

HKEx LISTING DECISION
Cite as HKEx-LD47-1 (July 2005)

Summary	
Names of Parties	<p>Company A - a Main Board listing applicant and its subsidiaries (the “Group”)</p> <p>Subsidiary X – a wholly owned subsidiary of Company A which owned the majority of the assets of the Group and which prior to reorganisation into the Group was previously owned by Shareholder XX</p> <p>Subsidiary Y – a wholly owned subsidiary of Company A which provided management services to the Group and which prior to reorganisation into the Group was previously owned by Shareholder YY</p> <p>Subsidiary Z – a wholly owned subsidiary of Company which owned the remaining assets of the Group and which prior to reorganisation into the Group was previously owned by the amalgamation of Shareholder YY and Shareholder ZZ</p>
Subject	Whether the requirements for ownership and management continuity could be satisfied absent a single legal structure amongst separate groups of entities in the track record period that made up Company A at the time of listing?
Listing Rules	Listing Rules 8.05(2) (b) and 8.05(2)(c)
Decision	The Exchange determined that there was a high degree of integration and interconnections amongst the entities which together formed the Group. Consequently, the Exchange determined that these entities could be viewed together as a group throughout the track record period for the purpose of assessing management and ownership continuity under Listing Rules 8.05(2)(b) and 8.05(2) (c).

SUMMARY OF FACTS

1. Company A applied for listing on the Main Board pursuant to Listing Rule 8.05(2).
2. The Group was reorganised for the purpose of listing from three groups of subsidiaries through Subsidiary X, Subsidiary Y and Subsidiary Z (collectively referred to as the ‘Subsidiaries’). Before the reorganisation during the track record period, these

Subsidiaries had been separate entities held by their respective shareholders, Shareholder XX, Shareholder YY, and the amalgamation of Shareholder YY and Shareholder ZZ.

3. Subsidiary X (held by Shareholder XX) owned the majority of the revenue generating assets of the Group. Subsidiary Y (held by Shareholder YY) principally engaged in the provision of management services for the Group. Subsidiary Z (held by the amalgamation of Shareholder YY and Shareholder ZZ) owned the remaining revenue generating assets of the Group.
4. The sponsor sought to regard the Subsidiaries as a group for the purpose of demonstrating management and ownership requirements under Listing Rule 8.05(2)(b) and (c). Given the lack of a single legal structure amongst Subsidiaries, the Exchange was required to review whether Subsidiary X, Subsidiary Y and Subsidiary Z could be viewed together as a group under a common set of management and a common group of controlling shareholders throughout the track record period.
5. In the course of the Exchange's review, the Exchange noted the following submissions by the sponsor:
 - a. The Subsidiaries came together as an integrated enterprise for a number of years prior to the track record period on the basis that Shareholder YY would contribute its operating and management expertise, and Shareholder XX would contribute the required funding for the business to acquire revenue generating assets. Since establishment of this business mode, Shareholder XX and Shareholder YY sought opportunities to expand their operations by increasing the number of revenue generating assets through additional capital contributions provided by Shareholder XX and Shareholder YY and Shareholder ZZ.
 - b. The operation and management of the assets of the Group were wholly delegated to Subsidiary Y through long term on-going management contracts (the "Management Contracts"). As a result, Shareholder YY was in charge of the day to day management of the business, including Subsidiary X and Subsidiary Z, through the operation of the Management Contracts.
 - c. Shareholder XX was an integral part of the decision making process of the business and was involved in the strategic decision making of the Group's business as a whole. Shareholder XX had exerted substantial influence over the management of the business since its inception through various provisions under the Management Contracts which conferred additional rights to Shareholder XX:-
 - (i) Major Actions - Under the Management Contracts, certain major transactions such as sale of any companies or assets held under Subsidiary X, entering into or modifying any agreement for the borrowing or lending of funds by Subsidiary X required the prior approval of Shareholder XX. In addition, Shareholder YY agreed that it would not, without the consent

- of Shareholder XX, invest independently in any business which might compete with the business of the Group.
- (ii) Regular meetings – Shareholder XX and Shareholder YY held regular meetings to discuss the affairs of the Group. All policy decisions were the result of interactions between Shareholder XX and Shareholder YY, and required the approval of Subsidiary X.
 - (iii) Regular reporting – Under the Management Contracts, Shareholder YY was required to provide Shareholder XX with regular information on the progress of, or developments in the business and to produce quarterly progress reports. Shareholder YY was also responsible for identifying potential new business opportunities and for presenting these to Shareholder XX for discussion and consideration.
- d. Other contractual arrangements between Shareholder XX and Shareholder YY also supported the view that Subsidiary X and Subsidiary Y and Subsidiary Z should be regarded as a unified group:-
- (i) Packaged as one business for sale – Shareholder XX and Shareholder YY entered into a drag-along agreement which required that if Shareholder XX decided to sell Subsidiary X to a third party, then Shareholder YY would sell certain companies held under Subsidiary Y to such party as well. This mechanism would enable Shareholder XX and Shareholder YY to sell intact all or a significant part of their business even though Shareholder XX and Shareholder YY were separate legal entities.
 - (ii) Success fees – there were agreements for Shareholder XX to pay certain success fees to Shareholder YY as incentives and rewards for its performance as manager and supervisors of the assets owned by Subsidiary X, and to align the mutual interests of Shareholder XX and Shareholder YY.
- e. Subsidiary Z was tied to Subsidiary Y through the Management Contracts and by virtue of ownership structure. In particular, Shareholder YY and its shareholders together owned interests in the respective members of Subsidiary Z. Furthermore, Shareholder YY controlled the board composition of and operated Subsidiary Z through holding all the voting rights (in the form of class A shares) in all members (save for one) of Subsidiary Z. The role of Shareholder ZZ in the business was limited solely to funding part of the acquisition costs of new assets.

THE ISSUE RAISED FOR CONSIDERATION

6. Whether the requirements for ownership and management continuity could be satisfied absent a single legal structure amongst separate groups of entities in the track record period that made up Company A at the time of listing?

APPLICABLE LISTING RULES OR PRINCIPLES

7. Listing Rule 8.05(2) states that:

‘[T]o meet the market capitalisation/revenue/cash flow test, a new applicant must satisfy each of the following:-

- (a) a trading record of not less than three financial years;
- (b) management continuity for at least the three preceding financial years;
- (c) ownership continuity and control for at least the most recent audited financial year;
- (d) a market capitalisation of at least HK\$2,000,000,000 at the time of listing;
- (e) revenue of at least HK\$500,000,000 for the most recent audited financial year; and
- (f) positive cash flow from operating activities carried out by the new applicant, or its group, that are to be listed of at least HK\$100,000,000 in aggregate for the three preceding financial years’.

THE ANALYSIS

8. *The Consultation Paper on Proposed Amendments to the Listing Rules relating to Initial Listing Criteria and Continuing Listing Obligations* published by the Exchange in July 2002 (the ‘Consultation Paper’) acknowledged that other markets do not require a listing applicant to demonstrate there is no change in their ownership at any time during the track record period. However, the situation in Hong Kong is unique, and the Exchange’s intention is to prevent listing applicants from ‘packaging’ their businesses so as to meet the profit record requirement.
9. When considering the issue of packaging in the context of the present case, the Exchange took into consideration the following factors:

- a. there was a high degree of integration and cooperation between Shareholder XX and Shareholder YY as evidenced by the Management Contracts and other contractual arrangements;
 - b. there was, through different groups, management continuity throughout the three financial years track record period;
 - c. Shareholder XX had demonstrated continuous ownership of Company A throughout the last financial year of the track record period and Shareholder XX was and would be the largest group of shareholders before and after the reorganisation;
 - d. Shareholder YY had, through participation on boards of directors and the Management Contracts, in fact managed the Subsidiaries comprising Company A throughout the track record period and would after the reorganisation have majority representation in the executive board of Company A; and
 - e. the structure of the Group before the reorganisation took account of the separation of the management of assets from the funding and ownership of the assets.
10. Based on the above analysis, the Exchange accepted the sponsor's submissions that the present structure was driven by commercial considerations related to the efficient growth and development of the business that formed the subject matter of listing. The consolidation of the Subsidiaries was not found to be an amalgamation of different and unrelated businesses created purely for the purpose of or in connection with an application for listing. As such, the Exchange was of the view that the grouping of the Subsidiaries through reorganisation should not be viewed as 'packaging' for the purpose of satisfying the requirements of Listing Rules 8.05(2)(b) and 8.05(2)(c).

THE DECISION

11. Based on the facts and circumstances of the above case and the Exchange's analysis, the Exchange determined that there was a high degree of integration and interconnections amongst the entities which together formed the Group. Consequently, the Exchange determined that these entities could be viewed together as a group throughout the track record period for the purpose of assessing management and ownership continuity under Listing Rules 8.05(2)(b) and 8.05(2)(c).