Charltons - Hong Kong Law Newsletter - 11 July 2011

[online version](http://www.charltonslaw.com/takeovers-and-mergers-panel-releases-ruling-on-whether-two-parties-should-be-considered-concert-parties-under-the-takeovers-code/)

# Takeovers And Mergers Panel Releases Ruling On Whether Two Parties Should Be Considered “Concert Parties” Under The Takeovers Code

## Introduction

The Takeovers and Mergers Panel (the **Panel**) released on 24 May 2011 its ruling on whether two parties should be regarded as “Concert Parties” under the Codes on Takeovers, Mergers and Share Repurchases (the **Codes**). The case concerns the proposed acquisition (the **Proposed Acquisition**) by Rengo Co Ltd (**Rengo**), of 29.9% of the voting rights in Hung Hing Printing Group Limited (**Hung Hing**), from Asia Packaging Company Limited (**Asia Packaging**). The matter was referred to the Panel by the Takeover Executive (the **Executive**) under section 10.1 of the Introduction to the Codes, which concerns issues of law which are particularly novel, important or difficult.

The Panel was asked to give a ruling on three connected issues:

* Whether Rengo and the family (the **Family**), holder of a 33.39% stake in Hung Hing, are parties acting in concert in relation to the Proposed Acquisition?
* If yes, will a mandatory general offer obligation be imposed once the Proposed Acquisition is complete and
* Do Rengo and Asia Packaging have any arrangements in place which would permit the former to effectively control the 7.6% interest in Hung Hing which the latter would retain upon completion of the Proposed Acquisition?

After consideration of the submissions of the Executive, the Family, Rengo and Asia Packaging, the Panel concluded that there was not enough evidence to support the proposition that the Family and Rengo were acting in concert as regards the Proposed Acquisition. Although accepting that Rengo and the Family were known to each other, the Panel was not convinced that they were “actively cooperating” in the manner required by the Codes to support a finding of parties “Acting in Concert”. Furthermore, the Panel did not consider that the evidence available supported the contention that Rengo would exercise control over the stake retained by Asia Packaging. As a result of these findings, no obligation to make a general offer applies. Although the reasoning underpinning this ruling and the submissions of the parties are considered in more detail in this newsletter, the following are the key factors in the Panel’s decision:

* The disposal process engaged in by Asia Packaging was transparent, involved alternative bidders and was overseen by an independent party, JP Morgan
* There is no evidence of an arrangement between Rengo and Asia Packaging which would allow Rengo to exert control over Asia Packaging’s residual stake in Hung Hing after the Proposed Acquisition. Although the price paid by Rengo for the 29.9% stake may include a premium compensating Asia Packaging for the lower price it may be forced to accept in the market for its remaining shares, and it is equally clear that Rengo did not wish to cross the 30% mandatory general offer threshold, this does not of itself mean that Rengo would effectively gained control over Asia Packaging’s residual stake
* Asia Packaging informed the Panel that if would be making all reasonable efforts to sell its remaining 7.6% shareholding as soon as possible, with the effect that Rengo would not be in a position to exert control over 30% or more of the voting rights of Hing Hung after the Proposed Acquisition

## The Relevant Provisions Of The Codes

### “Acting in Concert”

The past rulings of the Panel confirm that three elements must be present in order to support a finding that parties are acting in concert under the Codes:

* More than one person actively cooperating, according to an agreement or understanding (which can be formal or informal)
* The aim of this cooperation must be to gain or consolidate control of a company to which the Codes apply
* via the acquisition by at least one of the parties of voting rights in that company.

### Rule 26.1

Rule 26.1 imposes an obligation on parties acting in concert to make an offer to each class of equity holder in a company, where they together hold at least 30%, but not more than 50%, of the voting rights of that company and one (or more) of them obtains additional voting rights, with the effect that the overall holdings of the parties acting in concert increases by more than 2% when compared with the lowest collective percentage holding of the parties in the 12 months previous to this new acquisition.

### Note 7 to Rule 26.1

Furthermore, Note 7 to Rule 26.1 states that where a controlling shareholder, such as Asia Packaging in relation to Hung Hing in this case, sells only a part of its interest in a company, the Executive will be on notice to inquire as to whether an arrangement exists permitting the purchaser to effectively control the vendors remaining voting rights. If such an arrangement is uncovered, the Executive will normally demand that the purchaser make a general offer.

The Note also details the factors which the Executive will take into account when evaluating whether the purchaser has effective control over the voting rights retained by the vendor:

1. is the vendor an “insider”? If not, there is less likelihood of a relevant level of control over the retained voting rights.
2. Has a very high price been paid for the voting rights? If yes, this may point to a situation where the entire holding has been effectively obtained.
3. Have the parties negotiated options over the retained voting rights? If yes, this points to the existence of effective control on the part of the purchaser.
4. Do the retained rights constitute a large part of the company’s capital or are they very valuable in monetary terms? If so, this can lead to a presumption of independence on the part of the vendor
5. The mere fact that a vendor deals with a purchaser whose vision for the company is similar to her own or that a purchaser makes vendor support for his chosen board representative a condition of the transaction will not, absent other evidence, cause the Executive to direct that a general offer be made.

## Background And Facts Of The Case

Hung Hing, a printing, packaging, paper trading and box manufacturing company listed on the Main Board of the Stock Exchange of Hong Kong (the **Exchange**), was founded by Mr Yam Cheong Hung in 1950 and has been run by the Family ever since. The Family held a 33.39% shareholding interest in Hung Hing at the time of the Proposed Acquisition. Asia Packaging, a company under the control of funds managed by the private equity firm CVC Asia Pacific, held a 37.5% interest at that time, thus leaving it with a 7.6% interest, should the Proposed Acquisition take place. Rengo, a Japanese incorporated packaging solutions company listed on the Tokyo Stock Exchange, held a mere 0.01% interest in Hung Hing before the Proposed Acquisition

Rengo and Hung Hing have enjoyed a business relationship dating back to 1995, when they acquired mutual ownership interests in two foreign invested joint ventures (**Paper Mill Joint Ventures**) in Mainland China. This business relationship has led to continuous contact between the representatives of the two companies over the last 16 years.

### The case advanced by the Executive

The Executive submitted that Rengo and the Family were acting in concert to gain or consolidate control of Hung Hing, via the acquisition of voting rights in the company, and therefore the Proposed Acquisition must result in a general offer. Factors highlighted by the Executive in support of this included the following:

* The two parties had a long standing, pre existing relationship which they expected to continue long beyond the completion of the Proposed Acquisition. Regular contact also occurred between the parties via the board meetings of the Paper Mill Joint Ventures.
* The alleged intimation by the Family that they would prefer that the acquirer of Asia Packaging’s interest in Hung Hing be a party known to them, so as to ensure the continuation of the family’s position of influence in relation to Hung Hing
* The Executive alleged that the submissions by Rengo and the Family that there had been no discussions of collusion regarding board seats to be held by Rengo lacked credibility
* The fact that Rengo was prepared to pay a 52.2% premium over the market price for 29.9% the shares in Hung Hing suggested was considered to be significant by the Executive.

However, the Executive also submitted that the circumstances of this case do not suggest that the concerns addressed by Note 7 to Rule 26.1 apply here and that Rengo and Asia Packaging do not have any arrangements in place which would permit the former to effectively control the latter’s remaining 7.6% interest in Hung Hing.

### The case advanced by Rengo

Rengo argued that in a case such as this, more than a temporary meeting of minds must be demonstrated if a finding of acting in concert is to be made. Rengo denied that there was any active cooperation between it and the Family, claiming at most a “passive acquiescence” on the part of the Family towards the Proposed Acquisition. Furthermore it advanced significant business reasons for the investment and its price, which it claimed was a “strategic minority investment”.

### The case advanced by the Family as regards the sale process conducted by Asia Packaging

The Family emphasised its non active role in the sale process, stating that it was not privy to much of the details of the process and had no preference for any particular bidder. It highlighted the control it already had over Hung Hing via its 33.34% stake, such as the ability to prevent the delisting or privatisation of the company. In relation to its long term business relationship with Rengo, the Family stressed that the two parties had disagreed on business issues on numerous instances in the past and that there was no concerted relationship. Importantly, the Family also noted that although the Executive had emphasised the links established between it and Rengo by virtue of the Paper Mill Joint Ventures, this business was of minor importance when viewed in the context of the two parties’ overall activities.

### The case advanced by Asia Packaging as regards the conduct of the sale process

CVC, the private equity firm which controls Asia Packaging, highlighted the following features of the sale process, in order to emphasise that the valuation of the shares involved in the transaction did not represent a premium paid for control and could be validated for business and commercial reasons:

* It wished to sell its entire stake in Asia Packaging and had instructed JP Morgan to obtain a higher price if only a portion of its stake could be disposed of
* The bidders for the stake were introduced to the process by JP Morgan and the Family played no role whatsoever
* CVC was entirely free to dispose of its stake in Hung Hing without any oversight from the Family

## The Panel Decision

Following consideration of the foregoing, the Panel considered that there was insufficient evidence to support a finding of that the Family and Rengo were acting in concert as regards the Proposed Acquisition, or that Rengo would exercise control over the stake retained by Asia Packaging. The key reasons for this ruling are as set out in the introduction to this newsletter.

**This newsletter is for information purposes only.**

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at [unsubscribe@charltonslaw.com](mailto:unsubscribe@charltonslaw.com?subject=unsubscribe%20-Hong%20Kong%20Law-)

**Charltons - Hong Kong Law Newsletter - Issue 128 - 11 July 2011**