

TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to a referral by the Executive to the Takeovers and Mergers Panel (the “Panel”) for a ruling in relation to statements made by a representative of the Offerors regarding China Gas Holdings Limited (“China Gas”, Stock Code: 384) under the Code on Takeovers and Mergers (“Code”)

Introduction

1. The Panel met on 2 April 2012 to consider a referral by the Executive under section 10.1 of the Introduction to the Code, which relates to referrals by the Takeovers Executive in respect of particularly novel, important or difficult points at issue. The hearing was non-disciplinary.
2. The Panel was asked to consider:
 - (a) whether certain statements by Mr Fu Chengyu (“Mr Fu”), Chairman and executive director of China Petroleum & Chemical Corporation (“Sinopec”, Stock Code: 386) constitute a “no increase statement” under Rule 18.3 of the Code; and if so, whether ENN Energy Holdings Limited (“ENN”, Stock Code: 2688) and Sinopec (together, the “Offerors”) should be bound by such statements; and
 - (b) in the event that the Panel does not consider the statements to constitute a no increase statement whether a clarification announcement should be issued under Rule 18.1.

Background and a summary of the facts

5. On 6 and 7 March 2012, the press widely reported statements made by Mr Wang Yusuo (“Mr Wang”), chairman of ENN, to the effect that “increasing the joint bid” would be “impossible” and the “takeover offer won’t be raised” (“First Incident”).
An [announcement](#) was issued by the Offerors in the afternoon of 7 March 2012 to confirm that they had not made any “no increase statement” pursuant to Rule 18.3 of the Code.
6. On 9 March 2012, the Executive issued a warning letter to Sullivan & Cromwell (“S&C”), legal advisers to the Offerors, requesting it to convey to its client the Executive’s serious concerns about Mr Wang’s conduct.
7. On 26 March 2012, Mr Fu made oral statements (the “Statements”) in Mandarin to the media during a press conference for Sinopec’s annual results. A transcript of the statements as submitted by S&C is as follows:

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”

The English translation (also submitted by S&C and agreed by the Executive) is as follows:

“Regarding the acquisition of China Gas, we and ENN Energy have provided an offer price, which reflects fair value given to China Gas in accordance with market circumstances. As to whether or not there will be an increase to the offer price,

framework within which takeovers, mergers and share repurchases are to be conducted.”

12. General Principle 6 of the Code states (emphasis added):

“All persons concerned with offers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of a false market. **Parties involved in offers must take care that statements are not made which may mislead** shareholders or the market.”

13. Note 1 to Rule 9.1 states (emphasis added):

“1. Financial advisers’ responsibility for release of information

The Executive regards financial advisers as being responsible to the Executive for guiding their clients and any relevant public relations advisers with regard to any information released in relation to an offer or possible offer or during an offer period.

*Advisers must ensure at an early stage that directors and officials of companies are warned that they must consider carefully the Takeovers Code implications of what they say, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. **In appropriate circumstances, the Executive will require a statement of retraction.** Particular areas of sensitivity on which comment must be avoided include future profits and prospects, asset values **and the likelihood of the revision of an offer** (see also the Notes to Rule 8.1).”*

14. Rule 18.1 of the Code states (emphasis added):

“No misleading statements

Parties to an offer or possible offer and their advisers must take care not to issue statements which, while not factually inaccurate, **may mislead shareholders and the market or may create uncertainty.** In 153 TD[(wiew0nd the mark)Tj mu6,

16. Note 1 to Rule 18 states:

"1. Firm Statements

In general, an offeror will be bound by any firm statements as to the duration or finality of its offer. Any statement of intention will be regarded for this purpose as a firm statement and accordingly the expression "present intention" should not be used as it may be misleading to shareholders. Furthermore, the Executive will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, i.e. the offer is "final", or will not be "increased", "amended", "revised", "improved", "changed", and similar expressions will all be treated in the same way."

The case of the Executive in summary

17. The Executive submitted that:

- (a) the Statements made by Mr Fu constitute a "no increase statement" for the purpose of Rule 18.3.
- (b) it interpreted the Statements to mean that the offer price of HK\$3.50 reflects the market value of China Gas shares and that the Offerors cannot pay a price that is higher than HK\$3.50 per share.
- (c) as the Statements had not been immediately withdrawn or clarified (despite repeated requests by the Executive to do so) that they also constituted a statement which may mislead shareholders and the market or may create uncertainty within the meaning of Rule 18.1.
- (d) it noted that the Statements made by Mr Fu were intentional and carefully crafted. However the Executive was not at any time consulted about these Statements before they were made. This was all the more surprising as following the First Incident the Executive specifically wrote to S&C asking them to draw their client's attention to General Principle 6, Rule 8.1, Note 2 to Rule 8.1, Rule 18.1 and Rule 18.3 of the Code.
- (e) Rule 18.3 clearly contemplates a whole range of possible statements that might constitute a no increase statement. The fact that examples of such statements are given does not preclude differently worded statements from being interpreted as falling within the ambit of the Rule.
- (f) as to whether or not the Statements had misled shareholders or resulted in uncertainty the Executive noted that the Statements have been widely reported by the press with many different interpretations.

The case of the Offerors in summary

18. S&C, on behalf of the Offerors, submitted that:

- (a) Mr Fu did not mention a specific offer price. He did not state that the Offerors will not increase the offer price. He did not state that the Offers will not be amended,

revised, improved or changed. He did not mention that the offer price will remain

22. The Panel did not attach much weight to the submissions from the Offerors and China Gas which attempted to draw inferences from market turnover and prices as to whether or not the Statements were a no increase statement. As there are numerous factors which might affect share price and turnover, to ascertain the precise causes of changes in these (or the lack thereof) is often a speculative task.
23. The Panel noted the increase in volume in China Gas shares on 27 March 2012 to its highest daily level in two weeks, which occurred on the day of the media coverage of the Statements. Although it could offer some support to the submission that the Statements caused uncertainty and confusion, there are numerous other factors, other than the Statements, which might have affected price and turnover. However, the Panel would like to emphasise that Rule 18.1 cautions against making statements which “**may** mislead shareholders and the market or **may** create uncertainty” (emphasis added); no demonstration of actual market impact is necessary for statements to be potentially misleading or to potentially create uncertainty.
24. Clear evidence of the confusion caused by the Statements lies in the broad range of interpretations of the meaning of the Statements in media coverage, as does a common-sense reading of the agreed translation of the Statements. The Panel is of the view that the Statements could reasonably have been taken (amongst other meanings) to mean:
 - (a) “we will not offer more than the current market price” (which closed on 26 March 2012 at \$3.77, a premium to the offer price of \$3.50), indicating a cap on a possible increase; or
 - (b) “we cannot (and therefore will not) raise our offer price because it already reflects market prices or values for similar businesses” (a no increase statement); or
 - (c) “we will not pay more than we think it is worth from time to time with regard to market circumstances, and currently we think our offer reflects the fair value of China Gas”.
25. Accordingly, in this case, the Panel rules that the Statements did not constitute a “no increase statement” under Rule 18.3 but were ambiguous and created uncertainty as to whether or not the Offerors were ruling out the possibility of an increase in the Offers.
26. The Panel rejects the submission by the Offerors that it was necessary to “strike a delicate balance” between the prohibitions of the Code and providing a “meaningful

28. In particular, Citigroup Global Markets Asia Limited, the financial adviser to the Offerors, is reminded of Note 1 to Rule 9.1 which states that it is the financial advisers who are responsible for guiding their clients with regard to any information released in relation to an offer. Whilst parties to an offer are of course free to take legal advice and to make submissions via their lawyers, this does not absolve the financial adviser of its primary role and duties under the Code, and it is the financial adviser who is licensed by the SFC for this purpose.
29. Prior to the referral to the Panel, the Offerors were afforded by the Executive every opportunity to publicly clarify the Statements, but chose not to. The Panel rejects the submission by the Offerors that clarifying the Statements could in any sense cause market confusion and speculation in itself. It would merely return the position to where it had been before the Statements were made (and after the clarification following the First Incident). Clear, accurate and unambiguous statements do not increase uncertainty.
30. It is a matter of regret to the Panel that it was even necessary to hear this case. The Panel takes this opportunity to remind practitioners that General Principle 10 requires that “all parties concerned with transactions subject to the Code are required to co-operate to the fullest extent with the Executive...”. When the Executive asks a party to an offer to publish a clarification of statements made by its officials, that request should be acceded to without delay unless there are very good reasons to challenge the Executive’s position. In the Panel’s view, this clearly was not one of those occasions.
31. In view of the urgency of reducing the confusion caused by the Statements, in the oral decision which preceded this written ruling, the Panel required the Offerors to issue the clarification previously requested by the Executive, and specifically to state whether or not they rule out the possibility of an increase in the offer price. This statement was to be made by 6pm on 3 April 2012 or such later time as the Executive may have agreed.

Post-hearing note

32. Subsequent to the Panel hearing, at 5:55pm on 3 April 2012, the Offerors issued an [announcement](#) as required by the Panel.

12 April 2012

Parties present at the hearing:

The Executive

ENN and Sinopec: the Offerors

Citigroup Global Markets Asia Limited: financial adviser to the Offerors

Sullivan & Cromwell: legal adviser to the Offerors

Kirkland & Ellis: legal adviser to the financial adviser to the Offerors

China Gas

Linklaters: legal adviser to China Gas