

## HKEx LISTING DECISION

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Summary	
<b>Name of Party</b>	Company A – a Main Board listed company  The Project Company – a subsidiary of Company A  The Purchaser – an independent third party company proposing to acquire from Company A a 29.99% equity interest in the Project Company
<b>Subject</b>	Whether the Exchange would deem the Purchaser as a connected person of Company A upon completion of the Transaction under Main Board Listing Rule 2.04
<b>Listing Rules</b>	Main Board Listing Rules 1.01, 2.04, 14A.07
<b>Decision</b>	The Exchange determined that the Purchaser should be deemed as a connected person of Company A upon completion of the Transaction under Main Board Listing Rule 2.04.

### SUMMARY OF FACTS

1. Company A, through two of its wholly owned subsidiaries (namely Company X and Company Y), held a 70.01% equity interest and a 29.99% equity interest in a property development company (the “**Project Company**”) respectively.
2. The Purchaser was a company owned by certain funds (the “**Funds**”) managed by a fund management company.
3. Company A and the Purchaser entered into an agreement (the “**Agreement**”) under which the Purchaser would acquire from Company A the entire interest in Company Y and hence an indirect 29.99% equity interest in the Project Company (the “**Transaction**”). Upon completion of the Transaction, Company A (through Company X) would continue to hold a 70.01% equity interest in the Project Company which would be a non-wholly owned subsidiary of Company A. The Purchaser (through Company Y) would hold the remaining 29.99% equity interest in the Project Company.
4. It was also agreed that upon completion of the Transaction, Company Y would reduce its voting power at the general meetings of the Project Company (the “**General Meetings**”) to 9.98% and the remaining 90.02% of the voting power would be exercisable by Company X. Company X and Company Y would have

the right to appoint 10 directors and 1 director to the board of the Project Company (the “**Board**”) respectively.

5. Notwithstanding the arrangements mentioned in paragraph 4 above, the joint venture contract and the articles of association of the Project Company would provide that:
  - a. if the Funds (or the Purchaser) dispose of their indirect interest in the Project Company to a potential purchaser, the potential purchaser’s voting power in the General Meetings, and rights to appoint directors to the Board will be restored to the same extent as the equity interest acquired by the potential purchaser. This term, Company A submitted, catered for a potential purchaser who might have an expectation different from those of the Funds and might want to retain control of the Project Company proportionate to its equity interest in the Project Company; and
  - b. Company Y has veto rights in respect of certain matters concerning the Project Company (the “**Reserved Matters**”) covering a wide range of matters. The Reserved Matters include but are not limited to the following matters:
    - winding up of the Project Company
    - amendment to constitutional documents
    - change in share capital, or issue or redemption of securities
    - amendment to shareholders’ rights
    - distribution of reserve
    - development of new business or material change in the nature or scope of business
    - any capital and operating budget or business plan or any material amendment thereto
    - any material contact outside the normal course of business
    - any contract other than on arm’s length market terms
    - any acquisition, sale, lease or disposal of any property other than in the ordinary course of business
    - any material transaction outside the ordinary course of the business
6. Company A submitted that
  - The Funds were primarily interested in the economic return on their investment in the Project Company, and did not intend to participate in the management of the Project Company’s business. The reduction in Company Y’s voting power in the General Meetings, which the Funds did not commercially require, would exclude Company Y and therefore the Purchaser from the definition of “substantial shareholder” of the Project Company and therefore a connected person of Company A; and

- Subjecting certain matters of a joint venture company to the special approval of minority shareholders was necessary for the protection of the minority shareholders and was customary in property joint ventures. Since the Reserved Matters were restricted to material matters outside the ordinary course of business of the Project Company and the respective veto right was meant to be a defensive measure for protection of minority interest rather than a means to acquire control, the Project Company would still be able to manage its business in its ordinary course without interference from Company Y. Accordingly, Company Y should not be considered to be in a position to have an influence over the Project Company to such an extent that it should be treated as a connected person.

**THE ISSUE RAISED FOR CONSIDERATION**

- 7. Whether the Purchaser should be deemed as a connected person of Company A under Rule 2.04.

**APPLICABLE LISTING RULES**

- 8. Main Board Listing Rule 1.01 defines “substantial shareholder” and “connected person” as follows:

“substantial shareholder” in relation to a company means a person ... who is entitled to exercise, or control the exercise of, 10% or more of the voting power at any general meeting of the company.

“connected person” has the meaning in rule 14A.06(7)  
...

- 9. Main Board Listing Rule 2.04 provides that:

It is emphasised that the Exchange Listing Rules are not exhaustive and that the Exchange may impose additional requirements or make listing subject to specific conditions whenever it considers it appropriate. Conversely, the Exchange may waive, modify or not require compliance with the Exchange Listing Rules in individual cases (to suit the circumstances of a particular case), as a variety of circumstances may exist which require it to make ad hoc decisions. ...

10. Main Board Listing Rule 14A.07(1) provides that the definition of “connected person” includes:
  - a ... substantial shareholder of the listed issuer or any of its subsidiaries.

## ANALYSIS

11. The connected transaction rules seek to ensure that the interests of shareholders as a whole are taken into account by a listed issuer when it enters into transactions with connected persons, in particular to safeguard against connected persons (such as the listed issuer’s directors, chief executives or substantial shareholders or their associates) taking advantage of their positions to the detriment of minority shareholders of an issuer.
12. For the purposes of the connected transaction rules, the definition of “connected person” is set out in Rules 14A.07 to 14A.22.
13. Rule 2.04 provides that the Listing Rules are not exhaustive and that the Exchange has discretion to, among others, modify the existing requirements under the Listing Rules and impose additional requirements as it considers appropriate. The Exchange will have regard to all of the relevant facts and circumstances of the case in its determination of whether to exercise its discretion under Rule 2.04. In circumstances where the definition of “connected person” is technically inapplicable to a particular person/entity due to certain specific arrangements, the Exchange will look at the substance of the arrangements and consider whether they have been structured to circumvent the spirit and intent of the rules. In such circumstances, it may be appropriate to “deem” such person/entity as connected under Rule 2.04.
14. In the present case, given the special voting arrangement established for the Project Company, Company Y would not be entitled to exercise or control the exercise of 10% or more of the voting power at any general meetings of the Project Company. It did not meet the definition of a substantial shareholder of the Project Company. Accordingly, Company Y and hence the Purchaser would not be connected persons of Company A pursuant to Rule 14A.07(1).
15. Having considered the relevant facts and circumstances of this case, the Exchange considered it necessary to deem the Purchaser as a connected person of Company A pursuant to Rule 2.04. Principal factors taken into account by the Exchange are set out below.
  - It was apparent from the facts that the special voting arrangement in respect of the Project Company was structured in the way to circumvent the

connected transaction rules. The Exchange was not satisfied that there was any genuine commercial reason for Company Y to restrict its voting power in the General Meetings to just below 10% (being the threshold for determining a substantial shareholder under the Listing Rules).

- Despite the restriction on Company Y's voting power in the General Meetings, Company Y would have the veto rights in respect of the Reserved Matters. While veto rights given to minority shareholders on certain material matters were not uncommon in property joint venture companies, the Reserved Matters in this case covered a wide range of matters some of which should normally be within the powers vested in shareholders at general meetings. The considerable influence of Company Y over these significant matters of the Project Company through its veto rights should be recognised.

## **DECISION**

16. Based on the above analysis, the Exchange determined that the Purchaser should be deemed as a connected person of Company A under Rule 2.04.