

HKEx LISTING DECISION

Cite as HKEx-LD51-5 (March 2006) (Updated for rule reference in September 2009)

Summary	
Name of Party	Company A - a GEM Board listing applicant and its subsidiaries (the 'Group')
Subject	Whether the requirements for substantially the same management and ownership throughout the active business pursuit period under GEM Listing Rule 11.12 ¹ were satisfied by aggregating the shareholding interests and control of a group of individual shareholders?
Listing Rule	GEM Listing Rule 11.12 ¹
Decision	The Exchange determined that special circumstances existed and that they justified aggregating the shareholding interests and control of a group of shareholders throughout the active business period. Consequently, the Exchange considered that Company A satisfied the requirements for substantially the same management and ownership throughout the active business pursuit period under GEM Listing Rule 11.12 ¹ .

SUMMARY OF FACTS

1. Subsidiary A was the only principal subsidiary of Company A. During the Group's active business pursuit period immediately prior to listing ('ABP Period'), Subsidiary A had been majority owned by a group of individuals comprising Shareholders P1, P2, P3, P4 and P5. The second largest group of individual shareholders in Subsidiary A comprised Shareholder P6, P7 and several others (holding insignificant interests). This second largest group of individual shareholders, through its holding vehicle, Holdco Y, had been the single largest shareholder in Subsidiary A during the ABP Period.
2. The shareholding structure of Subsidiary A during the ABP Period and at the time of listing is shown as follows:

Chart A – shareholding structure of Subsidiary A

Shareholders	The ABP Period	At the time of listing
	% of shareholding	% of shareholding
The Controlling Group (Note 1)		
Holdco W	29 % *	---
Holdco X	16 %*	---
Shareholder P4	8 %*	---
Shareholder P5	2 %*	---
Sub-total	55%*	---
Holdco Y (Note 2)	40%*	---
Others	5%*	---
Company A	---	100%
Total	100%	100%

* *Denotes minor fluctuations in shareholding interests during the ABP Period.*

Note 1 The term ‘Controlling Group’ denotes an aggregation of shareholding interests in Subsidiary A comprising the shareholders of Holdco W and Holdco X, Shareholder P4 and Shareholder P5.

Both Holdco W and Holdco X had been owned by Shareholder P1, Shareholder P2, Shareholder P3, Shareholder P4 and Shareholder P5 with different shareholding combinations.

Note 2 Holdco Y had been owned as to 75% thereof by Shareholder P6 and Shareholder P7 in the percentages of 80% and 20% respectively.

3. The sponsor sought to show that despite the various changes in shareholdings in Subsidiary A, the same controlling group of shareholders controlled the majority of the shareholding interests in the Group throughout the ABP Period and at the time of listing.
4. The sponsor submitted that during the ABP Period the ownership control over Subsidiary A had been exercised through a controlling group of shareholders comprising five individuals, namely Shareholders P1, P2, P3, P4 and P5 (the ‘Controlling Group’). The sponsor came to this view even though there had been

- no formal agreement amongst the Controlling Group to indicate a clear aggregation of shareholding interests.
5. In support of its view, the sponsor submitted that:
 - a. through Holdco W and Holdco X, the five individuals had beneficially owned the majority interests (ie. over 50%) in Subsidiary A during the ABP Period. As such, the five individuals had exercised their collective decisions through Holdco W and Holdco X. The voting patterns of Holdco W, Holdco X and other individual members (that is, Shareholders P4 and P5) had been identical;
 - b. the Controlling Group had adopted the practice of discussing major issues regarding the business from time to time; forming agreed-upon decisions amongst themselves before meetings of Subsidiary A's board were convened; and casting the same voting decisions at such board meetings of Subsidiary A; and
 - c. four of five individual members of the Controlling Group had been directors of Subsidiary A throughout the ABP Period and also at the time of listing. In addition, the chairman of Subsidiary A was a member of the Controlling Group.
 6. In formulating its view, the sponsor submitted that it had carried out various due diligence steps which included but not limited to the following:
 - a. interviewing each of the five individuals of the Controlling Group;
 - b. interviewing the other directors of Subsidiary A;
 - c. receiving written confirmation from Holdco Y, the single largest shareholder in Subsidiary A during the ABP Period; and
 - d. reviewing the board resolutions of Subsidiary A to ascertain the voting patterns in a total of eleven board meetings during the ABP Period.

THE ISSUE RAISED FOR CONSIDERATION

7. Whether the requirements for substantially the same management and ownership throughout the active business pursuit period under GEM Listing Rule 11.12 were satisfied by aggregating the shareholding interests and control of a group of individual shareholders?

APPLICABLE LISTING RULE OR PRINCIPLE

8. GEM Listing Rule 11.12¹ requires that a new applicant must demonstrate that, throughout the 24 months immediately preceding the date of submission of the listing application, it has, either by itself or through one or more of its subsidiaries, actively pursued one focused line of business under substantially the same management and ownership as existing at the time of the application for listing.
9. Reference is made to Listing Decision HKEx-LD44-4 published in the First Quarter of 2005 which sets out in paragraph 10 thereof the objective factors that the Exchange looked for in that case:

In determining whether any individual shareholders of Company A had been acting as part of a controlling group of shareholders, the Exchange took into account the following factual circumstances including:-

- a. the nature of their relationship including the way they had associated with each other in any past or present business dealings and whether there had been in existence any formal or informal arrangements amongst the individual shareholders;
- b. how the individual members jointly affected their “management and control” as a unit, for example:-
 - the pattern in which the individual members had voted in the past on shareholders’ resolutions involving key decisions other than routine resolutions at an annual general meeting. The frequent occurrence of unanimous resolutions amongst individual shareholders during the past years was considered to support the proposition that such shareholders should be viewed as a controlling group for the purposes of the Listing Rules;
 - whether consensus building process was adopted to arrive at a voting or business decision by the individual shareholders;
 - whether mutual trust and bonding as a group could be demonstrated amongst the individual shareholders in the consensus building process; and
- c. whether any group of shareholders could be regarded as “acting in concert” for the purposes of the Takeovers Code.

THE ANALYSIS

10. In determining whether the individual shareholders of Company A had been acting as a controlling group of shareholders during the ABP Period, the Exchange takes into account the factual circumstances of each individual case.
11. Applying the same analysis as in the previous cases (see for example, HKEx-LD44-4 published in the First Quarter of 2005), and based on the submissions of the sponsor including its submissions on the due diligence steps taken to support its findings, the Exchange determined that it was reasonable to view the five individuals as a controlling group even though there had been no formal agreement amongst those individuals to that effect. Noting also that five of the nine directors of Subsidiary A had remained on its board of directors and that all the senior management had remained with Subsidiary A throughout the ABP Period up to the time of listing, the Exchange considered that Company A had fulfilled the requirements for substantially the same management and ownership under GEM Rule 11.12¹.

THE DECISION

12. Based on the facts and circumstances of the case and the Exchange's analysis of the Listing Rules, the Exchange determined that special circumstances existed and that they justified aggregating the shareholding interests and control of a group of shareholders throughout the ABP Period. As such, the Exchange considered that Company A had satisfied the requirements for substantially the same management and ownership throughout the ABP Period under GEM Listing Rule 11.12¹.

Note:

1. *GEM Rule 11.12 was repealed on 1 July 2008. For ownership continuity requirement, please see GEM Rules 11.12A(2) which states that the applicant must have had continuity of ownership and control throughout the full financial year immediately preceding the issue of the listing document and up until the date of listing. For management continuity requirement, please see GEM Rules 11.12A(3) which states that the applicant must have been under substantially the same management throughout the 2 full financial years immediately preceding the issue of the listing document and up until the date of listing. (Added in September 2009)*