

**In the matter of**

BEIGE HOLDINGS LIMITED

APPLICANT

**and**

LION MATCH COMPANY (PROPRIETARY) LIMITED

RESPONDENT

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**RULING AND REASONS FOR THE RULING OF THE EXECUTIVE DIRECTOR**

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**INTRODUCTION**

1. This is a Ruling of the Executive Director in terms of Regulation 118(3) of the Companies Regulations (“the regulations”) following an application by Beige Holdings Limited (“Beige”) in a letter dated 3 February 2012 in respect of a “comparable offer” made by Lion Match Company (Proprietary) Limited (“Lion Match”) to the preference shareholders of Beige. In its application letter, Beige requests the TRP to “provide a ruling as to:
  - (i) the meaning of a ‘comparable offer’ for the purposes of the Takeover Regulations;
  - (ii) the basis to be used for determining a comparable offer; and
  - (iii) if an offeror is required to take account of the see-through price of any security in respect of which a comparable offer is to be made in terms of the Act”

2. In support of their application, Beige have submitted copies of the following:
  - (i) Practice Statement No. 24 issued by the London Takeover Panel;
  - (ii) Rules 18 and 19 and the notes thereto of the Singapore Code on Takeover and Mergers; and
  - (iii) A letter dated 1 December 2011, in which Beige raise its concern about the calculation of the comparable offer together with an attached document headed 'Beige Holdings Limited'.

## **BACKGROUND**

3. Beige is a company listed on the JSE Limited's Alternative Exchange. It is a contract manufacturer and distributor of cosmetics, soaps, household products, toiletries, laundry soaps and allied bath and body care products for South African and international markets.
4. Lion Match is a private company and holds investments through a number of subsidiaries. Lion Match is a subsidiary of Fasic Investment Corporation Limited.

## **THE FACTS**

5. Beige has 2 500 000 000 authorised ordinary par value shares of R0.01 (one cent) each and 1 631 821 425 issued ordinary par value shares of R0.01 (one cent) each, listed on the Alternative Exchange (Alt X) of the JSE under the share code of "BEG" . In addition, Beige has 25 000 000 authorised preference shares of R0.01 (one cent) each. All the preference shares have been issued and are listed under the code "BEGP2" on the Alt X.

6. The preference shares are variable-rate, cumulative, no-participating, convertible, redeemable preference shares. The preference shares are convertible into ordinary shares, at the election of the preference shareholder, on a date not less than three years and one day from the date of issue, in the ratio of 20 ordinary shares for every one preference share held. Any preference share not converted within 14 days of the conversion date will be automatically redeemed by Beige at a price based on the aggregate issue price of the preference shares, declared but unpaid dividends and any interest accruing thereon, as indicated in a letter from Beige dated 3 February 2012. According, to a letter from Beige dated 1 December 2011, the conversion of the preference shares will occur during May 2014.
7. Lion Match is the registered owner of 562 841 737 ordinary shares of R0.01 (one cent) each in Beige representing 34.49% of the issued ordinary share capital (including treasury shares) and 36.45% of the voting rights (excluding treasury shares) in Beige having acquired the shares at a purchase price of R0.08 per ordinary share.
8. Lion Match is not the registered owner of any of the issued preference shares of Beige according to its circular to the shareholders of Beige.
9. Lion Match crossed the 35% threshold referred to in section 123 of the Companies Act No 71 of 2008 (“the Act”), when it acquired ordinary shares in Beige. Accordingly, Lion Match is required to make a mandatory offer to all ordinary Beige shareholders at the same offer consideration as it acquired the 562 841 737 ordinary shares. In addition, Lion Match is required to make a comparable offer to the preference shareholders of Beige in terms of section 125 of the Act.
10. Lion Match Board made an offer of R0.08 (zero comma zero eight cents) per ordinary share in Beige and a comparable offer of R1.28 (one rand and twenty

eight cents) per preference share in Beige. Full details of the offer are in the Circular to Beige shareholders.

11. Beige is of the opinion that the ‘comparable offer’ made to the preference shareholders of Beige of a comparable offer of R1.28 (one rand and twenty eight cents) per preference share in Beige is not comparable as provided in terms of section 125(2) of the Act and regulation 87.

### **THE PROCEDURE PRIOR TO THE RULING**

12. Taking into consideration the provisions of The Promotion of Administrative Justice Act No 3 of 2000, Beige and Lion Match (the Parties) were given an opportunity to make written representations to the Executive Director. In respect of Beige in their letters dated, 3 February 2012, 5 March 2012 and 9 March 2012 and in the case of Lion Match in their letters dated 29 February 2012 and 7 March 2012.
13. In addition, Lion Match submitted a letter dated 28 February 2012 from an Independent Expert, Bridge Capital Advisors (Pty) Limited.
14. I have also been provided a copy of the correspondence between the parties dated 15 December 2011 which indicated that the parties have previously attempted to reach an agreement on the methodology of arriving at a ‘comparable offer’

### **THE TAKEOVER PROVISIONS DEALING WITH COMPARABLE OFFERS**

15. Section 125 Comparable and partial offers

provides:

(2) *If—*

(a) ...

*(b) a person acting alone, or two or more persons acting in concert, make an offer for any securities of a regulated company that has more than one class of issued securities, which, if accepted, could result in a person, or a number of related or inter-related persons holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights associated with all issued securities of the company, that person or those persons acting in concert must make a comparable offer to acquire securities of each class of issued securities of that company.*

16. Regulation 87 Comparable offers

provides:

*“(1) In addition to any other circumstances contemplated in section 125 (2), a comparable offer must be made if—*

*(a) a mandatory offer has been required in terms of section 123, including a mandatory offer that is required to be made as a result of a reacquisition of securities in terms of section 48 or section 114; and*

*(b) the offeree regulated company has more than one class of security in issue, which are required to be dealt with in terms of section 125.*

*(2) Comparable offers are required for all classes of issued security that have voting rights or could have voting rights in the future, including options.*

*(3) All schemes that are cash settled and have no present or future voting rights associated with them, such as cash settled phantom schemes and cash settled share participation rights schemes, which for settlement purposes, are dependent*

*on a future security price or value of securities (which are the subject of an offer), must be taken account of and treated on an equitable basis, relative to the classes of security that are subject to a comparable offer.*

*(4) The offer consideration(s) in a comparable offer is to be determined by the offeror taking account of the class of security to which the comparable offer is to be made.*

*(5) The fair and reasonable opinion given by the independent expert and the independent board opinion regarding the comparable offer must have the same opinions regarding fairness and reasonableness as the respective fair and reasonable opinions given by the independent expert and the independent board regarding the offer which gave rise to the comparable offer.”*

## **CONSIDERATION OF SIMILAR PROVISIONS FROM THE UNITED KINGDOM, HONG KONG AND SINGAPORE**

17. The South African Takeover Provisions in Chapter 5 of the Companies Act No 71 of 2008 are consistent with those of the London City Code on Takeovers and Mergers (the City Code) issued by the London Panel on Takeovers and Mergers (the London Panel).<sup>1</sup> The Hong Kong Takeover Code<sup>2</sup> and the Singapore Code on Takeovers and Mergers<sup>3</sup>, administered by the Singapore Security Industry Council are also similar to those of the City Code. Accordingly, I am of the view that it is appropriate to refer to those countries in order to obtain guidance in interpreting the South African Takeover Provisions.

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<sup>1</sup> See N Boardman “A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008” 2010 *Acta Juridica* 306, see also C Stein with G Everingham *The new Companies Act Unlocked-A Practical Guide*. (2011) 337.

<sup>2</sup> See B M Ho, “Rethinking the Systems of Sanctions in the Corporate and Securities Law of Hong Kong” *McGill Law Journal*. 1997. Vol. 42.

<sup>3</sup> See Singapore Code on Mergers and Takeovers. Available on : [http://www.mas.gov.sg/resource/sic/The\\_Singapore\\_Code\\_on\\_Take\\_Overs\\_and\\_Mergers](http://www.mas.gov.sg/resource/sic/The_Singapore_Code_on_Take_Overs_and_Mergers).

18. The City Code rule provides:

*“RULE 15. APPROPRIATE OFFER FOR CONVERTIBLES ETC.*

*(a) When an offer is made for voting equity share capital or for other transferable securities carrying voting rights and the offeree company has convertible securities outstanding, the offeror must make an appropriate offer or proposal to the stockholders to ensure that their interests are safeguarded. Equality of treatment is required.*

*(b) The board of the offeree company must obtain competent independent advice on the offer or proposal to the stockholders and the substance of such advice must be made known to its stockholders, together with the board’s views on the offer or proposal.*

*(c) Whenever practicable, the offer or proposal should be despatched to stockholders at the same time as the offer document is posted but, if this is not practicable, the Panel should be consulted and the offer or proposal should be despatched as soon as possible thereafter. A copy of the offer or proposal should be lodged with the Panel at the time of issue.*

*(d) The offer or proposal to stockholders required by this Rule should not normally be made conditional on any particular level of acceptances. It may, however, be put by way of a scheme to be considered at a stockholders’ meeting.*

*(e) If an offeree company has options or subscription rights outstanding, the provisions of this Rule apply mutatis mutandis.*

19. In order to provide guidance to companies involved in takeovers and practitioners in applying the rule, the London Panel Executives have issued Practice Statement No. 24. ("Statement No 24") The statement has been updated during September 2011.
20. I have also considered a Guidance Note issued by the Singapore Monetary Authority which guidance deals with appropriate offers for convertible securities. Rule 19 of the Singapore Code on Takeover and Mergers, ("Singapore Code") dealing with "appropriate offers" is similar to the City Code. In interpreting this concept, the Singapore Code notes indicate:

*"NOTES ON RULE 19*

*1. Appropriate offer price for instruments convertible into, rights to subscribe for and options in respect of securities being offered for or which carry voting rights.*

*For outstanding instruments convertible into, rights to subscribe for, and options in respect of, securities being offered for or which carry voting rights, the "see-through" price is normally used to determine the appropriate offer price. An appropriate offer or proposal for such instruments, subscription rights or options is at least the higher of the following:-*

*(a) the "see-through" price. For rights to subscribe for, and options in respect of, securities being offered for or which carry voting rights, the "see-through" price is the excess of the offer price for the underlying securities over the exercise or subscription price of such subscription rights or options.*



For instruments convertible into securities being offered for or which carry voting rights, the “see-through” price is the offer price for the underlying securities multiplied by the conversion ratio. (My underlining)

*For example, if the share offer price is \$4, the “see-through” price for an instrument convertible into 5 shares should be \$20 (\$4 times 5”*

21. I have also considered the Hong Kong Code on Takeover and Mergers (“Hong Kong Code”) which has a similar rule dealing with appropriate offers for convertibles or warrants under rule 13. The Hong Kong Takeover Panel Executives have issued Practice Note 6,<sup>4</sup> dealing with appropriate offers and calculation of “see-through” price. It provides:

***“Practice Note 6 (PN6) – Appropriate offers for convertibles or warrants under Rule 13 and calculation of “see-through” price***

*Rule 13.1 of the Takeovers Code provides that “where an offer is made for equity share capital and the offeree company has convertible securities outstanding, the offeror must make an appropriate offer or proposal to the holders of the convertible securities to ensure that their interests are safeguarded. Equality of treatment is required”.*

*The main rationale of Rule 13.1 is to ensure equal treatment of holders of convertible securities or warrants of the offeree company during an offer (see General Principle 1 of the Codes). Rule 13.1 also reflects General Principle 2 of the Codes which provides that “if control of a company changes or is acquired or is consolidated, a general offer to all other shareholders is normally required”.*

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<sup>4</sup> See Hong Kong Takeover Panel, Practice Note. Available: [http://www.sfc.hk/sfc/html/EN/cfd/mergers/practice\\_note/practice\\_note.html](http://www.sfc.hk/sfc/html/EN/cfd/mergers/practice_note/practice_note.html). Accessed: 10 March 2012.

Appropriate offers to be made

*In an earlier consultation the Executive was asked whether it would waive the requirement to make an appropriate offer to the holder of a convertible note of the offeree company under Rule 13.1 in the event a possible offer is made. This request was made on the basis that, among other things, the conversion rights under the note are not exercisable within the offer period (the note would only be exercisable sometime after the end of the offer period).*

*The Executive wishes to clarify that regardless of whether the conversion rights under convertible securities or warrants are exercisable within the offer period, where there is an offer for shares of a company under the Takeovers Code, the Executive would normally require an appropriate offer to be made under Rule 13.*

Calculation of “see-through” price

*Normally the consideration under any offer or proposal in relation to convertible securities, warrants, options or subscription rights will be considered appropriate if it is based on the offer price for the relevant equity share capital and such “see-through” price should be regarded as the minimum offer price (see Note 1 to Rule 13). The market price of the relevant securities is not relevant to the calculation of the “see-through” price. The following example illustrates how the “see-through” price of convertible securities may be calculated:*

*Example:*

*An offeror is offering \$2 for each ordinary share in the offeree company. Other than ordinary shares, the offeree company has in issue (i) options entitling holders to subscribe for ordinary shares at an exercise price of \$1 per share and (ii) convertible notes with a face value of \$100 which is convertible into ordinary shares at \$4 per share.*

*The option offer – The see-through value of each option would be the difference between the offer price for each ordinary share and the exercise price of each option. In this case, the relevant see-through price is \$1 for each option on the basis that the offer price for each ordinary share is \$2 and the exercise price of each option is \$1.*

*The convertible note offer – The see-through value of each convertible note would be the number of ordinary shares which each convertible note is convertible into multiplied by the offer price for each ordinary share. In this case, the relevant see-through price is \$50 for each convertible note with face value of \$100 on the basis that each convertible note is convertible into 25 ordinary shares (i.e. \$100 face value divided by the conversion price of \$4 per share) and the offer price for each ordinary share is \$2.”*

## **CONCLUSION**

22. It is my view that the concept “comparable offer” in this matter is used in the same context to refer to an “appropriate offer” as indicated in the Practice Statement 24, the Singapore Code and the Hong Kong Code.
23. It has been indicated that the purpose of requiring an appropriate offer for convertible securities is to safeguard the interests of holders of such securities in their capacities as potential holders of ordinary shares.<sup>5</sup> I have also considered the provisions of section 119(1) and 119(2) of the Act and believe that the Practice Statement 24, the Singapore Code and the Hong Kong Code accords with the principles set-out in those sections.
24. In terms of sections 119 (1) and 201 (3) of the Act, in exercising its powers and performing its functions the Panel must not consider commercial advantages or disadvantages of affected transactions. Accordingly, the ruling does not relate to

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<sup>5</sup> See, The Panel on Takeovers and Mergers, Practice Statement No 24. Paragraph 1.1. Available on [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk). Accessed 10 January 2012.

the “value” or the “fairness” of the comparable price for the preference shareholders.

## **RULING**

25. A comparable offer for the purposes of the section 125 (2) of the Act and regulation 87 does not require that the offer must be identical.<sup>6</sup>
26. The comparable offer of R1.28 per share made by Lion Match to the preference shareholders of Beige is not a “comparable offer” as contemplated in terms of section 125(2) and regulation 87.
27. A “comparable offer” must be made applying a “see through” valuation of the Beige preference shares. In order to be comparable, the offer price for the preference shares must be no less than the “see through” value of the ordinary shares.
28. Lion Match must comply with this ruling within 5 business days of this ruling by making a revised offer announcement to Beige preference shareholders and thereafter comply with the relevant regulations.
29. Beige must announce the ruling within 1 business day of receipt in accordance with regulation 118(7) (a).

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<sup>6</sup> See Rule 14.1 of the City Code and the notes there under.

## **HEARINGS**

30. Beige and Lion Match are entitled to apply for a hearing in respect of this ruling to the Takeover Special Committee within 5 business days from the date of the ruling in terms of regulation 118 (8).

**DATED 16 MARCH 2012**

Lucky Phakeng  
Executive Director