

TAKEOVERS AND MERGERS PANEL

Panel Decision

In relation to a referral to the Takeovers and Mergers Panel (the “Panel”) by the Takeovers Executive for a ruling on whether Nam Tai Electronics, Inc. (“NTEI”) is permitted to extend its offer for the shares in Nam Tai Electronic and Electrical Products Limited (“NTEEP”) not owned by NTEI or parties acting in concert with it, having previously announced that such an offer had lapsed

Purpose of the hearing

1. The Panel met on 14th April, 2009 to consider a referral by the Takeovers Executive under Section 10.1 of the Introduction to the Code on Takeovers and Mergers (the “Code”) and the Share Repurchases Code (collectively the “Codes”), which relates to a particularly novel, important or difficult point at issue. The Panel was asked whether it agreed with the Takeovers Executive that NTEI should not be permitted to extend for a further 14 days its offer for the shares in NTEEP, other than those shares held by NTEI or parties acting in concert with it, having previously announced that such an offer had lapsed.

Background and facts

2. NTEI is a company listed on the New York Stock Exchange. It is the holding company of NTEEP holding directly or through parties acting in concert with it as at 13th March, 2009 approximately 74.88% of its issued share capital. The shares in NTEEP are listed on the Hong Kong Stock Exchange and have been since April, 2004.
3. On 24th February, 2009 the boards of directors of NTEI and NTEEP announced that NTEI had informed NTEEP of its intention to make a voluntary conditional general cash offer to acquire all the shares in NTEEP, other than those owned by NTEI and parties acting in concert with it, at a price of HK\$1.50 per share, which represented a premium of approximately 168.2% over the closing price of HK\$0.57 per share on 20th February, 2009, being the last trading day prior to the temporary suspension of trading in NTEEP shares. The offer was final and not subject to revision. The announcement stated that the offer was subject to the condition that NTEI received acceptances and, or, purchases made after the posting of the initial composite offer document totalling at least 90% of the shares subject to the offer and, should that condition be fulfilled, NTEI would seek to exercise the right to compulsory acquisition so that it would constitute NTEEP as a wholly-owned subsidiary thereby effectively privatising it. The announcement, among other things, also stated that the first closing date of the offer would fall on the twenty-first day from the date on which the initial composite document had been posted. The offer was to be made by Yu Ming Investment Management Limited (“Yu Ming”) on behalf of NTEI.
4. The composite offer document dated 14th March, 2009 containing the offer and the response of NTEEP to it was despatched and the offer opened on 16th March, 2009. The first closing date of the offer was 6th April, 2009, being the twenty-first day following the commencement of the offer. In a note to the expected timetable given in the composite offer document reference is given to the latest date on which the offer could become unconditional, except with the consent of the Takeovers Executive, being 15th

would have become unconditional allowing NTEI to proceed to acquire compulsorily the balance of the shares in NTEEP subject to the offer.

The relevant provisions of the Code

11. In addition to its primary purpose of affording fair treatment for shareholders who are affected by takeovers and mergers and providing disclosure of timely and adequate information, the Code seeks to impose an orderly framework for the conduct of takeovers. In paragraph 1.2 of the Introduction to the Codes it is stated that:

“The Codes also provide an orderly framework within which takeovers, mergers and share repurchases are to be conducted.”

The disciplines imposed on the conduct of takeovers in Hong Kong are designed to achieve as far as possible conditions of certainty. This can be seen in such provisions as those relating to the preliminary announcement of an offer which requires the publication of the full terms and conditions of an offer and confirmation of the sufficiency of the financial resources available to the offeror [Rule 3.5]; the timetable for offers [Rule 15]; the binding nature of statements made during the course of an offer [Rule 18] and the prohibition on the inclusion of subjective conditions, the fulfilment of which depends on the judgment of the offeror or the fulfilment of conditions which are in his hands [Rule 30.1].

12. The Code is not concerned with the commercial aspects of a takeover or merger transaction. This is set out in paragraph 1.8 of the Introduction to the Codes which states that:

“The Codes are not concerned with the financial or commercial advantages or disadvantages of a takeover, merger or share repurchase, as the case may be. These are matters for the company and its shareholders”.

13. Provision is made in the Codes for the exercise of discretion by the Takeovers Executive and the Panel in certain circumstances. This is stated in paragraph 2.1 of the Introduction to the Codes which reads:

“[T]he Executive and the Panel may each modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or otherwise inappropriate, manner.”

14. The 90% acceptance condition of the offer made on behalf of NTEI was in accordance with the requirements of Rule 2.11, which sets out the acceptance condition required for a privatisation proposal effected by way of a takeover offer, as was the offer on behalf of NTEI for NTEEP. Rule 2.11 states that:

“Except with the consent of the Executive, where any person seeks to acquire or privatise a company by means of an offer and the use of compulsory acquisition rights, such rights may only be exercised if, in addition to satisfying any requirements imposed by law, acceptances of the offer and purchases (in each case of the disinterested shares) made by the offeror and persons acting in concert with it during the period of 4 months after posting the initial offer document total 90% of the disinterested shares.”

As with other numerical thresholds contained in the Code, it is an absolute requirement. No allowance can be made in its fulfilment if it fails to achieve the relevant threshold by even the most minimal amount.

15. Rule 9.1 sets out the standard of care and responsibility for announcements and documents made or issued during the course of a takeover. The relevant part of the Rule reads as follows:

“Each document issued or statement made in relation to an offer or possible offer or during an offer period must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented...”

Further, Rule 9.3 requires all directors to accept jointly and severally full responsibility for the accuracy and completeness of statements made in documents, which includes announcements, issued in the course of a takeover.

16. An offeror is not permitted except in wholly exceptional circumstances to reverse a statement made in connection with the duration of the offer. This is set out in Rule 18.2 and an accompanying note, the relevant parts of which read as follows:

“No extension statements

If statements in relation to the duration of an offer such as “the offer will not be extended beyond a specified date unless it is unconditional as to acceptances” (“no extension statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the stated date except where the right to do so has been specifically reserved....

Notes to Rule 18:

1. Firm statements

In general, an offeror will be bound by any firm statements as to the duration or finality of its offer...”

17. Rule 19.1 of the Code sets out the procedure to be followed when announcing the results of an offer. The relevant part of the Rule reads as follows:

“By 6.00 p.m. (or such later time as the Executive may in exceptional circumstances permit) on a closing date the offeror must inform the Executive and the Stock Exchange of its decision in relation to the revision, extension, expiry or unconditionality of the offer. The offeror must publish an announcement on the Stock Exchange’s website by 7.00 p.m. on the closing date stating whether the offer has been revised or extended, has expired or has become or been declared unconditional (and, in such case, whether as to acceptances or in all respects). A draft of such announcement must be submitted to the Executive and the Stock Exchange by 6.00 p.m. for comment. Such announcement must be republished in accordance with Rule 12.2 on the next business day thereafter...”

18. Note 1 to the Notes to Rule 30.2 sets out how acceptances to an offer are to be counted

(a) it is received by the offeror's receiving agent on or before the last time for acceptance set out in the offeror's relevant document or announcement and the offeror's receiving agent has recorded that the acceptance and any relevant documents required by this Note have been so received; and ..."

19. Finally, Rule 31.1(a) sets out the consequences of an offer which has lapsed because it

shareholders' interest by giving them more time so the offer could succeed.

The decision and reasons for it

22. As a general observation it is apparent that, as stated in the Introduction to the Codes, a takeover in Hong Kong is expected to be an or

is why it disregards incomplete acceptances for inclusion in the calculation of whether an acceptance condition is fulfilled. In the matter before it, the Panel concluded that there did not exist a wholly exceptional circumstance of the kind which would warrant the retraction of the decision not to extend the offer on 6th April, 2009, thereby allowing the offer to be re-opened.

27. For the reasons given above, the Panel endorsed the Takeovers Executive's view that the offer should not be re-opened. It follows that, without the consent of the Takeovers Executive, NTEI will not be permitted under the Code to make an offer for the shares in NTEEP for the twelve month period commencing 6th April, 2009.
28. As a subsidiary matter, the Panel authorised that its decision, but not the reasons for it, could be contained in an announcement supporting the reinstatement of the trading in the shares in NTEEP on the Hong Kong Stock Exchange in advance of the publication of this decision.

21st April, 2009

Parties present at the hearing

The Takeovers Executive

Nam Tai Electronics, Inc.

Yu Ming Investment Management Limited – financial advisers to Nam Tai Electronics, Inc.