

HKEx LISTING DECISION

Cite as HKEx-LD73-2 (**Published in** October 2009) (**Updated in July 2014**)

Summary	
Parties	<p>Company X – a Main Board listed company</p> <p>The Subsidiary – a GEM listed company and a subsidiary of Company X</p> <p>Company A – a substantial shareholder of Company X. It was controlled by Individual A.</p> <p>Company B and Company C – each a substantial shareholder of Company X. They were controlled by a company listed on the Exchange.</p> <p>Individual D, Individual E – each a director and a shareholder of Company X</p> <p>Company A, Company B, Company C, Individual D and Individual E are collectively referred to as the Relevant Shareholders</p>
Subject	<p>Whether each of the Relevant Shareholders had a material interest in Company X’s proposed privatisation of the Subsidiary and must abstain from voting on the resolution to approve the proposal at the general meeting of Company X</p>
Listing Rules	<p>Main Board Listing Rules 2.15, 14.46, 14A.3614A.56</p>
Decision	<p>Company A and Individual E each had a material interest in the proposal and must abstain from voting on the resolution to approve the proposal at the general meeting of Company X</p>

SUMMARY OF FACTS

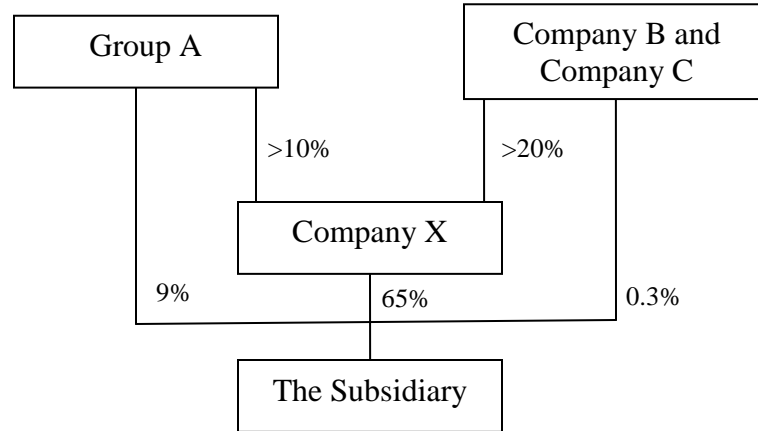
1. Company X and certain companies, including Company A, controlled by Individual A (Group A) held approximately 65 per cent and 9.9 per cent of the issued shares of the Subsidiary respectively.
2. Company X proposed to privatise the Subsidiary by a scheme of arrangement.

- Under the scheme, all shares in the Subsidiary excluding those held by Company X and Group A (Scheme Shares) would be cancelled in exchange for cash consideration.
 - Company X would also make an offer to the holders of the outstanding options granted by the Subsidiary according to the Takeovers Code.
3. Upon the scheme becoming effective, all Scheme Shares would be cancelled and any outstanding options not exercised on or before the record date would lapse.
 4. The proposal was subject to approval of the independent shareholders of the Subsidiary (ie shareholders other than Company X and parties acting in concert with it) under the Takeovers Code. The Relevant Shareholders were parties acting in concert with Company X in relation to the proposal.
 5. Upon completion, Company X's shareholding in the Subsidiary would increase to about 90 per cent. The proposal constituted a major transaction for Company X and was subject to shareholder approval at a general meeting of Company X.
 6. As some holders of the Scheme Shares or outstanding options were connected persons of Company X, the transactions with them under the proposal constituted connected transactions for Company X.
 7. Company X would convene a general meeting to seek shareholders' approval of the proposal, which included the transactions with connected persons of Company X. There was a question whether each of the Relevant Shareholders had a material interest in the proposal and was required to abstain from voting on the resolution to approve the proposal at the general meeting of Company X.

Company A, Company B and Company C – substantial shareholders of Company X

8. Company A was wholly owned by Individual A. Group A (which included Company A) held approximately 9.9 per cent of the issued share capital of the Subsidiary (other than those indirect interests in the subsidiary held through Company X). The shares in the Subsidiary held by Group A would not form part of the Scheme Shares and would not be cancelled upon the scheme becoming effective.
9. Company B and Company C were ultimately controlled by a company whose shares were also listed on the Exchange. They together held approximately 0.3 per cent of the issued share capital of the Subsidiary (other than those indirect interests in the Subsidiary held through Company X).

10. The simplified shareholding structure showing the interest of Group A, Company B and Company C in Company X and the Subsidiary before the proposed privatisation is set out below:



Individual D and Individual E – shareholders of Company X

11. Individual D and Individual E were each a director of Company X and the Subsidiary. Individual E was also the chief executive officer of the Subsidiary.
12. Individual D held some shares in the Subsidiary which represented less than 0.0001 per cent of the Subsidiary's issued share capital.
13. Individual E did not hold any shares in the Subsidiary but held a number of outstanding options. The shares to be issued upon exercise of the vested outstanding options represented approximately 2 per cent of the Subsidiary's issued share capital.

ISSUE

14. Whether each of the Relevant Shareholders had a material interest in the proposal and was required to abstain from voting on the resolution approving it under Rules 2.15 and 14.46.

APPLICABLE LISTING RULES OR PRINCIPLES

15. Rule 2.15 provides that:

Where a transaction or arrangement of an issuer is subject to shareholders' approval under the provisions of the Exchange Listing Rules, any shareholder that has a material interest in the transaction or arrangement shall abstain from voting on the resolution(s) approving the transaction or arrangement at the general meeting.

Note: For the avoidance of doubt, any provision in the Exchange Listing Rules requiring any other person to abstain from voting on a transaction or arrangement of an issuer which is subject to shareholders' approval shall be construed as being in addition to the requirement set out in rule 2.15.

16. Rule 2.16 provides that:

For the purpose of determining whether a shareholder has a material interest, relevant factors include:

- (1) whether the shareholder is a party to the transaction or arrangement or an close associate ~~(as defined in rule 1.01)~~ of such a party; and
- (2) whether the transaction or arrangement confers upon the shareholder or his close associate a benefit (whether economic or otherwise) not available to the other shareholders of the issuer.

There is no benchmark for materiality of an interest nor may it necessarily be defined in monetary or financial terms. The materiality of an interest is to be determined on a case by case basis, having regard to all the particular circumstances of the transaction concerned.

17. Rule 14.40 provides that:

In the case of a major transaction, the listed issuer must comply with the requirements for all transactions and for discloseable transactions set out in rules 14.34 to 14.39. In addition, a major transaction must be made conditional on approval by shareholders.

18. Rule 14.46 provides that:

The Exchange will require any shareholder and his associates to abstain from voting at the relevant general meeting on the relevant resolution(s) if such shareholder has a material interest in the transaction. ...

19. Rule ~~14A.36~~~~14A.54~~ provides that:

~~The Exchange will require any connected person with a material interest in a proposed transaction, and any shareholder with a material interest in such transaction and its associate(s), to abstain from voting at the relevant general meeting on the relevant resolution(s). The connected transaction must be conditional on shareholders' approval at a general meeting held by the listed issuer. Any shareholder who has a material interest in the transaction must abstain from voting on the resolution.~~

ANALYSIS

20. Rule 2.16 provides a non-exhaustive list of factors to determine whether a shareholder has a material interest for the purposes of the Listing Rules. The Rule also states that there is no benchmark for materiality of an interest nor may it necessarily be defined in monetary or financial terms.
21. When determining the materiality of an interest, the Exchange will need to consider all the circumstances of the proposed transaction.

Company A

22. Company X submitted that Company A as a substantial shareholder of Company X did not have a material interest in the proposal as the 9 per cent shareholding in the Subsidiary directly held by Group A would not form part of the Scheme Shares and Group A would not be entitled to any payment of the cash consideration.
23. The Exchange did not agree. As set out in Rule 2.16, a material interest may not necessarily be defined in monetary or financial terms.
24. Under the proposal, there was a specific arrangement between Company X and Group A that the shares in the Subsidiary held by Group A would be excluded from the scheme and would not be cancelled upon the scheme becoming effective. The Exchange considered that Group A, as a party to this arrangement, had a

material interest in the proposal. Accordingly, Company A must abstain from voting at the general meeting of Company X.

Company B and Company C

25. Company B and Company C each held a substantial shareholding in Company X, which owned a 65 per cent interest in the Subsidiary. Although these companies were holders of the Scheme Shares, their direct interest in the Subsidiary (in aggregate about 0.3 per cent) was immaterial compared to that held through Company X. The Exchange accepted that as substantial shareholders of Company X, the interest of Company B and Company C in the proposal was in alignment with the interest of other shareholders of Company X. Therefore, Company B and Company C would not be regarded as having a material interest in the proposal.
26. The Exchange also noted that the connected transactions with Company B and Company C would be exempt from the independent shareholders' approval requirement under the de minimis provisions in Chapter 14A of the Listing Rules.
27. Company B and Company C would not be required to abstain from voting at the relevant general meeting of Company X.

Individual D

28. The Exchange agreed that Individual D did not have a material interest in the proposal because the amount of Scheme Shares he held was insignificant. He had also undertaken to donate his Scheme Shares to a charitable body and there was not any transaction between Company X and him under the proposal. Accordingly, he would not be required to abstain from voting at the relevant general meeting of Company X.

Individual E

29. The proposal involved privatising the Subsidiary. Individual E was then the chief executive officer of the Subsidiary and held a number of outstanding options. His interest in the proposal was different from the other shareholders of Company X and was regarded as material in light of the circumstances.
30. Under the proposal, the transaction between Company X and Individual E constituted a connected transaction that required independent shareholders' approval under Chapter 14A of the Listing Rules. Therefore, when Company X put forward a resolution to seek shareholders' approval of the proposal which included the transaction with Individual E, Individual E must abstain from voting.

DECISION

31. The Exchange determined that Company A and Individual E had a material interest in the proposal and must abstain from voting on the resolution to approve the proposal at the general meeting of Company X