

Corporate Insider

企业内望

January 2015

2015年1月

A regular update on areas of interest for company directors and decision makers
为公司董事及决策者而设的最新情报

Welcome to the January 2015 edition of Stephenson Harwood's Corporate Insider. In this edition we continue our series on joint ventures by looking at the transfer of shares in joint venture companies. We then provide an update on the recently published draft guidelines to the Hong Kong Competition Ordinance. As usual, if you have any suggestions for future editions, please let us know.

欢迎参阅罗夏信律师事务所二零一五年一月号的《企业内望》。在本期内，我们将探讨合资企业的股份转让，作为合资企业文章系列的续作。然后，我们会介绍最近发表《竞争条例》的草拟指引。一如既往，如您对将来的《企业内望》有任何建议，请不吝告之。

- [Transfer of shares in Joint Venture Companies](#)
- [合资企业的股份转让](#)
- [Draft guidelines to the Hong Kong Competition Ordinance](#)
- [《竞争条例》草拟指引](#)

TRANSFER OF SHARES IN JOINT VENTURE COMPANIES

Finding the right partner for a joint venture and establishing the joint venture business can be a lengthy process. For this reason alone, most participants in a joint venture will want to retain some degree of control over the parties involved. It would, for example, be unfortunate to witness the exit of a key participant or the introduction of an unknown or undesirable third party. If a corporate vehicle is used for the joint venture, restrictions are therefore often placed on the participants' ability to transfer shares in the joint venture company ("JVC"), typically set out in the articles of association and/or in a separate joint venture agreement. Here we look at some of the possible methods of dealing with the transfer of shares in a JVC. While the focus is on the

合资企业的股份转让

寻找合适的合资企业伙伴及成立合资企业可以是一个费时的过程。因此，大部分合资企业的参与者均有意保留一定程度的控制权以控制参与者的人选。无论是一个重要的参与者退出，抑或是一个不认识或不合意的第三方加入，都是不幸的情况。因此，若合资企业以公司形式组成，参与者在转让合资企业股份时通常会受到限制。该等限制一般载于合资企业的组织章程细则及/或另外订立的合资企业协议内。本文将探讨一些处理合资企业股份转让的可行方法。虽然本文集中讨论以公司形式组成的合资企业，但是很多概念亦同样适用于其他涉及多于一个拥有人的商业关系。

股份转让的限制是否适度，是取决于合资企业

use of a corporate vehicle, many of the concepts are equally applicable to other forms of business relationship that have more than one owner.

The appropriate level of restrictions on the transfer of shares in a JVC will ultimately depend on the purpose and nature of the joint venture. In some situations it may not be appropriate to allow any transfer of shares without the consent of the other parties. Where a venture has a fixed and relatively short lifespan, the parties may be more likely to agree to an absolute prohibition on transfers. In most cases however, parties will want to retain a degree of flexibility to exit the joint venture or sell off part of their interest at a later date. Parties may therefore agree to prohibit transfers only for a specified period of time or to place other restrictions and conditions on the transfer of shares.

If transfers are allowed, the joint venture participants will often include pre-emption rights in the articles of the JVC. Pre-emption rights require shareholders who are planning to dispose of shares to first offer them to the other existing shareholders to purchase on the same terms. This gives the existing shareholders the option of keeping share ownership among the existing members, albeit at cost, and preventing an unknown third party from entering the venture. The parties may nonetheless consider permitting certain transfers free of pre-emption rights, such as transfers to companies within the same corporate group as the selling shareholder (although this in itself can raise issues).

In some cases, parties may not be willing or able to take up their pre-emption rights. This is particularly relevant where a majority shareholder intends to sell its shares in the JVC. In such cases, the minority shareholders may not have sufficient means to purchase the shares and may be unable to prevent the controlling interest in the JVC passing to a third party. In order to protect themselves, minority shareholders are advised to seek some form of "tag along" right in the articles or joint venture agreement. Tag along rights take effect when a proposed sale of shares would result in a change in the control of the JVC. In such cases, the tag along rights require the selling shareholder to procure that the proposed buyer makes an offer to the other shareholders on the same terms. This allows minority shareholders to "piggy back" on a

的成立目的及性质。在一些情况下，若股份转让不须获其他参与者同意，未必是一个适当的安排。若企业的成立年期是固定及较短暂，参与者较有可能同意完全禁止任何股份转让。然而，在大部分的情况下，参与者会希望保留一定程度的弹性，好让日后能退出合资企业或卖出其部分股份。因此，参与者可能只会同意禁止在合资企业成立后一段指定时间内转让股份，或者加入其他股份转让的限制及条件。

若合资企业参与者容许转让股份，它们通常会在合资企业的组织章程细则加入优先购买权。优先购买权要求计划出售股份的股东先向其他现有股东按给予第三方的相同条款出售该等股份。虽然行使优先购买权须付上金钱，但是这个安排既能让现有股东保持其于合资企业一定的持股比例，又能防止不认识的第三方加入合资企业。然而，参与者也可考虑豁免某些股份转让，使其不受优先购买权限制，例如：出售股份的股东与受让方属同一集团公司（虽然这可引致其他问题）。

在一些情况下，参与者未必愿意或能够行使其优先购买权。譬如，若多数股东计划出售其于合资企业的股份，少数股东可能缺乏足够的资金购买该等股份，因而未能防止第三方取得合资企业的控股权。少数股东应于组织章程细则或合资企业协议内加入「随卖权」，以保障其利益。若股份出售导致合资企业的控制权有所改变，少数股东可行使随卖权，迫使出售股份的股东确保准买家向其他股东按相同条款购买其股份。这个安排可让少数股东跟随出售控股权的多数股东出售其股份。

同样地，多数股东通常会在组织章程细则或合资企业协议内加入「强卖权」，从而确保间公司的股份可全数出售。强卖权可给予多数股东较大的弹性卖掉其于合资企业的股权；若多数股东不能确保准买家能购买公司的全数股权，多数股东可能会较难出售其控股权益。若多数股东打算出售其于合资企业的股份给某一买家，它可行使强卖权迫使少数股东将其股份出售予同一买家，从而可确保买家能购买合资企业的全数股权。

合资企业参与者亦可考虑是否需要加入额外条件以限制股份转让，例如：新股东是否需要跟现有股东订立相同或相类似的合资企业协议；若某些股东退出合资企业，合资企业的名称是否需要更改；若某一股东决定退出合资企业，该名股东与合资企业所订立的协议将如何处理。

sale by the majority shareholder of its majority interest.

Similarly, to enable a sale of the whole company, a majority shareholder will often seek to include “drag along” rights in the articles or joint venture agreement. Such rights give a majority shareholder greater flexibility to dispose of its interest in the JVC; it may be more difficult to sell a controlling interest in a company without ensuring that a prospective buyer can acquire the entire shareholding free of minority interests. In the event that the majority shareholder intends to sell its shares in the JVC, drag along rights can be used to compel the minority shareholders to sell their shares to the same buyer, thereby ensuring that the buyer can acquire the entire share capital of the JVC.

Parties to a joint venture may also wish to consider whether additional conditions should be placed on any transfer of shares, for example, will new shareholders be required to enter into the same or a similar joint venture agreement with the existing members? Will the name of the JVC need to be changed if certain shareholders leave the venture? What happens to any agreements between a shareholder and the JVC if that shareholder decides to exit the venture?

Ultimately, the appropriate level of restrictions and conditions on the transfer of shares will depend on a number of factors including the purpose, lifespan and ownership structure of the joint venture. Nonetheless, how these issues are dealt with is one of the most important aspects of a joint venture or shareholders’ agreement.

归根究底，股份转让的限制和条件是否适度，是取决于若干因素，包括：合资企业的成立目的、成立年期及股权结构。如何处理以上问题是合资企业协议或股东协议内最为重要的方面之一。

DRAFT GUIDELINES TO THE HONG KONG COMPETITION ORDINANCE

In last year’s June edition of Corporate Insider we provided an update on the implementation of the Hong Kong Competition Ordinance which was enacted in June 2012 to establish a new competition regime in Hong Kong. Towards the end of last year, the Competition Commission published six draft guidelines to explain how the Commission will interpret and apply the substantive provisions of the Ordinance which are expected to come into force in 2015. The draft guidelines are currently

《竞争条例》草拟指引

在去年六月号的《企业内望》，我们谈及过《竞争条例》的实施安排。《竞争条例》在2012年6月制定，藉以建立一个全新的竞争法体制。竞争事务委员会(“竞委会”)在去年年底发表了六份草拟指引来解释竞委会将会如何诠释及执行预期于2015年生效的《竞争条例》实质条文。竞委会现正就草拟指引进行公众咨询，其后会征询立法会意见，并预期于2015年上半年度完成指引最终稿。

undergoing a public consultation and are expected to be finalised in the first half of 2015 following consultation with the Legislative Council.

Three of the draft guidelines cover the new competition rules implemented under the Ordinance, relating to anti-competitive agreements between undertakings (the "**First Conduct Rule**"), abuse of substantial market power (the "**Second Conduct Rule**"), and anti-competitive mergers involving telecommunications carrier licensees (the "**Merger Rule**"). The remaining three guidelines deal primarily with procedural matters such as the Commission's approach to the handling of complaints and investigations. Here we provide a brief summary of the draft guidelines:

Draft Guideline on the First Conduct Rule

The First Conduct Rule prohibits anti-competitive arrangements between two or more undertakings. The draft guideline on the First Conduct Rule notes that there are two types of anti-competitive arrangements that may be caught by the rule: those that by their very nature have the object of harming competition, such as cartel behaviour, and those that do not have an anti-competitive object but nonetheless have an anti-competitive effect. The draft guideline notes that the First Conduct Rule applies to both vertical and horizontal arrangements (i.e. arrangements between undertakings at all levels of the supply chain). The guideline also helpfully provides a number of examples demonstrating the Commission's approach to certain common arrangements such as the use of standard terms, recommended or maximum resale price agreements and membership of trade associations.

Draft Guideline on the Second Conduct Rule

The Second Conduct Rule prohibits conduct that has, as its object or effect, the prevention, restriction or distortion of competition in Hong Kong. It only applies to undertakings which have a substantial degree of market power in a given market. The draft guideline on the Second Conduct Rule explains how the Commission will define the relevant market in which an undertaking operates and assess whether it has a substantial degree of market power therein. The guideline confirms that the Commission's approach will follow international best

其中三份草拟指引谈及将于《竞争条例》下实施的三项竞争守则：有关业务实体之间的反竞争协议的守则("第一行为守则")、有关滥用相当程度的市场权势的守则("第二行为守则")以及有关涉及电讯业传送者牌照持有人的反竞争合并的守则("合并守则")。剩余的三份指引主要处理程序性事宜，例如：竞委会处理投诉及进行调查的方式。现在我们会概括介绍六份草拟指引：

第一行为守则草拟指引

第一行为守则禁止两个或多个业务实体之间的反竞争安排。第一行为守则草拟指引针对两类反竞争安排：本质上具有妨碍竞争目的的反竞争安排（如：合谋行为）；以及不具有反竞争目的但会产生反竞争效果的反竞争安排。第一行为守则指引规管横向安排和纵向安排（即，在供应链各个层面的业务实体之间的安排）。这份指引还提供了一些例子，以说明竞委会处理某些常见安排（如：使用标准条款、建议或最高转售价格协议及行业协会会籍）的方式。

第二行为守则草拟指引

第二行为守则禁止从事目的或效果是妨碍、限制或扭曲在香港的竞争的行为。第二行为守则只适用于在某市场中具有相当程度的市场权势的业务实体。第二行为守则草拟指引解释竞委会如何界定相关市场及如何评估业务实体是否于该相关市场有相当程度的市场权势。这份草拟指引确认了竞委会所采用的方式是已顾及到产品市场和地域市场，并遵循了国际间的最佳做法。这份草拟指引也确认了在评估是否有相当程度的市场权势时，超过指定的市场占有率并非唯一的决定因素，竞委会会按个别情况考虑若干经济因素而作出决定。

合并守则草拟指引

合并守则禁止具有或相当可能具有大幅减弱在香港的竞争的效果的合并。当合并守则生效时，初步仅适用于在电讯业界经营的业务实体。这份草拟指引说明了竞委会执行合并守则的方式，包括评估某一合并对竞争带来的影响的方式。这份草拟指引也提及两个「安全港」，两个安全港分别以市场占有率及市场集中率为基础。若某一合并处于任何一个安全港的范围内，该合并不大可能涉及反竞争的问题。这份草拟指引也阐述了某些流程和程序，包括向竞委会寻求非正式意见的流程。

practice, taking into account both the product market and the geographic market, and that the assessment of substantial market power will not simply depend on meeting certain prescribed market share thresholds, but will instead be determined on a case by case basis considering a number of economic factors.

Draft Guideline on the Merger Rule

The Merger Rule prohibits mergers that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. When the rule comes into force it will initially only apply to undertakings operating in the telecommunications sector. The guideline sets out the Commission's approach to applying the Merger Rule, including its approach to assessing the effect that a given merger will have on competition, and indicates two "safe harbours" based on market share and market concentration. Mergers that fall into either of these safe harbours are unlikely to raise competition concerns. The draft guideline also sets out certain processes and procedures including a process to seek informal advice from the Commission.

Draft Guidelines on Complaints, Investigations and Applications

The remaining three guidelines deal mainly with procedural matters. They explain how a party that suspects an undertaking of contravening a competition rule may register a "complaint" with the Commission and how the Commission will handle such complaints. They outline the approach that the Commission will adopt when considering an alleged contravention of the Ordinance and how it proposes to use its statutory information gathering powers. In addition, they explain how a person may apply to the Commission for a decision as to whether or not an agreement or course of conduct falls within the relevant exemptions under the Ordinance, and outline the Commission's approach to issuing "Block Exemption Orders" which exempt certain categories of agreements from the application of the First Conduct Rule.

有关投诉、调查及申请的草拟指引

剩余的三份指引主要处理程序性事宜。该等指引解释了在怀疑某业务实体违反某竞争守则时该如何向竞委会作出投诉，以及竞委会如何处理此等投诉。该等指引也概述了竞委会在考虑声称违反竞争守则的行为时所采取的处理方法，以及竞委会打算如何行使其法定搜集资料权力。除此之外，该等指引说明了如何向竞委会提出申请，让竞委会厘定某协议或行为是否在《竞争条例》下获得豁免。该等指引也概述了竞委会在考虑是否发出集体豁免命令时所采用的原则。倘若获得集体豁免命令，特定类型的协议可获豁免遵守第一行为守则。

RECENT PUBLICATIONS:

Corporate Finance Update - Launch of Shanghai-Hong Kong Stock Connect; MOFCOM issues new administrative measures for outbound investment from China; and Takeovers

Panel Rules no mandatory general offer obligation triggered for China oriental. Please click [here](#) to read more.

环球快报 (Global Snapshot) - 越南放宽外国人持有住宅的限制; 缅甸新劳动法开始实施. 详情请按[此](#)
[处](#).

Eye on Greater China – New Chinese governmental initiatives to encourage investments into China. Please click [here](#) to read more.

CONTACT US

Paul Westover

Partner, Corporate

Tel: +852 2533 2755

Email: Paul.Westover@shlegal.com

Victor Lee

Associate, Corporate

Tel: +852 2533 2832

Email: Victor.Lee@shlegal.com

Fiona Cheng

Associate, Corporate

Tel: +852 2533 2736

Email: Fiona.Cheng@shlegal.com

ATHENS* BEIJING BUCHAREST* DUBAI HONG KONG JAKARTA*
LONDON PARIS PIRAEUS SHANGHAI SINGAPORE SEOUL YANGON*

*Associated Office

Information contained in this document should not be applied to any particular set of facts without seeking legal advice.

You are receiving this email because you are on our general mailing list and one of our lawyers have selected you to be on the mailing list for this publication. If you would like to be removed from this mailing list. Please click on the unsubscribe button on the bottom left corner of the email. For further information about Stephenson Harwood, please visit our website at www.shlegal.com.

Stephenson Harwood, 18th Floor, United Centre, 95 Queensway, Hong Kong.