

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

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Takeovers Panel's ruling on TVB's whitewash waiver and disclosure of shareholding structure

The Takeovers Panel has ruled that a whitewash waiver should be granted, subject to conditions, in relation to a share buy-back offer announced by Television Broadcasts Limited (TVB) in January 2017, and full details of the shareholding structure of Young Lion Holdings Limited (Young Lion) should be disclosed in the shareholders' circular.

On 24 January 2017, TVB announced its intention to conduct a share buy-back by general offer. TVB's offer announcement stated that Young Lion holds a direct interest in 26% of TVB's shares and an additional 3.9% indirectly with its concert parties. Young Lion stated that it did not intend to accept TVB's share buy-back offer. The Young Lion concert group therefore applied to the Executive for a whitewash waiver as its shareholding will increase from 29.9% to up to 41.19% as a result of TVB's share buy-back and thereby a mandatory general offer will be triggered under the Takeovers Code.

We referred the matter to the Panel under section 10.1 of the Introduction to the Takeovers Code as it involved novel, important and difficult issues. The Panel met on 27 April 2017 to consider the referral.

In ruling that full details of Young Lion's shareholding structure and certain arrangements between its shareholders should be disclosed in the shareholders' circular, the Panel noted that this would give TVB shareholders a fully-informed view on how control of Young Lion and hence TVB is exercised. The Panel also noted that as a result of agreements among Young Lion's shareholders regulating certain aspects of their relationship, certain decisions of Young Lion require approval of shareholders holding a majority of all Young Lion's voting and non-voting shares. This is distinctively different from a normal situation in which a company's non-voting shares have no real say except in situations which affect their class rights.

Highlights

- Takeovers Panel's decision concerning TVB
- Revisions to the Codes to reflect new resolution regime
- Quarterly update on the Takeovers Team's activities

The Panel noted that the Companies Ordinance requires TVB's shareholders to approve the offer in a general meeting by an ordinary resolution. It follows that the vote on that resolution must be subject to the scale-back provisions under the Broadcasting Ordinance. The Panel also noted, however, that a whitewash waiver is not a right or a privilege. The Executive or Panel may in its discretion grant a waiver on such terms and conditions as it thinks fit to achieve the underlying purposes of the Codes on Takeovers and Mergers and Share Buy-backs (Codes). Accordingly, the Panel ruled that a whitewash waiver should be granted subject to a majority of votes being cast in favour of the resolution to approve TVB's offer (without adjustment). The Panel also decided that the whitewash waiver should not be put before TVB's shareholders for a separate vote (Whitewash Waiver Approval Decision).

The funding of the share buy-back offer was considered at the Panel hearing and the Panel found that all that is required by the Takeovers Code is a confirmation from a financial adviser that sufficient resources are available to satisfy the offer.

In its decision, the Panel expressed concern over the difficulty the Executive and the Panel experienced in obtaining the Relationship Agreement between Young Lion's shareholders. The Panel also put on record that Young Lion did not make available to the hearing one of its directors who might be familiar with its affairs and those of its shareholders despite an earlier direction by the Acting Panel Chairman to do so.

We would like to take this opportunity to remind parties concerned with Codes transactions to fully cooperate with us, the Panel and the Takeovers Appeal Committee and to provide all relevant information in line with General Principle 10.

The Panel's written decision dated 10 May 2017 and the Executive's press release dated 10 May 2017 can be found in the "Regulatory function – Listing & takeovers – Takeovers & mergers – Decisions & statements – Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" section of the SFC website.

On 29 May 2017, TVB applied to the High Court of Hong Kong for leave to commence judicial review of the Whitewash Waiver Approval Decision.

Codes amended to align with new resolution regime

The SFC will introduce a new section to the Codes to align them with the new Financial Institutions (Resolution) Ordinance (FIRO) (Cap. 628) effective on 7 July 2017.

The FIRO establishes a resolution regime in Hong Kong to mitigate the risks posed by the non-viability of systemically important financial institutions to the stability and effective working of the financial system of Hong Kong. The FIRO (except for certain provisions) will take effect on 7 July 2017¹.

Part 9 of the FIRO (Deferral of Certain Disclosure Requirements) provides for the deferral, suspension or waiver of disclosure and other obligations under the Securities and Futures Ordinance (SFO) and rules made under the SFO where a listed entity (as defined in the FIRO)² or its group company is likely to be subject or has been subject to resolution action. This includes the deferral or suspension of the obligation to disclose inside information under Part XIVA of the SFO and the obligation to disclose interests under Part XV of the SFO by the listed entity or certain other persons. Without these powers, there is a risk that premature disclosure could severely impede the effective exercise of resolution measures and thus undermine orderly resolution.

Specifically, section 153(7) under Part 9 of the FIRO exempts all persons from any obligation arising in relation to a listed entity under the Codes after the resolution authority has applied the bail-in resolution option to that listed entity or its group company and the bail-in is ongoing. This includes the obligations to make an offer for shares, to enter into a takeover or merger transaction, to

¹ The FIRO was passed by the Legislative Council on 22 June 2016 and was gazetted on 30 June 2016.

² A listed entity is an entity that is listed on a recognized stock market and that is a within-scope financial institution or a group company of such a financial institution. Within-scope financial institutions are specified entities in the banking, insurance and securities and futures sectors that are covered by the regime.

make an announcement of an offer or to disclose information of any kind. When the bail-in is completed, the provisions of the Codes will once again apply to the relevant person(s).

In light of the above, a new section 19.1 will be added to the Introduction to the Codes, as follows, to provide a specific exemption in relation to a listed entity which is affected by the use of the bail-in resolution option:

“Financial institution recovery and resolution

19.1 Pursuant to section 153(7) of the Financial Institutions (Resolution) Ordinance (Cap. 628), all persons are exempt from any obligation arising in relation to the relevant listed entity (as defined in section 149 of that Ordinance) under the Codes where a stabilization option mentioned in section 33(2)(d) (bail-in) of that Ordinance has been applied to the listed entity or its group company (as defined in section 2(1) of that Ordinance) and the bail-in of which is ongoing.”

As the amendments are made to bring the Codes in line with the introduction of the new legislation, they have been made without public consultation.

The revised Codes will take effect on 7 July 2017. Printed copies of the revised pages will be distributed to Takeovers Code annual subscribers in due course.

Quarterly update on the activities of the Takeovers Team

In the three months ended 31 March 2017, we received 22 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), 11 whitewashes and 105 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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