

HKEx LISTING DECISION
Cite as HKEx-LD44-4 (First Quarter of 2005)

Summary	
Name of Party	Company A – a Main Board listing applicant
Subject	Whether the requirement for ownership continuity and control for at least the most recent audited financial year under Listing Rule 8.05(1)(c) could be satisfied by aggregating the shareholding interests and control of a group of individual shareholders?
Listing Rule	Listing Rule 8.05(1)(c)
Decision	The Exchange determined that special circumstances existed and that they justified aggregating the shareholding interests and control of a group of shareholders in the most recent audited financial year of Company A. Consequently, Company A had satisfied the ownership continuity and control requirement of Listing Rule 8.05(1)(c).

SUMMARY OF FACTS

1. Prior to the most recent audited financial year of the track record period of Company A, Company A's share capital was divided into Class A and Class B shares, which entitled each class of shareholders to different rights. In particular and subject to performance targets being met, Class A Shares could be converted into Class B Shares.
2. The Class A Shares were held by ten individuals (“Founding Individuals”), which accounted for no less than 51% of the voting rights in Company A but only approximately 10% of the beneficial interest in Company A. In contrast, although the Class B Shares held by other three financial investors (“Financial Investors”) accounted for approximately 90% of the beneficial interest in Company A, the shares conferred upon them only 49% of the voting rights.
3. Pursuant to a shareholders’ agreement entered into between the Founding Individuals and the Financial Investors in the second year of the track record period, the Financial Investors were granted veto rights with regard to major corporate decisions concerning the operations of Company A. Certain major corporate decisions, amongst others, required the approval of two out of the three board members nominated by the Financial Investors. The prescribed major corporate decisions included any changes to the business scope, any amendments to/modifications/waivers of provisions in the charter documents, a sale or disposition of all or substantially all of the assets, a merger, any transactions

- involving large amounts, the approval of annual budget, and any commitments to large capital expenditure.
4. The Founding Individuals included members of Company A's senior management and their business associates. However, the majority of the board members of Company A and its subsidiary were representatives appointed by the Founding Individuals.
 5. During the last audited financial year of the track record period, the existing shareholders increased their investment in Company A. As a result of the additional investment and the conversion of Class A Shares into Class B Shares, the Founding Individuals' voting rights merged with their equity rights and their aggregated shareholdings increased to more than 60%, while the Financial Investors' equity interests and voting rights were correspondingly reduced.
 6. In reviewing whether Company A could fulfil the ownership continuity and control requirement for at least the most recent audited financial year under Listing Rule 8.05(1)(c) by virtue of the shareholding interests of the Founding Individuals in Company A, the Exchanged considered the following reasons:-
 - a. no individual member of the Founding Individuals or the Financial Investors held a controlling interest in Company A at any time during the track record period.
 - b. the Founding Individuals neither had a shareholders' agreement nor any other form of documentation concerning their rights as shareholders; and
 - c. without the Founding Individuals being viewed as a group of shareholders for the purposes of Listing Rule 8.05, the Financial Investors would change their collective status from being the single largest group of shareholders to the second largest group of shareholders during the most recent audited financial year.

THE ISSUE RAISED FOR CONSIDERATION

7. Whether the requirement for ownership continuity and control for at least the most recent audited financial year under Listing Rule 8.05(1)(c) could be satisfied by aggregating the shareholding interests and control of a group of individual shareholders?

APPLICABLE LISTING RULE OR PRINCIPLE

8. Listing Rule 8.05(1)(c) provides that in order to meet the profit test, a new applicant must have an adequate trading record under substantially the same management and ownership. This means that a new applicant or its group must, amongst other criteria, have *'ownership continuity and control for at least the most recent audited financial year'*.

THE ANALYSIS

9. In reaching its conclusion in the present case, the Exchange interpreted control under Listing Rule 8.05(1)(c) to mean voting control as distinguished from beneficial interest.
10. 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.

11. Applying the above analysis, the Exchange determined that there was a reasonable basis to view the Founding Individuals as a controlling group of ten shareholders although the relationship amongst them were never formalized or documented (by way of shareholders' agreement or otherwise).
12. The conclusion was reached based on the factual circumstances that:-
 - a. the Founding Individuals had a long term business relationship of more than ten years and had jointly invested in the Group for more than four years;
 - b. the Founding Individuals held regular meetings, reached consensus on key decisions, and had unanimous voting patterns which supported the premise that they had consolidated their "management and control" and acted as a unit; and
 - c. no single largest shareholder or single largest group of shareholders among the Founding Individuals ever attempted to exercise his/their voting rights independently without the concurrence of the other Founding Individuals.
13. In contrast and based on the same analysis, the Exchange determined that the Financial Investors never acted as a controlling group that could enable their interests to be aggregated. The Exchange arrived at such a conclusion based on the factual circumstances that:-
 - a. each of the Financial Investors was an independent private equity investor;
 - b. each of the Financial Investors was owned and managed by different entities without any cross ownership or management amongst the three entities. They did not have any joint investments other than their investment in Company A;
 - c. there had been no understanding or arrangement (formal or otherwise) that the board representatives of the Financial Investors would vote in any coordinated manner;
 - d. the Financial Investors were not considered by the Securities and Futures Commission as parties acting in concert in respect of Company A under the Takeovers Code; and
 - e. as regards the veto rights of the Financial Investors under the shareholders' agreement, the Exchange found that the rights could be regarded as conferring on the Financial Investors some operational control over Company A. However, the Exchange determined that since day-to-day management was entrusted to the Founding Individuals, and the

Financial Investors had never exercised their veto rights, the existence of the veto rights was insufficient to establish that the Financial Investors had ownership control of Company A during the last financial year of the track record period. Therefore, the Exchange determined that the presence of the veto rights did not affect the ownership continuity and control for the most recent financial year of the track record period.

THE DECISION

14. Based on the above facts and the circumstances of the case and the Exchange's analysis of the Listing Rules, the Exchange determined that the Founding Individuals constituted the controlling group of shareholders for at least the most recent audited financial year. Consequently, Company A had satisfied the ownership continuity and control requirement of Listing Rule 8.05(1)(c).