Takeovers Panel upholds the Takeovers Executive’s decision that no mandatory general offer obligation triggered for China Oriental

19 Oct 2015

The Takeovers and Mergers Panel (Panel) has upheld the Takeovers Executive’s (Executive) ruling to grant ArcelorMittal, a substantial shareholder of China Oriental Group Company Limited (China Oriental), a waiver from having to acquire all the shares of China Oriental under the mandatory general offer obligation of the Code on Takeovers and Mergers (Takeovers Code) upon the unwinding of certain put option arrangements.

The Panel made the decision following requests by two minority shareholders for a review of the Executive’s ruling on a waiver application by ArcelorMittal earlier this year.

On 29 January 2015, ArcelorMittal applied to the Executive for a waiver of the mandatory general offer obligation which might have arisen following the termination of the put option arrangements with ING Bank (ING) and Macquarie Bank Limited (Macquarie) (Note 1).

The Executive subsequently issued a ruling waiving the mandatory general offer obligation of ArcelorMittal, taking into account all the circumstances of the case, including the Panel’s decision in relation to China Oriental dated 14 October 2014.

After the Executive’s decision was made public by an announcement made by China Oriental dated 29 May 2015, two minority shareholders of China Oriental, Mr Chan Pak To and Mr Churk Shue Sing, wrote to the Executive requesting for a review of this decision. The Panel met on 6 October 2015 to consider, among others, the review of the Executive’s decision in response to the minority shareholders’ requests.

In granting the ruling, the Panel noted that the Executive had taken into account all the circumstances of the case including the leadership of the concert party group and the significance of the changes within the concert party group and other material factors. The Panel considered these factors to form a reasonable basis on which the Executive made its decision to grant the waiver and saw no reason to amend or reverse the Executive’s decision (Note 2).

A copy of the Panel’s decision can be found on the SFC’s website (Note 3).

End

Notes:

1. For details relating to the put option arrangements and other background and facts of the case, please refer to the SFC’s press release dated 15 October 2014, which relates to the Panel’s decision to uphold the Executive’s ruling that ArcelorMittal had not triggered a mandatory general offer following a review request made by the independent non-executive directors of China Oriental.
2. The Executive also considered a number of other material factors in granting the waiver, including: (i) the underlying economic interest that ArcelorMittal held in the shares in China Oriental registered in the names of ING and Macquarie and the risks to which it was exposed; (ii) the 2014 Panel decision and in particular its determination that the shares in China Oriental were essentially being warehoused on a temporary basis on behalf of ArcelorMittal by ING and Macquarie; (iii) the circumstances which led up to the implementation of these arrangements over some seven years, which of themselves were most unusual; and (iv) the accounting treatment of the investment in China Oriental in the accounts of ArcelorMittal.
3. The decision can be found in the “Takeovers and Mergers Panel and Takeovers Appeal Committee decisions and statements” section of the SFC website.

Page last updated : 19 Oct 2015

收購委員會維持收購執行人員有關並無觸發對中國東方作出強制全面要約責任的決定

2015年10月19日

收購及合併委員會（委員會）維持收購執行人員（執行人員）的裁定，寬免中國東方集團控股有限公司（中國東方）大股東ArcelorMittal在解除了若干認沽權安排後，須根據《公司收購及合併守則》（《收購守則》）的強制全面要約責任收購中國東方的所有股份。

委員會是於兩名少數股東要求覆核執行人員在今年較早時就ArcelorMittal的寬免申請所作出的裁定後，作出此項決定。

2015年1月29日，ArcelorMittal向執行人員申請寬免於終止與ING Bank（ING）及麥格理銀行有限公司（麥格理）的認沽權安排後可能會產生的強制全面要約責任（註1）。

執行人員經考慮該個案的所有情況（包括委員會於2014年10月14日就中國東方所作出的決定）後，發出寬免ArcelorMittal的強制全面要約責任的裁定。

中國東方在2015年5月29日的公告中公布執行人員的決定後，中國東方兩名少數股東陳柏濤先生及卓澍丞先生去信執行人員，要求覆核此項決定。委員會因應少數股東要求於2015年10月6日舉行會議，覆核（除其他事項外）執行人員的決定。

在作出裁定時，委員會注意到執行人員已考慮該個案的所有情況，包括一致行動集團的領導人情況、一致行動集團內的變動的重大程度，以及若干其他關鍵因素。委員會認為，該等因素構成執行人員作出寬免決定的合理基礎，並看不到任何須修訂或推翻執行人員決定的理由（註2）。

委員會決定的文本載於證監會網站（註3）。

完

備註:

1. 有關認沽權安排的詳情及本案的其他背景和資料，請參閱證監會2014年10月15日的新聞稿，內容乃關於委員會在中國東方的獨立非執行董事提出覆核要求後，決定維持執行人員的裁定，認為ArcelorMittal並無觸發強制全面要約。
2. 執行人員在授出寬免時亦曾考慮其他關鍵因素，包括：(i) ArcelorMittal在以ING及麥格里名義登記的中國東方股份中所持有的相關經濟利益及其所承受的風險；(ii) 《2014年委員會決定》，尤其是當中有關中國東方股份根本上是由ING及麥格里代ArcelorMittal暫時存管的裁斷；(iii) 引致過去約七年來須採取該等本身極不尋常的安排的有關情況；及 (iv) ArcelorMittal帳目內就對中國東方的投資所作的會計處理。
3. 有關決定可於證監會網站的〈收購及合併委員會、收購上訴委員會的決定及聲明〉一欄取覽。

最後更新日期：2015年10月19日

TAKEOVERS AND MERGER PANEL

Panel Decision
in relation to a review of the decision of the Takeovers Executive
to waive the mandatory general offer obligation which would otherwise have arisen
for Mittal Steel Holdings AG ("ArcelorMittal" and where the context
requires its ultimate listed holding company) and, in the event that
the decision to grant a waiver were not to be upheld, on a number
of issues which may need to be addressed as to the conditions, timetable and price of
the mandatory general offer and to enable the mandatory
general offer to be made while being in compliance with laws and
regulations in The People's Republic of China (the "PRC")

Introduction

1. The Panel met on 6th October, 2015 to review the decision made by the Takeovers Executive to waive the mandatory general offer obligation which would otherwise have arisen for ArcelorMittal upon the unwinding of the share purchase and option arrangements between it on the one hand and ING Bank ("ING") and Macquarie Bank Limited ("Macquarie") on the other in relation to shares in China Oriental Group Company Limited ("China Oriental"). In the event that the Panel decided not to uphold the decision of the Takeovers Executive to grant the waiver a number of issues arose on implementing the mandatory general offer. These were in summary:

   - whether the mandatory general offer may be made conditional upon regulatory clearance from the Ministry of Commerce of the PRC;

   - whether or not the 50% acceptance condition as required by Rule 30.2 of the Code on Takeovers and Mergers (the "Takeovers Code") should be waived in respect of the mandatory general offer;

   - the timetable for the mandatory general offer; and

   - the price at which such mandatory general offer should be made.

2. Given the Panel decided to uphold the waiver granted to ArcelorMittal by the Takeovers Executive it was not necessary for the Panel to rule on the mechanics and the price to be paid under the mandatory general offer and, accordingly, this decision is confined to the single issue of whether to uphold, alter or reverse the Takeovers Executive's decision to waive the mandatory general offer obligation.

3. The application to the Panel was made under Paragraph 10.1 of the Introduction to the Codes on Takeovers and Mergers and Share Buy-backs (the "Codes") where the Takeovers Executive may refer a matter to the Panel for a ruling, without itself giving a ruling, when it considers that there is a particularly novel, important or difficult point at issue. At the hearing itself the Takeovers Executive explained that this application related essentially to the subsequent mechanical and pricing decisions which needed to be made in the event that the Panel reversed the decision to waive ArcelorMittal's mandatory general offer obligation. The Takeovers Executive did not regard its waiver decision itself to be either novel, important or difficult. After the Takeover Executive's waiver decision was made public by the announcement made by China Oriental dated

29th May, 2015, two minority shareholders of China Oriental, Mr. Chan Pak To ("Mr. Chan") and Mr. Churk Shue Sing ("Mr. Churk") wrote to the Takeovers Executive requesting a review of this decision. The hearing of the Panel, as far as the waiver was concerned, was essentially a response to those requests for a review. As potential offeror and offeree companies respectively, ArcelorMittal and China Oriental were also invited to attend the Panel's hearing and to make submissions.

4. Reference is made by the Takeovers Executive in the reasons for its decision to the decision by the Panel made on 14th October, 2014 (the "2014 Panel decision") which also related to China Oriental and arrangements between ArcelorMittal and various banks. In response a number of the parties to the Panel hearing challenged a number of the conclusions reached by the Panel in its 2014 Panel decision. The Panel wishes to make it clear that the proceedings before it did not include a review of the 2014 Panel decision. That decision stands and is final. Given the similarity of some of the issues, the Panel considers that the 2014 Panel decision provided useful guidance and precedent in the present matter.

Background and facts

5. Following the decision of the Panel in 2007, ArcelorMittal made a mandatory general offer for all the shares in China Oriental, other than those held by parties acting in concert with it, including Mr. Han Jingyuan ("Mr. Han") the chairman of China Oriental, who held approximately 45% of its shares.

6. As a result of ArcelorMittal's mandatory general offer, it increased its shareholding to approximately 47% of the shares in China Oriental so that between it and Mr. Han, substantial shareholders held some 92% of the shares resulting in the public float falling well below the minimum required by the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the "Listing Rules").

7. In order to address the public float requirements under the Listing Rules, as it was required to do under its agreement with Mr. Han, ArcelorMittal made the following arrangements with ING and Deutsche Bank ("DB") (collectively the "banks"):

   - it sold respectively to ING and DB, 9.9% and 7.5% of the shares in China Oriental at a price of HK$5.7938 per share;

   - ArcelorMittal granted each of the banks a put option under which it agreed to acquire all of the shares purchased by the banks at the original purchased price, adjusted for interest at an agreed rate of interest, less any dividends received by the banks during the three year currency of the put option which was exercisable on 30th April, 2011. This put option was fully cash collateralised, with the collateral netted off against the purchase price so that, apart from the payment of fees to the banks, no cash changed hands. Effectively ArcelorMittal had financed the full purchase price of the shares by the banks by the provision of this matching collateral; and

   - ArcelorMittal could require the banks to exercise their put options following the exercise of the call options it had been granted under its agreement with Mr. Han. This agreement terminated on 9th May, 2011 a few days after the completion of the arrangements with the banks, although there was continuing uncertainty whether certain provisions of the agreement had survived its termination.

8. At the time this arrangement satisfied the Listing Rules requirements for the public float.

9. The shares in China Oriental traded for a short period in May, 2008 at or above the purchase and option price under the arrangements with the banks.

10. In April, 2011, the arrangements with the banks were rolled over for a further three years.

11. Towards the end of 2013, the Hong Kong Stock Exchange informed China Oriental that these arrangements would no longer satisfy the public float requirements of the Listing Rules. Further, DB notified ArcelorMittal that it would not be rolling over the arrangements again and would give notice of the exercise of its put option on 30th April, 2014. ING on the other hand indicated it would renew the arrangements or enter arrangements which were broadly similar.

12. At the time before the exercise of the put option by DB, ArcelorMittal negotiated terms whereby Macquarie would effectively replace DB. Under these arrangements:

    - Macquarie purchased a 7.5% shareholding interest in China Oriental, the same interest as DB originally held, at HK$1.70 per share;

    - Macquarie was granted by ArcelorMittal a put option whereby Macquarie could put its shareholding in China Oriental to ArcelorMittal at HK$1.70, adjusted if required for the payment of any dividend, at the end of the option period being 30th April, 2015 which put option was fully cash collateralised so that, apart from the payment of fees and reimbursement of Macquarie's costs, no cash changed hands; and

    - ArcelorMittal agreed to indemnify Macquarie against all the risks of the arrangements, including any mandatory general offer obligation arising from them.

13. ING agreed to roll over its arrangements with ArcelorMittal on the same basis as those agreed by Macquarie.

14. On 9th June, 2014 the independent non-executive directors of China Oriental challenged these arrangements claiming that they had resulted in a mandatory general offer obligation for ArcelorMittal at a price of some HK$6.50 and requesting a ruling from the Takeovers Executive to this effect. On 21st August, 2014 the Takeovers Executive ruled that a mandatory general offer had not been triggered. In response to this ruling the independent non-executive directors requested on 1st September, 2014 a review of the ruling by the Panel. The Panel hearing was then held on 25th September, 2014 which resulted in the 2014 Panel decision. In its decision, the Panel decided that:

    - no mandatory general offer obligation had been triggered by ArcelorMittal;

    - Macquarie and ArcelorMittal were presumed to be acting in concert under class (9) of the definition of acting in concert;

    - the presumption of acting in concert had not been rebutted; and

    - given the similarity of the arrangements, it would follow that both ING and DB are also parties presumed to be acting, or had acted, in concert with ArcelorMittal.

15. After the initial application to the Takeovers Executive by the independent non-executive directors, China Oriental held its annual general meeting. From the poll results it is evident that both Mr. Han and ArcelorMittal voted in favour of all the resolutions proposed, except the resolution granting the general mandate to directors to

issue shares on which ArcelorMittal voted against. It is also apparent that neither ING nor Macquarie voted at all at the meeting.

16. Towards the end of 2014, when it appeared that the arrangements with ING and Macquarie would terminate and would not be rolled-over, ArcelorMittal approached the Takeovers Executive for guidance on a number of Takeovers Code issues which might have arisen following the termination of the arrangements with ING and Macquarie. During the discussions mention was made of the possibility of a voluntary offer being made for the shares in China Oriental as well as various issues concerning the implementation of a mandatory general offer in the light of regulations in the PRC were such an offer to be required. Temporary alternatives to the arrangements with ING and Macquarie were also discussed. The consultation culminated in an application by ArcelorMittal on 29th January, 2015 for a waiver of the mandatory general offer obligation which would otherwise arise when the put options were exercised by ING and Macquarie. By letters dated 4th and 10th February, 2015, the Takeovers Executive issued its ruling waiving the mandatory general offer obligation of ArcelorMittal.

The relevant provisions of the Takeovers Code

17. The Codes in their introduction stress the importance of previous Panel decisions in the interpretation of the Takeovers Code. In Paragraph 2.3 of the Introduction to the Takeovers Code it states that:

    "The Executive and the Panel also interpret [the Takeovers Code] in the light of previous rulings that have been made under [the Takeovers Code] by the Executive and the Panel, or their predecessor, the Committee on Takeovers and Mergers."

18. Rule 26.1 is at the heart of the Takeovers Code and defines the thresholds when control is acquired and when a mandatory general offer is required. This Rule states that:

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

    (a) any person acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting rights of a company;…

    … 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 (see also Rule 36)."

    It is apparent from the introductory words to the Rule that the obligation to extend a mandatory general offer can be waived by the Takeovers Executive. The Notes to Rule 26.1, as can be seen below, set out certain criteria that the Takeovers Executive must apply when considering to grant a waiver from the requirements of this Rule and the circumstances when a mandatory general offer is normally required when there are transfers of shares between members of a concert party group and when waivers can generally be expected. In an answer to a question from the Panel, the Takeovers Executive confirmed its understanding of the opening words of Rule 26.1 that the criteria to be used to assess whether a waiver should be granted requires an analysis of all the relevant facts and circumstances and not simply the criteria set out in Notes 6(a) and 7 to the Notes of Rule 26.1.

19. Note 1 to Rule 26.1 reads as follows:

"The majority of questions which arise relate to persons acting in concert. The definition of "acting in concert" contains a list of persons who are presumed to be acting in concert unless the contrary is established. The following Notes illustrate how this Rule 26 and definition are interpreted by the Executive.

There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more."

This Note makes it clear that changes within a concert party group, even if they do not result in any additional voting rights attaching to shares being acquired by the concert party or a Takeovers Code threshold being triggered can give rise to a mandatory general offer obligation. It also requires the Takeovers Executive to apply the criteria set out in Note 6(a) and Note 7 to the Notes to Rule 26.1.

20. The relevant portion of Note 6(a) to the Notes to Rule 26.1 reads as follows:

"Acquisitions from another member

Whenever the holdings of a group acting in concert total 30% or more of the voting rights of a company and as a result of an acquisition of voting rights from another member of the group a single member comes to hold 30% or more or, if already holding between 30% and 50%, has acquired more than 2% of the voting rights in any 12 month period, an obligation to make an offer will normally arise.

In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:–

(i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;

(ii) the price paid for the shares acquired; and

(iii) the relationship between the persons acting in concert and how long they have been acting in concert."

This Note states that changes in a concert party group which results in a member of that group crossing a takeover threshold will "normally" be required to make a mandatory general offer: that is the starting point. The waiver is a concession and the Note sets out the criteria which will be applied. However, as stated in the Panel decision relating to Hong Kong Aircraft Engineering Company Limited of 10th December, 2008 [at paragraph 27] these criteria are not exhaustive. So the criteria set out does not exclude the considerations of other factors.

21. Although Note 1 to Rule 26.1 also directs the Takeovers Executive to consider the criteria set out in Note 7 to the Notes to Rule 26.1, none of the criteria set out in this Note is relevant to the present matter.

22. Acting in concert and the classes of persons presumed to be concert parties, unless the contrary is established, are defined in the Takeovers Code as follows:

    *"**Acting in concert:** 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.*

    Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:–…

    …

    (9) a person, other than an authorised institution within the meaning of the Banking Ordinance (Cap. 155) lending money in the ordinary course of business, providing finance or financial assistance (directly or indirectly) to any person (or a person acting in concert with such a person) in connection with an acquisition of voting rights (including any direct or indirect refinancing of the funding of the acquisition)."

    Concert party activity is directed towards the objective of obtaining or consolidating control. However, it must also relate to how control is held and changes to that. Note 1 to the Notes to Rule 26.1 in particular would make little sense if this were not the case. Transfers between concert party members, even if they do not result in any threshold being crossed or an increase in the concert party's aggregate shareholding, can result in effectively a new concert party grouping.

    The presumption clause puts those in each class on notice that they will be considered to be acting in concert with the persons of the same class, unless the contrary is established. ArcelorMittal is not an authorised institution within the meaning of the Banking Ordinance (Cap. 155) and it provided ING and Macquarie financial assistance to purchase their shares in China Oriental. The Panel in its 2014 Panel decision did not accept that the presumption had been rebutted.

23. Once a concert party group has been determined or admitted, it will be considered a concert party until clear evidence is presented to establish the contrary. This is set out in Note 3 to the definition of "acting in concert" which states:

    "Break up of concert parties

    When a ruling or admission has been made that a group of persons is or has been acting in concert, it will be necessary for clear evidence to be presented before it can be accepted that they are no longer acting in concert."

    In the 2014 Panel decision, the Panel ruled that ArcelorMittal, ING and Macquarie were concert parties. No evidence has been adduced that at any time between the 2014 Panel decision and the completion of the exercise of the put option by ING and Macquarie that the concert party had broken up. Accordingly the Takeovers Code requires them to be considered parties acting in concert from the date on which it was determined that they were concert parties until 30th April, 2015 when ING and Macquarie ceased to have any shares in China Oriental.

24. In case of doubt the Takeovers Code also encourages parties to a takeover or merger transaction to consult with the Takeovers Executive. This is set out in Paragraph 6.1 of the Introduction to the Codes which reads as follows:

"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."

25. While the Codes state that consultation will not result in provisional rulings, this does not preclude parties from seeking formal rulings. In this regard, for an authoritative ruling to be made by the Takeovers Executive it requires to be fully informed of all relevant information relating to the ruling. This is set out in Paragraph 7.1 of the Introduction to the Codes, the relevant portion of which states the following:

"A ruling by the Executive normally involves a consideration of all relevant information in relation to the application and a more thorough analysis than that permissible under a consultation. In some cases the Executive may find it necessary to convene an informal meeting or hear the views of other interested parties before making a ruling. The Executive requires prompt co-operation from those to whom enquiries are directed so that decisions may be both properly informed and given as speedily as possible. Rulings may initially be conveyed to parties orally but will always be confirmed in writing in time."

26. Paragraph 8 of the Introduction to the Codes sets out the information required to be submitted for a ruling by the Takeovers Executive which it is not necessary to repeat here. In respect of the ruling made by the Takeovers Executive in this matter, it was conveyed to ArcelorMittal in writing by letters dated 4th and 10th February, 2015.

The cases of China Oriental, Mr. Chan and Mr. Churk in summary

27. Mr. Churk believed that the 2014 Panel decision was fundamentally flawed and that by definition ArcelorMittal, ING and Macquarie should not have been considered parties acting in concert as the presumption did not apply. In this circumstance, it should be disregarded. Further, were the presumption to apply, it could be readily rebutted as no acquisition or consolidation of control as the shareholding of ArcelorMittal and the concert party as a whole remained unchanged. If they were not concert parties, the provisions of Note 6(a) to the Notes to Rule 26.1 could not apply to them so the basis on which the Takeovers Executive had granted the waiver was incorrect.

28. The other parties were less adamant on whether the Takeovers Code permitted the Takeovers Executive the discretion to grant a waiver of the mandatory general offer obligation which arose on the termination of the arrangements between the parties. They argued instead that the waiver should not have been granted on the basis of the criteria set out in Note 6(a). While they did not deny that ArcelorMittal remained the leader of the concert party, it must be apparent that the balance between the shareholdings of the concert party group changed significantly with two members of the group ceasing to be members and ArcelorMittal alone increasing its shareholding from just below 30%, the trigger point for a mandatory general offer, to some 47%. This was a much greater change than in the Panel decision in relation to Wing Hang Bank, Limited [29th August, 2008] where the Panel had ruled that the changes in shareholding had resulted in the formation of a new concert party.

29. China Oriental was particularly critical of the Takeovers Executive's contention that ArcelorMittal retained the "beneficial ownership" of the shares in China Oriental held by the other concert party members. The shares had been purchased by ING and Macquarie, stamp duty had been paid, the ownership of the shares was clearly theirs, they were entitled to receive all dividends by China Oriental during the currency of the options and they were free to vote the shares in any way they wanted. In this connection it was noted that while ArcelorMittal voted against the resolution at the 2014 annual general meeting of China Oriental to renew the directors' mandate to issue shares, neither ING nor Macquarie had voted which was contrary to how a concert party is expected to act.

30. It was irrelevant that ArcelorMittal had already made a mandatory general offer for the shares in China Oriental which had closed in 2008. If a mandatory general offer had been triggered subsequently then that offer should be made. In this regard, emphasis was given to the statement in paragraph 43 of the 2014 Panel decision which stated the Panel's view that "[w]ithout an arrangement of this kind [the sale of shares to, and option arrangement with, Macquarie] ArcelorMittal would have had to purchase DB's shareholding in China Oriental thereby triggering a mandatory offer obligation under Rule 26.1 at a very high price."

31. China Oriental also sought to contrast the way ArcelorMittal had described the arrangements with the banks to the Hong Kong Stock Exchange and in litigation with Mr. Han which emphasised the independence of the banks and the way these arrangements were being described now. Mr. Chan also drew the Panel's attention to regulatory and other disputes involving ArcelorMittal in other parts of the world to undermine ArcelorMittal's contention that it had taken its responsibilities to abide by the Takeovers Code conscientiously and had fully cooperated with the Takeovers Executive.

32. Lastly, Mr. Chan argued that if a waiver were to be granted it should be made conditional upon the approval of the minority shareholders of China Oriental.

The case of ArcelorMittal in summary

33. Unsurprisingly ArcelorMittal agreed with the Takeovers Executive's ruling and its reasons for it. It submitted that the Takeovers Executive had the clear discretion to grant the waiver, the reasons for which are not confined to the criteria set out in Note 6(a), and once that waiver had been granted it should only be overturned in the most exceptional circumstances.

34. It also suggested that the matter should be viewed in the overall context of the history of the events which started in 2007 when ArcelorMittal became a substantial shareholder of China Oriental. The unwinding of the arrangements simply put it back to its position when it had completed its mandatory general offer made which closed in 2008.

The case of the Takeovers Executive in summary

35. The Panel had clearly ruled in its 2014 Panel decision that ArcelorMittal, ING and Macquarie were parties acting in concert. That decision stands and is final. The fact that ING and Macquarie did not vote at China Oriental's 2014 annual general meeting does not alter the position. The starting point, therefore, in considering the matter is that these parties are concert parties.

36. The Takeovers Executive was in no doubt that the unwinding of the arrangements between ArcelorMittal, ING and Macquarie which resulted in ArcelorMittal increasing its shareholding from below 30% of the voting rights attaching to shares in China Oriental

to some 47% triggered a mandatory general offer under Rule 26.1. Given its central importance in the regulation of takeovers and mergers in Hong Kong, this Rule is very strictly regulated.

37. By its wording, Rule 26.1 gives the Takeovers Executive the discretion to waive the mandatory general offer obligation in reliance on specific Notes to Rule 26.1 and more generally in response to all the circumstances relating to the matter. In this matter a crucial consideration was the 2014 Panel decision and the reasons the Panel gave for it.

38. Looking at the provisions of Note 6(a) to the Notes to Rule 26.1, it is apparent that there has been no change in the leadership of the concert group which had always been held by ArcelorMittal. The issue was the significance of the changes in the concert party group, which effectively resulted in its disbandment. While there was evidently a shift in the balance of the registered shareholdings, the Takeovers Executive did not consider there was a significant change in what it referred to as the "beneficial ownership". By "beneficial ownership" it did not mean the narrow legal definition of the term but rather where the economic benefits lay. It believed that for all practical purposes the economic risks of the shareholdings held by ING and Macquarie had from the outset been assumed by ArcelorMittal and in more recent years and in particular when the arrangements were renegotiated in 2014 there was no realistic prospect of ING or Macquarie benefitting from any upside potential from their shareholdings in China Oriental. The Panel in its 2014 Panel decision had characterised the arrangements as essentially a warehousing of shares; no money had changed hands and the shares were destined to be put back to ArcelorMittal.

39. The other criteria set out in Note 6(a), being the price paid and the relationship between the members of the concert party and how long they had been acting in concert were not relevant in this matter.

40. The accounting treatment of the investment in China Oriental in the accounts of ArcelorMittal, which had not "derecognised" the 17.4% shareholding held by ING and Macquarie, and before that DB, confirmed that ArcelorMittal had a significant exposure to the risks and rewards of this investment.

41. The potential payment of dividends by China Oriental which would have been received by ING and Macquarie in respect of the shares in China Oriental registered in their names did not alter its analysis as the amount of any payment would have been set off against the put price payable by ArcelorMittal. As it was, China Oriental had not declared any dividends since its 2011 financial year.

42. The fact that ING and Macquarie did not vote at the 2014 annual general meeting was not a critical issue either. During the period immediately preceding the annual general meeting discussions were taking place between the Takeovers Executive and the parties, who claimed that they were not acting in concert so they were unlikely to take actions which would obviously contradict this assertion. As it was, in the 2014 Panel hearing Macquarie had advanced the idea that it was generally a passive investor and did not generally vote at the meetings of the companies in which it was invested.

43. There was no question that the waiver granted to ArcelorMittal should have been made conditional upon the approval of minority shareholders as the "whitewash waiver" approval was only applicable in relation to the issue of new securities.

44. The consultation process is an essential feature of the success of the Takeovers Code and helps to minimise the possibility of breach. In this matter, ArcelorMittal, together with its legal advisers, conducted themselves appropriately. Furthermore there was

nothing wrong in parties structuring their transactions so that they fall within one or more of the safe harbours provided by the Takeovers Code.

The decision and reasons for it

45. ArcelorMittal had applied to the Takeovers Executive for a waiver of its Rule 26.1 mandatory general offer obligation. In doing so, it appears to have provided the Takeovers Executive with sufficient information for it to have made a properly informed decision to grant the waiver. During the Panel hearing, no material, new or significant factors beyond those already before the Takeovers Executive at the time the waiver was granted was drawn to the attention of the Panel. The ruling from the Takeovers Executive was properly obtained. In normal circumstances, a party to a possible takeover or merger transaction who has received a ruling from the Takeovers Executive should be confident that it can act on it, otherwise this would serve to undermine the consultation process and the efficacy of obtaining rulings from the Takeovers Executive in advance of any action. While it is always open to the Panel to alter or reverse a ruling, it should still be alive to the broader consequences of such a decision and take this into account.

46. In this matter the 2014 Panel decision served as an important precedent. Not only does the Takeovers Code require the Panel to have regard to previous decisions of the Panel but in this case the 2014 Panel decision involved the same company and similar issues. It was certainly not open to the Panel to alter the 2014 Panel decision. In this matter, it had already been decided that ArcelorMittal, ING and Macquarie were parties acting in concert and in considering the application for a waiver the Takeovers Executive was correct in regarding them as members of a concert party group.

47. The termination of the arrangements between ArcelorMittal, ING and Macquarie triggered a mandatory offer obligation under Rule 26.1 in the absence of the Takeovers Executive granting a waiver. The statement in the 2014 Panel decision that the exercise by DB of its put option would trigger a mandatory general offer obligation is correct. It was unnecessary in the context that statement was made to refer to the ability of the Takeovers Executive to waive such an obligation. The wording of the Rule 26.1 makes this abundantly clear.

48. Although the Notes to Rule 26.1 direct the attention of the Takeovers Executive to a number of criteria which it must consider, it should also be apparent from the more general wording of Rule 26.1 itself that in exercising its discretion to waive a mandatory general offer under Rule 26.1 the Takeovers Executive should take into account all relevant factors.

49. In this case, in addition to considering the leadership of the concert party group and assessing the significance of the changes within the concert party group, the Takeovers Executive also considered other material factors, including:

   - the underlying economic interest that ArcelorMittal held in the shares in China Oriental registered in the names of ING and Macquarie and the risks to which it was exposed. These were almost entirely, if not entirely, borne by ArcelorMittal;

   - the 2014 Panel decision and in particular its determination that the shares in China Oriental were essentially being warehoused on a temporary basis on behalf of ArcelorMittal by ING and Macquarie;

- the circumstances which led up to the implementation of these arrangements over some seven years, which of themselves were most unusual; and

- the accounting treatment of the investment in China Oriental in the accounts of ArcelorMittal.

These factors form a reasonable basis on which the Takeovers Executive made its decision to grant a waiver. Accordingly, the Panel sees no reason to amend or reverse the decision of the Takeovers Executive.

50. As the Takeovers Executive's decision to grant a waiver has been upheld by the Panel, there is no reason to make a determination on the other matters before it.

19th October, 2015

Parties:

The Takeovers Executive
Mr. Chan Pak To, a minority shareholder of China Oriental
Mr. Churk Shue Sing, a minority shareholder of China Oriental
China Oriental Group Company Limited, advised by Sullivan & Cromwell
Mittal Steel Holdings AG, advised by Linklaters

收購及合併委員會

委員會決定

關於覆核收購執行人員寬免 Mittal Steel Holdings AG（“ArcelorMittal”，在文義所需的情況下包括其最終上市控股公司）原應須承擔的強制全面要約責任的決定，及如不維持授予寬免的決定，關於強制全面要約的條件、時間表及價格方面及為了能夠在遵守中華人民共和國（“中國”）法律及法規的情況下提出強制全面要約而可能需要處理的若干事宜

引言

1. 委員會於 2015 年 10 月 6 日舉行會議，覆核收購執行人員有關寬免 ArcelorMittal 在解除了其分別與 ING Bank（“ING”）及麥格理銀行有限公司（“麥格理”）就中國東方集團控股有限公司（“中國東方”）股份訂立的購股及認股權安排後原應須承擔的強制全面要約責任的決定。假如委員會決定不維持收購執行人員授予寬免的決定，便會產生關於落實強制全面要約的若干事宜。有關事宜概述如下：

   - 能否提出附有需獲得中國商務部的監關批准與否為條件的強制全面要約；

   - 應否就強制全面要約寬免《公司收購及合併守則》（“《收購守則》”）規則 30.2 所訂的 50%接納條件；

   - 強制全面要約的時間表；及

   - 強制全面要約的價格應為多少。

2. 由於委員會決定維持收購執行人員授予 ArcelorMittal 的寬免，委員會無須就強制全面要約下的機制及須予支付的價格作出裁定，及因此本決定僅與是否維持、改變或推翻收購執行人員寬免強制全面要約責任的決定一事有關。

3. 有關申請是根據《公司收購、合併及股份回購守則》（“兩份守則”）〈引言〉第 10.1 段向委員會提出的。有關條文規定，收購執行人員如果認為有事項牽涉特別罕見、事關重大或難於處理的爭論要點，可以不作裁定而將有關事項轉介予委員會處理。收購執行人員在聆訊上解釋，此項申請基本上是關於假如委員會推翻寬免 ArcelorMittal 的強制全面要約責任的決定時，之後需作出的機制及定價決定而作出。收購執行人員認為其寬免決定並無牽涉特別罕見、事關重大或難於處理的爭論要點。在中國東方於 2015 年 5 月 29 日的公告中公布收購執行人員的寬免決定後，中國東方兩名少數股東陳柏濤先生（“陳先生”）及卓澍丞先生（“卓先生”）去信收購執行人員，要求覆核此項決定。就有關寬免而言，委員會的聆訊基本上是對有關覆核要求的回應。ArcelorMittal 及中國東方（分別作為潛在要約人及受要約公司）亦獲邀出席委員會的聆訊及作出陳詞。

4. 收購執行人員在其決定的理由中提述委員會於 2014 年 10 月 14 日作出的決定（“《2014 年委員會決定》”）。《2014 年委員會決定》亦與中國東方及與 ArcelorMittal 和多家銀行之間的安排有關。就此，出席委員會聆訊的多名當事人質疑委員會在其《2014 年委員會決定》中得出的多項結論。委員會謹此澄清，在委員會席前進行的研訊並不包括對《2014 年委員會決定》的覆核。《2014 年委員會決定》仍然有效並為最終決定。鑑於部分事宜性質相似，委員會認為《2014 年委員會決定》為目前處理的事項提供了有用的指引及先例。

背景及事實

5. ArcelorMittal 按照委員會在 2007 年作出的一項決定，就除了由與其一致行動的人士持有的股份（包括中國東方的主席韓敬遠先生（韓先生）持有的約 45%股份）外的全部中國東方股份，作出強制全面要約。

6. ArcelorMittal 作出的強制全面要約令其於中國東方股份的持有量增至大約 47%，以致其與韓先生作為大股東合共持有 92%的股份，令公眾持股量下降至遠低於《香港聯合交易所有限公司證券上市規則》（《上市規則》）規定的最低水平。

7. 根據與韓先生訂立的協議，ArcelorMittal 須符合《上市規則》有關公眾持股量的規定，因此為符合該規定，ArcelorMittal 與 ING 及德意志銀行（德意志）（統稱“該等銀行”）作出以下安排：

   - 其以每股 5.7938 港元的價格分別向 ING 及德意志出售 9.9%及 7.5%中國東方股份；

   - ArcelorMittal 向該等銀行各自授出一項可在 2011 年 4 月 30 日行使的認沽權，根據有關認沽權，ArcelorMittal 同意以原本的購買價（按協定利率作出利息調整，及減去該等銀行在有關認沽權的三年有效期內收取的任何股息）取得該等銀行購買的所有股份。這項認沽權全部以現金作為抵押。這項抵押品與購買價互相抵銷，因此除了向該等銀行支付的費用外，當中並不涉及任何現金轉移。ArcelorMittal 實際上已透過提供與購買價等值的抵押品，為該等銀行購買有關股份的購買價全數提供資金；

   - ArcelorMittal 可在其行使根據與韓先生訂立的協議獲授的認購權後，要求該等銀行行使它們的認沽權。這項協議於 2011 年 5 月 9 日，在與該等銀行的安排完成後數日終止，儘管協議的某些條文在協議終止後是否存續仍然存在不確定因素。

8. 上述安排在當時符合《上市規則》有關公眾持股量的規定。

9. 中國東方股份在 2008 年 5 月曾於短時間內以等於或高於與該等銀行的安排下的購買價及認沽權的價格進行買賣。

10. 2011 年 4 月，與該等銀行的安排獲延期三年。

11. 香港聯交所在接近 2013 年底通知中國東方，指該等安排不再符合《上市規則》有關公眾持股量的規定。此外，德意志通知 ArcelorMittal，指其不會再次將有關安排延期，並將會就其行使認沽權在 2014 年 4 月 30 日發出通知。ING 則表示其會將有關安排續期或訂立大致類似的安排。

12. 在德意志行使認沽權之前，ArcelorMittal 就麥格理實際上將取代 DB 的條款進行了磋商。根據有關安排：

    - 麥格理以每股 1.70 港元購買中國東方 7.5%股權，即德意志原先持有的相同權益；

    - 麥格理獲 ArcelorMittal 授予一項全部以現金作為抵押的認沽權，據此，麥格理可於認沽權屆滿日期（即 2015 年 4 月 30 日）以 1.70 港元（如需支付任何股息，則作出調整後的價格）將其持有的中國東方股權售回予 ArcelorMittal。結果是除了支付相關費用和付還麥格理的成本外，沒有任何資金轉移；及

    - ArcelorMittal 同意就有關安排所涉及的一切風險，包括由其所引致的任何強制全面要約責任，向麥格理作出彌償。

13. ING 同意將其與 ArcelorMittal 的安排延期，有關安排與麥格理所協議的一樣。

14. 2014 年 6 月 9 日，中國東方獨立非執行董事質疑這些安排，聲稱它們導致 ArcelorMittal 須以每股大約 6.50 港元的價格履行強制全面要約責任，並要求收購執行人員作出表明此意的裁定。2014 年 8 月 21 日，收購執行人員裁定，強制全面要約責任沒有被觸發。得悉此裁定後，獨立非執行董事在 2014 年 9 月 1 日要求委員會對該項裁定進行審核。委員會遂在 2014 年 9 月 25 日召開聆訊，從而產生了《2014 年委員會決定》。委員會在其決定中得出以下結論：

    - ArcelorMittal 沒有觸發強制全面要約責任；

    - 麥格理與 ArcelorMittal 根據一致行動的定義中的第(9)類別被推定為一致行動；

    - 一致行動的推定沒有遭到反駁；及

    - 鑑於該等安排大同小異，因此亦可將 ING 及德意志推定為與或曾經與 ArcelorMittal 一致行動。

15. 在獨立非執行董事向收購執行人員提出初步申請後，中國東方舉行了年度股東大會。投票結果清楚顯示，韓先生與 ArcelorMittal 均投票贊成所有建議的決議，惟 ArcelorMittal 投票反對的授予董事發行股份的一般性授權的決議除外。ING 與麥格理亦明顯地完全沒有在這次會議上投票。

16. 接近 2014 年底，在與 ING 及麥格理的安排看來將要終止及不會獲得延期的情況下，ArcelorMittal 諮詢收購執行人員，就與 ING 及麥格理的安排終止後可能出現

的若干《收購守則》事宜尋求指引。在討論過程中，雙方提到就中國東方股份作出自願要約的可能性，以及與遵照中國內地法規落實強制全面要約（假如須作出此要約）相關的各項事宜，並就與 ING 及麥格理的安排商討臨時替代方案。ArcelorMittal 在諮詢完畢後，於 2015 年 1 月 29 日就原應在 ING 及麥格理行使認沽權時產生的強制全面要約責任申請寬免。收購執行人員藉日期為 2015 年 2 月 4 日及 10 日的函件，作出了豁免 ArcelorMittal 遵守強制全面要約責任的裁定。

《收購守則》的有關條文

17. 兩份守則在其引言部分強調委員會以往的決定對詮釋該守則的重要性。《收購守則》〈引言〉部分第 2.3 項訂明：

"執行人員和委員會亦按照執行人員和委員會根據《收購守則》作出的裁定，或其前身收購及合併委員會（the Committee on Takeovers and Mergers）以往所作的裁定，來詮釋《收購守則》。"

18. 規則 26.1 作為《收購守則》的核心，界定了取得控制權及何時須作出強制全面要約的門檻。這項規則訂明：

"除非獲執行人員授予寬免，否則當－

(a) 任何人不論是否透過在一段期間內的一系列交易而取得一間公司 30%或以上的投票權時；……

……該人須按本規則 26 所列基礎，向該公司每類權益股本（不論該類權益股本是否附有投票權）的持有人，以及向該人或與其一致行動的人持有的任何一類有投票權的非權益股本的股份持有人，作出要約（另見規則 36）。"

從該規則的開首部分可以看到，收購執行人員是可以寬免作出強制全面要約的責任。規則 26.1 的註釋（見下文）列明收購執行人員在考慮就這項規則的規定授予寬免時須採用的某些準則，以及當一致行動集團的成員之間發生股份轉讓時通常要求作出強制全面要約的情況和一般預期可獲寬免的情況。收購執行人員在回答委員會的提問時，確認其對規則 26.1 的開首部分的理解，即在採用準則來評估是否應授予寬免時，須對所有相關事實和情況進行分析，而不是僅僅依循規則 26.1 註釋 6(a)及 7 列出的準則。

19. 規則 26.1 註釋 1 訂明：

"大部分的問題都是與一致行動的人有關。除非相反證明成立，"一致行動"的定義包含一系列被推定為一致行動的人。以下的註釋說明執行人員如何詮釋本規則 26 及定義。

在某些情況下，一致行動集團的組成可能會有所改變，以致實際上形成新的一致行動集團或集團的均勢有重大改變。例如當一致行動集團的一名成員將所持有的股份全部或大部分售予一致行動集團內其他現有成員或另一人時，這情況便會出

現。執行人員將採用下文，特別是本規則26.1註釋6(a)及7列出的準則，並且可能縱使在沒有單一股東持有30%或以上股份的情況下，仍要求有關人士作出全面要約。”

此項註釋清楚說明，一致行動集團內的改變，即使其不會導致一致行動人士取得任何附帶於股份的額外投票權，或觸發《收購守則》的界線，亦可引起強制全面要約責任。此項註釋亦規定，收購執行人員須採用規則26.1註釋內的註釋6(a)及註釋7列出的準則。

20. 規則26.1註釋內的註釋6(a)的相關部分訂明：

“從另一成員取得投票權

假如某一致行動集團持有一家公司合共30%或以上的投票權，而該集團的個別成員因向另一成員取得投票權而持有30%或以上的投票權，或如其持有量已介乎30%與50%之間，而在任何12個月期間再取得超過2%投票權，通常便會產生作出要約的責任。

除本規則26.1註釋7列明的因素外，執行人員在考慮是否寬免要約的責任時，將顧及的因素包括：

(i) 該集團的領導人或最大的個別持股量是否已有所改變及該集團內持有量的均勢是否有重大改變；

(ii) 為取得該等股份所支付價格；及

(iii) 一致行動的人之間的關係及他們採取一致行動的時間有多久。”

此項註釋訂明，如一致行動集團的改變導致該集團的某名成員超出收購界線，便“通常”會需要作出強制全面要約： 這個便是切入點。寬免是一項讓步，而此項註釋列出了將會採用的準則。然而，正如日期為 2008 年 12 月 10 日有關香港飛機工程有限公司的委員會決定第 27 段所述，該等準則並非巨細無遺，故此所列出的準則不會排除其他考慮因素。

21. 雖然規則 26.1 註釋 1 亦指示收購執行人員考慮規則 26.1 註釋內的註釋 7 所列出的準則，但此項註釋內的準則無一與目前討論的事宜有關。

22. 一致行動及被推定為一致行動的人的類別（除非相反證明成立）在《收購守則》中界定如下：

“一致行動：一致行動的人包括依據一項協議或諒解（不論正式與否），透過其中任何一人取得一間公司的投票權，一起積極合作以取得或鞏固對該公司的“控制權”（定義如下）的人。

在不影響本項定義的一般適用範圍的情況下，除非相反證明成立，否則下列每一類別的人都將會被推定為與其他同一類別的人一致行動：……

(9) 任何就取得投票權向其他人（或與其一致行動的人）提供（直接或非直接）融資或財政援助（包括與取得投票權有關的融資的任何直接或非直接再融資）的人，但在日常業務過程中提供貸款的《銀行業條例》（第155章）所指的認可機構除外。”

一致行動人士的活動以取得或鞏固控制權為目標，但亦必定與如何持有控制權及控制權的變動有關，否則，規則 26 註釋內的註釋 1 便會尤其變得毫無意義。一致行動人士的成員之間的轉讓，即使其不會導致超越任何界線或增加一致行人動人士的合計持股量，亦可在實際上引致新的一致行動集團的形成。

此項推定條文提醒各個類別的人士，他們都會被視為與屬同一類別的人一致行動，除非相反證明成立。ArcelorMittal 並非《銀行業條例》（第 155 章）所指的認可機構，而其曾就 ING 及麥格理購買中國東方股份向他們提供財務協助。委員會在其《2014 年委員會決定》中，不接納此項推定已被推翻。

23. 一致行動集團的存在一經被裁定或予以承認，將會被視為一致行動人士，直至提出明確證據證明屬相反為止。這點載於“一致行動”定義的註釋 3，當中訂明：

“一致行動當事人的解散

如果已裁定或有當事人已承認某一組人目前或一直是一致行動的，則他們必須提出明顯的證據支持，方可獲接納為不再一致行動。”

委員會在《2014 年委員會決定》當中，裁定 ArcelorMittal、ING 及麥格理為一致行動人士。當事人並無提出證據，證明由《2014 年委員會決定》至 ING 及麥格理完成行使認沽權止期間的任何時間，一致行動人士已經解散。因此，《收購守則》規定它們須由被裁定為一致行動人士的日期起，直至 2015 年 4 月 30 日（ING 及麥格理於當日不再持有中國東方任何股份）止的期間，被視作一致行動人士。

24. 《收購守則》亦鼓勵收購或合併交易的當事人如有任何疑問，應諮詢執行人員的意見。這點於兩份守則的〈引言〉第 6.1 段訂明：

“如果當事人或其顧問對擬採取的行動是否符合一般原則或規則有任何疑問，均應事先諮詢執行人員的意見。這樣，當事人便可以清楚知道正確行事的準則，從而盡量避免因貿然行事而可能違反該兩份守則”

25. 雖然兩份守則訂明諮詢過程不會達致臨時裁定，但當事人仍可尋求正式的裁定。在此方面而言，執行人員在作出具權威性的裁定前，必須掌握與該項裁定有關的所有資料。這點載於兩份守則的〈引言〉第 7.1 段，當中的有關部分訂明：

"執行人員在作出裁定前，通常會考慮與申請有關的所有資料，以及進行較諮詢過程所容許的更為透徹的分析。在某些個案中，執行人員也許會認為有必要在作出裁定前進行非正式會議，或聽取其他對此有利害關係的當事人的意見。執行人員要求接受查詢的人迅速提供資料，以便有關決定有正確資料作為根據及盡快作出。裁定最初可能會以口頭形式告知當事人，但最終必定會以書面形式加以確認。"

26. 兩份守則的〈引言〉第 8 段載列了為使收購執行人員能作出裁定而須提交的資料，在此不贅。收購執行人員就此事作出的裁定，已透過日期為 2015 年 2 月 4 日及 10 日的函件以書面知會 ArcelorMittal。

中國東方、陳先生及卓先生的論據摘要

27. 卓先生相信《2014 年委員會決定》在基本上存在錯誤，ArcelorMittal、ING 及 Macquarie 在定義上不應被視為一致行動人士，原因是有關推定並不適用。在此情況下，應無須理會有關推定。此外，即使採用有關推定，亦可能會隨時被推翻，原因是 ArcelorMittal 及一致行動人士的整體持股量維持不變，並沒有出現取得或鞏固控制權的情況。如它們並非一致行動人士，規則 26.1 註釋內的註釋 6(a)的條文便不適用於它們，故此收購執行人員授予寬免所依據的基準並不正確。

28. 其餘兩方對於《收購守則》是否容許收購執行人員酌情決定就強制全面要約的責任（在有關安排終止時產生）授予寬免，他們的立場並不是那麼堅定。然而，他們認為不應按照註釋 6(a)載列的準則授予寬免。雖然他們不否認 ArcelorMittal 仍然是一致行動人士的領袖，但隨著一致行動集團內的兩名成員不再是成員，以及 ArcelorMittal 單獨將其持股量從剛好低於 30%（強制全面要約的觸發點）增加至約 47%後，任誰都必能清楚看到該集團內的持股量均勢出現了重大改變。相比日期為 2008 年 8 月 29 日有關永亨銀行有限公司的委員會決定（委員會於當中裁定持股量的改變導致形成新的一致行動集團）中的有關變動，這項變動大得多。

29. 中國東方對收購執行人員指 ArcelorMittal 仍然於其他一致行動人士的成員持有的中國東方股份中保留"實益擁有權"的論點，尤其感到不滿。該等股份已經由 ING 及麥格理購買，並且已支付印花稅，股份的擁有權明顯屬它們所有，而它們有權在認沽權的有效期間收取由中國東方派發的所有股息，以及隨意按照它們希望的任何方式以股份進行投票。就此方面而言，我們注意到雖然 ArcelorMittal 於中國東方的 2014 年股東週年大會上，投票反對重續董事的發行股份授權決議案，但 ING 及麥格理均沒有投票，與一致行動人士的預期行動方式相反。

30. ArcelorMittal 曾經就中國東方的股份作出強制全面要約（已於 2008 年結束），但這已無關宏旨。倘若強制全面要約在其後被觸發，便應作出該項要約。在此方面，他們把重點放在《2014 年委員會決定》第 43 段中的陳述，當中列明委員會認為"假如沒有此類安排（向麥格理銷售股份及與其訂立認沽權安排），

ArcelorMittal 便須購入德意志所持有的中國東方股權，繼而以非常高的價格觸發規則 26.1 所訂的強制要約責任。”

31. 中國東方亦就 ArcelorMittal 如何向香港聯合交易所及在與韓先生的訴訟中描述與銀行訂立的安排，以及現在如何描述該等安排，尋求作出對照。陳先生亦請求委員會注意 ArcelorMittal 於世界其他地方所涉及的監管及其他糾紛，以削弱 ArcelorMittal 表示已承擔其切實遵守《收購守則》的責任，並與收購執行人員充分合作的論點。

32. 最後，陳先生認為即使授出寬免，亦應以取得中國東方少數股東的批准作為條件。

ArcelorMittal 的論據摘要

33. 不令人感到意外的是，ArcelorMittal 同意收購執行人員的裁定，以及其作出裁定的理由。ArcelorMittal 表示，收購執行人員具有明確的酌情權授予寬免，而授予寬免的理由並非只局限於註釋 6(a)所載列的準則，而一旦授予寬免，便僅應在非常特殊的情況下才能予以推翻。

34. 此外，ArcelorMittal 亦表示，應以從 2007 年（ArcelorMittal 於該年成為中國東方的大股東）開始的整段事件經過來了解此事。解除該等安排，只是純粹令 ArcelorMittal 回到其提出的強制全面要約（已於 2008 年結束）完成時的狀況。

收購執行人員的論據摘要

35. 委員會已於其《2014 年委員會決定》中明確裁定 ArcelorMittal、ING 及麥格理為一致行動人士。該項決定仍然有效，並為最終決定。這個狀況不會因為 ING 及麥格理沒有於 2014 年股東週年大會上投票的事實而有所改變。因此，在考慮此事時的切入點是，該等人士為一致行動人士。

36. 收購執行人員對於 ArcelorMittal、ING 及麥格理之間的安排在解除後導致 ArcelorMittal 所持有的中國東方股份所附帶的投票權由低於 30%增加至約 47%，因而觸發規則 26.1 下的強制全面要約，沒有任何疑問。鑑於這項規則在香港的收購合併規例中具有核心重要性，故此受到非常嚴格的規管。

37. 從措辭上看，規則 26.1 給予收購執行人員酌情權，可依賴規則 26.1 的特定註釋及更廣泛地因應與事宜有關的所有情況，寬免強制全面要約責任。在此事宜上的關鍵考慮因素，是《2014 年委員會決定》及委員會作出該決定的理由。

38. 從規則 26.1 註釋內的註釋 6(a)的條文來看，一致行動集團的領導人顯然沒有改變，一直都是由 ArcelorMittal 擔任。問題在於一致行動集團之間出現重大變動，實際上導致其解散。雖然註冊持股量的均勢出現了明顯轉移，收購執行人員並不認為其所提述的“實益擁有權”有重大改變。“實益擁有權”並非指該詞狹窄的法律定義，而是指經濟利益所在之處。收購執行人員認為，ING 及麥格理所持有股份的經濟風險實際上從一開始便已由 ArcelorMittal 來承擔，而在近年（特別是

於 2014 年重新磋商有關安排之時），ING 或麥格理能夠因其持有的中國東方股份的任何升值潛力而實際獲益的機會十分渺茫。委員會在其《2014 年委員會決定》中形容有關安排的特點實質上是代持股份，當中並沒有資金轉移，而股份亦必定會售回予 ArcelorMittal。

39. 註釋 6(a)所載的其他條件，即所支付價格、一致行動的人之間的關係及他們採取一致行動的時間有多久，與此事無關。

40. 在 ArcelorMittal 帳目內對於中國東方的投資的會計處理方法，即沒有“取消確認”由 ING 及麥格理（及在此之前由德意志）持有的 17.4%股權，肯定了 ArcelorMittal 因這項投資而承受重大風險及獲得回報。

41. ING 及麥格理原本會就以其名義登記的中國東方股份收取中國東方可能派發的股息一事，並不影響收購執行人員的分析，原因是任何派息額均會被 ArcelorMittal 應支付的認沽權價格所抵銷。事實上，中國東方自其 2011 財政年度以來未曾派息。

42. ING 及麥格理沒有於 2014 年股東週年大會投票，亦非關鍵事宜。在緊接股東週年大會前的期間，收購執行人員與當事人曾進行討論。當事人聲稱他們並非一致行動，因此他們不大可能採取明顯會違反這項宣稱的行動。事實上，在 2014 年的委員會聆訊上，麥格理曾表示，其基本上是一名被動投資者及一般不會在其投資的公司的會議上投票。

43. 由於“清洗交易的寬免”的批准只適用於發行新證券的情況，故並不存在向 ArcelorMittal 授予的寬免應以取得少數股東的批准為條件的問題。

44. 諮詢過程是《收購守則》賴以成功的一項要素，並有助減低違規的可能性。在此事上，ArcelorMittal 連同其法律顧問已進行適當的諮詢。此外，當事人將其交易結構設計成符合《收購守則》所訂明的一個或多個安全港的定義，並無不妥之處。

決定及理由

45. ArcelorMittal 就其根據規則 26.1 須履行的強制全面要約責任向收購執行人員提出了寬免申請。在這過程中，其看來已向收購執行人員提供充分資料，讓收購執行人員得以根據正確資料作出授予寬免的決定。委員會在召開聆訊期間，除了該等在授予寬免之時已呈示於收購執行人員席前的因素外，並無獲悉其他關鍵、新增或重要因素。收購執行人員所作的裁定是以正當方式取得的。在一般情況下，潛在收購或合併交易的其中一方向收購執行人員取得裁定後，應該對其可根據該裁定行事抱持信心，否則會對在採取任何行動前所進行的諮詢程序和向收購執行人員取得裁定的成效造成損害。委員會雖然隨時有權更改或推翻任何裁定，但仍應注意其決定會帶來影響更廣泛的後果，並且應將此情況考慮在內。

46. 就此事而言，《2014 年委員會決定》是一個重要先例，這除了是因為《收購守則》要求委員會須參考其過往作出的決定外，還因為本案與《2014 年委員會決定》都關乎同一家公司和類似事宜。委員會根本無權更改《2014 年委員會決

定》。在此事上，委員會已經裁定 ArcelorMittal、ING 及麥格里屬一致行動人士，而收購執行人員在審批寬免申請時將三者視作一致行動集團的成員屬正確判斷。

47. 假如收購執行人員沒有授予寬免，ArcelorMittal、ING 及麥葛里之間的安排一旦終止，便會觸發規則 26.1 所訂的強制要約責任。故此，《2014 年委員會決定》指德意志行使其認沽權將會觸發強制全面要約責任是正確陳述，惟在作出該陳述時並無必要提及收購執行人員有能力寬免該項責任，因為規則 26.1 的措辭已充分說明這點。

48. 雖然規則 26.1 的註釋要求收購執行人員注意其必須考慮的一系列準則，但從規則 26.1 本身較為概括性的措辭應可同時清楚理解到，收購執行人員在行使其酌情權寬免規則 26.1 所訂的強制全面要約時，應考慮所有相關因素。

49. 在本案中，收購執行人員除考慮到一致行動集團的領導人情況和評估一致行動集團內的變動是否重大外，亦考慮了其他關鍵因素，包括：

- ArcelorMittal 在以 ING 及麥格里名義登記的中國東方股份中所持有的相關經濟利益及其所承受的風險。該等風險即使並非全部亦幾乎全由 ArcelorMittal 承擔；
- 《2014 年委員會決定》，尤其是當中作出中國東方股份根本上是由 ING 及麥格里代 ArcelorMittal 暫時存管的裁斷；
- 引致過去約七年來須採取該等本身極不尋常的安排的有關情況；及
- ArcelorMittal 帳目內就對中國東方的投資所作的會計處理。

上述因素構成收購執行人員作出授予寬免的決定時所依據的合理基礎。故此，委員會看不到任何須修訂或推翻收購執行人員決定的理由。

50. 由於委員會維持收購執行人員所作出授予寬免的決定，故委員會並無理由對其席前的其他事宜作出裁斷。

2015 年 10 月 19 日

當事人：

收購執行人員
陳柏濤先生，中國東方的少數股東
卓澍丞先生，中國東方的少數股東
中國東方集團控股有限公司，其法律顧問為蘇利文・克倫威爾律師事務所
Mittal Steel Holdings AG，其法律顧問為年利達律師事務所