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**Purpose of the hearing**

1. The Panel met on 3<sup>rd</sup> December, 2008 to consider a referral by the Takeovers Executive under Section 10.1 of the Introduction to the Code on Takeovers and Mergers (the “Code”), which relates to a particularly novel, important or difficult point at issue. The Panel was asked to consider

deputy chairman of CX. Further, four independent directors are to be nominated to the board of CX. Accordingly, under the shareholders agreement, Swire is entitled to nominate nine directors out of a board of seventeen: that is, a majority of the board.

4. Apart from the undertakings by the shareholders to support the continuation and any periodic renewal of the management services agreement between CX and John Swire & Son (H.K.) Limited, the immediate holding company of Swire, and the operating agreement between CX and Air China, the shareholders agreement does not contain any provisions for reserved matters which would require the unanimous consent of the



15. Acting in concert is defined in the Code as follows:

*“Acting in concert: Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate to obtain or consolidate “control” (as defined below) of a company through the acquisition by*



*class are to be treated similarly.”*

**The decision and the reasons for it**

22. As the issues appeared to be finely balanced and any decision was likely to be used as a precedent for similar transactions in the future, the Panel considers that the Takeovers Executive was correct in referring the matter to the Panel. Undeniably this was not an easy decision to make as the Code requires the exercise of subjective judgement. However, when it reached its decision the Panel was unanimous.

out in two paragraphs. In the first paragraph the criteria are related to acquisitions by a member of a concert party when it is not a purely domestic matter, if we can characterise it as such; that is, it is applicable to concert parties generally. The second paragraph confines itself to acquisitions by a member of a concert party from another when the relationship is particularly close, being either a company with its subsidiaries or an individual together with close relatives, related family trusts and companies controlled by the individual or close relatives. When transfers of voting rights attaching to shares are made between the persons specified in the second paragraph, any mandatory takeover offer obligation is “normally” waived.

30. For a waiver to be granted to Swire in this matter under the criteria set out in the second paragraph of Note 6(a), it would be essential that the definition of subsidiary apply to CX. The term subsidiary is defined in the Code. In short it is subsidiary as defined by the Hong Kong Companies Ordinance or an entity whose results are, or are to be, consolidated in another entity’s accounts. It was agreed by all parties that, notwithstanding the shareholders and management services agreements referred to earlier, CX was not by definition a subsidiary of Swire.
31. It was argued that, although CX was not a subsidiary of Swire, if the second paragraph were to be read purposively, as it was suggested it should be, this would include CX in relation to Swire. The Panel disagrees with this argument. The second paragraph is subsidiary-owned or controlled by the person specified in paragraph 6(a)(e)-an





did not meet in full the requirements of the first paragraph of Note 6(a) and, accordingly, a waiver should not be granted.

10 December, 2008

Parties present at the hearing:

The Takeovers Executive

Swire Pacific Limited

RBS Asia Corporate Finance Limited – financial adviser to Swire Pacific Limited

Slaughter and May – legal adviser to Swire Pacific Limited