

TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to a referral by the Takeovers Executive to

6. In 2008 the Company entered into an agreement with MCL, a company wholly-owned by Mr. Lai, under which the Company agreed to acquire Merdeka Timber Group Limited, a company which held a natural forest concession in Papua, Indonesia, and which was wholly-owned by MCL, in consideration for a payment in cash of HK\$7.8 million and an principal amount of HK\$776.88 million. The Convertible Bonds are convertible into shares in the Company at a conversion price of HK\$0.10 per share. To the extent that the Convertible Bonds have not been converted, the Convertible Bonds are repayable at their principal amount on 12th August, 2011. It is a term of the Convertible Bonds that MCL and its nominees do not have the right to convert any Convertible Bonds if such conversion resulted in MCL and parties acting in concert with it becoming interested in 30% or more of the enlarged issued share capital of the Company. The terms of the Convertible Bonds were designed so that their initial holder could not trigger a mandatory general offer obligation through their conversion. Notwithstanding this, conversion, whether by MCL and its nominees or others, could be expected to have a substantially dilutive impact on the percentage shareholdings of existing shareholders

To the extent that the Convertible Bonds are not converted, they represent a very substantial liability for the Company.

7. Following the acquisition of Merdeka Timber Group Limited by the Company, Mr. Lai
Company who had direct responsibility were appointed by the project.
8. The Panel was told that prior to the acquisition of Merdeka Timber Group Limited, there had been no business dealings between companies controlled by Mr. Mak and companies controlled by Mr. Lai. In addition, apart from the Company itself, there were no other business dealings between them subsequent to that time.
9. During 2009 the relationship between CCT Telecom Parties and Mr. Lai appears to have soured. There was little development of the forestry project. The two directors appointed to manage the forestry project either resigned or, according to Mr Lai, were dismissed.
10. On 12th July, 2010, the Company announced that it had entered into conditional acquisition and share subscription agreements under which it would acquire a 28% indirect shareholding in a gold mine situated in Gansu Province, the PRC, in consideration for an issue of 1,200 million shares at HK\$0.10 per share and a subscription for cash by the vendor of 500 million new shares at HK\$0.10 per share. There was also an option to acquire the balance of the interest in the gold mine. These arrangements were conditional upon the passing of a special resolution to change the name of the Company so that it would not be associated with CCT Telecom.
11. Had these arrangements been implemented there would have been a substantial change in the balance of the shareholdings in the Company with the emergence of the vendor as a substantial shareholder
It would also move the Company into a completely new area of activity. Mr. Lai found nothing to recommend in these arrangements and, when asked, CCT Telecom did not expect him to have done so. Despite the fact that it was expected that the MCL Parties would object to the proposal, no effort was apparently made by CCT Telecom to canvass the support of other shareholders for this proposal.

The relevant provisions of the Takeovers Code

of a company but may cause a mandatory offer obligation to arise. The relevant part of Note 1 states the following:

“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.”

The criteria which would persuade the Takeovers Executive that a new concert party had not been formed are set out in Note 6(a) to Note 26.1, the relevant part of which reads as follows:

“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.”*

When a controlling shareholder, such as the CCT Telecom Parties, sells a part only of ^{will be concerned} to see whether in such circumstances the arrangements between the purchaser and vendor effectively allow the purchaser to exercise a significant degree of control over the retained voting rights, in which case a general offer would normally be required.” The Note then describes the criteria which would be applied to establish the degree of control over the retained voting rights in the following terms:

“A judgement on whether such a significant degree of control exists will obviously depend on the circumstances of each individual case, but, by way of guidance, the Executive would regard the following points as having some significance:-

- (a) there would be less likelihood of a significant degree of control over the retained voting rights if the vendor was not an “insider”;*
- (b) the payment of a very high price for the voting rights would tend to suggest that control over the entire holding was being secured;*
- (c) if the parties negotiate options over the retained voting rights it may be more difficult for them to satisfy the Executive that a significant degree of control is absent. On the other hand, where the retained voting rights are in themselves a significant part of q*

reasonably compatible with his own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor's support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained voting rights, would not lead the Executive to conclude that a general offer should be made."

21. Concert parties exercise control through the exercise or potential exercise of voting rights. It is the only way they can exercise control. So voting together would be an action that would be expected of concert parties. However, while voting of itself with other shareholders would not confirm the existence of a concert party, it could be indicative of one depending on the circumstances. Note 4 to Rule 26.1, which deals with shareholders voting together, reads as follows:

"The Executive will not normally regard the action of shareholders voting together on particular resolution as action which of itself should lead to an offer obligation, but that circumstance may be taken into account as one indication that the shareholders are acting in concert."

The case of the Takeovers Executive in summary

22. Although it was not possible to say with precision when the concert party between the MCL Parties and the CCT Telecom Parties had formed, it had certainly formed by the time an agreement in principle had been reached on 19th November, 2010. This was a concert party which held in excess of 50% of the voting rights attaching to the shares in the Company.
23. The evidence of acting in concert is often not direct, because concert party arrangements which are not admitted are often concealed. In these circumstances it is usually the inferences drawn from the facts that establish the existence of a concert party. The negotiations which led to the Acquisition and the arrangements which demonstrated an active cooperation between the parties, the p

