Takeovers Panel Rules that Mandatory General Offer be Made for China Oriental Group Company Limited

6 Dec 2007

The SFC today publishes the Takeovers Panel's decision that ArcelorMittal S.A. and Mr Han Jingyuan, Wellbeing Holdings Limited and Chingford Holdings Limited (both are under Mr Han's control) are parties acting in concert with regard to China Oriental Group Company Limited. As a result, ArcelorMittal's acquisition of 28.02% of China Oriental gave rise to a mandatory offer obligation under the Takeovers Code. The Panel also ruled that the put option arrangement between ArcelorMittal and Mr Han constituted a special deal within the meaning of the Takeovers Code.

The background to this matter is that in June 2007, Ms Chen Ningning (the then 28.11% shareholder of China Oriental) announced a hostile offer for the shares of China Oriental. Shortly after the hostile offer was announced, ArcelorMittal approached Mr Han to discuss possible future co-operation between them with a view to defeating the hostile offer and acquiring control of China Oriental. On 8 November (about a month after the hostile offer lapsed), ArcelorMittal acquired Chen's 28.02% interest in China Oriental. The Executive considered that a mandatory general offer had been triggered and should be made in accordance with the Takeovers Code.

The Executive referred the matter to the Panel as there were particularly novel, important or difficult points at issue. The Panel met on 5 December 2007 to consider this matter.

A copy of the Panel's decision can be found in the "Prospectuses, Takeovers & Mergers" – "Takeovers and Mergers" – "Panel and Executive Decisions / Statements" section of the SFC Website at http://www.sfc.hk.

Ends

Page last updated : 1 Aug 2012

TAKEOVERS AND MERGERS PANEL

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")

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 controlled by Mr Han, also a director and the chairman of the Company, did not support the offer. Mr Han held an aggregate interest in 44.81% of the Shares through (i) Wellbeing Holdings Limited ("**Wellbeing**"), a company beneficially owned as to 60.69% by Mr Han,[1] which held 42.82%; and (ii) Chingford Holdings Limited ("**Chingford**"), a company wholly-owned by Mr Han, which held approximately 1.99% of China Oriental) (Mr Han, Wellbeing and Chingford are collectively referred to as "Mr Han" in this decision).
4. Shortly after the Hostile Offer was announced, ArcelorMittal approached Mr Han to discuss possible future cooperation between them with a view to defeating the Hostile Offer and acquiring control of China Oriental.
5. On 5 July 2007 China Oriental announced that the Hostile Offer was unsolicited, did not have the support of the board of directors and would not be accepted by

[1] Mr. Han also holds 16.09% of the issued share capital of Wellbeing on trust for the benefit of over 1,800 employees of Hebei Jinxi Iron and Steel Company Limited ("Hebei Jinxi"), the principal subsidiary of China Oriental. The remainder of the issued share capital of Wellbeing is owned by ten other individuals, all of whom are involved or were previously involved in the operations of Hebei Jinxi.

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 unconditional, it had lapsed and that the Shares tendered under the Hostile Offer would be returned to shareholders.

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) Conditional agreement for ArcelorMittal to purchase Bidco from Mr Han.

(c) One of the conditions to the proposed offer was the sale by Ms Chen of all her Shares to ArcelorMittal.

(d) During the offer period Mr Han and ArcelorMittal would not acquire Shares without the other party's consent.

(e) Mr Han would procure the Company not to issue Shares to Ms Chen.

(f) ArcelorMittal would not act in concert with Ms Chen (or her concert parties) as long as she or her concert parties remained a shareholder.

(g) Neither Wellbeing nor Chingford would sell any Shares to Ms Chen and ArcelorMittal would not sell any Shares acquired under the call or put options to Ms Chen (see clause 5).

Further talks between ArcelorMittal and Mr Han

16. Following the initialling of the draft Cooperation Agreement Mr Han proposed various ways for ArcelorMittal to acquire Shares although none of these was proceeded with.

17. On 17 October 2007 Mr Han wrote to Mr Ondra Otradovec, ArcelorMittal's principal negotiator in this transaction, confirming his undertaking that he would abide by the terms in the draft Cooperation Agreement on which consensus had been reached and that he would discuss the relevant agreement with ArcelorMittal within 2 days of ArcelorMittal's purchase of the entire 28% stake in China Oriental held by Ms Chen and on the basis of agreement reached, sign the agreement.

18. Following various legal, financial and operational due diligence checks between 22 and 24 October 2007 on behalf of ArcelorMittal on the Company and its principal

subsidaries, ArcelorMittal confirmed to Mr Han on 25 October 2007 that it had submitted a bid to Ms Chen.

19. Between 31 October and 4 November 2007 ArcelorMittal requested the finalisation and signing of the draft Cooperation Agreement with Mr Han before or simultaneously with, its signing of a sale and purchase agreement with Ms Chen. Mr Han refused and indicated he would only recommence discussions after ArcelorMittal had acquired the 28% stake from Ms Chen.

Acquisition of 28.02% interest by ArcelorMittal

20. On 6 November 2007, ArcelorMittal entered into a sale and purchase agreement for the Acquisition. The Acquisition was completed on 8 November 2007.

21. Between 7 November and 9 November 2007 the terms under the draft Cooperation Agreement were finalised. It was agreed that the Cooperation Agreement would be split into (i) the Shareholders' Agreement which would be entered into between ArcelorMittal and Mr Han; and (ii) the Business Cooperation Agreement which would be entered into between ArcelorMittal and the Company.

22. On 7 November 2007 trading in the Shares was suspended.

Shareholders' Agreement

23. On 9 November 2007 ArcelorMittal and Mr Han entered into the Shareholders' Agreement. This agreement is conditional on ArcelorMittal obtaining the requisite anti-trust approval from the Ministry of Commerce and the State Administration for Industry and Commerce of the PRC for all the transactions contemplated under the Shareholders' Agreement ("**PRC Anti-Trust Approval**"). This condition cannot be

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 1st Call Option, the Put Option and the 2nd 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 1st Call Option is an option granted by Mr Han to ArcelorMittal for it to purchase all (but not part) of the 1st 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 1st 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 1st Call Option; and (ii) the volume weighted average closing price of the Shares traded on the Stock Exchange over an agreed period prior to the exercise of the 1st Call Option, provided that the said purchase price shall not be less than the Offer Price (as defined below).

28. The Put Option is granted by ArcelorMittal to Mr Han for him to sell to ArcelorMittal all or part of the Put Option Shares (being the difference between Mr Han's current shareholdings and the number of Shares acquired by ArcelorMittal under the 1st Call Option) which is exercisable only once by Mr Han within a 36-month period from the

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

29. The 2nd Call Option is granted by Mr Han to ArcelorMittal for it to purchase the 2nd Option Shares (being the difference between Mr Han's current shareholdings and the number of Shares acquired under the 1st Call Option and Put Option) from Mr Han which is exercisable by ArcelorMittal within a 12-month period after the expiry of the Put Option.

30. The purchase price under the Put Option and the 2nd Call Option is to be calculated by reference to (i) the equity value per Share based on the latest reported EBITDA for the last 12 months and net cash or debt position of the Group prior to the exercise of the Put Option or 2nd Call Option (as the case may be); and (ii) the simple average of the ratio of the 3-month volume weighted average closing trading price divided by the reported earnings per share for the last 12 months prior to the exercise of the Put Option or 2nd Call Option (as the case may be) of all comparable companies listed on the Main Board of the Stock Exchange times the audited earnings of the Group for the last 12 months (in the event the Shares are no longer listed) or the volume weighted average closing trading price of the Shares over an agreed period before the exercise of the Put Option or 2nd Call Option (as the case may be) (in the event the Shares are listed). The purchase price under the Put Option or the 2nd Call Option shall not be less than the actual purchase price paid by ArcelorMittal for the 1st Call Option Shares.

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 1st Call Option, the Put Option or the 2nd 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 offer agreement

33. ArcelorMittal has undertaken to Mr. Han in the Shareholders' Agreement and to the Company in the Business Cooperation Agreement that, save for any mandatory general offers which ArcelorMittal may be required to make as a result of any transactions contemplated in the Shareholders' Agreement, it will not make (or become obliged to make) an unsolicited general offer and it will not accept any unsolicited general offer for Shares which has not been recommended by the board ("**No Hostile Offer Agreement**").

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 [**will become or may be treated as**] parties acting in concert with the Offeror, who will together be interested in an aggregate of [2,140,422,000] Shares, representing approximately [73.13%] of the issued share capital of the Company at the Latest Practicable Date. Pursuant to Rule 26.1 of the Takeovers Code, the Offeror will, following and subject to the Shareholders' Agreement becoming unconditional, be required to make an unconditional mandatory offer to acquire all the issued Shares, other than those Shares which are owned by the Offeror and its Concert Parties ..."*

36. On the same day, the Executive issued comments on the Draft Announcement to ING Bank which included raising concerns about whether ArcelorMittal and Mr Han were

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.

Acting in Concert

40. Acting in concert is defined in the definitions section of the Codes as follows:

"Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate to obtain or consolidate "control" (as defined below) of a company through the acquisition by any of them of voting rights of the company."

41. Control is defined in the definitions section of the Codes as follows:

"Unless the context otherwise requires, control shall be deemed to mean a holding, or aggregate holdings, of 30% or more of the voting rights of a company, irrespective of whether that holding or holdings gives de facto control."

Decision

42. It is the decision of the Panel that ArcelorMittal and Mr Han were parties acting in concert at the time of the Acquisition.

Mandatory offer

43. Rule 26.1(d) of the Code provides :

"Subject to the granting of a waiver by the Executive, when

.....

(d) two or more persons are acting in concert, and they collectively hold not less than 30%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 2% from the lowest collective percentage holding of such persons

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 :

"Evidence of persons acting in concert is usually circumstantial, rather than direct, and no one circumstance will necessarily be determinative. Thus the Panel must examine all of the circumstantial factors to decide whether an inference can reasonably be drawn that any two or more of the parties had an agreement or understanding actively to co-operate to obtain or consolidate control …."

48. In the instance before the Panel there is no dispute between the Executive and the parties as to the evidence of discussions, the preparation of documents, the development of business plans or the desire of the parties to obtain or consolidate control of the Company.

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 :

"there is no understanding, agreement or arrangement between ArcelorMittal and the Controlling Shareholders [in this document defined as Mr Han] other than the Shareholders' Agreement. Thus, ArcelorMittal and the Controlling Shareholders will only become parties acting in concert if and only if the Shareholders' Agreement becomes unconditional. As previously mentioned in our facsimile of 16 November 2007, the Condition is necessary because anti-trust filing with the Ministry of Commerce and the State Administration for Industry and Commerce of the PRC is required for : (a) the acquisition of Shares by the Offeror pursuant to the Possible Offer; and (b) the future acquisition of Shares by ArcelorMittal from the Controlling Shareholders pursuant to the Shareholders' Agreement under applicable laws and regulations in the PRC. Accordingly, the Condition is not one which is waivable by any party to the Shareholders' Agreement. In the event that the Condition fails to be satisfied, the Shareholders' Agreement will not become effective and ArcelorMittal and the Controlling Shareholders will not become parties acting in concert."

51. While the Panel recognises that it is only this Shareholders Agreement that establishes a legally binding relationship between ArcelorMittal and Mr Han it does not accept that the existence or otherwise of a legally binding agreement should be

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 or understanding between the parties to actively co-operate to obtain or consolidate control of the Company. Uncertainties as to the precise provisions of the arrangements may have prevailed until the signature of the Shareholders Agreement but its key provisions had remained largely unchanged throughout the period from at least July. The evidence before the Panel indicated strongly the existence of a common intent and active co-operation before completion of the Acquisition, including facilitation of a due diligence exercise on the Company. This must, in the Panel's view, prevail over a proposition that seeks to define acting in concert in the

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

Rule 26

54. The Panel regards the obligation to extend a mandatory offer under the provision of Rule 26 of the Code as one of the cornerstones of the Code. Rule 26.2 is unambiguous as to the requirement for offerors to ensure that except with the consent of the Executive a mandatory offer is conditional only upon acceptances. Specific reference is made to the absence of any other conditions including regulatory approvals. Rule 26.2 is set out below.

"26.2 Conditions

Except with the consent of the Executive:-

(a) offers made under this Rule 26 must be conditional only upon the offeror having received acceptances in respect of voting rights which, together with voting rights acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding more than 50% of the voting rights; and

(b) no acquisition of voting rights which would give rise to a requirement for an offer under this Rule 26 may be made if the making or implementation of such offer would or might be dependent on the passing of a resolution at any meeting of shareholders of the offeror or upon any other conditions, consents or arrangements."

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:

"Except with the consent of the Executive, neither the offeror nor any person acting in concert with it may make any arrangements with shareholders or enter into arrangements to purchase or sell securities of the offeree company, or which involve acceptance of an offer, either during an offer or when an offer is reasonably in contemplation or for 6 months after the close of such offer if such arrangements have favourable conditions which are not to be extended to all shareholders."

58. This basic provision is amplified in Note 3 to Rule 25 which reads as follow:

"3. Management retaining an interest

Sometimes an offeror may wish to arrange for the management of the offeree company to remain financially involved in the business. The methods by which this may be achieved vary but the principle which the Executive is concerned to safeguard is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. ***For example, the Executive would not***

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 company together hold more than 5% of the equity share capital of the offeree company, the Executive will also normally require such arrangements to be approved at a general meeting of the offeree company's shareholders. At this meeting the vote must be a vote of independent shareholders. Holdings of convertible securities, warrants, options and other subscription rights may also be relevant in determining whether a general meeting is required, particularly where such rights are exercisable during an offer.* ***The Executive must be consulted in all circumstances where this Note may be relevant****." (emphasis added)*

59. The Parties have in their submissions acknowledged that the Put Option extended to Mr Han is not capable of being extended to all other shareholders. Arguments turned on whether the overall arrangement with Mr Han; which comprised the 1st Call Option, the Put Option and the 2nd Call Option was in fact a favourable deal for Mr Han having regard to the obligations imposed on Mr Han by the Call Options and the various measures proposed to offer shareholders an option to sell their shares to ArcelorMittal at the same price as Mr Han in the event he exercised his put option.

60. The Panel noted the proposals that ArcelorMittal put forward to address the issues raised by the Put Option and their desire not to disadvantage shareholders.

61. The Panel was not persuaded, however, that these necessarily asymmetric arrangements, however well intentioned, remedied or counter balanced the facts that the arrangements with Mr Han contained favourable conditions which were not extended to all shareholders; that the consent of the Executive had been neither sought nor obtained and the arrangements stood clearly at variance with the provisions of Note 3 to Rule 25.

Decision

62. It is the decision of the Panel, that the Put Option constitutes a special deal under Rule 25.

63. By failing to obtain the consent of the Executive for the Put Option the parties have failed to comply with the provisions of Rule 25.

Obligation to consult

64. The Panel is concerned with the almost total absence of consultation by the parties and their advisers with the Executive prior to entering into both the Acquisition and the Put Option. Whilst there was a "no names" verbal query to the Executive from one of the advisers on the morning of the day of the Acquisition, this was far from a consultation identifying the specific proposals which by then were obviously in a very advanced state.

65. Both ArcelorMittal and Mr Han are advised by experienced practitioners familiar with the Codes. The issues considered by the Panel today were of substance and not matters arising from inadvertence or inexperience.

66. Paragraph 6.1 of the Introduction to the Code provides that :

"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