

# Insight

## on M&A

### Consult with the Panel to avoid public criticism and potential embarrassment

The Hong Kong Takeovers and Mergers Panel (the "HK Panel") has issued a decision confirming that "acting in concert" is not necessarily defined by a legal agreement and emphasising that consultation with the HK Panel must take place at an early stage in order to avoid unforeseen consequences such as a mandatory offer. The UK Takeovers and Mergers Panel (the "UK Panel") is highly likely to have come to the same conclusion had the transaction happened in the UK.

As this case shows, the consequences of not consulting the relevant panel can be commercially disadvantageous for the offeror as well as embarrassing for the offeror and its advisers.

#### Background

Arcelor Mittal ("AM") approached Mr Han, a major shareholder in China Oriental Group Company Limited ("China Oriental"), in June and July 2007, with a view to discussing possible areas of co-operation in relation to China Oriental. In October 2007, a draft co-operation agreement (the "Co-Operation Agreement") was initialled by Mr Han and AM; this, inter alia, provided for put and call options over China Oriental shares held by Mr Han.

On 6 November 2007, AM purchased 28% of China Oriental from a different shareholder, Ms Chen (the "Acquisition"), as Mr Han had refused to sign the Co-operation Agreement until the Acquisition took place.

The Co-operation Agreement was then split into a shareholders agreement (the "Shareholders Agreement") and a business co-operation agreement, each

of which was signed on 7 November. The Shareholders Agreement was conditional upon anti-trust approval and contained two call options and a put option (the "Put Option"), each of which was exercisable in certain circumstances.

On 13 November 2007, ING Bank, financial advisers to AM, submitted a draft announcement to the HK Panel which said that, upon the Shareholders Agreement becoming unconditional, Mr Han and AM may be treated as parties acting in concert and that, upon the Shareholders Agreement becoming unconditional, the parties might be required to make an unconditional mandatory offer for the rest of China Oriental's shares.

The Hong Kong Panel Executive then stated that it had formed the view that it considered AM and Mr Han to be acting in concert at the time AM completed the Acquisition and accordingly that a mandatory offer obligation had been triggered. The matter was then referred to the HK Panel for consideration.



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## The Hong Kong Panel's decision

The HK Panel gave its decision on 6 December 2007.

**Firstly**, it held that AM and Mr Han had been acting in concert at the time of the Acquisition, noting that the Code definition was deliberately vague - "an agreement or understanding (whether formal or informal)":

The HK Panel noted in particular a course of conduct over a period of time prior to the Acquisition and the existence of a common intent and active co-operation before completion of the Acquisition, both of which prevailed over a definition which looked only at narrow formal legal terms. AM and Mr Han had therefore been acting in concert for some time (probably from the initialling of the Co-operation Agreement) but the consequence (i.e. the obligation to make a mandatory bid) was only triggered at the time of the Acquisition.

The UK definition of "acting in concert" is exactly the same and persons involved in UK takeovers should be aware that they could be acting in concert with another party from an early stage, even before any documents are signed.

**Secondly**, the Put Option with Mr Han constituted a special deal and AM was therefore in breach of Rule 25 of the Hong Kong Takeover Code which prohibits special deals with shareholders unless the HK Panel's consent is obtained. Again, Rule 16 of the UK Takeover Code is exactly the same and the UK Panel is very likely to have come to the same conclusion.

**Finally**, the HK Panel was very critical generally of the failure by all parties to consult with the Hong Kong Panel Executive prior to entering into both the Acquisition and the Put Option. It noted in particular paragraph 6.1 of the introduction to the Hong Kong Takeover Code which states that the Hong Kong Panel Executive should always be consulted in advance where there is any doubt as to a proposed course of conduct (see paragraph 6 (b) of the UK Takeover Code which is exactly the same).

This public criticism is obviously embarrassing for those concerned and emphasises the importance of contact with the relevant Panel as early as possible in a transaction.

### We are here to help

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