

HKE_x LISTING DECISION

HKE_x-LD79-2014 (~~p~~Published in January 2014) Updated in July 2014

Parties	Company A – a Main Board listed issuer Newco – a subsidiary of Company A before the proposed spin-off Holding Company – the controlling shareholder of Company A
Issue	Whether the amendments to the non-competition undertaking given by the Holding Company to Company A would require independent shareholders' approval
Listing Rules	Main Board Rules <u>14A.25, 14A.36, 14A.76</u> 14A.13(1)(a), 14A.18, 14A.32
Decision	The amendments to the non-competition undertaking constituted a connected transaction for Company A and were subject to independent shareholders' approval

FACTS

1. Company A proposed to spin-off Newco for a separate listing on the Exchange. The proposal would involve Company A distributing all its interest in Newco in specie to the existing shareholders. Upon completion of the proposal, Company A would no longer hold any interest in Newco. Newco would become a connected person of Company A as the Holding Company would hold more than 50% interest in it.
2. Newco was principally engaged in the manufacturing and sale of certain products (the **Newco Business**).
3. At the time of Company A's new listing on the Exchange, the Holding Company and Company A had entered into a non-competition deed (the **Original Non-Competition Deed**), under which the Holding Company had undertaken to Company A not to, directly and indirectly, carry on or be engaged or interested in the principal businesses of Company A including the Newco Business.
4. In order to delineate the businesses of the Holding Company, Company A and Newco upon completion of the proposed spin-off, the parties would enter into the following non-competition arrangement (the **Revised Non-Competition Arrangement**):
 - the Holding Company and Company A would amend the Original Non-Competition Deed to exclude the Newco Business from the deed; and

- the Holding Company would undertake to Newco not to, directly and indirectly, carry on or be engaged or interested in the Newco Business. While Company A would not be a party to such undertaking, the Holding Company would exercise its influence on Company A so as to cause Company A to comply with the undertaking.
5. There was an issue whether the Revised Non-Competition Arrangement would constitute a connected transaction for Company A, and if so, whether the de minimis exemption would apply as Company A considered that the arrangement was made on normal commercial terms and no consideration would be paid or received by it.

APPLICABLE LISTING RULE

6. Rule 14A.01 states that:

~~“The connected transaction rules are intended to ensure that the interests of shareholders as a whole are taken into account by a listed issuer when the listed issuer enters into connected transactions. The rules set out in this Chapter also provide certain safeguards against listed issuers’ directors, chief executives or substantial shareholders (or their associates) taking advantage of their positions. This Chapter applies to connected transactions entered into by a listed issuer or its subsidiaries. The connected transaction rules ensure that the interests of shareholders as a whole are taken into account by the listed issuer when the listed issuer’s group enters into a connected transaction.”~~

7. Rule ~~14A.25~~~~14A.13~~(1)(a) states that:

~~“Any transaction between a listed issuer’s group and a connected person is a connected transaction. A connected transaction is:~~

~~(1)(a) — any transaction between a listed issuer and a connected person...”~~

8. Rule ~~14A.36~~~~14A.18~~ states that:

~~“The Exchange will require that connected transactions and continuing connected transactions are made conditional on prior approval by the shareholders of the listed issuer in general meeting... 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.”~~

9. Rule ~~14A.76~~~~14A.31~~ states that:

~~“This exemption applies to a connected transaction (other than an issue of new securities by the listed issuer) conducted on normal commercial terms or better as follows:~~

(1) The transaction is fully exempt if all the percentage ratios (other than the profits ratio) are:

(a) less than 0.1%;

(b) ...; or

(c) less than 5% and the total consideration...is less than HK\$3,000,000.

(2) The transaction is exempt from the circular (including independent financial advice) and shareholders' approval requirements if all the percentage ratios (other than the profits ratio) are:

(a) less than 5%; or

(b) less than 25% and the total consideration...is less than HK\$10,000,000.”

~~“The following connected transactions will be exempt from all the reporting, announcement and independent shareholders' approval requirements contained in this Chapter:~~

~~(1)...~~

~~(2) a connected transaction on normal commercial terms where each or all of the percentage ratios (other than the profits ratio) is/are:~~

~~(a) less than 0.1%;~~

~~(b) ...; or~~

~~(c) Less than 5% and the total consideration is less than HK\$1,000,000;~~

~~...”~~

~~10. Rule 14A.32 states that:~~

~~“A connected transaction on normal commercial terms where each or all of the percentage ratios (other than profit ratios) is/are:~~

~~(1) less than 5%; or~~

~~(2) less than 25% and the total consideration is less than HK\$10,000,000~~

~~is only subject to the reporting and announcement requirements set out in rules 14A.45 to 14A.47 and is exempt from the independent shareholders' approval requirements of this Chapter."~~

ANALYSIS

~~11.10.~~ In this case, Company A and the Holding Company proposed to enter into the Revised Non-Competition Arrangement which would confer a benefit on the Holding Company and its associates. It was a connected transaction for Company A.

~~12.11.~~ The Revised Non-Competition Arrangement would restrict Company A from engaging in certain businesses, and the value of the transaction could not be quantified in monetary terms. The Exchange did not agree that the transaction would qualify for the de minimis exemption.

CONCLUSION

~~13.12.~~ The Revised Non-Competition Arrangement required independent shareholders' approval under Chapter 14A.