



SFC Takeovers Bulletin No. 62

The Securities and Futures Commission of Hong Kong (**SFC**) published [Takeovers Bulletin No. 62](#) in September 2022 (**SFC Takeovers Bulletin 62**) covering recent decisions of the Hong Kong Takeovers Panel on cases involving the grant of a special waiver from the general offer obligation and the determination of the offer price in a mandatory general offer. It also provides a quarterly update on the activities of the Takeovers Team.

Takeovers Panel's Decision on Granting a Special Waiver from the Mandatory General Offer Obligation

Broad Gongga Investment Pte. Ltd. (**Broad Gongga**) consulted the SFC on whether a hypothetical foreclosure sale by third-party creditors would trigger a mandatory general offer obligation on the part of Broad Gongga under Rule 26.1 of the SFC Code on Takeovers and Mergers (**SFC Takeovers Code**). The Takeovers Panel ruled that a special waiver from the general offer may be granted as a result of a possible foreclosure sale.

Although the Takeovers Panel does not usually consider hypothetical questions, the matter was referred to the Panel by the SFC as there were novel, important, or difficult points at issue. The Takeovers Panel convened on 25 July 2022 to consider the case and published its [decision](#) on 30 August 2022.

Broad Gongga and Jinke Property Group Company Limited (**Jinke Property**) are shareholders of Jinke Smart Services Group Company Limited (**Jinke Smart Services**), an H-share company listed on the Stock Exchange of Hong Kong Limited, and concert parties under class 1 of the Takeovers Code's definition of "acting in concert". In the event of a foreclosure sale of Jinke Property's shares in Jinke Smart Services by creditors of Jinke Property having security over those shares (a **Seller Forced Disposal**), Broad Gongga would become the single largest shareholder and the leader of the concert group. According to Note 1 of Rule 26.1 of the Takeovers Code,¹ the Seller Forced Disposal would trigger a mandatory general offer on the part of Broad Gongga for Jinke Smart Services.

Considering the special circumstances surrounding the Seller Forced Disposal, including the fact that Broad Gongga would have no control over the entire process, the Takeovers Panel decided that a special waiver from the general offer obligation would, in principle, be appropriate. However, as the Seller Forced Disposal had yet to occur, the Takeovers Panel did not consider it appropriate to grant a waiver at this stage. It was decided that if a Seller Forced Disposal occurs or becomes imminent, Broad Gongga should apply for a special waiver and the Executive should consider the grant of a special waiver in accordance with the principles set out in the Panel's decision.

Takeovers Panel's Decision on the Offer Price in a Mandatory General Offer under Rule 26

On 16 May 2022, the legal advisers to Major Success Group Limited (**Major Success**) submitted a draft firm intention announcement to the Executive for vetting. The Executive expressed concerns regarding the offer price and how it was determined, and referred it to the Takeovers Panel as there were novel, important, or difficult points to consider. The Takeovers Panel convened on 11 August 2022 to consider the referral and the decision was published on 7 September 2022. The decision is available on the SFC's website [here](#).

Champion Trade Group Limited (**Champion Trade**) had taken assignment of an overdue loan extended by third parties to Star Soul Investments Limited (**Star Soul**) with full rights and benefits of the securities for the loan which included a controlling stake in Suncity Group Holdings Limited (**Suncity**) and other Suncity securities. Champion Trade then immediately sold all Suncity shares and other secured assets to Major Success Group Limited (**Major Success**) triggering a mandatory general offer obligation on the part of Major Success to acquire the shares of Suncity. Star Soul is owned by Chau Cheok Wa, the ex-chairman and an ex-executive director of Suncity, while Major Success and Champion Trade are owned by Lo Kai Bong, an executive director of Suncity.

Special Deal under Rule 25 of the SFC Takeovers Code

The Takeovers Panel considered that the transaction involved a discharge of Chau's liability under the loan. The transaction was regarded as favourable to him as a shareholder which constituted a special deal under the Takeovers Code. The Takeovers Panel noted that it did not matter whether Chau made an overall gain or loss under the arrangement, or whether or not he was involved in the negotiation of the transaction. The Panel's decision refers to the [SFC's Practice Note 17](#) on issues relating to special deals and Rule 25 of the Takeovers Code. Practice Note 17 sets out the Executive's approach to special deals which has been endorsed by the Takeovers Panel. It provides that:

- If a special deal arrangement is capable of being extended to all other shareholders, it should be so extended;
- If a special deal arrangement is not capable of being extended to all other shareholders, but the special benefit received by the counter-party shareholder(s) can be quantified, the value of the benefit should be appropriately reflected in the offer price; and
- If a special deal arrangement is not capable of being extended to all other shareholders and the special benefit conferred on the counter-party shareholder(s) cannot be quantified, the Executive may consent to the special deal in appropriate circumstances subject to compliance with the requirements of Note 4 to Rule 25 of the Takeovers Code.

The Takeovers Panel also noted the Executive's view that Note 5 to Rule 25 makes it clear that repayment or assignment of a shareholders' loan is a special deal. The Takeovers Panel found that since the favourable condition provided to Chau as a shareholder was clearly quantifiable (as the amount of the liability discharged), its value should be reflected in the offer price.

Rule 25 of the Takeovers Code aims to prevent some shareholders from receiving more than others in the event of a takeover offer. It reflects the requirement of General Principle 1 that all shareholders should be treated equally. However, not all special deals are prohibited and the Executive may consent to special deals subject to compliance with the procedural safeguards set out in the Notes to Rule 25 including obtaining majority shareholders' approval and a statement by an independent financial adviser that the terms of the transaction are fair and reasonable. The Takeovers Panel found that in completing the transaction, Major Success had already breached Rule 25 and the procedural safeguards under the Takeovers Code were no longer available as they cannot be used to ratify a special deal that has been completed.

The Takeovers Panel decided that in the mandatory general offer for Suncity by Major Success, the appropriate offer price should be HK\$0.0690 per share. This figure is derived from the total consideration paid by Major Success to Champion Trade for the acquisition of Suncity's shares and its other security assets, divided by the total number of Suncity shares acquired by Major Success.

Quarterly Update on the Activities of the SFC's Takeovers Team

The SFC Takeovers Bulletin 62 also provides an update of the SFC's work in the third quarter of 2022. The SFC received 10 takeovers-related cases (including privatisations, voluntary and mandatory general offers and off-market and general-offer share buybacks), four whitewashes and 65 ruling applications during the quarter.

If you have questions regarding the above and the Hong Kong Takeovers Code, please do not hesitate to contact us at enquiries@charltonslaw.com.

[1] <https://www.sfc.hk/-/media/EN/assets/components/codes/files-current/web/codes/the-codes-on-takeovers-and-mergers-and-share-buy-backs/the-codes-on-takeovers-and-mergers-and-share-buy-backs.pdf>

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