

An SFC newsletter to help participants in Hong Kong's financial markets better understand the Codes on Takeovers and Mergers and Share Buy-backs

Feedback and comments:
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Season's Greetings

We wish our readers a happy and healthy 2016!

Takeovers Panel upholds the Executive's ruling in respect of China Oriental

On 6 October 2015, the Takeovers and Mergers Panel (Takeovers Panel) upheld our ruling to grant ArcelorMittal, a substantial shareholder of China Oriental Group Company Limited (China Oriental), a waiver from the mandatory general offer obligation under the Takeovers Code that arose upon the unwinding of certain put option arrangements. The Takeovers Panel made the decision following requests by two minority shareholders for a review of our ruling granted earlier this year.

On 29 January 2015, ArcelorMittal applied to the Executive for a waiver from mandatory general offer obligations on its part which might have arisen following the termination of put option arrangements with ING Bank and Macquarie Bank Limited. Details of the put option arrangements and other background facts can be found in the SFC's press release dated 15 October 2014.

The Takeovers Panel's written decision published on 19 October 2015 can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" section of the SFC website.

Highlights

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- Takeovers Panel rules no general offer required for China Oriental
- Takeovers Panel's decision in relation to Cross-Harbour
- Impact of disqualifying transactions
- Dealing disclosure reminders to associates
- Quarterly update on the activities of the Takeovers Team

Takeovers Panel rules on general offer obligation for The Cross-Harbour (Holdings) Limited

The Takeovers Panel has ruled that a general offer obligation under the Takeovers Code will arise if Cheung Chung Kiu proceeds with the possible acquisition of a controlling shareholder interest in The Cross-Harbour (Holdings) Limited. The Takeovers Panel also agreed with the Executive that a waiver of the general offer obligation should not be granted.

We received an application for a ruling regarding the possible acquisition and referred the matter to the Takeovers Panel as there were particularly novel, important or difficult points at issue. The Takeovers Panel met on 7 December 2015 to consider the referral.

In its decision, the Takeovers Panel also noted that it expects full cooperation by all parties concerned. A party which is the subject of a hearing should attend the hearing in person, and not delegate others who have no direct knowledge of the arrangements at issue to attend.

The Takeovers Panel issued its written decision on 21 December 2015. A copy can be found in the "Regulatory functions – Listings & takeovers – Takeovers & Mergers – Decisions & statements – Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" section of the SFC website.

Reminder about the impact of disqualifying transactions

We would like to remind parties and their advisers that a whitewash waiver will not normally be granted and a waiver, if granted, will be invalidated, if:

- the person to whom the new securities are to be issued or any person acting in concert with him has acquired voting rights in the company (save for subscriptions for new shares which have been fully disclosed in the whitewash circular) in the six months prior to the announcement of the proposals but subsequent to negotiations, discussions or the reaching of understandings or agreements with the directors of the company (including informal discussions) in relation to the proposed issue of new securities; or
- without the prior consent of the Executive, any acquisition or disposal of voting rights are made by such persons in the period between the announcement of the proposals and the completion of the subscription.

In two recent cases, the whitewash transactions failed to complete as a result of disqualifying transactions. In one case, the offeree company effected a number of on-market share buy-backs both after negotiations about the proposed issue of new securities had started and again after the announcement of the proposed whitewash transaction. It is clear from the Takeovers Panel's 30 March 2000 decision in relation to Regent Pacific that share buy-backs are acquisitions for the purpose of the Takeovers Code and that share buy-backs fall within the category of potentially disqualifying transactions under paragraph 3 of the Whitewash Guidance Note (Schedule VI of the Codes). We declined to issue the requested whitewash waiver.

In another case, the whitewash applicant and its concert party made certain on-market acquisitions of shares in the offeree company after shareholders had approved the whitewash transaction at a general meeting but before completion of the subscription. In view of these disqualifying transactions, the whitewash waiver that had been granted was invalidated.

We reiterate that the disqualifying transaction provisions provide a further and fundamental safeguard in proposed whitewash transactions. A comprehensive explanation is set out in Issue No. 25 (June 2013) of the *Takeovers Bulletin*.

The prohibitions under paragraphs 3(a) and (b) against any acquisition of voting rights by the whitewash applicant and its concert parties aim to ensure equal treatment of shareholders in that the whitewash applicant or its concert parties may not provide an exit to some shareholders which is not available to others. This is consistent with General Principle 1 which states:

“All shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly.”

Given that a whitewash applicant is proposing to increase its shareholding interest in the subject company through the whitewash transaction, disposals of voting rights before the completion of the whitewash proposal are prohibited as they would be contrary to the intended effect of the proposal. If the whitewash applicant or its concert parties were permitted to dispose of voting rights during the period between the announcement of the whitewash proposal and completion of the subscription of the new securities, it would also not be possible to provide shareholders with precise details of the proposed shareholding position of the whitewash applicant. As such, shareholders would not be in a position to reach an informed decision when voting on the whitewash.

Dealing disclosure reminders to associates

Rule 3.8 of the Takeovers Code states that in the announcement which commences an offer period, the offeree company, the offeror or potential named offeror should remind their respective associates to disclose their dealings in any securities of the offeree company, or in the case of a securities exchange offer, any securities in the same class as the securities that are offered as consideration under an offer.

Sections 1 and 2 of Appendix 1 to Practice Note 20 (PN20) further provide that the offeree company and potential offeror should send dealing disclosure reminders to their respective associates.

In addition to the reminder in the first announcement that commences an offer period and in accordance with PN20, the offeree company and the potential offeror should take other positive action to remind their prospective associates about the dealing disclosure obligations under Rule 22, such as sending written reminders.

An unnamed potential offeror is not expected to remind its associates prior to its identity being announced. This is consistent with the confidentiality principles laid down in Rule 1.4 of the Takeovers Code. However, as soon as the offeror or potential offeror's identity is publicly announced, the offeror or potential offeror should immediately take action to remind its associates of their dealing disclosure obligations and comply with the requirements of PN20.

The potential offeror should also remind its associates about their dealing disclosure obligations in announcements that relate to the offer, including talks announcements issued under Rule 3.7 and announcements of a firm intention to make an offer under Rule 3.5.

Quarterly update on the activities of the Takeovers Team

In the three months ended 30 September 2015, we received 13 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), 11 whitewashes and 91 ruling applications.

Useful links

- The Codes on Takeovers and Mergers and Share Buy-backs
- Practice notes
- Decisions and statements
- Previous *Takeovers Bulletins*

All issues of the *Takeovers Bulletin* are available under 'Published resources – Industry-related publications – *Takeovers Bulletin*' on the SFC website at www.sfc.hk.

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