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Equal Treatment of Shareholders under the Dual Class Share Structure

Recent Development of Takeover Rules in Singapore

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Introduction

On 24 January 2019, a revised Singapore Code on Take-overs and Mergers (the Take-overs Code) was promulgated by the Monetary Authority of Singapore (MAS) on the advice of the Securities Industry Council (the SIC).¹ In Singapore, the SIC administers and enforces the Take-overs Code.² The SIC also reviews the take-over rules periodically and recommends changes for promulgation by the MAS.³

The revised Take-overs Code incorporates public feedback on the *Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers*. The Consultation Paper was issued by the SIC previously on 19 July 2018⁴ as a response to the nascent context of the primary listing of companies with dual class share (DCS) structures on the Mainboard of the Singapore Exchange (SGX) as of 26 June 2018.⁵

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The usual disclaimer applies.

¹ Section 139(6), the Securities and Futures Act (Revised Edition 2006)

² For a general discussion on the regulatory framework for the takeover market in Singapore, see, e.g. WAN Wai Yee, 'Chapter 13: Legal Transplantation of UK-Style Takeover Regulation in Singapore' in Umakanth Varottil and Wai Yee Wan (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (Cambridge University Press 2017) Wai Yee WAN and Umakanth VAROTIL, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis 2013) Chandrasegar Chidambaram, *Take-overs and Mergers* (2 edn, LexisNexis 2010)

³ The SIC has powers under the law to investigate any dealing in securities that is connected with a take-over or merger transaction. In addition, it issues guidance notes on the application of specific principles or rules. Section 138, the Securities and Futures Act.

⁴ When the consultation ended on 17 August 2018, the SIC had received comments from six respondents supporting the proposals. The comments made technical suggestions such as reference dates and the drafting of the proposed amendments.

Annex 1, the SIC, Consultation Conclusions on Revision of the Singapore Code on Take-overs and Mergers, 24 January 2019

⁵ Listing Framework for Dual Class Share Structures, Amendments to Mainboard Rules, 26 June 2018

See also Jiang Huiqing, 'Recent Developments in Singapore on the Listing of Dual-class Shares Companies' (2018) 40 *The Company Lawyer* 189 Pey-Woan Lee, 'Dual-Class Shares in Singapore – Where Ideology Meets Pragmatism' (2018) 15 *Berkeley Business Law Journal* 440

The revisions are to ensure that takeover practices targeting at companies with the DCS structures are conducted in compliance with the principle of equal treatment of all shareholders. The key amendments are two-fold: (a) expanding the application of mandatory offer and its dispensation to target companies with the DCS structures. (b) clarifying the fair pricing norms for multiple classes of equity share capital of target companies with the DCS structures. The following discusses each amendment in detail.

The Mandatory Offer Rule under the DCS Structures

The mandatory offer rule⁶ manifests “most discernibly” the principle of equal treatment of shareholders enshrined in the Take-over Code.⁷ Rule 14.1 mandates a person, or other concert parties, to extend offers immediately to the holders of any class of share of the company which carries votes and in which such person, or persons acting in concert with him, hold shares, if either of following circumstances occurs:

- 1) “any person acquires whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company”;
- 2) “any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 6 months additional shares carrying more than 1% of the voting rights, of the such person must extend offers immediately, on the basis set out in this Rule, to the holders of any class of share capital of the company which carries votes and in which such person, or persons acting in concert with him, hold shares.”⁸

The mandatory offer rule, however, is not applied without dispensation. There are instances where a target company and its shareholders as a whole would be better served if a shareholder is exempted from tendering a general offer.⁹ One such instance is where a shareholder subscribes to such a new issuance of shares that can be deployed for advancing the company’s business purposes.¹⁰ In Singapore, the so-called whitewash resolution approved by the independent shareholders has been utilized to dispense the mandatory offer obligation under the close supervision of the SIC.¹¹

To accommodate the SGX’s listing framework for DCS structures, an elaborate new Note 18 under Rule 14.1 is added to the Take-over Code to expand the application and the dispensation of the mandatory offer rule.¹² For a company with the DCS structure, there might occur a Conversion of multiple-votes shares (MV shares) to one-vote shares (OV shares), or a Reduction in the number of voting rights per MV share resulting in a lowering of the total number of voting rights of the company. A shareholder, with his concert parties if any, may find his shareholding cross the mandatory offer thresholds. The new Note 18 clarifies that such a triggering shareholder may find himself foisted with the mandatory offer obligation to extend a general offer for all outstanding shares,

⁶ Also referred as the mandator bid rule in literature and other jurisdictions, e.g. Reinier Kraakman, John Armour and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3 edn, Oxford University Press 2017) Section 8.3.4 (Exit rights: Mandatory bid rule and keeping the offer open). David Kershaw, *Principles of Takeover Regulation* (Oxford University Press 2016) Chapter VIII (The Mandatory Bid); Directive 2004/25/EC of the European Parliament and of the Council, Article 5 (Protection of minority shareholders, the mandatory bid and the equitable price). Casey Watters, 'Singapore M&A Code Amended to Clarify Provisions and Establish an Auction System' (2016) 37 *The Company Lawyer* 327

⁷ Principles 3 – 5, the Take-over Code

See also: Wai Yee WAN and Umakanth VAROTTIL, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis 2013) Page 397

⁸ Rule 14.1, the Take-over Code

⁹ For examples, three scenarios are listed under the *Notes on Dispensation from Rule 14*, the Take-over Code

¹⁰ Wai Yee WAN and Umakanth VAROTTIL, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis 2013) Page 441 - 442

¹¹ See Note 1 of *Notes on Dispensation from Rule 14 and Appendix 1 “Whitewash Guidance Note”*, the Take-over Code

¹² Note 18. Conversion of multiple voting shares to ordinary voting shares or reduction of voting rights of multiple voting shares, Rule 14.1, *ibid*

either immediately upon the acquisition of the additional voting rights,¹³ or upon the exercise of its voting rights in excess of the relevant mandatory offer threshold,¹⁴ or within 6 months if neither of above circumstances arises.¹⁵

Such an obligation to make a general offer for all outstanding shares, pursuant to the new Note 18, may be dispensed if the Triggering Shareholder:

- 1) is independent of the Conversion of the Reduction;
- 2) has not acquired any additional voting rights in the company from the date he becomes aware that the Conversion or the Reduction is imminent;
- 3) has not exercised his voting rights in excess of the relevant mandatory offer threshold under Rule 14.1 from the date of the Conversion or the Reduction

The power to dispense the general offer obligation is solely rested on the SIC. Note 18 mandates that the SIC should be consulted in all relevant cases but refrains from defining exhaustively the term “independent”. This is due to the consideration that the assessment of independency would entail examining specific circumstances of the Conversion or Reduction under various scenarios. For example, if a Triggering Shareholder was not acting in concert with other parties who initiating a Reduction proposal, such a Triggering Shareholder would be regarded as independent. If a Conversion was resulted from the demise of a holder of MV shares, a Triggering Shareholder would still be considered independent despite acting in concert with the demised shareholder.¹⁶

Even if the independency test failed, the mandatory offer requirement may still be waived if the Triggering Shareholder either reduces his aggregate voting rights to below the mandatory offer thresholds within 6 months,¹⁷ or obtains a whitewash waiver from independent shareholders within 3 months.¹⁸

The Fair Pricing Norms under the DCS Structures

A mandatory offer will not achieve the policy goal of treating shareholders fairly and equally without equitable considerations for equivalent shares.¹⁹ The Take-over Code imposes stringent minimum pricing norms under Rule 14.3 and the accompanying Notes to distribute the premium associated to the benefit of control to all shareholders equally. The minimum price is set to be not less than the highest price paid by the offeror or any person acting in concert with it for voting rights of the offeree company during the mandatory offer period and within 6 months prior to its commencement.²⁰

The revised Take-over Code introduces the new Note 8 on Rule 14.3 to determine the minimum offer price in the event of a mandatory offer triggered by a Conversion of MV shares to OV shares or a Reduction in the voting rights attached to each MV share. The date of the initial announcement of the change is added as an alternative reference date, given the impacts on the market by the announcement. The equitable offer price is hence set to be the highest price that the offeror or his concert parties have paid for voting rights in the company in the 6 months prior to the earlier one of:

- 1) the date of announcement of the Conversion or a Reduction,
- 2) the date of the Conversion or the Reduction.

¹³ Note 18(i), Rule 14.1, *ibid*

¹⁴ Note 18(ii), Rule 14.1, *ibid*

¹⁵ Or such longer period of time as the SIC may allow where exceptional circumstances warrant such extension of time. Note 18(a), Rule 14.1, *ibid*

¹⁶ The SIC, Consultation Conclusions on Revision of the Singapore Code on Take-overs and Mergers, 24 January 2019. Page 7

¹⁷ Or such longer period of time as the SIC may allow where exceptional circumstances warrant such extension of time. Note 18(b), Rule 14.1, the Take-over Code

¹⁸ See Note 1 of Notes on Dispensation from Rule 14 and Appendix 1 “Whitewash Guidance Note”, the Take-over Code

¹⁹ Wai Yee WAN and Umakanth VAROTTIL, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis 2013) Page 431

²⁰ Rule 14.3 (a), the Take-over Code

If the offeror and his concert parties did not acquire shares in the company within the above period, the offer price is set to be the simple average of the daily volume weighted average traded prices of the company on either the latest 20 trading days or whatever number of trading days there were within the 30 calendar days prior to the earlier of the above dates. The SIC, however, reserves the right to disregard any inexplicably high or low traded prices during the said 30 calendar days when computing the offer price.²¹

The revised Take-over Code further addresses the ratio of offer values involving both MV shares and OV shares. Where a shareholder is foisted with the mandatory offer for a company with multiple classes of shares, Rule 18 mandates a comparable offer for each class. The new Note 1 on Rule 18 prescribes a ratio of offer values to be equal to the ratio of the simple average of daily volume weighted average traded prices of the shares within 6 months preceding the commencement of the offer period. Where traded price is unavailable for any class and different classes differ only in their voting rights, the offer will be comparable if the ratio of the offer values is equal to one. In all cases, the ratio of the offer values must be justified to the SIC in advance.²²

Concluding remarks

The revisions to the Take-over Code have become effective as of 25 January 2019. The revisions feature several new Notes implementing the mandatory offer rule in the complex context of listed companies of DCS structures. These additional Notes provide greater certainty to market participants and potential business transactions. They reaffirm the fundamental principle that all shareholders, controlling or minority, multiple votes or one vote, shall be given the equal and fair opportunity to access the extra premium paid for the private benefits of control.

This regulatory development manifests the policy preference towards a strong shareholder protection in Singapore. It has been positively accepted by the market for corporate control, as evidenced by respondents' endorsement to the consultation paper. Such a regulatory update also projects transnational implications to other jurisdictions which have recently incorporated the DCS structure. For example, on 30 April 2018, the Hong Kong Exchanges and Clearing Limited (HKEX) added a new chapter to the Main Board Listing Rules for weighted voting rights listings.²³ The Codes on Takeovers and Mergers and Share Buy-backs have yet to be amended in the HK.²⁴ Given the affinity of takeover rules between Hong Kong and Singapore, the recent revisions of Singaporean Take-over Code will be a valuable reference for the future amendments to the HK Take-over Codes.

²¹ Note 8, Rule 14.3 (a), the Take-over Code

²² Note 1, Rule 18, *ibid*

²³ HKEX, *Research Report: Weighted voting rights: Angel or evil to investors?*, 19 July 2019); (Robin) Hui Huang, Wei Zhang and others, 'The (Re)introduction of Dual-Class Share Structures in Hong Kong: A Historical and Comparative Analysis' (Forthcoming, 2019) *Journal of Corporate Law Studies*; Jiang Huiqin and Casey Watters, 'Weighted Voting Rights in Asia: Race to the Bottom or Catalyst for Innovation?'. Working Paper 2019.

²⁴ The current version of the HK Codes was released on 13 July 2018

Bibliography

Chidambaram Chandrasegar, *Take-overs and Mergers* (2 edn, LexisNexis 2010)

Kershaw David, *Principles of Takeover Regulation* (Oxford University Press 2016)

Kraakman Reinier, Armour John and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3 edn, Oxford University Press 2017)

WAN Wai Yee and VAROTTIL Umakanth, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis 2013)

Wai Yee WAN, 'Chapter 13: Legal Transplantation of UK-Style Takeover Regulation in Singapore' in Varotttil Umakanth and Wan Wai Yee (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (Cambridge University Press 2017)

Huang (Robin) Hui, Zhang Wei and others, 'The (Re)introduction of Dual-Class Share Structures in Hong Kong: A Historical and Comparative Analysis' (Forthcoming, 2019) *Journal of Corporate Law Studies*

Huiqing Jiang, 'Recent Developments in Singapore on the Listing of Dual-class Shares Companies' (2018) 40 *The Company Lawyer* 189

Lee Pey-Woan, 'Dual-Class Shares in Singapore – Where Ideology Meets Pragmatism' (2018) 15 *Berkeley Business Law Journal* 440

Watters Casey, 'Singapore M&A Code Amended to Clarify Provisions and Establish an Auction System' (2016) 37 *The Company Lawyer* 327

HKEX, *Research Report: Weighted voting rights: Angel or evil to investors?*, 19 July 2019)