of its own shares, representing 0.38% of its issued share capital and 65% of the trading on the market that day at prices ranging between HK$3.175 and HK$2.70 per share. The aggregate consideration paid for the share repurchases was HK$10,531,775. As a result of the share repurchases, the aggregate shareholding of Mr. Mellon and parties acting in concert with him increased by 0.2% from 22.5% to 22.7%.

4. No application was made to the Executive for its prior consent for the share repurchases.

The Panel's Decisions

5. The Panel considered the written submissions of the Executive and Regent together with the opening and closing submissions and the representations made by the Executive and Regent's advisors.

6. In respect of the general ruling sought by the Executive, the Panel held that on a plain reading of the Code, share repurchases are acquisitions of voting rights for the purposes of the Code. The Panel ruled that consequently share repurchases fall within the category of potentially disqualifying transactions comprehended within paragraph 3 of Schedule VI to the Code, the Whitewash Guidance Note.

7. On the specifics of the Regent share repurchases, the Panel referred the matter back to the Executive pointing out that although an announcement of the proposed transaction was made on 15 March 2000, the application for a whitewash waiver had not yet been made to the Executive. In these circumstances, share repurchases made between the date of the announcement and prior to the grant of a waiver clearly could not of themselves invalidate a waiver as contemplated under paragraph 3(b) of Schedule VI to the Code since no waiver had yet been given. The decision as to the grant of a waiver still rests with the Executive.

8. By way of guidance to the Executive, the Panel ruled that acquisitions or disposals of voting rights between the date of the announcement and the date of the application for a waiver would clearly be germane to the Executive's consideration of a waiver application but would not of themselves absolutely rule out the possibility of the grant of a waiver.

Reasons

9. The principal question for the Panel to address was whether share repurchases constituted acquisitions of voting rights for the purposes of paragraph 3 of Schedule VI to the Code.

   Rule 32 of the Code provides that:

   "If as a result of a share repurchase a shareholder's proportionate interest in the voting rights of the repurchasing company increases, such increase will be treated as an acquisition of voting rights for purposes of the Code. As a result, a shareholder, or group of shareholders acting in concert, could obtain or consolidate control of a repurchasing company and thereby become obliged to make a mandatory offer in accordance with Rule 26. If so the Executive should be consulted at the earliest opportunity. In the case of a general offer or an off-market share repurchase, as such terms are defined in the Share Repurchase Code, the Executive will normally grant a waiver from the requirement to make a mandatory offer in accordance with Rule 26 if the Code implications of the share repurchase are disclosed in the repurchasing company's offer document and the share repurchase is approved in accordance with applicable shareholder approval requirements of the Share Repurchase Code by those shareholders who could not become obliged to make a mandatory offer as a result of the share repurchase. Reference is made in this regard to Rule 8 of the Share Repurchase Code.

   For the purposes of Rule 22, dealings in relevant securities include share repurchases of the relevant securities of a repurchasing company."

Rule 8 of the Share Repurchase Code provides that:

"If as a result of a share repurchase a shareholder's proportionate interest in the voting rights of an offeror increase, such increase will be treated as an acquisition for purposes of the Takeovers Code. As a result a shareholder, or group of shareholders acting in concert, could obtain or consolidate control of the offeror and become obliged to make a mandatory offer in accordance with Rule 26 of the Takeovers Code. In such cases the Executive should be consulted. In the case of a general offer or an off-market share repurchase, the Takeovers Committee will normally grant a waiver from the requirement to make a mandatory offer in accordance with Rule 26 of the Takeovers Code if the implications of the share repurchase are disclosed in the offer document and the share repurchase is approved in accordance with applicable share repurchase approval requirements of the Code by those shareholders who could not become obliged to make a mandatory offer as a result of the share repurchase."

In both Rule 32 of the Code and Rule 8 of the Share Repurchase Code, there is an unambiguous statement that a proportionate increase in a shareholder's voting rights arising as a result of a share repurchase will be treated as an acquisition of voting rights for the purposes of the Code.

10. The Panel held that Rule 32 of the Code and Rule 8 of the Share Repurchase Code clearly stated that share repurchases will be treated as acquisitions of voting rights for the purposes of the Code.

11. The Panel was not persuaded that any distinction should be made between the body of the Code and the Schedules to it, in particular Schedule VI, in applying these provisions.

12. The Panel was of the view that in the absence of any express exclusion of Schedule VI from provisions that are stated to have general applicability throughout the Code, the arguments put that Schedule VI should be construed separately were not sustainable against a plain reading of Rule 32 of the Code and Rule 8 of the Share Repurchase Code. It follows that

share repurchases fall within the category of potentially disqualifying transactions comprehended within paragraph 3 of Schedule VI to the Code.

13. As to whether there should be any dispensation granted from the provisions of paragraph 3 of Schedule VI to the Code on "de minimis" grounds, the Panel agreed with the view of the Executive that there were no provisions in the Code or Schedule VI to the Code which would admit of such a dispensation.

14. The Panel also heard arguments on London practice deemed relevant and also considered the Takeover Panel statement 1999/17 headed "Redemption or purchase by a company of its own shares Rule 37.1". The Panel noted the difference in views between Regent's advisors and the Executive as to the practice of the London Panel and also in particular the content of the London Panel statement on Rule 37.1 referred to above. The Panel was of the view that while in certain circumstances useful guidance may be drawn from the practice of the London Panel, the matter before them was one that could clearly be decided without a need to have recourse to a detailed understanding of current London practice and it was therefore unnecessary for the purposes of the decision to resolve conclusively the difference in views expressed as to London practice.

15. Having regard to the particular circumstances of the Regent share repurchases, the Panel concluded that the share repurchases in question could not constitute a disqualifying transaction within a strict reading of paragraph 3(b) of Schedule VI to the Code as no waiver had been granted by the Executive nor indeed been applied for at the time that the share repurchases were made.

16. Paragraph 3(b) on Schedule VI provides that *"a waiver will be invalidated if, without the prior consent of the Executive, any acquisitions or disposals of voting rights are made by such persons in the period between the announcement of the proposals and the shareholders' meeting"*. In the case in point, it is clear from Regent's announcement of 20 March 2000 that an application for a whitewash waiver had not yet been made. That this remained the case was confirmed by both Regent and the Executive. While the submission of a waiver

application subsequent to the announcement of proposals is entirely in accord with current practice, it does not rest easily with the strict application of the provisions of paragraph 3 of Schedule VI to the Code. Paragraph 3(a) deals with the period of six months prior to the announcement of proposals. Paragraph 3(b), deals with the period after both the announcement of the proposals and the grant of a waiver, since only after a waiver has been granted can it be invalidated.

17. In the circumstances of the current referral, the proposal has been announced (15 March), the share repurchases have taken place (17 March) but the application for a waiver has yet to be made. The Panel, therefore, concluded that a decision as to the grant or otherwise of a waiver still rests with the Executive who in considering whether or not to exercise discretion in this matter, would necessarily have regard to all relevant circumstances.

18. By way of guidance to the Executive, the Panel concluded that as it had ruled that share repurchases constituted acquisitions of voting rights for the purposes of Schedule VI to the Code, the share repurchases in question were clearly germane to the Executive's consideration of Regent's waiver application but did not of themselves absolutely fetter the Executive's ability to exercise its normal discretion in the matter of a waiver.

General

19. The Panel believes that the wording of paragraph 3 of Schedule VI to the Code and also the wording of paragraphs (i) and (ii) of Note 1 of the Notes on dispensations from Rule 26 should be re-examined in any revision of the Code and the lacuna identified in the current application to the Panel rectified.

20. In the interim, this Panel decision should serve as a guidance to practitioners. In addition, a press release should be issued by the Executive clarifying current practice.

21. The Panel also believes that it is appropriate to take this opportunity to remind practitioners and parties seeking a whitewash of the very clear injunctions in the Code for prior

consultation with the Executive and the need for absolute disclosure in circumstances that might bear upon a proper consideration of a whitewash application. In this regard, practitioners and applicants are reminded that a whitewash is a dispensation from one of the most basic obligations under the Code and as such the onus of full disclosure and prior consultation on any points of uncertainty rests very clearly on those making the application. The Panel does, however, wish to stress that this is a general reminder to practitioners and their clients and in no way reflects upon the discharge of professional duties by either Somerley Limited or Stephenson Harwood & Lo as advisors to Regent, neither of whom were advised in advance of Regent's intention to undertake the share repurchases in question.

30MAR00