

HKEx LISTING DECISION

Cite as HKEx-LD55-3 (June 2006) (Updated in September 2010) (Withdrawn in October 2012; Superseded by GL43-12)

| Summary | |
|------------------------|--|
| Name of Parties | Company A - a Main Board listing applicant and its subsidiaries (the 'Group') Pre-IPO Investor – a proposed investor in the shares of Company A prior to the IPO |
| Subject | Whether a placing of Company A's shares to the Pre-IPO Investor prior to listing that met the technical requirements regarding disclosure, lock-up and public-float as memorialised in Listing Decision HKEx-LD36-1 complied with Listing Rules 2.03 and 9.09 ¹ , where (a) the Pre-IPO Investor had, long before the filing of the listing application by Company A, completed its investment in Company A by subscribing for shares at a price which was at a discount to the IPO offer price of the shares upon listing; (b) the Pre-IPO Investor and the controlling shareholder of Company A proposed to amend the material terms of their investment agreement after approval in principle for listing had been given by the Exchange; and (c) the new terms allowed the Pre-IPO Investor to sell the shares back to the controlling shareholder after listing at a minimum sales price? |
| Listing Rules | Listing Rules 2.03(2) and (4); 9.09 ¹ ; Listing Decision HKEx-LD36-1 (October,2003); Listing Decision HKEx-LD55-1 (June 2006) |
| Decision | The Exchange determined that the proposed new agreements violated the 'no dealing' requirement under Listing Rule 9.09 ¹ and the guaranteed exit price violated the 'fair and orderly' principle and the 'even treatment of shareholders' principle in Listing Rule 2.03. The Exchange therefore decided that it was not appropriate to grant listing approval to Company A unless the proposed arrangements were modified in a manner acceptable to the Exchange. The proposal was subsequently withdrawn and the listing was permitted to proceed. |

SUMMARY OF FACTS

First Listing Hearing

1. At the first Listing Committee hearing to consider the listing application of Company A, the Listing Committee gave in-principle approval to the listing of Company A's shares which included a completed pre-IPO placing of its shares to the Pre-IPO Investor pursuant to a subscription agreement (the 'Subscription Agreement') entered into between Company A, its controlling shareholder (the 'Controlling Shareholder') and the Pre-IPO Investor prior to the filing of the listing application of Company A. The Pre-IPO Investor was not in the same industry as Company A.
2. The Subscription Agreement contained the following material terms:
 - a. the Pre-IPO Investor would, prior to the listing of Company A, take up approximately 20% interest in Company A at a fixed price which was equivalent to a 40% discount to the midpoint of the intended offer price range of Company A's shares;
 - b. the proceeds raised would be applied for funding the Group;
 - c. the Pre-IPO Investor had agreed that it be treated as a connected person under the Listing Rules. As such, its shareholdings would not be counted towards public float of Company A;
 - d. the Pre-IPO Investor had agreed to subject its interests in Company A to a lock-up period commencing from the date of the prospectus up to the date falling six months after the listing date; and
 - e. the prospectus would contain details of the Subscription Agreement.

After the First Listing Hearing but before Bulk Print of the Prospectus

3. After the First Listing Hearing but before the bulk print of the prospectus, the Controlling Shareholder proposed to revise the terms of the pre-IPO placing ('Proposed Arrangements') after in-principle approval had been given by the Listing Committee.
4. The sponsor gave the following reasons for the Proposed Arrangements:
 - a. Incidental to the signing of the Subscription Agreement, the Controlling Shareholder and the Pre-IPO Investor entered into an investor agreement where it was agreed that (i) Company A would be listed with no less than a certain market capitalisation ('Minimum Target Capitalisation'); and (ii) the Pre-IPO Investor was granted an option to exit its investment in Company A exercisable approximately 4 years later by selling the shares

back to the Controlling Shareholder at the subscription price of the shares plus an agreed annual rate of return if the listing did not proceed, or based on the prevailing market price of the shares if the shares were listed.

- b. The Minimum Target Capitalisation could not be met shortly prior to listing. In order to convince the Pre-IPO Investor to proceed with the listing, the Controlling Shareholder offered to establish the Proposed Arrangements, subject to the agreement of the Pre-IPO Investor.
5. The effect of the Proposed Arrangements was that the Controlling Shareholder would guarantee that the shares in Company A held by the Pre-IPO Investor could be resold at a minimum price by compensating the Pre-IPO Investor with a shortfall payment. It was proposed that details of the Proposed Arrangements would be made in the prospectus.
 6. In view of the Proposed Arrangements, Company A's listing application was brought to the Listing Committee for consideration for the second time.

THE ISSUE RAISED FOR CONSIDERATION

7. Whether a placing of Company A's shares to the Pre-IPO Investor prior to listing that met the technical requirements regarding disclosure, lock-up and public-float as memorialised in Listing Decision HKEx-LD36-1 complied with Listing Rules 2.03 and 9.09¹, where
 - a. the Pre-IPO Investor had, long before the filing of the listing application by Company A, completed its investment in Company A by subscribing for shares at a price which was at a discount to the IPO offer price of the shares upon listing;
 - b. the Pre-IPO Investor and the controlling shareholder of Company A proposed to amend the material terms of their investment agreement after approval in principle for listing had been given by the Exchange; and
 - c. the new terms allowed the Pre-IPO Investor to sell the shares back to the controlling shareholder after listing at a minimum sales price?

APPLICABLE LISTING RULES OR PRINCIPLE

8. Listing Rules 2.03(2) and (4) require that:
 - (2) the issue and marketing of securities is conducted in a fair and orderly manner and that potential investors are given sufficient information to enable them to make a properly informed assessment of an issuer...and
 - (4) all holders of listed securities are treated fairly and evenly...

9. Listing Rule 9.09¹ states that:

From the time of submission of the formal application for listing until listing is granted, there must be no dealing in the securities for which listing is sought by any connected person of the issuer....If any of the directors or their associates are found to have engaged in such dealing, the application may be rejected.

10. Listing Decision Series 36-1 (October, 2003) ('HKEx-LD36-1') states the following regarding pre-IPO placings:

The Exchange was of the view that, as a general principle on the Main Board, placings of shares shortly before a listing application should be permitted subject to full disclosure in the prospectus. However, the placee may be subject to a lock-up of his shares. The question of whether the placee should be subject to a lock-up is determined on a case-by-case basis having regard to all the circumstances of the case.

11. The Exchange reviewed the rationale of its earlier decision made in HKEx-LD36-1 when considering the case in HKEx-LD55-1 (published in June 2006) and observed that:

HKEx-LD36-1

8. However, the Exchange considered that the scenario contemplated in HKEx-LD36-1 was a 'simple' scenario where a pre-IPO placing was conclusively completed before listing with price and commitments affixed on the relevant parties.

THE ANALYSIS

12. The Exchange analysed the present case in light of the decision reached in the case in HKEx-LD55-1 where the pre-IPO placing was not permitted to proceed on the ground that it was against the requirements in Listing Rules 2.03(2) and 2.03(4) although such pre-IPO placing met the technical requirements of HKEx-LD36-1.

13. The Exchange noted that similar to the pre-IPO investor in the case of HKEx-LD55-1, the Pre-IPO Investor effectively would be getting a better deal than other investors. As such, the Proposed Arrangements would create different IPO share pricing contrary to the 'fair and orderly' and 'even treatment to all shareholders' principles in Listing Rule 2.03. The fact that the Proposed Arrangements were necessitated by changing market sentiment and the Controlling Shareholder

would be funding the Proposed Arrangements would not warrant the Exchange reaching a different conclusion.

14. Furthermore, the Exchange noted that the changes proposed to the pre-IPO placing were so substantial as to constitute a new agreement. Given that such new agreement was negotiated after the Listing Committee had given its in-principle approval for listing, it fell within the restricted period described in Listing Rule 9.09¹.
15. The Exchange also considered that if the Proposed Arrangements were allowed to proceed, it would raise the question of whether the Controlling Shareholder would in future act in a manner that would limit its personal liability to the Pre-IPO Investor.

THE DECISION

16. The Exchange determined that the Proposed Arrangements violated the ‘no dealing’ requirement under Listing Rule 9.09¹ and the guaranteed exit price violated the ‘fair and orderly’ principle and the ‘even treatment of shareholders’ principle in Listing Rule 2.03. The Exchange therefore decided that it was not appropriate to grant listing approval to Company A unless the Proposed Arrangements were modified in a manner acceptable to the Exchange. The proposal was subsequently withdrawn and the listing was permitted to proceed.

Note:

1. *Since November 2009, Rule 9.09 has been amended to:*

“There must be no dealing in the securities for which listing is sought by any connected person of the issuer (except as permitted by rule 7.11):

(a) in the case of listing application by listed issuers, from the time of submission of the formal application for listing until listing is granted; and

(b) in the case of a new applicant, from 4 clear business days before the expected hearing date until listing is granted.

The directors of the issuer for whose securities listing is being sought shall forthwith notify the Exchange of any such dealing or suspected dealing of which they become aware. If any of the directors or their associates are found to have engaged in such dealing, the application may be rejected.” (Added in September 2010)