Takeovers and Mergers Panel Disciplinary Decision -- South East Group Limited (formerly Benelux International Limited)

8 Jun 1999

Further to its press release on 24 May 1999, please see the attached written decision of the Panel in relation to an application by the Executive for proposed disciplinary action as a result of a failure to make a general offer for South East Group.

Warning --the general offer ordered by the Panel may not go ahead.

Investors should exercise caution when buying or selling shares in South East Group.

Page last updated : 1 Aug 2012

TAKEOVERS AND MERGERS PANEL

Panel Decision In relation to an application by the Executive for proposed disciplinary action as a result of a failure to make a general offer for the South East Group Limited (formerly Benelux International Limited)

The Panel met on 21 May 1999 to consider whether or not to endorse proposed disciplinary action against Madame Cheong Swee Kheng ("***Madame Cheong***") and Dr. Hendra Rahardja ("***Dr. Hendra***").

Salient Facts

In May 1998, the Executive ruled that a general offer obligation had been triggered in April 1998 under the provisions of Rule 26.1 of the pre-August 1998 version of the Code on Takeovers and Mergers (the "***Code***") in circumstances contemplated within Note 7 to Rule 26.1 (the "***Ruling***")(please see attached copy of Rule 26.1 and Note 7).

The background to this matter is that in June 1997, Fortune Grand Investment Limited ("***Fortune Grand")*** became the second largest shareholder of Benelux by subscribing to 550,000,000 new shares (representing c.17% of the diluted share capital) in a placement under the Company's general mandate. Fortune Grand is owned as to 80% by Dr. Hendra, 10% by Madame Cheong and 10% by a close relative of Dr. Hendra. Prestbury Incorporated Limited ("***Prestbury***"), a company owned by Mr. Kwee Cahyadi Kumala ("***Mr. Kumala***") remained the single largest substantial shareholder at that time, holding about 34% of the diluted share capital.

In April 1998, Prestbury/Mr. Kumala transferred 450 million Benelux shares (about 14% of the share capital) to Madame Cheong and her sister at $0.08 per share. As a result of this transaction, Fortune Grand/Madame Cheong/Dr. Hendra became the largest shareholder in Benelux and Prestbury/Mr. Kumala retained a reduced shareholding.

The Executive's Ruling was made on the basis that in April 1998, a concert party had been formed consisting of Madam Cheong (who was acting in concert with Fortune Grand and Dr. Hendra) and Mr. Kumala (acting in concert with Prestbury, the vendor of part only of a shareholding in South East Group) and that their aggregate shareholding in the South East Group exceeded the 35% threshold imposed by the Code.

Although she was prepared to accept the Executive's Ruling that a concert party had been formed, Madame Cheong informed the Executive shortly after its Ruling, that she was unable to secure the necessary financing for a general offer. The Executive therefore proposed to impose an immediate order denying Madame Cheong, Dr. Hendra, Fortune Grand and any private companies directly or indirectly controlled by them, access to the securities markets for a period of 12 months (a "***cold shoulder order***"). In response, it was proposed that a general offer would be made at $0.08 per share within 12 months from the date of any Panel ruling, failing which, Madame Cheong and her related parties would be subject to a cold shoulder order for a period of 12 months (the "***Proposal***"). The Executive agreed to the Proposal. However, as a deferred general offer was novel in Hong Kong, the Executive referred the Proposal to the Panel for endorsement.

Panel's Decision

The Panel considered the written submissions of the Executive, Madam Cheong and Dr. Hendra's letter dated 7 May 1999. The Panel noted that Madame Cheong and Dr. Hendra had both formally indicated their acceptance of the Proposal. Madam Cheong and Dr. Hendra had both declined to attend the Panel hearing and were jointly represented by their legal adviser who made opening and closing submissions on their behalf and addressed such questions posed to him by members of the Panel as he was able to answer.

The Panel noted that Section 12.2 of the Introduction to the current version of the Code, empowers the Executive to deal with a disciplinary matter if the party to be disciplined agrees to the disciplinary action proposed by the Executive. The Panel further noted that this matter had been referred to it for the specific purpose of it considering whether or not to endorse the Proposal. Although the Panel had asked various questions to clarify the background to this matter, it had based its deliberations on the premise that there was no application before it challenging the Executive's Ruling. In such circumstances, the Panel wished to emphasise that it had strictly limited its enquiries to whether the Proposal was appropriate or not based on the Executive's Ruling.

The Panel ruled that any general offer should not be deferred but made immediately. In reaching this decision, the Panel took into account :

1. the Executive's ruling, which involved the breach of a core provision of the Code;

2. the considerable period of time that had already passed since the Proposal was agreed upon by the Executive and Madame Cheong; and

3. that no satisfactory grounds had been put forward to support the deferral of any general offer in this case.

The Panel clarified the point that such general offer obligation should extend to Madame Cheong, Dr Hendra and their corporate vehicle, Fortune Grand, as members of the concert group. Save as aforesaid, the general offer should be made upon such terms as were agreed between Madame Cheong and the Executive in June 1998.

The Panel was mindful of the practicalities of the situation, and in particular, that the Proposal contemplated a period of time subsequent to any Panel ruling during which a general offer was to be made, failing which a cold shoulder order would be imposed. In such circumstances, the Panel was prepared to allow a grace period of 3 months from the date of its ruling for the making of the general offer. The Panel further ruled that in the event that the general offer was not made within such 3 month period, a cold shoulder order would be imposed upon Madame Cheong, Dr Hendra and Fortune Grand and any private companies directly or indirectly controlled by them. The precise terms of the cold shoulder order would be notified to the relevant parties, if and when the need arose.

The Panel wished to make it absolutely clear that its decision in this matter is based on the particular facts of this case and is not intended to be of general application in future cases. For the avoidance of doubt, the Panel is concerned to emphasise that it does not approve of the deferral of general offers.

Pursuant to section 13.1 of the Introduction to the current Code, the parties have 7 days from the receipt of the Panel's written reasons within which to apply to the Takeovers Appeal Committee for a review of the appropriateness of the sanctions imposed by the Panel.

Rule 26.1 of the pre-August 1998 version of the Code

26 Mandatory offer

26.1 When mandatory offer required

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, 35% or more of the voting rights of a company;

(b) two or more persons are acting in concert, and they collectively hold less than 35% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 35% or more of the voting rights of the company;

(c) any person holds not less than 35%, but not more than 50%, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than 5% from the lowest percentage holding of that person in the 12 month period ending on and inclusive of the date of the relevant acquisition; or

(d) two or more persons are acting in concert, and they collectively hold not less than 35%, 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 5% 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, or the principal members of the concert group, as the case may be, shall extend offers, on the basis set out in this Rule, 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. Offers for different classes of equity share capital must be comparable and the Executive should be consulted in advance in such cases. (See Rule 14.)

Note 7 to Rule 26.1

7. *Vendor of part only of a shareholding*

Shareholders sometimes wish to sell part only of their holdings or a purchaser may be prepared to acquire part only of a holding. This arises particularly where an acquirer wishes to acquire just under 35%, thereby avoiding an obligation under this Rule to make a general offer. The Executive will be concerned to see whether in such circumstances the vendor is acting in concert with the acquirer for instance in such a way as effectively to allow the acquirer to exercise a significant degree of control over the retained shares, in which case a general offer would normally be required.

A judgment on whether such a significant degree of control exists will obviously depend on the circumstances of each individual case, but, by way of guidance, the Executive would regard the following points as having some significance :

(a) there would be less likelihood of a significant degree of control over the retained voting rights if the vendor was not an "insider";

(b) the payment of a very high price for the voting rights would tend to suggest that control over the entire holding was being secured;

(c) if the parties negotiate options over the retained voting rights it may be more difficult for them to satisfy the Executive that a significant degree of control is absent. On the other hand, where the retained voting rights are in themselves a significant part of the company's capital (or even in certain circumstances represent a significant sum of money in absolute terms) a correspondingly greater element of independence may be presumed;

(d) it would be natural for a vendor of part of a controlling holding to select a purchaser whose ideas as regards the way the company is to be directed are reasonably compatible with his own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor's support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained voting rights, would not lead the Executive to conclude that a general offer should be made.