

**HKEx LISTING DECISION**  
**HKEx-LD93-1 (June 2010)**

<b>Parties</b>	Company A – a Main Board issuer and a shareholder of the Target  The Target – Company A’s acquisition target
<b>Issue</b>	Whether Company A’s payment of a deposit under an escrow agreement was a major transaction
<b>Listing Rules</b>	Main Board Rule 14.04(1)(a)
<b>Decision</b>	The deposit payment was a major transaction under Chapter 14 and should have required prior approval of Company A’s shareholders

**FACTS**

1. Company A announced a general offer to acquire all the Target’s shares it did not already own. If all the offerees accepted the offer, the acquisition would be a very substantial acquisition for Company A and would require shareholder approval.
2. A day before the announcement, Company A had entered into an escrow agreement with the Target which was not conditional on approval by Company A’s shareholders. Under the agreement, Company A would pay a deposit to an escrow agent upon irrevocable undertakings from the Target’s other major shareholders to accept the offer in respect of 50% of the Target’s existing share capital. The deposit represented approximately 30% of Company A’s total assets. It would be applied to partially pay for the acquisition if the offer became unconditional before a deadline, and was refundable upon a breach of the undertakings. However, the Target would be entitled to the deposit if the offer did not materialise before the deadline for example, if Company A failed to obtain shareholder approval for the acquisition.
3. Company A submitted that the escrow agreement formed part of the commercial arrangement for the offer, and was not a separate transaction. It therefore did not require separate shareholder approval.

## **APPLICABLE LISTING RULES**

4. Rule 14.04(1)(a) states that for the purposes of Chapter 14:
  - (1) any reference to a “transaction” by a listed issuer:
    - (a) includes the acquisition or disposal of assets, including deemed disposals as referred to in rule 14.29 ...
5. Rule 14.06(3) states that:

major transaction — a transaction or a series of transactions (aggregated under rules 14.22 and 14.23) by a listed issuer where any percentage ratio is 25% or more, but less than 100% for an acquisition or 75% for a disposal ...
6. Rule 14.40 states that:

A major transaction must be made conditional on approval by shareholders.

## **ANALYSIS**

7. Chapter 14 governs certain transactions of an issuer, principally acquisitions and disposals having a material impact on its financial position. It seeks to ensure that shareholders are being informed of these transactions and, if they are material, have an opportunity to vote on them.
8. Rule 14.04(1)(a) defines a “transaction” to include an acquisition or disposal of assets. In this case, the purpose of the deposit was to secure an undertaking from certain existing shareholders of the Target to accept the offer. The deposit would be forfeited if Company A failed to obtain shareholder approval and complete the acquisition. This was different from cases where a deposit was refundable upon termination or non-completion of an acquisition for whatever reason.
9. In the circumstances, the deposit payment could be viewed as an acquisition of an intangible asset (i.e. the undertaking to accept) or a disposal of asset (i.e. parting with the deposit to the Target). In either case, it was itself a transaction under Rule 14.04(1)(a).

## **CONCLUSION**

10. Since the size of the deposit exceeded the threshold for a major transaction, the agreement to pay the deposit should have required prior approval of Company A’s shareholders.