

## TAKEOVERS AND MERGERS PANEL

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### Panel Decision

**In relation to a referral by the Executive to  
the Takeovers and Mergers Panel (the “Panel”)  
for a ruling in relation to statements made by a representative of the Offerors  
regarding China Gas Holdings Limited (“China Gas”, Stock Code: 384)  
under the Code on Takeovers and Mergers (“Code”)**

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### Introduction

1. The Panel met on 2 April 2012 to consider a referral by the Executive under section 10.1 of the Introduction to the Code, which relates to referrals by the Takeovers Executive in respect of particularly novel, important or difficult points at issue. The hearing was non-disciplinary.
2. The Panel was asked to consider:
  - (a) whether certain statements by Mr Fu Chengyu (“Mr Fu”), Chairman and executive director of China Petroleum & Chemical Corporation (“Sinopec”, Stock Code: 386) constitute a “no increase statement” under Rule 18.3 of the Code; and if so, whether ENN Energy Holdings Limited (“ENN”, Stock Code: 2688) and Sinopec (together, the “Offerors”) should be bound by such statements; and
  - (b) in the event that the Panel does not consider the statements to constitute a no increase statement whether a clarification announcement should be issued under Rule 18.1.

### Background and a summary of the facts

3. On 12 December 2011, the Offerors jointly [announced](#) a pre-conditional voluntary general offer for shares in China Gas (other than those already held by the Offerors and parties acting in concert with them) and to cancel all outstanding share options of China Gas (the “Offers”). The offer for shares will be made at HK\$3.50 per China Gas share. The making of the Offers is subject to the satisfaction of certain pre-conditions including, amongst others, various PRC regulatory approvals and the approval of the shareholders of ENN. The Offers will be conditional on, amongst other things, acceptances being received which would result in the Offerors holding more than 50% of the voting rights of China Gas.
4. On 12 December 2011, China Gas issued an [announcement](#) under Rule 13.09(1) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited and Rule 3.7 of the Code in relation to a possible pre-conditional voluntary cash offer by the Offerors for China Gas. On 14 December 2011, China Gas issued a further [announcement](#) in relation to the Offers referring to them as “wholly unsolicited and opportunistic” and stating that they fail to reflect the fundamental value of China Gas.

5. On 6 and 7 March 2012, the press widely reported statements made by Mr Wang Yusuo (“Mr Wang”), chairman of ENN, to the effect that “increasing the joint bid” would be “impossible” and the “takeover offer won’t be raised” (“First Incident”).  
An [announcement](#) was issued by the Offerors in the afternoon of 7 March 2012 to confirm that they had not made any “no increase statement” pursuant to Rule 18.3 of the Code.
6. On 9 March 2012, the Executive issued a warning letter to Sullivan & Cromwell (“S&C”), legal advisers to the Offerors, requesting it to convey to its client the Executive’s serious concerns about Mr Wang’s conduct.
7. On 26 March 2012, Mr Fu made oral statements (the “Statements”) in Mandarin to the media during a press conference for Sinopec’s annual results. A transcript of the statements as submitted by S&C is as follows:

“關於收購中燃氣，我們是和新奧一起提出了一個收購價，這方面已經反映了市場的公允價值。至於以後要不要提高，我們並不是爲了收購而收購，我們是不能付高於市場價格的價格。所以我覺得我們已經反映了市場價格。”

The English translation (also submitted by S&C and agreed by the Executive) is as follows:

“Regarding the acquisition of China Gas, we and ENN Energy have provided an offer price, which reflects fair value given to China Gas in accordance with market circumstances. As to whether or not there will be an increase to the offer price, we do not have to complete this acquisition just for the sake of completing an acquisition. We cannot overpay by paying a price which is above market. And I believe the price we are offering is a price that has taken into account the market prices.”

8. By 27 March 2012, Mr Fu’s statements were widely reported in the media, with a range of interpretations of the meaning of the statements, including:
  - (a) “Sinopec stays firm on China Gas buying price [headline]” “Our joint bid price has already reflected the fair market value of China Gas,” said Sinopec chairman Fu Chengyu. “We don’t make acquisitions for the sake of acquisitions, and we can’t offer more than the market price.” (South China Morning Post)
  - (b) “Sinopec stays firm on China Gas buying price: Energy giant says share prices only rose because of its bid and it will not lift offer, but this may not be view of bidding consortium or major shareholders” (Bloomberg)
  - (c) “中石化暗示無意提價購中燃 [標題]” “中石化董事長傅成玉表示，要約價已反映市場公允價格，集團不會支付高於市場價格的價錢，似乎暗示不會加價收購。” (Hong Kong Economic Journal) (Translation: “Sinopec implied that no intention to increase the offer price for China Gas [headline]” “Sinopec Chairman Fu Chengyu said that the offer price has reflected the fair market price, the Group will not pay a price higher than the market price, which seems to imply that the bid price will not be increased.”)

9. The chronology of events following the press reports, as provided by the Executive, and which Sinopec and its advisers did not dispute, is as follows:
- (a) In the morning of 27 March 2012, the Executive called S&C in relation to the media coverage of the Statements and requested the Offerors to confirm whether the Statements had been made and, if so, to issue an announcement clarifying the meaning of the Statements or withdrawing them.
  - (b) In the afternoon of 27 March 2012, S&C indicated to the Executive that Sinopec did not consider the Statements to constitute a “no increase statement” and hence did not consider it necessary to issue a clarification announcement.
  - (c) The Executive indicated that it held the view that the Statements (as reported) constitute a no increase statement and that, if Mr Fu had been misquoted, then the Offerors should issue an announcement to clarify this “immediately” in accordance with Rule 18.3 of the Code. On the other hand if Mr Fu had not made the Statements (as reported) and they did not represent the Offerors’ intentions, the Executive indicated that the Offerors should issue an immediate announcement to clarify this. The Executive requested that such clarification announcement should be issued by lunch time on 28 March 2012.
  - (d) As the Executive had not received any draft announcement for review by the morning of 28 March 2012, the Executive called S&C again on this matter. The Executive once again requested that the Offerors issue an announcement immediately to clarify the situation. S&C said their client did not intend to issue any announcement in this regard as it did not consider the Statements to be a no increase statement.
  - (e) After reviewing S&C’s submission at around 14:30 on 28 March 2012, the Executive spoke to S&C again. S&C confirmed that the Offerors remained of the view that the Statements did not constitute a no increase statement. The Executive indicated that as there was at the very least ambiguity about the meaning of the Statements (see Rule 18.1) the Offerors should immediately issue an announcement to confirm the Statements did not constitute statements under Rule 18.3 of the Code.
  - (f) At around 17:00 on 28 March 2012, S&C called the Executive to say the Offerors would not issue an announcement to clarify the situation.
10. On 29 March 2012, the matter was referred to the Panel.

#### **The relevant provisions of the Code**

11. Section 1.2 of the Introduction to the Code states (emphasis added):

“The primary purpose of the Codes is to afford fair treatment for shareholders who are affected by takeovers, mergers and share repurchases. The Codes seek to achieve fair treatment by requiring equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision as to the merits of an offer and **ensuring that there is a fair and informed market** in the shares of companies affected by takeovers, mergers and share repurchases. The Codes also provide an **orderly**

**framework** within which takeovers, mergers and share repurchases are to be conducted.”

12. General Principle 6 of the Code states (emphasis added):

“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. **Parties involved in offers must take care that statements are not made which may mislead** shareholders or the market.”

13. Note 1 to Rule 9.1 states (emphasis added):

*“1. Financial advisers’ responsibility for release of information*

*The Executive regards financial advisers as being responsible to the Executive for guiding their clients and any relevant public relations advisers with regard to any information released in relation to an offer or possible offer or during an offer period.*

*Advisers must ensure at an early stage that directors and officials of companies are warned that they must consider carefully the Takeovers Code implications of what they say, particularly when giving interviews to, or taking part in discussions with, the media. It is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. Control of any possible abuse lies largely with the person being interviewed. **In appropriate circumstances, the Executive will require a statement of retraction.** Particular areas of sensitivity on which comment must be avoided include future profits and prospects, asset values **and the likelihood of the revision of an offer** (see also the Notes to Rule 8.1).”*

14. Rule 18.1 of the Code states (emphasis added):

“No misleading statements

Parties to an offer or possible offer and their advisers must take care not to issue statements which, while not factually inaccurate, **may mislead shareholders and the market or may create uncertainty**. In particular, an offeror must not make a statement to the effect that it may improve its offer without committing itself to doing so and specifying the improvement.”

15. Rule 18.3 of the Code states:

“If statements in relation to the value or type of consideration such as “the offer will not be further increased” or “our offer remains at \$x per share and it will not be raised” (“no increase statements”) are included in documents sent to offeree company shareholders, or are made by or on behalf of an offeror, its directors, officials or advisers, and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the offeror be allowed subsequently to amend the terms of its offer in any way even if the amendment would not result in an increase of the value of the offer (e.g. the introduction of a lower paper alternative) except where the right to do so has been specifically reserved.”

16. Note 1 to Rule 18 states:

*"1. Firm Statements*

*In general, an offeror will be bound by any firm statements as to the duration or finality of its offer. Any statement of intention will be regarded for this purpose as a firm statement and accordingly the expression "present intention" should not be used as it may be misleading to shareholders. Furthermore, the Executive will treat any indication of finality as absolute, unless the offeror clearly states the circumstances in which the statement will not apply, and will not distinguish between the precise words chosen, i.e. the offer is "final", or will not be "increased", "amended", "revised", "improved", "changed", and similar expressions will all be treated in the same way."*

**The case of the Executive in summary**

17. The Executive submitted that:

- (a) the Statements made by Mr Fu constitute a "no increase statement" for the purpose of Rule 18.3.
- (b) it interpreted the Statements to mean that the offer price of HK\$3.50 reflects the market value of China Gas shares and that the Offerors cannot pay a price that is higher than HK\$3.50 per share.
- (c) as the Statements had not been immediately withdrawn or clarified (despite repeated requests by the Executive to do so) that they also constituted a statement which may mislead shareholders and the market or may create uncertainty within the meaning of Rule 18.1.
- (d) it noted that the Statements made by Mr Fu were intentional and carefully crafted. However the Executive was not at any time consulted about these Statements before they were made. This was all the more surprising as following the First Incident the Executive specifically wrote to S&C asking them to draw their client's attention to General Principle 6, Rule 8.1, Note 2 to Rule 8.1, Rule 18.1 and Rule 18.3 of the Code.
- (e) Rule 18.3 clearly contemplates a whole range of possible statements that might constitute a no increase statement. The fact that examples of such statements are given does not preclude differently worded statements from being interpreted as falling within the ambit of the Rule.
- (f) as to whether or not the Statements had misled shareholders or resulted in uncertainty the Executive noted that the Statements have been widely reported by the press with many different interpretations.

**The case of the Offerors in summary**

18. S&C, on behalf of the Offerors, submitted that:

- (a) Mr Fu did not mention a specific offer price. He did not state that the Offerors will not increase the offer price. He did not state that the Offers will not be amended,

revised, improved or changed. He did not mention that the offer price will remain at a certain price. He did not mention anything about the finality of the Offers.

- (b) the Statements are materially different from the “no increase statements” contemplated under Rule 18.3 of the Code such as “the offer will not be further increased”, “the offer is final”, or “our offer remains at \$x per share and it will not be raised”.
- (c) the Statements when read in their full context reflect the Offerors’ view that they do not seek to acquire China Gas regardless of the costs involved, and that the Offerors seek to pay a fair offer price only. Mr Fu was at the media conference for Sinopec’s annual results. He was expected and entitled to assure Sinopec’s shareholders that management will act responsibly and will not complete the acquisition at all costs by paying above market value.
- (d) the Statements were an “artful response” striking a “delicate balance” so that neither a misleading statement to the effect that the Offers would be improved (which is prohibited under Rule 18.1) nor a “no increase statement” (which is prohibited under Rule 18.3) was made, while at the same time providing meaningful responses to media queries.
- (e) the Statements had not led to any market confusion which warrants publication of a clarification announcement. As evidence, the Offerors contended that the Statements had no impact on the market price and turnover of China Gas shares.
- (f) the Offerors had grave concerns that publishing a clarification announcement repeating the Statements might attract unnecessary speculation that there could be an increase in the offer price and may lead to market confusion and volatility.

### **The submission of China Gas in summary**

- 19. The Panel hearing dealt principally with a case made by the Executive regarding the Statements and a case in response from the Offerors. However, a submission was made on the same subject by the offeree, China Gas.
- 20. China Gas submitted that:
  - (a) the Statements constituted a “no increase statement” for the purposes of Rule 18.3 of the Code.
  - (b) the media seemed to have interpreted the Statements to be no increase statements.
  - (c) the repeated statements of this nature by senior representatives of the Offerors are creating great uncertainty as to the status of the Offers.
  - (d) there is strong evidence that the market traded on the basis of the Statements.

### **Discussion, decision and reasons**

- 21. The Panel agrees with the submission of the Executive that Rule 18.3 does not restrict the wording that offerors may use to make a statement that may be regarded as a “no increase statement”. It merely provides “such as” examples.

22. The Panel did not attach much weight to the submissions from the Offerors and China Gas which attempted to draw inferences from market turnover and prices as to whether or not the Statements were a no increase statement. As there are numerous factors which might affect share price and turnover, to ascertain the precise causes of changes in these (or the lack thereof) is often a speculative task.
23. The Panel noted the increase in volume in China Gas shares on 27 March 2012 to its highest daily level in two weeks, which occurred on the day of the media coverage of the Statements. Although it could offer some support to the submission that the Statements caused uncertainty and confusion, there are numerous other factors, other than the Statements, which might have affected price and turnover. However, the Panel would like to emphasise that Rule 18.1 cautions against making statements which “**may** mislead shareholders and the market or **may** create uncertainty” (emphasis added); no demonstration of actual market impact is necessary for statements to be potentially misleading or to potentially create uncertainty.
24. Clear evidence of the confusion caused by the Statements lies in the broad range of interpretations of the meaning of the Statements in media coverage, as does a common-sense reading of the agreed translation of the Statements. The Panel is of the view that the Statements could reasonably have been taken (amongst other meanings) to mean:
- (a) “we will not offer more than the current market price” (which closed on 26 March 2012 at \$3.77, a premium to the offer price of \$3.50), indicating a cap on a possible increase; or
  - (b) “we cannot (and therefore will not) raise our offer price because it already reflects market prices or values for similar businesses” (a no increase statement); or
  - (c) “we will not pay more than we think it is worth from time to time with regard to market circumstances, and currently we think our offer reflects the fair value of China Gas”.
25. Accordingly, in this case, the Panel rules that the Statements did not constitute a “no increase statement” under Rule 18.3 but were ambiguous and created uncertainty as to whether or not the Offerors were ruling out the possibility of an increase in the Offers.
26. The Panel rejects the submission by the Offerors that it was necessary to “strike a delicate balance” between the prohibitions of the Code and providing a “meaningful response” to media queries about the possibility of the Offers being increased. Any attempt to do so was almost bound to result in an ambiguous statement, one which the Offerors termed “artful” in their first submission to the Executive. The Offerors were under no obligation to make any statement at all, but any statement they chose to make should have been made with clarity.
27. The Offerors and their advisers are reminded of General Principle 6 which requires that “parties involved in offers must take care that statements are not made which may mislead shareholders or the market”. This General Principle is reflected in the requirements of Rule 18.1 which further calls on parties and their advisers not to make statements which “may mislead shareholders and the market or may create uncertainty”.

28. In particular, Citigroup Global Markets Asia Limited, the financial adviser to the Offerors, is reminded of Note 1 to Rule 9.1 which states that it is the financial advisers who are responsible for guiding their clients with regard to any information released in relation to an offer. Whilst parties to an offer are of course free to take legal advice and to make submissions via their lawyers, this does not absolve the financial adviser of its primary role and duties under the Code, and it is the financial adviser who is licensed by the SFC for this purpose.
29. Prior to the referral to the Panel, the Offerors were afforded by the Executive every opportunity to publicly clarify the Statements, but chose not to. The Panel rejects the submission by the Offerors that clarifying the Statements could in any sense cause market confusion and speculation in itself. It would merely return the position to where it had been before the Statements were made (and after the clarification following the First Incident). Clear, accurate and unambiguous statements do not increase uncertainty.
30. It is a matter of regret to the Panel that it was even necessary to hear this case. The Panel takes this opportunity to remind practitioners that General Principle 10 requires that “all parties concerned with transactions subject to the Code are required to co-operate to the fullest extent with the Executive...”. When the Executive asks a party to an offer to publish a clarification of statements made by its officials, that request should be acceded to without delay unless there are very good reasons to challenge the Executive’s position. In the Panel’s view, this clearly was not one of those occasions.
31. In view of the urgency of reducing the confusion caused by the Statements, in the oral decision which preceded this written ruling, the Panel required the Offerors to issue the clarification previously requested by the Executive, and specifically to state whether or not they rule out the possibility of an increase in the offer price. This statement was to be made by 6pm on 3 April 2012 or such later time as the Executive may have agreed.

### **Post-hearing note**

32. Subsequent to the Panel hearing, at 5:55pm on 3 April 2012, the Offerors issued an [announcement](#) as required by the Panel.

12 April 2012

Parties present at the hearing:

The Executive

ENN and Sinopec: the Offerors

Citigroup Global Markets Asia Limited: financial adviser to the Offerors

Sullivan & Cromwell: legal adviser to the Offerors

Kirkland & Ellis: legal adviser to the financial adviser to the Offerors

China Gas

Linklaters: legal adviser to China Gas