Takeovers Panel rules no mandatory general offer obligation triggered for China Oriental

15 Oct 2014

The Takeovers and Mergers Panel (Panel) upheld the Takeovers Executive's (Executive) ruling that the completion of certain transactions between ArcelorMittal, a substantial shareholder of China Oriental Group Company Limited (China Oriental), and counterparties involving shares of China Oriental on 30 April 2014 did not give rise to a mandatory general offer obligation under the Code on Takeovers and Mergers (Takeovers Code) by ArcelorMittal to acquire all the shares of China Oriental (Note 1).

Following a general offer by ArcelorMittal for shares in China Oriental in 2008, ArcelorMittal and Mr Han Jingyuan, chairman of China Oriental, held 47% and 45% shares of China Oriental, respectively. As a result, the minimum public float requirement under the Listing Rules of the Stock Exchange of Hong Kong was not satisfied.

ArcelorMittal subsequently sold 9.9% and 7.5% of shares in China Oriental it owned to ING Bank (ING) and Deutsche Bank (DB), with a view to satisfying the requirement of the Listing Rules. As part of the transactions at the time, ArcelorMittal granted ING and DB put options entitling them to sell back the shares of China Oriental to ArcelorMittal at the original purchase price (with adjustments) (Note 2).

The put options expired on 30 April 2014 and ArcelorMittal proposed to extend the arrangement with the put option with ING for one year on amended terms. It also proposed to close the arrangement with DB and enter into an arrangement with Macquarie Bank Limited (Macquarie) which was similar to the amended arrangement with ING. These transactions were to be completed simultaneously (Note 3).

As a result of the new arrangements between ArcelorMittal and the counterparties, i.e. ING and Macquarie, the independent non-executive directors of China Oriental applied to the Executive for a formal ruling that a mandatory general offer had been triggered by ArcelorMittal.

The Executive ruled on 21 August 2014 that ArcelorMittal had not triggered a mandatory general offer. On 1 September 2014, the independent non-executive directors of China Oriental applied to the Panel to review the Executive's ruling.

The Panel met on 25 September 2014 to consider the matter and concluded that the completion of the agreements between DB and ArcelorMittal on the one hand and ArcelorMittal and Macquarie on the other did not result at any time in ArcelorMittal acquiring additional voting rights as these voting rights passed directly from DB to Macquarie.

The Panel also ruled that Macquarie and ArcelorMittal are presumed to be acting in concert by virtue of the financial arrangements between them and the presumption had not been rebutted. The Panel further ruled that given the similarity of the arrangements, it would follow that both ING and DB were also parties presumed to be acting in concert with ArcelorMittal (Note 4).

Since ArcelorMittal and its concert parties, i.e. DB, ING and Macquarie, held a combined 47% stake in China Oriental throughout the existence of such arrangements, the Panel concluded that the arrangements did not increase the concert parties' aggregate holding; and did not cause any member of the concert party group to cross a mandatory offer trigger point, or any significant change to the concert party with the substitution of Macquarie for DB. As a consequence, a mandatory offer obligation had not arisen.

A copy of the Panel's decision can be found on the SFC's website (Note 5).

End

Notes:

1. Under the Takeovers Code, a mandatory offer is normally triggered when a person or persons acting in

concert cross a takeover offer trigger point, being either 30% or, if holding not less than 30% but not more than 50%, increasing a shareholding by more than 2%.

2. The put option granted by China Oriental was fully cash collaterised as in each case the collateral was netted off against the purchase price so that no cash changed hands with the result that ING and DB acquired a shareholding interest in China Oriental without any financial outlay.
3. ArcelorMittal, whose shareholding in China Oriental was 29% at the time, consulted the Executive who confirmed on a consultation basis that a mandatory general offer would not be triggered as a result of these transactions.
4. Under the Takeovers Code, persons acting in concert comprise persons who, pursuant to an agreement or understanding, actively cooperate to obtain or consolidate “control” of a company (i.e. holding 30% or more of its voting rights) through an acquisition of voting rights. The Takeovers Code presumes a person (other than an authorised institution under the Banking Ordinance) who provides financial assistance to another for the acquisition of voting rights to be acting in concert with each other, unless the contrary is established.
5. The decision can be found in the "Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements" section of the SFC website. From the home page, follow the path: "Regulatory functions" > "Listings & takeovers" > "Takeovers & Mergers" > "Decisions & statements" to go to the section.

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TAKEOVERS AND MERGERS PANEL

Panel Decision
In relation to the application by the independent non-executive directors of China Oriental Group Company Limited ("China Oriental", stock code: 581)
for a review of the decision of the Takeovers Executive relating to whether a mandatory offer obligation had arisen for Mittal Steel Holdings AG ("ArcelorMittal" and where the context requires its ultimate holding company)

Introduction

1. The Panel met on 25th September, 2014 to consider an application by the three independent non-executive directors of China Oriental on its behalf for a review of the decision by the Takeovers Executive which had concluded that the arrangements entered into between ArcelorMittal and Macquarie Bank Limited ("Macquarie") on 27th April, 2014 and completed on 30th April, 2014 had not given rise to a mandatory offer obligation for ArcelorMittal. The application was made in accordance with paragraph 9.1 of the Introduction to the Codes on Takeovers and Mergers and Share Buy-backs (the "Takeovers Code"), which permits a party who wishes to contest a ruling by the Takeovers Executive to ask for the matter to be reviewed by the Takeovers and Mergers Panel (the "Panel").

Background and facts

2. Following a decision by the Panel in 2007, ArcelorMittal made a takeover offer for all the shares in China Oriental not already owned by it or parties acting in concert with it. At the close of this offer ArcelorMittal held approximately 47% of the issued share capital of China Oriental. As the chairman of China Oriental, Mr. Han Jingyuan ("Mr. Han") held approximately 45% of the issued share capital, there were insufficient shares held by the public to meet the public float requirements of the Rules Governing the Listing of Securities on The Hong Kong Stock Exchange Limited (the "Listing Rules" of the "Stock Exchange").

3. Under an agreement between ArcelorMittal and Mr. Han dated 9th November, 2007, ArcelorMittal was obliged to make arrangements to satisfy the public float requirements of the Listing Rules and did so by the sale of 9.9% and 7.5% of the shares in China Oriental to respectively ING Bank ("ING") and Deutsche Bank ("DB") (collectively the "banks") on identical terms.

4. The terms in summary were as follows:

   - Each of the banks purchased shares in China Oriental at a price of HK$5.7938 per share which compared with the last traded price before suspension of HK$6.01 per share;

   - ArcelorMittal granted each of the banks a put option under which it agreed to acquire all the shares purchased by the banks at the original purchase price adjusted for interest at an agreed rate, less any dividends received during the

three year currency of the put option which was exercisable on 30th April, 2011. This put option was fully cash collaterised. This collateral was netted off against the purchase price so that no cash changed hands with the result that each of the banks acquired a shareholding interest in China Oriental without any financial outlay as ArcelorMittal had effectively financed the whole of the purchase through the notional cash collateralisation of the put options;

- each of the banks were paid fees for the option and for entering into these arrangements; and

- ArcelorMittal could require the banks to exercise their put options following the exercise by ArcelorMittal of the call option it had been granted under the shareholders' agreement of 9th November, 2007.

5. ArcelorMittal's ability to force the exercise of the put option placed a considerable restraint on the banks in selling their shares in China Oriental as they might be required to buy them back if ArcelorMittal required them to exercise the put. While the shareholders' agreement terminated on 9th May, 2008, a few days after the arrangements with the banks had been completed, there was some dispute between ArcelorMittal and Mr. Han on whether certain provisions of the agreement between them had survived so there was uncertainty as to the status of ArcelorMittal's call option under the shareholders' agreement.

6. As it happened the shares in China Oriental traded for only a short time at or above HK$6.00 per share after the arrangements with the banks had been entered into, so there was little incentive for the banks to sell their shares and the exercise of the put options was inevitable unless the arrangements were renewed or replaced.

7. In April, 2011, the arrangements were rolled over for a further three years.

8. Towards the end of the life of the rolled-over arrangements, circumstances changed in that the Stock Exchange notified ArcelorMittal in late 2013 that these arrangements would no longer satisfy the public float requirements of the Listing Rules and, were they to be rolled over again, the shares in China Oriental would be suspended because of an insufficient public float. Further, towards the end of March, 2014, DB notified ArcelorMittal that it would not be rolling over the arrangement again and would give notice to exercise its put option on 30th April, 2014. By this time, the exercise price under the put option was approximately HK$6.50. This compares with a share price of HK$1.16 immediately before trading was suspended on 29th April, 2014.

9. While ING had indicated that it would renew the arrangements or enter arrangements which were broadly similar, ArcelorMittal had only a short period of time to find a replacement for DB or else, upon the exercise of the put option by DB, it would incur a mandatory offer obligation at some HK$6.50 per share, a premium of approximately 460% to the last traded price of shares in China Oriental. In the event, ING introduced Macquarie to ArcelorMittal as a counterparty that would be suitable and was able to respond quickly to the proposal.

10. After some negotiation Macquarie agreed to the following arrangements whereby it would:

- purchase a 7.5% shareholding interest in China Oriental, the same interest as DB had originally held, at HK$1.70 per share;

- be granted a put option by ArcelorMittal whereby it could put its shareholding in China Oriental back to ArcelorMittal at HK$1.70 at the end of the option period, being 30th April, 2015, which option was fully cash collateralised. The effect of this was that the purchase price was netted off against the cash collateral, so no money changed hands;

- charge a fee for the option and a subsidiary would charge an introductory fee, 75% of which could be off-set against future investment banking fees payable by ArcelorMittal;

- be reimbursed its costs, including legal costs and the payment of its portion of stamp duty;

- cooperate with ArcelorMittal in obtaining a resumption of trading of the shares in China Oriental which it knew would be suspended were it to enter into these arrangements; and

- be indemnified against all the risks of this arrangement, including the costs of any mandatory offer obligation arising from it.

11. ING entered into an amendment and reinstatement agreement under which the put option was extended for a further year at HK$1.70 and the other terms of the agreement was essentially the same as the arrangements with Macquarie.

12. Before these arrangements were entered into, ArcelorMittal through its legal advisors consulted with Takeovers Executive on a number of occasions to ascertain that these arrangements would not of themselves result in ArcelorMittal triggering a mandatory offer obligation under Rule 26.1 of the Takeovers Code. Consultation with the Takeovers Executive is encouraged by paragraph 6 of the Introduction to the Takeovers Code. While such consultation does not bind the Takeovers Executive, ArcelorMittal was given to understand that the Takeovers Executive on the basis of the information provided to it did not consider the arrangements with Macquarie would trigger a mandatory offer obligation.

13. The agreement with Macquarie was entered into on 27th April, 2014. The next day DB gave notice of its exercise of the put option. Under the agreement with DB, ArcelorMittal was able to direct DB to complete the exercise notice in favour of Macquarie. On 30th April, 2014 the arrangements were completed with the exercise by DB of the put option and the acquisition by Macquarie of the 7.5% shareholding interest in China Oriental. While ArcelorMittal designed those arrangements so that they completed simultaneously, the statutory disclosure of interest notifications describe a four step process as the shareholding interests and derivative interests of ArcelorMittal changed. Further, the bought and sold notes prepared for the Stamp Office reflects a purchase by ArcelorMittal at about HK$6.50 per share in China Oriental and a sale by it to Macquarie at a price of HK$1.70 per share.

14. On 29th April, 2014 China Oriental requested the suspension of trading in its shares pending the publication of an announcement relating to its public float. This announcement was published on 5th May, 2014 which informed shareholders that through the actions taken by ArcelorMittal there was no longer sufficient public float and, as a consequence, the suspension of trading would continue. Indeed, at the time of the Panel hearing the suspension had not been lifted.

15. On 9th June, 2014 the independent non-executive directors on behalf of China Oriental wrote to the Takeovers Executive requesting a ruling that ArcelorMittal had triggered a mandatory offer obligation under Rule 26.1 of the Takeovers Code. On 21st August, 2014 the Takeovers Executive ruled that a mandatory offer obligation had not been triggered. In response to this decision on 1st September, 2014 the independent non-executive directors requested a review of the decision by the Panel.

The relevant provisions of the Takeovers Code

16. Acting in concert is defined in the Takeovers Code as follows:

*"**Acting in concert**: Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate to obtain or consolidate "control" (as defined below) of a company through the acquisition by any of them of voting rights of the company.*

Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:–…

(9) a person, other than an authorised institution within the meaning of the Banking Ordinance (Cap. 155) lending money in the ordinary course of business, providing finance or financial assistance (directly or indirectly) to any person (or a person acting in concert with such a person) in connection with an acquisition of voting rights (including any direct or indirect refinancing of the funding of the acquisition)."

17. Rule 26.1 sets out the circumstances when a mandatory offer is required. The relevant sections of this rule state the following:

"When mandatory offer required

Subject to the granting of a waiver by the Executive, when

(a) any person acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting rights of a company;…

(d) two or more persons are acting in concert, and they collectively hold not less than 30%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 2% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date of the relevant acquisition;

that person shall extend offers, on the basis set out in this Rule 26, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares (see also Rule 36)."

18. While a mandatory offer is normally triggered when a person or persons acting in concert cross a takeover offer trigger point, being either 30% or, if holding not less than 30% but not more than 50%, increasing a shareholding by more than 2%, there are circumstances when shareholdings of a concert party group change when no takeover offer trigger point is crossed which still may have Takeovers Code

consequences. This is set out in Note 1 to Rule 26.1, the relevant section of which reads as follows:

"There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more."

19. The relevant section of Note 6(a) of the Notes to Rule 26.1 states:

"Acquisitions from another member

Whenever the holdings of a group acting in concert total 30% or more of the voting rights of a company and as a result of an acquisition of voting rights from another member of the group a single member comes to hold 30% or more or, if already holding between 30% and 50%, has acquired more than 2% of the voting rights in any 12 month period, an obligation to make an offer will normally arise.

In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:–

(i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;

(ii) the price paid for the shares acquired; and

(iii) the relationship between the persons acting in concert and how long they have been acting in concert."

20. Although Note 1 to Rule 26.1 also refers to Note 7, in the context of this matter the criteria set out on that note is not considered relevant.

The case of China Oriental in summary

21. The case of China Oriental was supported by three principal contentions. The first was that the agreement between ArcelorMittal and DB required ArcelorMittal to first acquire shares from DB at a price of approximately HK$6.50 per share before it could on sell them to Macquarie at HK$1.70 per share. This was supported by the disclosure of interests notifications and, on questioning ArcelorMittal, the way the contract notes had been prepared for the Stamp Office which clearly indicates a purchase by ArcelorMittal at about HK$6.50 per share. It did not matter what happened subsequently, before the purchase from DB, ArcelorMittal held under 30% of the votes attaching to shares in China Oriental and immediately afterwards it held approximately 37.5% of the voting rights. If this was so, Rule 26.1(a) required a mandatory offer to be made at a price of about HK$6.50 per share.

22. Secondly, Macquarie was a party acting in concert with ArcelorMittal. Macquarie was a presumed concert party under class 9 of the definition of acting in concert and was essentially acting as a "safe harbour" for ArcelorMittal. The transaction between them

required no cash outlay and involved no downside risk for Macquarie. There did not appear to be any genuine investment interest in China Oriental. Macquarie did not appear to have any interest in obtaining an investment return from its shares in China Oriental; any dividends paid would simply go to reducing the price of the put. Having purchased a significant shareholding it had never contacted the company.

23. Furthermore, the put option price, unlike that for the original arrangements with ING and DB, was at a substantial premium to the last traded price of the shares in China Oriental. It should follow, even in the unlikely event of the suspension being lifted, it would be unlikely that there would be an opportunity for Macquarie to sell at above the put option price, so a realisation of its shareholding in China Oriental was a remote prospect, which Macquarie must have appreciated from the beginning.

24. Macquarie had earned substantial fees for the accommodation it was providing ArcelorMittal and all its costs including stamp duty were effectively paid by ArcelorMittal. Macquarie was also indemnified against all losses and liabilities, including, if the Panel required it, a mandatory offer. Macquarie also undertook to ArcelorMittal to support it in any effort to restore the public float and the lifting of the temporary suspension of the shares in China Oriental.

25. The arrangements between ArcelorMittal and Macquarie did not mention any other instance where Macquarie's cooperation would be sought through the exercise of the voting rights attaching to the shares in China Oriental. That would have made the existence of a concert party arrangement all too obvious. Concert parties seldom document their arrangements. In this regard, reference was made to the Guinness/Distillers decision of the London Panel where a concert party arrangement could be confirmed by no more than "a nod and a wink". While the Panel's own decision in the matter of Kong Tai International Holdings Limited [Decision – 24th June, 1999] qualified the Guinness expression of a "nod and a wink" to exclude something momentary or fleeting, the arrangements did not have to be explicit for them to exist. While there was no agreement to vote together, the advisers of Macquarie had themselves advanced the idea that Macquarie generally does not exercise the votes attaching to the shares in which it invests, so ArcelorMittal could be assured at least of its neutrality. Further, ArcelorMittal was incentivised to develop a business relationship with Macquarie by the fee rebate arrangements for any subsequent investment banking transaction advised by it. Conversely in developing an investment banking relationship Macquarie was incentivised to cooperate with ArcelorMittal.

26. In summary, the arrangements between ArcelorMittal and Macquarie were strongly indicative of a concert party arrangement and certainly the presumption of acting in concert had not been rebutted.

27. The third contention was that the arrangements negotiated by ArcelorMittal resulted in significant changes to the concert party group. If ING and DB were previously acting in concert with ArcelorMittal, at some time before 30th April, 2014, DB had decided that it wanted to terminate these arrangements and, by doing so, gave notice that it was no longer a concert party. So before Macquarie acquired its shareholding in China Oriental, the old concert party had reduced its interest from some 47% to 39.5% of the voting rights attaching to shares in China Oriental and the purchase of shares by Macquarie, as a new concert party member, raised the concert party's aggregate holding back to 47%, thereby incurring a mandatory offer obligation under Rule 26.1(d).

28. An alternative argument would be to apply the principles used by the Panel in the matter of Wing Hang Bank Limited [Decision – 29th August, 2008] and Hong Kong Aircraft Engineering Company Limited [Decision – 10th December, 2008]. In this

regard had to be taken of the criteria set out in Note 6(a) of the Notes to Rule 26.1. While the leadership of the concert party had not changed, the balance between members had changed significantly with one member leaving the concert party group entirely, unlike Bank of New York in the Wing Hang Bank Limited matter, which had only reduced its interest. This would be a factor against the grant by the Takeovers Executive of a waiver of the mandatory offer obligation that would otherwise result.

29. Then there is the matter of price. In this case, a very high price was paid, if the price paid is effectively HK$6.50 per share in China Oriental and higher than the premium paid by Swire Pacific Limited in the Hong Kong Aircraft Engineering Company Limited matter, if a price of HK$1.70 per share in China Oriental is used. This too would suggest a waiver should not be granted.

30. On the final factor concerning the relationship between the parties, unlike a member of a family or a group of companies, the members of this concert party do not have the kind of close relationship which would support the waiver of the mandatory offer obligation.

31. Lastly, even if the arrangements between ArcelorMittal, Macquarie and the banks warranted the grant of a waiver it could not now be given retrospectively.

Points raised in the other submissions to the Panel

32. The legal advisers of ArcelorMittal explained that great care had been taken in designing the arrangements so that at no time during the completion of the arrangements did ArcelorMittal hold the voting rights attaching to the shares subject to the put option held by DB. The original contract permitted ArcelorMittal to direct that shares be transferred to a party nominated by it. Further the form of exercise of the put also specified that ArcelorMittal could nominate the party to whom the shares issued to be transferred. So although there were two transactions, a purchase from DB and a sale to Macquarie by ArcelorMittal, at no time did ArcelorMittal hold the voting rights attaching to the shares acquired by Macquarie. The physical transfer of shares went directly from DB's CCASS account to that of Macquarie.

33. The order of the transactions was important. The agreement with Macquarie preceded the exercise of the put option by DB so that Macquarie could be nominated as the transferee of the shares under the put option. The actual purchases and sales were completed simultaneously on 30th April, 2014. In this regard the Takeovers Executive confirmed that it recognises simultaneous completion and had done so for a while. However, it looked extremely carefully at the facts and circumstances of each case. On at least three occasions it has confirmed that no general offer obligation would arise as a result of simultaneous completion.

34. It was apparent that any effort to restore the public float had been unsuccessful. ArcelorMittal had suggested a combination of a sale by the two major shareholders and the issue of new shares by China Oriental. Mr. Han, on the other hand, was adamant that any proposal to restore the public float should involve ArcelorMittal only. In this circumstance it was difficult to see how the public float was to be restored. In the absence of this, any sales of shares in China Oriental by Macquarie at prices in excess of HK$1.70 appeared equally remote. It was likely, therefore, that the shares in China Oriental would remain suspended throughout the life of the agreements with ING and Macquarie which end on 30th April, 2015.

35. Stress was also made on the short time there had been to negotiate the arrangements with Macquarie as ArcelorMittal had little more than a month to find a replacement for

DB. Having said this, the arrangements were very similar to the original arrangements with the banks. While the parties were unsure why they had settled upon HK$1.70 per share as the price of the put option, the price had apparently been the subject of negotiation. It would seem, however, that it was the minimum price that ArcelorMittal was prepared to sell an interest in China Oriental and it would be a price which was not artificially depressed by the prospect of a prolonged suspension.

36. Notwithstanding the arrangements with the banks and Macquarie, ArcelorMittal continued to reflect its interest in China Oriental as a 47% held associate. A note in its most recent accounts explained that it had not "derecognized" the 17.4% shareholding in China Oriental, as ArcelorMittal retained a significant exposure to the risks and rewards of this investment through the put options.

37. Macquarie was adamant that it was not simply warehousing the shares in China Oriental or providing a "safe harbour" for them. It had the complete freedom to vote the shares as it wished and the undertaking to support ArcelorMittal in any effort to restore the public float did not alter its freedom to vote on any other matter. Although Macquarie generally did not vote the shares it held, the shareholdings that it held tended to be small relative to the issued capital of the companies in which it invested, the majority being well below 1%. If there were proposals which could increase the value of the investment, Macquarie would vote to support them. When it entered into the arrangements with ArcelorMittal, it had believed there was genuine upside potential in the shares in China Oriental. In agreeing to the arrangements it had looked at the published information on China Oriental and noted in particular its net asset value per share which was substantially higher than HK$1.70 per share. What Macquarie had not appreciated at the time the arrangements with ArcelorMittal were being negotiated was that the prospect of any agreement between ArcelorMittal and Mr. Han on restoring the public float was as remote as they appeared to be now. On the question of its fees, these appeared to be normal for the transactions of this kind with institutions of Macquarie's size.

38. The Takeovers Executive also confirmed that the tight timetable to complete the arrangements put it under considerable pressure to respond to ArcelorMittal's request for guidance on how the arrangements would be viewed by the Takeovers Executive. It was primarily for this reason that the consideration of the presumption of acting in concert came rather late in its assessment. On balance the Takeovers Executive considered that Macquarie was not acting in concert with ArcelorMittal as there were sufficient factors to rebut the presumption. Even if the Takeovers Executive was wrong on this point, its decision did not turn on it. If Macquarie was a presumed concert party so too were ING and DB. In neither instance did any party cross a Rule 26.1 trigger point, being either passing through 30% or, if the holding was between 30% and 50%, an increase of 2% or more. In normal circumstances when no trigger point has been crossed, no mandatory offer arises.

39. Note 1 of the Notes to Rule 26.1 does not apply in all cases where shareholdings of a concert party group change. It happens only if the balance of the group has changed significantly or in effect a new concert party has been formed. In this regard it gives as an example the sale of all or a substantial part of a shareholding by one member of a concert party group to another. In the present case there was not a significant change. While the criteria set out in Note 6(a) was not particularly relevant to the present case, the Note directs the Takeovers Executive to look at them. The leadership remained unaltered and the balance between two financial institutions remained unchanged. The price paid did not appear to reflect a premium for control. Similarly the length of the relationship between concert party members was not particularly relevant.

40. Both the Wing Hang Bank Limited and Hong Kong Aircraft Engineering Company Limited matters were very different. In the first the arrangements were designed to consolidate the position of the Fung family. When the Bank of New York wanted to dispose of a much larger percentage of the voting rights, than is now held by Macquarie in China Oriental, part was sold to the Fung family. Further, there were contractual arrangements between the members of the concert party which clearly strengthened the Fung family's position within the concert group. On the second matter, Swire Pacific Limited directly and through a non-wholly owned subsidiary obtained statutory control. It passed through a trigger point in the Takeovers Code.

41. Lastly, Note 1 of the Notes to Rule 26.1 did not require parties to obtain a waiver from the Takeovers Executive. The initiative rests with the Executive to decide whether changes within a concert party group, which do not result in a takeover trigger being crossed, give rise to a mandatory offer obligation. That the criteria the Takeovers Executive is directed to consider is the same as in Notes 6(a) and 7, which deal with the basis on which waivers are granted, does not alter this.

The decision and the reasons for it

42. The Panel considered that the starting point in assessing the arrangements was the presumption of acting in concert under class 9 of the definition and, if the arrangements between the parties fell within that definition, they were presumed concert parties unless they could establish the contrary. The onus was on Macquarie to rebut the presumption and, in this regard, in line with past practice Macquarie would have to make a compelling case to do so.

43. There was no doubt that ArcelorMittal, which is not an authorised financial institution, had provided financial assistance to Macquarie. The arrangements between them resulted in Macquarie acquiring a 7.5% interest in China Oriental without the outlay of any money and without it assuming any financial risk which was effectively mitigated by the put option arrangement and the indemnity given by ArcelorMittal. It is difficult to escape the conclusion that the primary purpose of these arrangements was to facilitate a financial institution to hold on a temporary basis a shareholding in China Oriental and it was paid attractive fees for doing so. Without an arrangement of this kind ArcelorMittal would have had to purchase DB's shareholding in China Oriental thereby triggering a mandatory offer obligation under Rule 26.1 at a very high price.

44. While there was no explicit understanding or agreement to vote together, indeed it would have been surprising if such arrangements had been documented were they to have been intended, there was an incentive on both sides to cooperate together in relation to China Oriental and by its own admission Macquarie had made little effort to know China Oriental better or to meet its management.

45. The arrangements did not need to be exclusively for the purpose of holding shares on behalf of ArcelorMittal on a temporary basis. There were circumstances which would have yielded Macquarie an investment return over and above the fees it had charged. However, this must have been a subsidiary consideration and by the time of the Panel hearing, if not at the outset, the prospect of a successful sale of shares in China Oriental at a price in excess of HK$1.70 was remote.

46. Accordingly, for the reasons set out above, the Panel did not believe that the presumption had been rebutted by Macquarie and so it was by presumption acting in concert with ArcelorMittal.

47. Given the similarity of the arrangements, it would follow that both ING and DB were also parties presumed to be acting in concert with ArcelorMittal. Throughout its existence, the concert party held 47% of the voting rights attaching to shares in China Oriental.

48. The Panel also concluded that the completion of the agreements between DB and ArcelorMittal on the one hand and ArcelorMittal and Macquarie on the other did not result at any time in ArcelorMittal acquiring additional voting rights as these voting rights passed directly from DB to Macquarie. It follows that no mandatory offer obligation arose on ArcelorMittal by it crossing a mandatory offer trigger point.

49. While the arrangements neither increased the concert party's aggregate holding nor caused any member of the concert party group to cross a mandatory offer trigger point, it did result in a change to the concert party group with the substitution of Macquarie for DB. In this circumstance Note 1 to the Notes to Rule 26.1 requires the Takeovers Executive to consider whether there has been a significant change to the concert party group and directs it to assess the changes against the criteria set out in Notes 6(a) and 7.

50. There is no doubt that the leadership of the concert party group remains unchanged and its contractual relationship between the other members of the concert party group are largely unchanged, except for the reduction in the exercise price of the put option. The balance of the concert party remained unchanged between ArcelorMittal and two financial institutions. This distinguishes it from the facts in the matter of Wing Hang Bank Limited. The position may have been different if the leader of the concert party group was clearly seeking to consolidate control of the target and the transfer of a minority concert party stake involved the introduction of strategic investors. But this was not the case in this matter.

51. On the other criteria set out in Note 6(a) it was difficult to see how they have relevance. Since Macquarie had not in effect paid a price for its shareholding, the arrangements hardly qualified for a payment of a control premium and the higher the purchase price and the price of the put option the more likely the put option would be exercised resulting in the shares returning to ArcelorMittal. Further, if the primary purpose of the arrangement was to hold shares for ArcelorMittal on a temporary basis, the length of the relationship is not relevant either. The relationship was simply a financial institution, which could have been one of many, facilitating what ArcelorMittal wanted to achieve.

52. Given that the Panel has concluded that there was no significant change to the concert party, it follows that no mandatory offer obligation for any member of the concert party group has arisen under Note 1 to Rule 26.1.

14 October, 2014

Parties:

The Takeovers Executive
China Oriental Group Company Limited, through its independent non-executive directors, advised by Sullivan & Cromwell
ArcelorMittal, advised by Linklaters
Deutsche Bank, advised by Clifford Chance
ING
Macquarie Bank Limited, advised by Allen & Overy