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# OVERVIEW OF THE SFC'S TAKEOVERS CODE

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# Introduction

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- The Takeovers Code is a voluntary code that relies on market participants' willingness to comply rather than the law to enforce it
  - aims to ensure fair and equal treatment of all shareholders in relation to takeovers
  - administered by the Executive Director of the Corporate Finance Division of the SFC (the "Executive")

Breaches of the Takeovers Code may result in:

- Private reprimand
- Public censure
- Public statement involving criticism, disciplinary action, and/or suspension

**Takeovers Code Rule 13.13:** Takeovers Panel can require a person who has breached the Takeovers Code to pay compensation to shareholders who suffered losses as a result of the breaches

# Jurisdiction of the Takeovers Code

Takeovers Code applies to:

- takeovers and mergers involving public companies in Hong Kong; and
- companies with a primary listing of their equity securities in Hong Kong

Definition of "public company":

- The Executive uses an economic or commercial test and will also consider:
  - the number of Hong Kong shareholders;
  - the extent of share trading in Hong Kong; and
  - other relevant factors



# General Principles

- **10 general principles**

1. all shareholders are to be treated equally;
2. if control of a company changes, a general offer to all other shareholders is normally required;
3. during the course of an offer or when an offer is in contemplation, information made available to some shareholders must be made available to all shareholders (except for some information furnished in confidence to the potential offeror or vice versa);
4. an offer should only be made after careful and responsible consideration;
5. shareholders should be given sufficient information, advice and time to reach an informed decision;
6. all persons concerned with offers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of a false market and making statements which may mislead shareholders or the market;
7. rights of control should be exercised in good faith and oppression of minority shareholders is unacceptable;
8. directors should have regard to the interests of the shareholders as a whole;
9. the board of the offeree should not take actions to frustrate a proposed bona fide offer or deny the shareholders the opportunity to decide on its merits; and
10. all parties concerned with takeovers and mergers are required to co-operate to the fullest extent with the Executive, the Takeovers and Mergers Panel (the "Panel") and the Takeovers Appeal Committee

# Voluntary and Mandatory offers

## Voluntary offer:

- Any person or company may make a voluntary offer as long as the consequence of this offer does not trigger a mandatory offer or the 2% “creeper rule”
    - this would change the voluntary offer into a mandatory offer pursuant to **Rule 26**
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## General offer:

- Offer by the offeror and its concert parties to all shareholders of the offeree company to purchase all shares from those shareholders

## Partial offer:

- Offer by the offeror to buy a part of but not all of the shares of the offeree company which carry voting rights and are not held by the offeror or its concert parties



# Voluntary Offer – conditions for a voluntary offer

- Voluntary offers may incorporate any conditions except:
  - conditions dependent on the judgments of the offeror or the offeree company; or
  - the fulfilment of which is under the control or discretion of the offeror or the offeree company.
- **Rule 30:** offers must be conditional on acceptances
  - acceptance condition: offeror having received the acceptance of shareholders, whose shares, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and its concert parties holding more than 50% of the voting rights of the offeree company
  - can seek consent from the Executive to waive this condition
- Voluntary offers may be conditional upon a higher acceptance level of shares
  - if the acceptance level is not reached → offeror can withdraw the offer
- NB: 25% public float requirement under the Listing Rules

# Voluntary Offer – Consideration



Price may not be lower than 50% of the market price of the offeree company's shares

- market price = the lesser of:
  - closing price of the shares on the day before the announcement of a firm intention to make an offer under Rule 3.5; and
  - the 5-day average closing price prior to this day
- aims to prevent 'low-ball' or 'one cent' offers



**Rule 24.1(a):** If the offeror, or anyone acting in concert with it, has purchased shares in the offeree company:

- a. within 3 months before the start of the offer period, or earlier the purchase was from directors or connected persons; or
  - b. during the offer period and before the announcement of a firm intention to make an offer under Rule 3.5
- offer must be no less favourable terms than those of the above purchase



**Rule 24.1(b):** If, after an announcement of firm intention to make an offer, the offeror or concert parties purchase shares at a price higher than the offer:

- the offer price must be increased to the highest price paid for such shares
- need to make a revised offer under Rule 24.3

# Voluntary Offer – Consideration (Cont'd)



The consideration may be cash or securities

- **Rule 23.1:** if the offeror and any concert party have acquired for cash shares in the offeree company carrying 10% or more of the voting rights during the offer period and within 6 months before the start of the offer period
  - the general offer must be in cash, or accompanied by a cash alternative
  - price  $\geq$  highest price paid
- Executive can require cash to be made available if:
  - less than 10% has been purchased in the 6 months before the start of the offer period from directors or other persons closely connected with the offeror or offeree company.



**Rule 23.2:** if the offeror and concert party acquired shares in the offeree company carrying 10% or more of the voting rights in exchange for securities during the offer period and within 3 months before the start of the offer period,

- securities are required to be offered to all other shareholders of that class
- need to comply with Rule 23.1 → unless the vendor is required to hold the securities received until the offer has lapsed or the offer consideration has been posted to accepting shareholders
- If purchase from directors or persons closely connected with the offeror or offeree company the Executive may require a full share offer where:
  - less than 10% has been purchased; or
  - the purchase was made more than 3 months before the start of the offer period



# Voluntary Offer – Acceptance

Acceptance condition fulfilled when:

- the offeror's receiving agent receives an acceptance on or before the deadline for acceptance; and
- the receiving agent has recorded that the acceptance and any relevant materials required have been received

Acceptance form to be completed and accompanied by share certificates and certified by the offeree company's registrar or the HKEx



# Mandatory Offer

**Rule 26:** offeror must make a mandatory offer to all shareholders of the offeree company if:

- a. any person (or two or more persons acting in concert) acquires 30% or more of the voting rights of the offeree company, regardless of whether the acquisition occurs over a period of time or not; or
  - b. any person (or two or more persons acting in concert), holding not less than 30% and not more than 50% of the voting rights of the company, acquires additional voting rights that increase their holding by more than 2% from the lowest percentage holding in the preceding 12 months (i.e. 'creeper' provision)
- Unless with waiver from the Executive



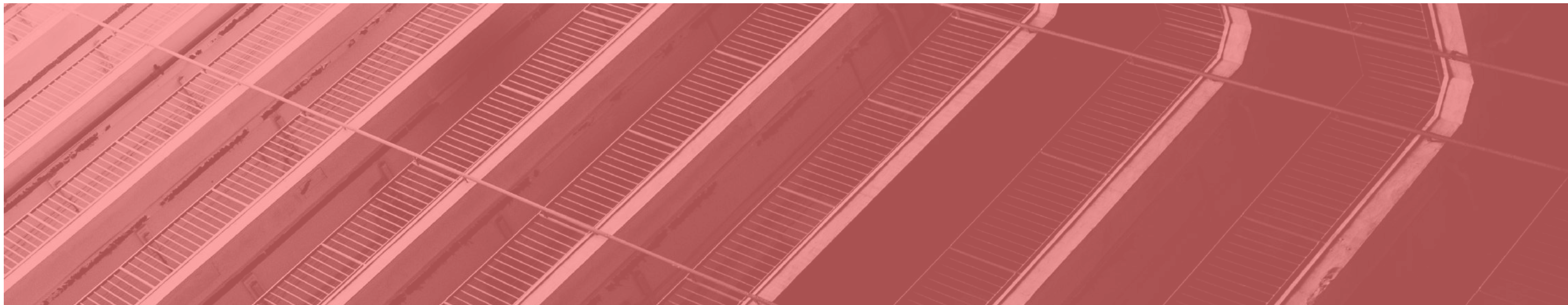
# Mandatory Offer - Conditions

- Must be conditional upon:
  - the offeror having received acceptances + acquired voting rights during the offer (or to be acquired), will result in the offeror and any person acting in concert with it holding more than 50% of the voting rights
  - unless with consent from the Executive
- If the offeror holds more than 50% of the voting rights before the offer is made → an offer must normally be unconditional
- Mandatory offers may not be made conditional upon the passing of shareholders' resolutions of the offeror
- Other conditions accepted only under special circumstances



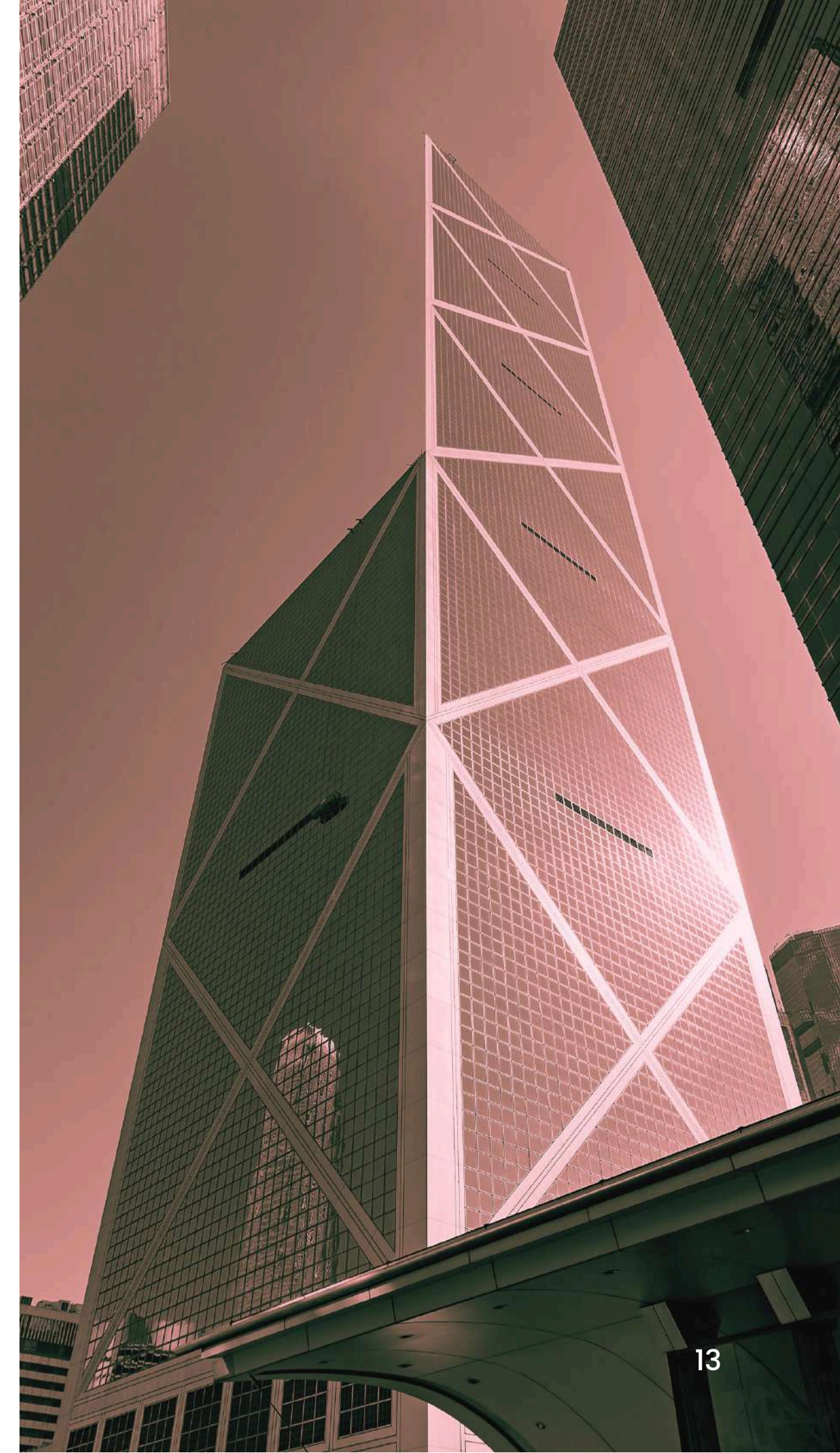
# Mandatory Offer

- A mandatory offer is a general offer
  - extended to holders of each class of equity share capital of the offeree company
  - will not consider whether the class carries voting rights or not
- **Rule 14:** offers for different classes of equity share capital must be comparable and the offeror should consult the Executive in advance



# Mandatory Offer – Waiver

- Whitewash procedure = Executive will waive the mandatory offer requirement if:
  - a. whitewash waiver is approved by at least 75% of the independent votes at a shareholders' meeting; and separately
  - b. underlying transaction(s) is approved by more than 50% of the independent votes at a shareholders' meeting
- Executive will NOT grant a waiver if:
  - a. the person to whom the new securities are to be issued or its concert parties has acquired voting rights in the offeree company in the 6 months prior to the announcement of the proposals but after negotiations or discussions with the directors of the company
    - unless the acquisition is by way of subscriptions for new shares which have been fully disclosed in the whitewash circular; or
  - b. voting rights have been acquired or disposed of by such persons without the Executive's prior consent after the announcement of the proposals and before the completion of the subscription



# Mandatory Offer – Waiver (Cont’d)

- If **Rule 26** mandatory offer was triggered → Executive may grant “whitewash” waiver under the following circumstances:

## Rescue Operations

- The company is in a serious financial position and can only be saved by an urgent rescue operation
- If the rescue operations involve the following and would fall under **Rule 26**:
  - the issuance of new shares without approval by a vote of independent shareholders; or
  - acquisition of existing securities by the rescuer

## Inadvertent Mistake

- Obligation under **Rule 26** triggered due to inadvertent mistake; and
- The person then disposes sufficient voting rights within a limited period to unconnected persons

## Placing and Top-up Transactions

- Shareholder + concert parties hold 50% or less of the voting rights places some of his shares with an independent person; and
- As soon as practicable, subscribes for new shares up to the number of shares placed at a price substantially equivalent to the placing price less expenses

# Mandatory Offer – Consideration

- **Rule 26.3(a):** it must be in cash or be accompanied by a cash alternative
  - $\geq$  highest price paid by the offeror or any concert party for shares of that class during the offer period and within 6 months prior to its commencement
    - unless prior consent from the Executive has been obtained
- Non-cash consideration: amount determined by independent valuation
- If the offeror or any concert party acquires securities in the offeree company at a price higher than the offer price during the offer period → must increase the offer price to at least match the highest price paid

# Concert parties and indemnities

- “Acting in concert” = pursuant to a formal or informal agreement or understanding, the person is actively co-operating to obtain or consolidate control of the offeree company through the acquisition of voting rights
- Presumption of acting in concert for the following classes of persons (unless rebutted by clear evidence):
  - i. a company, its parent, its subsidiaries, its fellow subsidiaries, associated companies of any of the foregoing, and companies of which such companies are associated companies;
  - ii. company with any directors, together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives or related trusts of it or of its parent;
  - iii. a company with any of its pension funds, provident funds and employee share schemes;
  - iv. a fund manager, including an exempt fund manager with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;
  - v. a financial or other professional adviser, including a stockbroker with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser, except in the capacity of an exempt principal trader or exempt fund manager;



## Concert parties and indemnities (Cont'd)

- vi. directors of a company (together with their close relatives, related trusts and companies controlled by such directors, their close relatives and related trusts) which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent;
- vii. partners;
- viii. an individual, including any person who is accustomed to act in accordance with the instructions of the individual with his close relatives, related trusts and companies controlled by him, his close relatives or related trusts; and
- ix. a person, other than an authorised institution within the meaning of the Banking Ordinance lending money in the ordinary course of business, providing finance or financial assistance whether directly or indirectly to any person or concert party in connection with an acquisition of voting rights, including any direct or indirect refinancing of the funding of the acquisition

# Advisers – Financial Advisers

- Responsibilities of a financial adviser:
  - advise on the financial aspects and participate in negotiations of the offer
  - responsible for the general conduct of the offer
  - responsible for the timetable
  - responsible for documentation
  - liaison with the Executive and the Panel
- **Rule 2.1:** independent committee of directors of the offeree company must obtain competent independent financial advice
  - must be made known to the offeree company's shareholders in the offeree board circular
  - must announce the appointment of the independent financial adviser in the initial announcement of the offer or possible offer, or as soon as the appointment has been made
- When in the case of a reverse takeover or directors' conflict of interest
  - **Rule 2.4:** board of the offeror to obtain competent independent advice as to whether an offer is in the interests of the offeror's shareholders

# Advisers (Cont'd)

## Legal Advisers

- Primarily responsible for advising upon the legal aspects of the offer
- Draft documentation
- Liaise with the Executive and Takeovers Panel

## Stockbrokers

- Advise on market perception
- Liaise with major shareholders
- Liaise with the HKEx

## Auditors

- Prepare financial and other information to be disclosed

## Press Consultants

i.e. specialist press firm or financial public relations consultant

- Assist with press publications
- Liaise with the press

# Negotiations

- **Rule 6:** equality of information
  - any information given to an offeror must, on request, be given to any bona fide competing offeror
  - usually on the same terms as to confidentiality
- Irrevocables → ensure the success of its offer
  - shareholders undertake irrevocably to accept the offer
  - “shut-outs” = where the commitment prevented another competitor from succeeding
  - must consult the Executive beforehand
    - except where a very restricted number of sophisticated shareholders who have a controlling shareholding are approached
- **Rule 25:** offeror prohibited from entering into arrangements with shareholders of the offeree company with more favourable conditions which are not available to all shareholders

# Secrecy

Leak of information may draw speculations or cause an increase in share price

- Executive may require clarifying announcement
- May lead to insider dealing allegations



# Announcements

- Listed companies: announcements must be published on:
  - website of the HKEx; and/or
  - website of the listed company
- Unlisted companies: published as a paid announcement in ≥1 leading English language newspaper + ≥1 leading Chinese language newspaper published daily and circulating generally in Hong Kong
- All documents must be delivered to SFC in electronic form to be published on SFC website

# Announcements (Cont'd)

- **Rule 3.1:** situations where announcements by the offeror or potential offeror must be made –

1

Before an approach has been made:

- the offeree company is the subject of rumour or speculation about a possible offer or
- there is undue movement in its share price or in the volume of share turnover and there are reasonable grounds for concluding that it is the actions of the potential offeror or its concert parties, whether through inadequate security, purchasing of the offeree company's shares or otherwise, which have led to the situation;

2

When negotiations or discussions are about to be extended to include more than a very restricted number of people, other than those who need to know in the companies concerned and their immediate advisers; and

3

Immediately when the offeror triggers a mandatory offer obligation under Rule 26

# Announcements (Cont'd)

- **Rule 3.2:** situations where announcements by the board of the offeree company must be made after the board is approached of the offer-

1

When a firm intention to make an offer is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer;

2

When the offeree company is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover

- whether or not there is a firm intention to make an offer;

3

When negotiations or discussions are about to be extended to other people

- i.e. other than those who need to know in the companies concerned and their immediate advisers; and

4

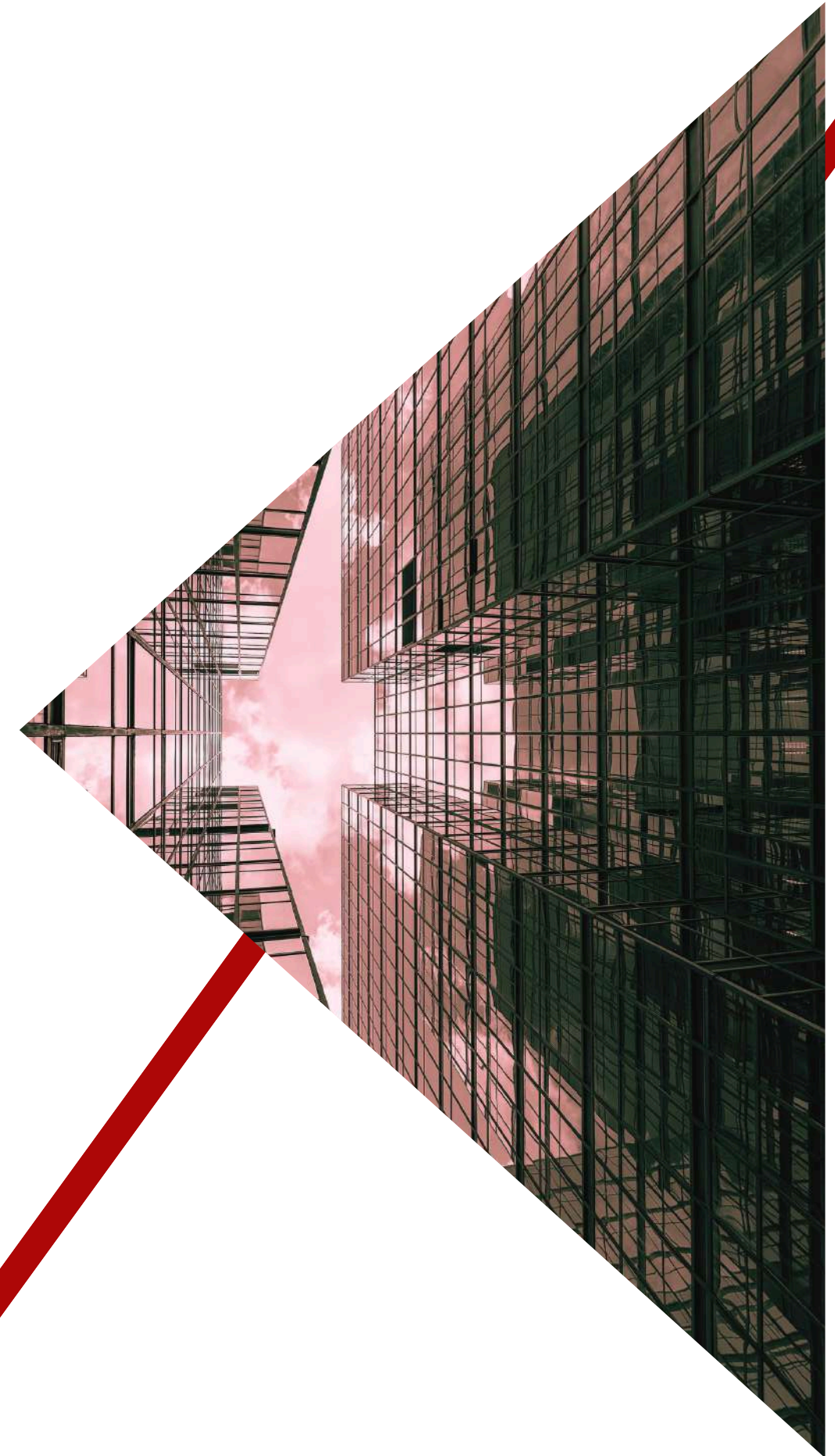
When the board of the offeree company is aware that there are negotiations or discussions between a potential offeror and the controlling shareholder(s) or when the board of the offeree company is seeking potential offerors, and

- a. the offeree company is the subject of rumour or speculation about a possible offer or there is undue movement in its share price or in the volume of share turnover; or
- b. the number of potential purchasers or offerors approached is about to be extended to more than a very restricted number of people



# Announcements – other requirements (Cont'd)

- **Rule 3.1 and Rule 3.2:**
  - talks announcement stating that talks are taking place or that a potential offeror is considering making an offer required
- After **Rule 3.7** possible offer announcement → monthly announcements on updates
  - until firm intention of offer or decision not to proceed with offer
- **Rule 31.1(b):** if announced that offer does not intend to make an offer → generally prohibited from bidding for the offeree company for a period of 6 months



# Announcements – Vendor's announcements

- **Rule 3.3:** vendor is required to make an announcement when there are:
  - negotiations or discussions between a potential offeror and the controlling shareholders; and
    - the offeree company is the subject of rumour or speculation about a possible offer; or
    - there is undue movement in its share price or in the volume of share turnover, and there are reasonable grounds for concluding that it is due to the potential vendor's actions (whether through inadequate security or otherwise)

# Announcements – Firm Intention to Make an Offer

- **Rule 3.5:** announcement of firm intention to make an offer
  - the announcement does NOT constitute the offer itself
  - must contain all offer terms
  - must include confirmation by the financial adviser or another appropriate third party that the offeror has sufficient resources to satisfy the offer in full
- **Rule 5:** offeror must proceed with offer unless a specific condition is not satisfied
  - except with the consent of the Executive

# Announcements – Numbers of Relevant Securities in Issue

## Offeree company announcement

- **Rule 3.8:** announcement giving details of all classes of its “relevant securities” and the number of such securities in issue
  - “Relevant securities” = shares, convertible securities, warrants, options and derivatives in respect of such securities

## Offeror or potential offeror announcement

- **Rule 3.8:** announce:
  - the same details of the relevant securities of the offeror +
  - the relevant securities of the company whose securities will be offered as consideration (if applicable)
    - allow shareholders of the offeror to determine whether they are “associates” of the offeror (holding 5% or more of its relevant securities) → subject to dealing disclosure requirements under **Rule 22**

## Announcement contents:

- Remind associates of the offeree company, the offeror or potential offeror to disclose their dealings in any securities of the offeree company
- Securities exchange offer:
  - disclose dealings in any relevant securities of the offeror or potential offeror
  - disclose dealings in any relevant securities of the company whose securities will be offered as consideration

# Announcements – Results of an Offer

- **Rule 19.1:** announcement on the HKEx's website stating whether the offer has been revised or extended, has expired or has become or been declared unconditional
  - 7:00 pm on closing date → announcement published
  - 6.00 p.m. on the closing date → draft must be submitted to the Executive and the HKEx for comment



# Dealings – Disclosure obligations

## Part XV of Securities and Futures Ordinance

- Disclose acquisition of an interest of 5% or more of the voting shares of a Hong Kong listed company to be disclosed to the HKEx and the company within 3 business days
  - “interest” = interest in the underlying shares of equity derivatives
- Disclose notifiable interest increases or decreases across a percentage level
- If 5% threshold reached → disclose acquisition or disposal of a short position of 1% or more in the voting shares of a listed company and a change in the percentage level of a short position

# Dealings - Disclosure obligations (Cont'd)

## Takeovers Code - Rule 22

- After announcement of possible offer → disclose all dealings by parties to an offer + their associates (for themselves or on behalf of investment clients) on securities of the offeree company
  - securities exchange offer: disclose these dealings on relevant securities of the offeror or of another company whose securities will be offered as consideration for the offer
- If offeror included in a Talks Announcement → disclose dealings of the potential offeror and its concert parties under Rule 22 + identity of potential offeror
- Timing of disclosure:
  - 12:00 noon on the business day after the date of the transaction
  - If dealings are under US time zones → 12:00 noon on the second business day following the transaction
- Method of disclosure:
  - dealings by offeree company, the offeror, and their respective associates for their own account and for their discretionary investment clients → published on SFC and HKEx website
  - dealings for non-discretionary investment clients → disclosed to the Executive only and will not be made public

# Dealings – Disclosure obligations (Cont'd)

- **Scope of dealings covered:** all dealings during the offer period until the later of:
  - i. the date when the offer closes for acceptances;
  - ii. the date the offer lapses;
  - iii. an announcement that a possible offer will not proceed;
  - iv. the date of an announcement of the withdrawal of a proposed offer; and
  - v. where the offer contains a possibility to elect for alternative forms of consideration, the latest date for making such election.





# Dealings – Disclosure obligations (Cont'd)

- **Definition of “associates”:**

- a. any person acting in concert with an offeror, potential offeror or offeree company;
- b. any financial and other professional adviser (including a stockbroker) of the parent, subsidiaries and fellow subsidiaries of an offeror, potential offeror or offeree company, including persons controlling, controlled by or under the same control as such financial and other professional advisers
  - other than exempt fund managers and exempt principal traders covered in class (5) below
  - control = holding of 30% or more of the voting rights of a company
- c. the directors of any subsidiary or fellow subsidiary of an offeror, potential offeror or offeree company
  - together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives and related trusts

# Dealings - Disclosure obligations (Cont'd)

- **Definition of “associates”:**

- d. the pension funds, provident funds and employee share schemes of the parent, subsidiaries and fellow subsidiaries of an offeror, potential offeror or offeree company;
- e. any exempt principal trader or exempt fund manager which is controlling, controlled by or under the same control as the financial and other professional adviser
  - including a stockbroker, of an offeror, potential offeror or offeree company, its parent, subsidiaries and fellow subsidiaries; and
- f. a person who, or who as a result of a transaction, owns or controls 5% or more of any class of the relevant securities of an offeror, potential offeror or offeree company, this includes fund managers acting on behalf of its clients.

# Dealings – Disclosure obligations (Cont'd)

- **Rule 22 definition of “relevant securities”**

- i. the offeree company's securities which are the subject of the offer or which carry voting rights;
- ii. equity shares of the offeree company;
- iii. in a securities exchange offer, equity shares of the offeror or of another company whose securities are to be offered as consideration;
- iv. securities of the offeror or of a company whose securities are to be offered as consideration having substantially the same rights as any securities to be issued as consideration for the offer; and
- v. securities carrying conversion or subscription rights into any of the foregoing; and
- vi. options and derivatives in respect of any of the foregoing.

# Dealings -

## Takeovers Code consequences on the offer

- **Rule 26:** dealings may trigger the mandatory offer requirement
- **Rule 24.1:** if the offeror or any person acting in concert acquires shares at above the price of the offer, the offer itself must be increased to that price.
- **Rule 23.1(a):** if the offeror and any concert parties acquire more than 10% of the offeree company for cash during the offer period and within the 6 months prior to the offer period
  - the cash alternative must be increased to meet the best price paid within that period
- **Rule 23.2:** if the offeror and its concert parties acquire offeree company shares carrying more than 10% voting rights of the offeree company in exchange for securities during the offer period and within 3 months before the start of the offer period
  - full share offer required
- **Rule 3.6:** immediate announcement may be required following the above changes

# Dealings – Prohibited dealings

## The Securities and Futures Ordinance

- Insider dealing provisions
  - person who is knowingly in possession of price-sensitive information, deals, or procures someone else to deal, in the listed securities or the derivatives of the company he is connected with or is the subject of the potential takeover.
  - person disclosing such price-sensitive inside information to another, knowing or having reasonable cause to believe that that person will use the information to deal, or procure someone else to deal, in the securities.
- Offences and penalties:
  - sanctions under the SFO
  - **Part XIV of the SFO**: criminal offence punishable by a maximum of 10 years' imprisonment and fines of up to \$10 million
- **Part XIII SFO**: Civil proceedings before the Market Misconduct Tribunal under Part XIII SFO
  - may be disqualified as a director
  - prohibited from dealing in securities for up to 5 years
  - required to repay any profit made from the insider dealing.

# Dealings – Prohibited dealings (Cont'd)

## The Takeovers Code

- **Rule 21.1:** no dealings of any kind may take place in securities of the offeree company by any person, other than the offeror who is privy to confidential price-sensitive information concerning an actual or contemplated offer or revised offer before the announcement of the approach, offer or revised offer
  - these dealings in the offeror are also prohibited unless the offer or proposed offer is not price-sensitive in relation to those securities
- **Rule 21.3:** If the consideration for an offer includes securities of the offeror or a concert party.
  - neither the offeror nor such person may propose or conduct any off-market share buy-back or share buy-back by general offer before the end of the offer period.



# Offer Document

- **Rule 8.2:** offer document must be posted within 21 days of announcement of firm intention to make offer
  - or within 35 days in the case of a securities exchange offer
- Content requirements → **Schedule I to the Takeovers Code**
  - include any other relevant information
  - include the formal offer set out in the form of a letter
    - with offer price, information on the business of the offeror and of the offeree company, taxation advice and the procedure for acceptance.
  - include the letter from the board of directors of the offeror on reasons for the offer

# Offer Document (Cont'd)

## Contain formal terms and conditions of the offer

**A**

### *Acceptances*

- 50% acceptance threshold (or a higher acceptance level in voluntary offer)
- If acceptance level reached → unconditional as to acceptances
  - all other conditions must be satisfied or waived within 21 days of the later of:
    - i. the first closing date or
    - ii. the date the offer becomes or is declared unconditional as to acceptances

**B**

### *Consents*

- Conditional upon the offeror obtaining various consents

**C**

### *Other conditions*

- E.g., the ability of the offeror to withdraw its offer if there has been a material adverse change in the offeree company

**D**

### *Other information*

- E.g., information on the offeror's intentions concerning the offeree company and its employees
- E.g., financial information of the offeree company and how the offer is to be financed
- E.g., details of shareholders and dealings by the parties and their associates
- E.g., verification of profit forecasts
- Securities exchange offer: need to contain additional information in relation to the securities offered for exchange and details of the company whose shares are being offered for exchange



# Offeree company board circular

- **Rule 8.4:** circular to its shareholders by the offeree company
  - contain information set out in Schedule II of the Takeovers Code:
    - names of the offeree company's directors and of the directors comprising the independent committee of the board
    - any other information
    - the views of its board or independent committee on the offer
    - the written advice of the independent financial adviser.
- Agreed offer → composite document encouraged
- Contested/competing offer → offeree board circular sent separately
  - must be posted within 14 days of the formal offer document

# Timetable

- Offer period: **at least 21 days** from posting of the offer document
  - if the offeree board circular is posted after the offer document → at least 28 days
  - Unless the offer is wholly unconditional from the outset, generally must be open for 14 days after first closing date on which it becomes or is declared unconditional

Day 0	Posting of offer document (Rule 8.2) <ul style="list-style-type: none"><li>▪ within 21 days of announcement (cash offer)</li><li>▪ within 35 days of announcement (securities offer)</li></ul>
Day 14	Last day for posting of offeree board circular (Rule 8.4)
Day 21	First permitted closing date (for composite document) (Rule 15.1)
Day 28	First permitted closing date (separate offeree board circular) (Rule 15.1)
Day 39	Last day for offeree company to announce material new information (Rule 15.4)
Day 46	Last day for revision of offer
Day 60	Last day for offer to become or be declared unconditional as to acceptances (Rule 15.5)

# Communication with shareholders, the press and the public

- All profit forecasts and valuations made by either side must be properly verified
  - apply to any informal or general statements,
  - if cannot be verified → the Executive will insist that they are withdrawn
- Must not publish misleading or uncertain statements
  - ✗ offeror stating that it might increase or extend its offer without actually committing itself to do so
  - ✗ offeree company making statements on a given level of support
- Restriction on the extent to which parties to an offer may contact the offeree company shareholders to induce them to accept or reject the offer
- Must exercise great care when engaging journalists
  - avoid discussions relating to sensitive subjects (e.g. future prospects and asset values)



# Duties of the board of the offeror and the offeree company

- Director duties under the takeovers code and Hong Kong company law
  - must ensure that there is a binding contractual commitment on the offeror to comply with the provisions of the Takeovers Code after completion



# Duties of the board of the offeror and the offeree company (Cont'd)

- Company law duties:
  - to act bona fide in the interests of the company;
  - to act for proper, and not “collateral” purposes;
  - to avoid conflicts of interest with the company;
  - not to make secret profits;
  - to exercise skill and care in performance of their duties; and
  - to be honest and not to mislead the shareholders of the company.
- Takeovers Code: each director must ensure, so far as he is reasonably able, that the Takeovers Code is complied with during the conduct of the offer
  - can delegate day-to-day conduct of an offer to individual directors or committees
  - overall responsibility on the board to monitor delegates and the conduct of the offer



## Duties of the board of the offeror and the offeree company (Cont'd)

- The board should impose arrangements to ensure that:
  - a. it promptly receives copies of all documents and details issued by the company in relation to the offer, including:
    - details of all dealings in relevant securities by the company or its associates; and
    - details of any agreements, understandings, guarantees, expenditures, fees or other obligations involving the company and the offer other than routine administrative matters
  - b. the directors with day-to-day responsibility for the offer are in a position to justify their actions to the board; and
  - c. the advisers' opinions are available to the board for consideration.
- Board meetings should also be held as and when necessary throughout the offer

# Duties of the board of the offeror and the offeree company - Preparation of documents

- **Rule 9.3:** directors to be responsible for the accuracy of the information contained in all documents
  - must ensure that an appropriate procedure has been established and followed for checking the accuracy of the information concerned
  - must include and sign a responsibility statement in all documents
- When supervision of a document is delegated to a board committee:
  - directors must reasonably believe the delegates are competent to carry out the task+
  - must have disclosed to the committee all relevant facts required under the Takeovers Code
- Checking of documents must only be assigned to competent employees considering the nature of the information and whether it requires special knowledge of the company affairs
  - the employee must be given access to any necessary documents
  - the employee must have the chance to discuss issues with company officers or directors
- Documents must be filed with the Executive for comments
  - can only be published after confirmation of no comments
  - except for documents on the Post-Vet List

# Duties of the board of the offeror and the offeree company - No frustrating action

- **Rule 4:** the board must not take any action which could frustrate the offer or deny the shareholders the opportunity to decide on the merits of the offer without the approval of the shareholders at a general meeting
- The board must not:
  - ⊗ issue any shares;
  - ⊗ create, issue or grant, or permit the creation, issue or grant of, any convertible securities, options or warrants in respect of shares of the company;
  - ⊗ sell, dispose of or acquire assets of a material amount;
  - ⊗ enter into contracts, including service contracts, other than in the ordinary course of business; or
  - ⊗ cause the company or any subsidiary or associated company to buy back, purchase or redeem any shares in the company or provide financial assistance for any such buy back, purchase or redemption
- Can apply to Executive for waiver
  - e.g. bound by prior contractual arrangements or under special circumstances



# Independent committee of the board

- **Rule 2.1:** when a board receives an offer, or is approached with a view to an offer being made → must appoint an independent committee of the board
  - make a recommendation as to whether the offer is fair and reasonable and as to acceptance and voting
- Comprise of all non-executive directors of the company without any interest in the offer other than as a shareholder of the company



# Restrictions following offers and possible offers

- If an offer has been withdrawn or has lapsed, neither the offeror nor any concert party may:
  - a. make an offer for the offeree company; or
  - b. acquire any shares of the offeree company resulting in an obligation to make a mandatory offer under Rule 26within 12 months from the date of withdrawal or lapse of such offer
  - unless with the consent of the Executive
- Executive may grant consent when:
  - i. the new offer is recommended by the board of the offeree company + offeror is not, or is not acting in concert with a director or substantial shareholder of the offeree company
    - NB: consent is not normally granted within 3 months where the offeror was prevented from revising the offer by a no increase or no extension statement
  - ii. the new offer follows the announcement by a third party of an offer for the offeree company; or
  - iii. the new offer follows the announcement by the offeree company of a “whitewash” proposal or of a reverse takeover which has not failed or lapsed, or been withdrawn



## Restrictions following offers and possible offers (Cont'd)

- **Rule 31.3:** a person holding at least 50% of a company's voting rights and its concert parties cannot:
  - make a second offer to acquire, or acquiring, shares from any shareholder in that company at above the offer price of a previous offer made by him to the shareholders of that company within 6 months after the end of the offer period of the previous offer
    - except with the consent of the Executive
- Value of a securities exchange offer calculated as at the later of:
  - a. the date of the offer document; or
  - b. the date the offer became, or was declared, unconditional.

# Acquisition of minority shares after successful takeover

## Compulsory acquisition for mandatory takeover

- If within 4 months of posting the initial offer document + by virtue of acceptances of the takeover offer, the offeror has acquired or contracted unconditionally to acquire ≥ 90% shares to which the offer relates
  - can give notice to the remaining shareholders to acquire the remaining shares
- Notice must be given before the earlier of:
  - a. 3 months after the end of the offer period of the takeover offer; and
  - b. 6 months from the date of the takeover offer
- Within 2 months of receipt of notice:
  - shareholder can apply to court to refuse the acquisition or vary the terms; or
  - if there is no notice by the shareholder → offeror required to send a copy of the compulsory acquisition notice + necessary instruments of transfer + consideration to offeree company
- The offeree company must register the transfer

# Acquisition of minority shares after successful takeover (Cont'd)

## Minority's Right to be Bought Out

- **Companies Ordinance s700:** if the offeror has acquired or contractually agreed to acquire  $\geq 90\%$  shares in the offeree company before the end of the offer period
  - minority shareholders have the rights to request for a buy out
- Offeror must give notice to relevant shareholders of their rights under s700 + period during which those rights are exercisable
  - notice must be given within 1 month of the s700 rights arising
- A shareholder must exercise the right to be bought out within 3 months after the later of:
  - a. the end of the offer period; and
  - b. the date of the offeror's notice



## Delisting following a general offer

- Delisting resolution:
  - must be approved by 75% of the votes of disinterested shareholders +
  - the number of shares voted against the resolution must not exceed 10% of the votes of all disinterested shareholders.
- **Rule 2.2:** the offeror must be entitled to + must exercise its rights of compulsory acquisition

# Delisting following a general offer (Cont'd)

- Companies incorporated in jurisdictions without compulsory acquisition rights must apply for waiver from the Executive
  - Executive will require arrangements to protect minority shareholders
- The arrangements must require that:
  - a. when the offer becomes or is declared unconditional in all respects → offer must remain open for a longer period than normally required by **Rule 15.3**;
  - b. shareholders who have not yet accepted the offer must be notified in writing of the extended closing date and the implications if they choose not to accept the offer; and
  - c. the resolution to approve the delisting must be subject to the offeror receiving valid acceptances amounting to 90% of the disinterested shares

