



# Takeovers Bulletin

## Highlights

- Takeovers Panel's decision on deducting dividend from offer price
- Special deal considerations for ordinary course of business transactions
- Early identification of connected fund managers and connected principal traders
- Signatories to confirmations under Note 3 to Rule 8.1
- Quarterly update on the activities of the Takeovers Team

## Season's Greetings

We wish all readers a healthy and fruitful 2020!

## Takeovers Panel's decision on deducting dividend from offer price

The Takeovers Panel has ruled that Broadford Global Limited will not be allowed to deduct the final dividend approved by shareholders of Dalian Port (PDA) Company Limited from its offer price in a possible mandatory general offer.

Dalian Port announced a final dividend of RMB1.9 cents per share on 26 March 2019. On 4 June 2019, Broadford announced a possible offer for all the H shares of Dalian Port (the Joint Announcement). Broadford's advisers approached the Executive on 14 June 2019 seeking its confirmation that the terms of the possible offer permitted Broadford to deduct the final dividend from the offer price set out in the Joint Announcement.

The matter was referred to the Panel as there were particularly novel, important or difficult points at issue.

The Panel met on 11 September 2019 and considered that the Joint Announcement did not mention that the final dividend may be deducted from the stated offer price. The Joint Announcement was drafted in such a way that readers would have expected Dalian Port's shareholders to receive the full offer price of \$1.0127 per H share.

The Takeovers Code requires that all statements made during the course of an offer must satisfy the highest standards of accuracy and, in normal circumstances, the price stated in an offer announcement should not be reduced.

A copy of the Panel's decision issued on 2 October 2019 is available 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's website.

## Special deal considerations for ordinary course of business transactions

The Executive has been consulted on a number of occasions as to whether certain arrangements with shareholders involving parties' ordinary business activities would constitute special deals under Rule 25 of the Takeovers Code.

Rule 25 reflects the provision in General Principle 1 that all shareholders should be treated equally. It provides that, among other things, neither the offeror nor any person acting in concert with it may make any arrangements with shareholders either during an offer or when an offer is reasonably in contemplation or for six months after the close of such offer if such arrangements have favourable conditions which are not to be extended to all shareholders, without the Executive's consent.

The Executive recognises that a strict interpretation of Rule 25 may at times result in unnecessary restrictions on the parties' ordinary course of business. Having considered the above, the Executive will not normally regard an arrangement (the Arrangement) as constituting a special deal where:

- (1) the Arrangement is in the parties' ordinary course of business;
- (2) (a) the Arrangement involves the provision of consumer goods and services on terms that are available to the public generally; or  
  
(b) the Arrangement is entered into periodically or involves a continuation or an extension of a previous arrangement; and

(3) where (2)(b) applies:

- (a) there is no material change to the terms of the Arrangement when compared with the previous arrangement; or
- (b) the terms of the Arrangement are determined pursuant to certain market standards or pre-determined formulas (such as established parameters or benchmarks or where a public tender process is involved) without the influence of either party.

As always, parties are encouraged to consult the Executive at the earliest opportunity if any of the above arrangements are being contemplated by the parties.

## Early identification of connected fund managers and connected principal traders

The Executive notes that in recent cases, certain companies and their advisers have overlooked the possible Code implications of dealings in the relevant securities of the offeree company by connected fund managers or connected principal traders of the offeror during the period from six months prior to the commencement of the offer period up to and including the final closing date of the offer (Relevant Period).

The Codes set out that a fund manager or principal trader will be connected with an offeror (thereby becoming a connected fund manager or connected principal trader) if the fund manager or principal trader controls<sup>1</sup>, is controlled by or is under the same control as: (1) an offeror; (2) any financial or other professional adviser (including a stockbroker) to an offeror; or (3) an investor in a consortium formed for the purpose of making an offer (eg, through a special purpose company).

<sup>1</sup> Please refer to Note 1 to the Definitions under the Codes.

Market practitioners, companies and their advisers are reminded that they must carry out appropriate due diligence at the outset of a Code transaction. They must identify all members within the offeror group who are engaged in fund management business or principal trading activities and may deal in the relevant securities of the offeree company or relevant securities of a company which are to be offered as consideration (including the offeror's own securities) (collectively, Relevant Securities) during the Relevant Period and ascertain any possible implications under the Codes. This is particularly crucial where offerors are members of large complex conglomerates with member companies engaging in fund management business or principal trading activities, either within or outside Hong Kong.

Dealings in Relevant Securities during the Relevant Period can potentially lead to material implications under the Codes, including:

- setting a minimum level of consideration for an offer (Rules 23.1, 24.1 and 26.3);
- a breach of the restrictions on dealings in Relevant Securities during an offer period (Rules 21.2 and 21.3); and
- in the case of whitewash transactions, disqualifying transactions (Paragraph 3 of Schedule VI).

Although Rule 21.6(a) provides a limited safe harbour for discretionary fund managers and principal traders, the safe harbour will no longer be available after the identity of the offeror or potential offeror is publicly announced (or, if prior to that, the connected party had actual knowledge of the possibility of an offer being made by a person with whom it is connected). Exempt status is not relevant if the connected fund manager or connected principal trader belongs to the same group as the offeror (see Note 2 to the definitions of exempt fund manager and exempt principal trader).

If an offeror is not able to restrict or prohibit dealings in Relevant Securities by a connected fund manager or connected principal trader after the safe harbour is no longer available, the Executive should be consulted immediately and in any event prior to any such dealings. When there is any doubt, parties or their advisers should always consult the Executive at the earliest opportunity.

### Signatories to confirmations under Note 3 to Rule 8.1

Note 3 to Rule 8.1 of the Takeovers Code provides that meetings between representatives of the offeror, the offeree company or their respective advisers and any shareholder (or holder of other Relevant Securities) of either an offeror or offeree company, investment analyst, stockbroker or others engaged in investment management or advice may take place during an offer period as long as no material information is provided and no significant new opinions are expressed by the relevant representative or adviser.

In this connection, the Code requires that an appropriate representative of the financial adviser to the offeror or the offeree company must be present at the meeting, unless the Executive consents otherwise. The representative will also be responsible for confirming to the Executive, not later than 12.00 noon on the business day following the date of the meeting, that no material new information was provided and no significant new opinions were expressed by the relevant representatives or advisers.

The Code does not specify the seniority of the representative attending the meeting and providing the confirmation to the Executive. As a matter of practice, the Executive would expect that these be done by a member of the transaction case team with sufficient senior standing and who is conversant with the requirements of the Codes. Where a junior

member attends the meeting, the Executive would expect that the confirmation be signed by the attendee and countersigned by a senior member of the case team, such senior member being a responsible officer licensed to carry out Type 6 regulated activity (advising on corporate finance) without any conditions attached. When in doubt, the Executive should be consulted.

## Quarterly update on the activities of the Takeovers Team

In the three months ended 30 September 2019, we received 20 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buy-backs), two whitewashes and 67 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 – Newsletters – Takeovers Bulletin' on the SFC website at [www.sfc.hk](http://www.sfc.hk).

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