

## HKEx LISTING DECISION

Cite as HKEx-LD52-3 (March 2006) [\(Withdrawn in January 2024\)](#)

<b>Summary</b>	
<b>Name of Party</b>	Company A – a Main Board listing applicant and its subsidiaries (the ‘Group’)
<b>Subject</b>	Whether shares of Company A subscribed by its employees and the employees of its parent company shortly prior to listing at a price discounted to the proposed IPO price should be subject to compulsory lock-up and treated as part of the public float?
<b>Listing Rules</b>	Listing Rules 8.08(1)(a); 8.24 and Listing Decision HKEx-LD36-1 (October 2003)
<b>Decision</b>	The Exchange determined that the shares held by Company A’s employees and the employees of its parent company upon listing would not be subject to a compulsory lock-up and could be treated as part of the public float.

### SUMMARY OF FACTS

1. The parent company and two executive directors of Company A would hold 75% of the issued share capital of Company A at the time of listing.
2. The 25% of the issued share capital (necessary to satisfy the required public float of Company A's shares) would be held by the issue of new shares to the public and by employees of Company A and parent company.
3. These employees could be divided into two groups and together they held in aggregate more than 10% of the issued share capital of Company A.
4. The first group comprised twenty employees of Company A's parent company. The shares were held by these employees through twenty one nominee companies (the ‘Parent Employee Nominees’). Each of these Parent Employee Nominees would hold less than 1% of the issued share capital of Company A upon listing.
5. The second group comprised more than ten employees of Company A (the ‘Employee Shareholders’). Each of these employees held a small percentage of interest in Company A. None of these employees held any directorship in Company A.

6. Through a pre-IPO subscription that took place some five and a half months before the date of the listing application of Company A, 15% of the issued shares of Company A were distributed amongst the Parent Employee Nominees, the Employee Shareholders and two executive directors of Company A. The purpose of the subscription was to reward certain employees and to strengthen their commitment to the Group's future performance after listing. The subscriptions were offered at a discount ranging approximately from 30% to 45% as compared to the proposed minimum and maximum offer price of Company A's shares.
7. The IPO would raise approximately HK\$3 billion and Company A's proposed market capitalisation would be around HK\$20 billion.

### **THE ISSUE RAISED FOR CONSIDERATION**

8. Whether shares of Company A subscribed by its employees and the employees of its parent company shortly prior to listing at a price discounted to the proposed IPO price should be subject to compulsory lock-up and treated as part of the public float?

### **APPLICABLE LISTING RULES OR PRINCIPLE**

9. Listing Rule 8.08(1)(a) requires that at least 25% of the issuer's total issued share capital must at all times be held by the public.
10. Listing Rule 8.24 states that the Exchange will not regard any connected person of the issuer as a member of the 'public'. The rule further provides that the Exchange will not recognise as a member of the 'public' where:
  - (1) any person whose acquisition of securities has been financed directly or indirectly by a connected person; or
  - (2) any person who is accustomed to take instructions from a connected person in relation to the acquisition, disposal, voting or other disposition of securities of the issuer registered in his name or otherwise held by him.
11. A listing decision published in October 2003 ('HKEx-LD36-1') relating to a pre-IPO placing by the controlling shareholder of a Main Board new listing applicant stated that:

The Exchange was of the view that, as a general principle on the Main Board, placings of shares shortly before a listing application should be permitted subject to full disclosure in the prospectus. However, the placee may be subject to a lock-up of his shares. The

question of whether the placee should be subject to a lock-up is determined on a case-by-case basis having regard to all the circumstances of the case.

The decision also noted that:

Furthermore, the Exchange would not regard any placee who is subject to a lock-up as a member of the public at the time of listing and for so long as the transferor and the placee together constitute a “group of persons who are together entitled to exercise or control the exercise of [30 per cent] or more of the voting power at general meetings of the issuer or who is or are in a position to control the composition of a majority of the board of directors of the issuer”.

The decision also noted that:

- “shortly before a listing application” tends to be measured in terms of months rather than weeks and with the date of the listing application as reference point;
- the greater the amount of any discount to the IPO price and/or the greater the proximity in time of the placing to the date of the listing application, the greater would be the doubt as to the genuine nature of the transaction such that a lock-up of the shares would be warranted;

## **THE ANALYSIS**

12. The Exchange regards the requirement for a minimum public float of 25% as serving dual purposes. Its primary purpose is to facilitate the maintenance of a fair and orderly market by ensuring that a minimum number of shares are available in the market for trading. It also serves as an indicator of the level of the public’s interest in the issuer’s shares. In the present case, the Exchange noted that Company A was eligible to apply for a lower public float between 15% and 25% under Listing Rule 8.08(1)(d) but did not do so because the Company A believed that its proposed shareholding structure satisfied the public float requirement.
13. As regards whether a lock-up is necessary, the approach set out in HKEx-LD36-1 was adopted in the present case. The most important single factor in the Exchange’s analysis of HKEx-LD36-1 is whether a pre-IPO placing is done to circumvent the compulsory lock-up requirement. The Exchange is also of the view that the commercial decision of the listing applicant or the underwriter whether to impose a voluntary lock-up on the shares held by some placees is not a relevant consideration.

14. While the Exchange considered that favourable factors existed in support of a finding that the shares held by the Parent Employee Companies and Employee Shareholders should not be locked-up and be counted as part of the public float, a contrary view could still be possible for the following reasons:

a. Relationship with the controlling shareholder of Company A

While the Parent Employee Nominees were not connected persons under the Listing Rules, their shares were beneficially owned by employees of the controlling shareholder of Company A. These relationships might affect the position of these Parent Employee Nominees when voting as shareholders at general meetings of Company A. Consequently, though not technically caught under the definition of ‘connected persons’, the potential influence of the employees of the parent company over the Parent Employee Nominees should be recognised.

b. Timing of the pre-IPO subscriptions

HKEx-LD36-1 specified that the timing of placing should be measured in terms of months rather than weeks, with the date of the listing application as reference point (but not the listing date). Before the issuance of HKEx-LD36-1 in October 2003, it had been the practice of the Exchange that no pre-IPO placing would be allowed at a price below the offer price of the issuer’s shares if such pre-IPO placing was made (i) within six months before the date of listing (for Main Board applicants); or (ii) within six months before the date of the listing application (for GEM applicants). HKEx-LD36-1 standardised the reference point to the date of the listing application for both Main Board and GEM applicants (however, it was silent on the number of months that a pre-IPO placing is required to go back before the date of the listing application). In the present case, the pre-IPO placing took place some five and a half months before the date of the listing application of Company A.

c. Extent of the discount to the IPO price

The greater the amount of any discount to the proposed offer price, the greater would be the doubt as to the genuine nature of the transaction such that a compulsory lock-up of the shares would be warranted. In the case of Company A, the discount would be in the range from 30% to 45% when compared to the proposed offer price range. This percentage range could be considered to be significant.

d. Materiality of shareholdings – The Parent Employee Nominees and the Employee Shareholders together accounted for more than 10% of Company A’s shares upon listing. Despite the large capitalisation of the

present listing, it would be in the interest of investors to have as much free float as possible so that a fair and orderly market could be created at listing and maintained after listing.

15. Having considered all the relevant factors, individually and in aggregate, the Exchange determined that the facts were not grave enough to conclude negatively on compliance with Listing Rule 8.08(1)(a). Most important of all, the Exchange did not consider that the pre-IPO placings were done to circumvent the lock-up requirement.

## **THE DECISION**

16. Based on the above analysis and factual circumstances, the Exchange determined that a lock-up of the shares held by the Parent Employee Nominees and the Employee Shareholders upon listing would not be necessary and that the shares held by the Parent Employee Nominees and the Employee Shareholders could be treated as part of the public float.