

## HKEx LISTING DECISION

Cite as HKEx-LD59-2 (August 2007) (Withdrawn in October 2012; Superseded by GL43-12)

<b>Summary</b>	
<b>Name of Party</b>	Company A - a Main Board listing applicant
<b>Subject</b>	Whether the guaranteed discount to the IPO price of the mandatory Convertible Bonds and the negative pledge under the non-mandatory Convertible Bonds available only to the Convertible Bondholders would violate the fair and orderly principle and the requirement to treat all holders of listed securities fairly and equally under Listing Rule 2.03
<b>Listing Rules</b>	Listing Rule 2.03 Listing Decisions HKEx-LD55-1, HKEx-LD55-2 and HKEx-LD55-3
<b>Decision</b>	The Exchange determined that the guaranteed discount to the IPO price for the mandatory Convertible Bonds and the preferential investment terms of the non-mandatory Convertible Bonds available only to the holders of the Convertible Bonds would violate the fair and orderly principle and the general principle of even treatment of shareholders under Listing Rule 2.03, and as such should be removed prior to Company A's listing on the Exchange.

### SUMMARY OF FACTS

1. This matter arose for decision by the Listing Committee in considering a new listing application. A few months prior to the filing of the formal listing application with the Exchange, Company A issued certain amount of mandatory and non-mandatory convertible bonds (the "Convertible Bonds") with maturity in year 2011. The mandatory Convertible Bonds would be convertible into shares of Company A at 90.25% of the IPO price immediately before the Global Offering, and the non-mandatory Convertible Bonds would be convertible into shares of Company A at 104% of the IPO price after 180 days subsequent to the listing of Company A. The Convertible Bonds were listed on a foreign Stock Exchange.
2. In addition, Company A had given negative pledge not to commit any of the following without the prior consent of the Convertible Bondholders:
  - (a) create any additional lien, encumbrance or security interest on Company A's assets and revenues;

- (b) engage in consolidations, mergers and amalgamations involving substantially all the assets of Company A;
- (c) incur additional indebtedness other than in the ordinary course of business of Company A; and
- (d) issue any new shares or other securities.

### **THE ISSUE RAISED FOR CONSIDERATION**

- 3. Whether the guaranteed discount to the IPO price of the mandatory Convertible Bonds and the negative pledge under the non-mandatory Convertible Bonds available only to the Convertible Bondholders would violate the fair and orderly principle and the general principle of even treatment of shareholders under Listing Rule 2.03.

### **APPLICABLE LISTING RULE OR PRINCIPLE**

- 4. Listing Rule 2.03 sets out the general principles of the Listing Rules as follows:

The Exchange Listing Rules reflect currently acceptable standards in the market place and are designed to ensure that investors have and can maintain confidence in the market and in particular that:-

- (1) applicants are suitable for listing;
- (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, in the case of a guaranteed issue, the guarantor and of the securities for which listing is sought;
- (3) investors and the public are kept fully informed by listed issuers and, in the case of a guaranteed issue, the guarantors of all factors which might affect their interests – and in particular that immediate disclosure is made of any information which might reasonably be expected to have a material effect on market activity in, and the prices of, listed securities;
- (4) all holders of listed securities are treated fairly and equally;
- (5) directors of a listed issuer act in the interests of its shareholders as a whole – particularly where the public represents only a minority of the shareholders; and

- (6) all new issues of equity securities by a listed issuer are first offered to the existing shareholders by way of rights unless they have agreed otherwise.

In these last four respects, the rules seek to secure for holders of securities, other than controlling interests, certain assurances and equality of treatment which their legal position might not otherwise provide.

## THE ANALYSIS

5. During the vetting process, the Exchange raised comments on the specific features of the Convertible Bonds, namely, the guaranteed discount to the IPO price for the mandatory Convertible Bonds, and the apparent preferential investment terms by way of the negative pledge under the non-mandatory Convertible Bonds available only to the Convertible Bondholders. Together, these features may give rise to concerns that the pre-IPO investors would not have assumed investment risks significantly different from those assumed by public investors, or would be protected from certain types of equity risks after listing in a manner that was significantly different from that assumed by public investors.

6. The Exchange specifically raised the following comments:

- a. *Guaranteed discount of the mandatory Convertible Bonds*

The Exchange commented that given the conversion price of the mandatory Convertible Bonds was stated as a fixed discount to the IPO price, in essence there was no price as the price was to be determined only until the date of the IPO. In addition, the guaranteed discount to the IPO price provided to the holders of the mandatory Convertible Bonds would effectively create two different prices for the same securities at listing, hence potentially creating a disruptive effect on the market at the time of listing. The Exchange made reference to Listing Decision HKEx-LD55-1 where the Exchange determined that the terms of the pre-IPO placing in relation to guaranteed discount to the IPO offer price were contrary to the principles of Listing Rule 2.03.

- b. *Negative Pledge under the non-mandatory Convertible Bonds*

There is no specific Listing Rule or published listing decisions dealing with convertible bonds having the features of negative pledge (as described in paragraph 2).

In the case of Company A, the non-mandatory Convertible Bonds were to be redeemed at a 4% premium of the IPO price after listing. The Exchange commented that the unconverted Convertible Bonds to be redeemed at such a low premium should be considered in substance to render the Convertible Bonds equivalent to the equity securities offered at IPO because the 4% premium may not be great enough to justify such

Convertible Bonds being viewed as a class of debt securities separate from the underlying common equity. The investment risks assumed by the holders of such Convertible Bonds are substantially the same as that assumed by the public investors.

The Exchange made reference to Listing Decisions HKEx-LD55-1, HKEx-LD55-2 and HKEx-LD55-3 that preferential terms available to the pre-IPO investors were determined to have violated the fair and orderly principle and the general principle of even treatment of shareholders under Listing Rule 2.03. The negative pledge were considered as additional rights available to the holders of the non-mandatory Convertible Bonds over and above the rights of other shareholders of Company A.

*Comments taken by Company A*

7. In response to the Exchange's comments, Company A agreed with the holders of the Convertible Bonds that:
  - (i) the principal amount of the mandatory Convertible Bonds would be fully redeemed such that there would be no conversion of the mandatory Convertible Bonds (with guaranteed discount) prior to the listing.
  - (ii) the clauses related to the negative pledge, issue of additional securities, consolidation, amalgamation and merger, indebtedness as previously provided in the terms of the Convertible Bonds would be removed.

**THE DECISION**

8. Based on the above analysis and having regard to the material facts, the Exchange determined that the guaranteed discount to the IPO price for the mandatory Convertible Bonds and the preferential investment terms of the non-mandatory Convertible Bonds available only to the holders of the Convertible Bonds would violate the fair and orderly principle and the general principle of even treatment of shareholders under Listing Rule 2.03, and as such should be removed prior to Company A's listing on the Exchange.