

HKE_x LISTING DECISION

HKE_x-LD95-5 (July 2010) (updated in October 2019 (amendments to the reverse takeover Rules))

Parties	Company A - a Main Board issuer Mr X – Company A’s controlling shareholder and owner of a 70% interest in the Target The Target – a company in which Company A acquired a 30% interest from Mr X two years ago
Issue	Whether Company A’s proposed acquisition of a further interest in the Target from Mr X was a reverse takeover under Note 2(b) to Rule 14.06B
Listing Rules	Note 2(b) to Main Board Rule 14.06B
Decision	Company A’s proposed acquisition was a reverse takeover under Note 2(b) to Rule 14.06B

FACTS

Background

1. Mr X subscribed for Company A’s new shares, and became its controlling shareholder. The Securities and Futures Commission granted him a whitewash waiver from the requirement to make a general offer to acquire all Company A’s shares not already owned by him.

Proposed Acquisition

2. Six months later, Company A proposed to acquire a further interest in the Target from Mr X (the **Acquisition**). This would be a connected and very substantial acquisition. The consideration would be in cash and convertible preference shares. The terms of the convertible preference shares did not allow any conversion which would trigger a mandatory general offer under the Takeovers Code (the **Conversion Restriction**).
3. To fund the cash consideration for the Acquisition, Company A would place new shares to independent third parties. The Acquisition and the placing would be conditional upon each other.

4. After completion of the placing and the Acquisition, Mr X's interest in Company A would drop below 30% and he would cease to be Company A's controlling shareholder but remain its single largest shareholder.
5. Company A sought the Exchange's confirmation whether the Acquisition would be a reverse takeover under Rule 14.06(6)(b). Company A considered that it was not because:
 - a. Given (i) the conditionality of the Acquisition and the placing and (ii) the Conversion Restriction, Mr X would cease to be the controlling shareholder on their completion.
 - b. It was implicit under Rule 14.06(6)(b) that for the Rule to apply, the issuer's controlling shareholder from whom the issuer was acquiring an asset had to remain in control of the issuer after the acquisition. Accordingly, the Rule would not apply because of paragraph 5a above.
 - c. The Acquisition would expand, and not change, Company A's business activities.

APPLICABLE LISTING RULES

6. Rule 14.06(6) defines a "reverse takeover" as:

an acquisition or a series of acquisitions of assets by an issuer which, in the opinion of the Exchange, constitutes, or is part of a transaction or arrangement or series of transactions or arrangements which constitute, an attempt to achieve a listing of the assets to be acquired and a means to circumvent the requirements for new applicants set out in Chapter 8 of the Exchange Listing Rules. A "reverse takeover" normally refers to:

...

- (b) acquisition(s) of assets from a person or a group of persons or any of his/their associates pursuant to an agreement, arrangement or understanding entered into by the listed issuer within 24 months of such person or group of persons gaining control (as defined in the Takeovers Code) of the listed issuer (other than at the level of its subsidiaries), where such gaining of control had not been regarded as a reverse takeover, which individually or together constitute(s) a very substantial acquisition.".

(Rule 14.06(6) (now Rule 14.06B) was amended on 1 October 2019. See Note 1 below.)

ANALYSIS

7. Rule 14.06(6) seeks to prevent circumvention of the new listing requirements. Its introductory paragraph defines “reverse takeover” as an acquisition or a series of acquisitions which represents, in the Exchange’s opinion, an attempt to (i) list the assets to be acquired and (ii) circumvent the new listing requirements. Rules 14.06(6)(a) and (b) provide bright line tests which apply to two specific forms of reverse takeover. They are not meant to be exhaustive.
8. Sub-rule (b) applies if (i) an issuer’s acquisition(s) of assets constitute(s) a very substantial acquisition; and (ii) the assets were acquired from the incoming controlling shareholder within 24 months after his gaining control of the issuer (as defined under the Takeovers Code).
9. The Exchange considered that the Acquisition would be a reverse takeover under Rule 14.06(6)(b) because it:
 - a. would take place within 24 months after Mr X’s gaining of control of Company A (as defined under the Takeovers Code); and
 - b. was a very substantial acquisition.
10. Company A submitted that for Rule 14.06(6)(b) to apply, Mr X had to remain in control of Company A after the Acquisition. The Exchange disagreed. Rule 14.06(6)(b) is a bright line test and both conditions specified in the Rule were met. The fact that Mr X would cease to be Company A’s controlling shareholder on completion was irrelevant.

CONCLUSION

11. Rule 14.06(6)(b) would apply to the proposed Acquisition.

Notes

1 The reverse takeover Rules were amended on 1 October 2019. Under the new Rule 14.06B (which incorporates former Rule 14.06(6) with certain modifications),

- *A “reverse takeover” is defined as an acquisition or series of acquisitions by a listed issuer which, in the opinion of the Exchange, constitutes, or is part of*

a transaction and/or arrangement or series of transactions and/or arrangements which constitutes, an attempt to achieve a listing of the acquisition targets and a means to circumvent the requirements for new applicants as set out in Chapter 8 of the Listing Rules.

- *Note 1 to Rule 14.06B sets out the factors that the Exchange will normally consider in assessing whether the acquisition or series of acquisitions is a reverse takeover.*
- *Note 2 to Rule 14.06B states that:*

“Without limiting the generality of rule 14.06B, the following transactions are normally reverse takeovers (the bright line tests):

- (a) an acquisition or a series of acquisitions (aggregated under rules 14.22 and 14.23) of assets constituting a very substantial acquisition where there is or which will result in a change in control (as defined in the Takeovers Code) of the listed issuer (other than at the level of its subsidiaries); or*
- (b) acquisition(s) of assets from a person or a group of persons or any of his/their associates pursuant to an agreement, arrangement or understanding entered into by the listed issuer within 36 months of such person or group of persons gaining control (as defined in the Takeovers Code) of the listed issuer (other than at the level of its subsidiaries), where such gaining of control had not been regarded as a reverse takeover, which individually or together constitute(s) a very substantial acquisition.”*

2 *The Rule amendments would not change the analysis and conclusion in this case.*