

## TAKEOVERS AND MERGERS PANEL

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### PANEL DECISION

**In relation to a referral by the Executive to the Takeovers Panel for a ruling as to whether certain parties are acting in concert in relation to China Oriental Group Company Limited (“China Oriental” or “Company”) and related issues under the Codes on Takeovers and Mergers and Share Repurchases (“Codes”)**

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#### **Purpose of the hearing**

1. The Panel met on 5 December 2007 to consider a referral by the Executive under Section 10 of the Introduction to the Codes, which relates to referrals by the Executive in respect of particularly novel, important or difficult points in issue. The hearing was not a disciplinary hearing under Section 12 of the Introduction to the Codes.
2. The Panel was asked to consider the following:
  - (a) Whether the parties, namely ArcelorMittal S. A. (“**ArcelorMittal**”) and Mr Han Jingyuan (“**Mr Han**”) are parties acting in concert in relation to China Oriental.
  - (b) If so, whether a mandatory general offer obligation has been triggered as a result of the completion of ArcelorMittal’s acquisition of a 28.02% interest in China Oriental (“**Acquisition**”) and the consequences of that.
  - (c) Whether a put option (the “**Put Option**”) granted to Mr Han by

ArcelorMittal constituted a special deal under Rule 25 of the Code on Takeovers and Mergers (“**Code**”).

## **Background and facts**

### **Hostile offer by Ms Chen**

3. On 18 June 2007 Ms Chen Ningning (“**Ms Chen**”), a director of China Oriental holding 817,519,151 shares in the Company, representing approximately 28.11% of the then issued share capital of the Company (“**Shares**”), announced a hostile offer (“**Hostile Offer**”) for the Shares. The board of directors of the Company, which was

Wellbeing, the controlling shareholder of the Company with a 42.78% interest at the time.

6. On 3 August 2007 the offer document was issued.
7. On 17 August 2007 the response document was issued. The response document included the board's (including each of the independent non-executive director's but excluding Ms Chen's) advice to shareholders to reject the Hostile Offer and a statement that the board would welcome the exit of Ms Chen both as a board member and as a shareholder.
8. On 14 September 2007 (being the first closing date of the Hostile Offer), Smart Triumph Corporation ("**Smart Triumph**"), the company through which Ms Chen made the Hostile Offer, announced that it had received acceptances in respect of Shares representing approximately 1.91% of the issued share capital of the Company and that the Hostile Offer had not become unconditional. The offer price was revised.
9. On 17 September 2007 a revised offer document was issued.
10. On 25 September 2007 a response document to the revised offer was issued.
11. On 2 October 2007 (being the closing date of the revised Hostile Offer) Smart Triumph announced that (i) it had received acceptances in respect of Shares representing approximately 16.62% of the issued Shares; (ii) together with its 28.11% shareholding, Smart Triumph and parties acting in concert with it had become interested in 44.74% of the issued share capital of the Company; and (iii) as the Hostile Offer had not become uncond

12. On 29 October 2007 a special general meeting of China Oriental shareholders was held and an ordinary resolution was passed to remove Ms Chen as a director of the Company with immediate effect.

### **ArcelorMittal's involvement and the Acquisition**

13. In June and July 2007 ArcelorMittal approached Mr Han to discuss possible areas of future cooperation including the possibility of entering into a draft memorandum of understanding which included provisions for, amongst other things, call and put options over Shares, voting rights arrangements, management rights and Mr Han and ArcelorMittal's future roles in China Oriental.

14. In August and September 2007, there were further discussions on possible future cooperation between ArcelorMittal and Mr Han including the possibility of making a competing offer against the Hostile Offer. Matters discussed included, but were not limited to, the structure and strategy for a competing offer, the pricing mechanism for call and put options, cost sharing and financing.

### *Draft Cooperation Agreement*

15. On 3 October 2007, the day after the Hostile Offer lapsed, a draft cooperation agreement was initialed by both ArcelorMittal and Mr Han ("**draft Cooperation Agreement**"). The draft Cooperation Agreement referred to ArcelorMittal's wish to acquire certain Shares. It set out arrangements for Mr Han to make a voluntary offer (which was not pursued in fact) through a special purpose vehicle ("**Bidco**") and for call and put options over the Shares held by Mr Han. The draft Cooperation Agreement proposed inter alia the following:

(a) The offer by Bidco would be financed by ArcelorMittal.

(b)



waived. On the same day ArcelorMittal and the Company entered into the Business Cooperation Agreement.

24. The Shareholders' Agreement contains various provisions for cooperation between ArcelorMittal and Mr Han including those referred to below.

25. The Shareholders' Agreement provides for the 1<sup>st</sup> Call Option, the Put Option and the 2<sup>nd</sup> Call Option (as described below), and certain dealing restrictions on Mr Han, Wellbeing and Chingford including a restriction of the sale of their shares other than to ArcelorMittal.

26. The 1<sup>st</sup> Call Option is an option granted by Mr Han to ArcelorMittal for it to purchase all (but not part) of the 1<sup>st</sup> Call Option Shares (being the number of Shares that will bring ArcelorMittal's shareholding in the Company to 50.1%) which is exercisable only once by ArcelorMittal within a 12-month period commencing 18 months after the date the Shareholders' Agreement becomes unconditional.

27. The purchase price under the 1<sup>st</sup> Call Option will be calculated by reference to: (i) the equity value per Share based on the latest reported EBITDA for the 12 months and net cash or debt position of the Group prior to the exercise of the 1<sup>st</sup> Call Option; and (ii) the volume weighted average closing price of the 41491 -2.3033a2(f(g p )5.2((07.1(ou)4.4(p p)

completion of the sale and purchase of the 1<sup>st</sup> Call Option Shares. The Put Option is made conditional upon the exercise by ArcelorMittal of the 1<sup>st</sup> Call Option.

29.



*Issues arising from the Acquisition*

31. Under the Shareholders' Agreement Mr Han has undertaken to ArcelorMittal that so long as he is a party acting in concert with ArcelorMittal, he will not, without the consent of ArcelorMittal, acquire any further Shares that would result in ArcelorMittal having to pay (i) a higher offer price than HK\$6.12 in the possible unconditional mandatory offer for the Shares which ArcelorMittal proposed to make following and subject to the Shareholders' Agreement becoming unconditional; or (ii) a higher price than the purchase price under the 1<sup>st</sup> Call Option, the Put Option or the 2<sup>nd</sup> Call Option in a future mandatory general offer that may be made by ArcelorMittal for the Company.

32. It was agreed that Mr Han (or his representative) may remain as the chairman of the Company for a 36-month period after ArcelorMittal becomes interested in more than 50% of its issued share capital. Thereafter ArcelorMittal will have the right to nominate the chairman of the Company.

*No hostile of*

*Business Cooperation Agreement*

34. The Business Cooperation Agreement sets out certain terms of cooperation between ArcelorMittal and the Company, in particular, the terms of ArcelorMittal's participation in relation to the operation of China Oriental Group ("**Group**") and contains ArcelorMittal's undertaking to the Company in respect of the No Hostile Offer Agreement. Terms include technology transfer arrangements, provision of financial expertise, assistance in exploring overseas marketing opportunities and contribution towards the Group's plan to increase its steel production capacity.

**"Possible unconditional mandatory offer" proposal**

35. On 13 November 2007, ING Bank, financial advisers to ArcelorMittal, submitted to the Executive a draft announcement in respect of a "possible unconditional cash offer" to be made by ArcelorMittal ("**Draft Announcement**"). The Draft Announcement stated that upon the Shareholders' Agreement becoming unconditional, *"the Controlling Shareholders [*

acting in concert and the fact that under Rule 26.2 of the Takeovers Code a mandatory offer could not be made subject to conditions (other than the acceptance condition which would not be applicable in this case). In the days that followed the Executive raised a number of further requisitions and had various discussions with Baker & McKenzie (ArcelorMittal's legal advisers). During these discussions the Executive stated that it had formed the view that it considered ArcelorMittal and Mr Han to be acting in concert at the time ArcelorMittal completed the Acquisition and in consequence a mandatory offer obligation had been triggered. The Executive indicated an appropriate announcement should be made as soon as possible.

#### **Executive referral to Panel**

37. As ArcelorMittal and its advisers were not able to satisfactorily address the concerns raised by the Executive, the matter was referred by the Executive to the Panel on 23 November 2007 for its consideration as it involves novel, important or difficult issues.

#### **The Panel's rulings and the reasons for them**

38. The Panel considered carefully the written and verbal submissions of the parties and the Executive and the answers given by the parties and the Executive to questions raised by the Panel.

39. In its deliberations, the Panel addressed first the question of whether ArcelorMittal and Mr Han were acting in concert in relation to China Oriental at the time of the Acquisition.



*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.”*

### **Decision**

44. ArcelorMittal acquired 28.02% of the Shares at a time when it was acting in concert with Mr Han who at the time held an interest in aggregate of 44.81% of the Shares of the Company. This gave rise to a mandatory offer obligation under Rule 26.1(d).

45. The Panel requires that the Parties comply with their obligations under Rule 26.1(d) to make a mandatory offer. The offer will be unconditional in all respects as the acceptance condition of 50% set by Rule 30.2 of the Code is already satisfied by the combined shareholding of ArcelorMittal and Mr Han, being parties acting in concert. Rule 30.2 is set out below.

*“30.2 Acceptance condition –*

*Except with the consent of the Executive, all offers, except partial offers made under Rule 28, shall be conditional upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and persons acting in concert with it holding more than 50% of the voting rights of the offeree company.*

*A voluntary offer may be made conditional on an acceptance level of shares carrying a higher percentage of the voting rights.*

*Mandatory offers made under Rule 26 shall be subject to no other conditions, whether as to minimum or maximum levels of acceptances required to be received or otherwise. It follows that the offer should be unconditional where the offeror and persons acting in concert with it hold more than 50% of the voting rights before such offer is made.”*

### **Reasons**

46. Acting in concert is one of the most crucial definitions in the Code. It is crafted in deliberately wide terms and has been the subject of analysis in a number of Panel decisions. It is well established that there are three elements to acting in concert. There must be (i) an agreement or understanding (whether formal or informal); (ii) to actively co-operate to obtain or consolidate control; (iii) through the acquisition of voting rights.
47. It is equally well recognized as the Panel observed in the Kong Tai case that :

49. The difference between them lies in essence in differing views as to what is necessary to constitute “an agreement or understanding formal or informal.....” for the purposes of the Codes.
50. It was ArcelorMittal’s contention, endorsed by Mr Han and his advisers, as set out in their legal adviser’s submission to the Executive dated 20 November 2007 that :

the single determinative test as to whether ArcelorMittal and Mr Han are parties acting in concert.

52. The evidence before the Panel, which was not disputed and which the parties confirmed, was of serious engagement between the parties to explore various avenues to obtain or consolidate control of the Company. These were not casual discussions: they involved advisers; they contemplated detailed business arrangements, complex option provisions, draft documentation; and included a written undertaking albeit not legally binding from Mr Han that the terms of the draft Cooperation Agreement initialled on 3 October 2007 on which consensus had been reached would remain unchanged and setting out the way forward for a legally binding agreement to be reached.

53. Acting in concert is seldom evidenced by a single event. Here the conduct of the parties over an extended period of time, leads the Panel to conclude that notwithstanding that a legally binding agreement was only executed immediately after the Acquisition, there was at the time of the Acquisition an informal agreement



narrowest of formal legal terms and sits at variance with the wider compass of the definition contained in the Codes.

**Rule 26**

54.

55. General Principle 4 is also germane in that it provides:

*“An offeror should announce an offer only after careful and responsible consideration. The same applies to making acquisitions which may lead to an obligation to make a general offer. In either case the offeror and its financial advisers should be satisfied that it can and will continue to be able to implement the offer in full.”*

56. The Panel sees neither need nor merit in the matter before it to consider or recommend any dispensation from these cornerstone provisions.

**Special deals**

57. Rule 25 of the Code provides as follow:

*normally find acceptable an option arrangement which guaranteed the original offer price as a minimum. The Executive will normally require, as a condition of its consent, that the independent adviser to the offeree company publicly states that in its opinion the arrangements with the management of the offeree company are fair and reasonable. In addition, where the offeror and the management of the offeree*

61. The Panel was not persuaded, however, that these necessarily asymmetric

*“When there is any doubt as to whether a proposed course of conduct is in accordance with the General Principles or the Rules, parties or their advisers should always consult the Executive in advance. In this way, the parties can clarify the basis on which they can properly proceed and thus minimise the risk of taking action which might be a breach of the Codes.”*

67. The Panel is firmly of the view that had the consultation process defined by paragraph 6 been followed then the risk of a failure to comply with the Codes would have been greatly reduced, as the Executive would likely have reached the same view as it did when informed of the full facts after the Acquisition and Put Option had been entered into.

68. The attention of all advisers and parties subject to the Codes is therefore explicitly drawn to the provisions of paragraph 6 of the Introduction to the Codes.

69. Advisers

Financial adviser to Mr Han : UBS AG

Legal adviser to Mr Han : Freshfields Bruckhaus Deringer

Financial adviser to ArcelorMittal : ING Bank N.V.

Legal adviser to ArcelorMittal : Baker & McKenzie

6 December 2007