

Part B Consultation Questions

Please reply to the questions below that are raised in the Concept Paper downloadable from the HKEx website at: [add link]. Please indicate your preference by ticking the appropriate boxes.

Where there is insufficient space provided for your comments, please attach additional pages.

We encourage you to read all of the following questions before responding.

1. Should the Exchange¹ in no circumstances allow companies to use WVR structures?

Yes (in no circumstances allow companies to use WVR structures)

No

Please give reasons for your views below.

We believe that companies should be allowed to use WVR structures in certain circumstances for the following reasons:

(a) We should be open-minded about changes that may be required to the Rules to ensure that the Hong Kong market remains competitive and stays in line with developments in the capital markets, whether on a global, regional or local level.

(b) We need to balance the need for investor protection against the benefit in allowing the investor to make an informed decision whether or not to participate in the securities of such companies which have gained widespread acceptance, as evidenced by successful listings in the US and the global trend in regulations adopted or proposed by other principal markets that compete with Hong Kong.

(c) Restrictions on the nature and extent of disproportionate rights under WVR structures and safeguards against the risks involved can be put in place to afford better protection to the investors.

(d) Changes to the Rules can be implemented in stages to minimise the risk of adverse impact on the market (e.g., adverse market reaction resulting in a sizable discount to the market capitalisation of the listed securities in Hong Kong) and to test and develop the readiness of market participants and other stakeholders. Initially, restrictions as set out in 2. below should be imposed. At a later stage, depending on the market situation, these restrictions may be adjusted or relaxed, as appropriate.

Please only answer the remaining questions if you believe there are circumstances in which companies should be allowed to use WVR structures.

¹ References to “the Exchange” in this Questionnaire mean The Stock Exchange of Hong Kong Limited, a HKEx subsidiary.

2. Should the Exchange permit WVR structures:

- (a) for all companies, including existing listed companies; or
- (b) only for new applicants (see paragraphs 147 to 152 of the Concept Paper);
or
- (c) only for:
 - (i) companies from particular industries (e.g. information technology companies) (see paragraphs 155 to 162 of the Concept Paper), please specify below which industries and how we should define such companies;

or

- (ii) “innovative” companies (see paragraphs 163 to 164 of the Concept Paper), please specify how we should define such companies below;

or

- (iii) companies with other specific pre-determined characteristics (for example, size or history), please specify with reasons below;

We believe that WVR structures should be allowed for a new applicant with the following characteristics:

(A) A pre-determined size and financial track record that should be sufficiently robust so that the benefits of participating in a hugely successful business make it worthwhile for the investor to undertake the risks involved in having a WVR structure in such a company.

(B) Ability to satisfy the Exchange that it is suitable for listing with a WVR structure having regard to:

(aa) the quality, experience and track record of its management;

(bb) its standard and track record of corporate governance;

(cc) the nature of its business, the need (both in the track record period and in the foreseeable future) for the company to incentivise its management (or other senior members of staff) or for its management or controller to retain control of the board and the company and for the company to raise a significant amount of capital; and

(dd) other special circumstances that justify the use of a WVR structure by the new applicant.

or

- (d) only in “exceptional circumstances” as permitted by current Listing Rule 8.11² (see paragraph 81 of the Concept Paper) and, if so, please give examples below.

Please give reasons for your views below.

² GEM Rule 11.25.

2.1 We believe that WVR structures should not be allowed for existing listed companies for the following reasons:

(a) An existing listed company should not be allowed to impose the WVR structure onto existing ordinary shareholders, whose shareholder rights will be diluted and whose share prices may also suffer as a result.

(b) Changes should be implemented in stages (see 1(d) above). Initially, only new applicants should be allowed to list with a WVR structure. At a later stage, when the market becomes more sophisticated and developed, then it may be appropriate for the Exchange to consult the market on whether existing listed companies may, subject to satisfaction of specified conditions, also be allowed to adopt a WVR structure.

(c) Circumvention risks by existing listed companies can be reduced by introducing anti-avoidance Rules. For example, the Rules can provide that an applicant, that is seeking a listing of assets that were listed on the Exchange within the last 24 months, would not be considered to be suitable for listing with a WVR structure (see 2(c)(iii)(B) above).

2.2 We believe that WVR structures should not be restricted to particular industries or "innovative" companies for the following reasons:

(a) Restricting to particular industries (e.g., information technology companies) is purely a policy decision that may only address the issues in the short term.

(b) Other types of companies can also have the required characteristics and satisfy the Exchange that it is suitable for listing with a WVR structure (see 2(c)(iii) above).

(c) Companies may have businesses in multiple lines of industries.

If you wish, you can choose more than one of the options (b), (c) and (d) above to indicate that you prefer a particular combination of options.

3. If a listed company has a dual class share structure with unequal voting rights at general meetings, should the Exchange require any or all of the restrictions on such structures applied in the US (see the examples at paragraph 153 of the Concept Paper), or others in addition or in substitution?

Please identify the restrictions and give reasons for your views below.

3.1 We believe that, conceptually, any one of all of the characteristics in paragraph 153 of the Concept Paper (except the sunset clause) should trigger a mandatory conversion of the multiple-voting shares into OSOV shares, subject to determining the appropriate figures for the "minimum equity threshold held by founders or others" and the "minimum threshold of shares outstanding".

3.2 A cap should also be imposed on the number of votes that can be carried by one share, as suggested in paragraph 154 of the Concept Paper.

3.3 We believe that the Exchange should impose higher standards of corporate governance on the company to guard against possible abuse by the controllers or founders of the company by:

(a) applying a more stringent set of connected transaction rules that can be set out in a separate Chapter in the Listing Rules;

(b) requiring a higher proportion of independent non-executive directors ("INEDs") who will not have entrenchment rights;

(c) requiring a confirmation by the INEDs and a statement by the auditors in the annual report similar to those required for continuing connected transactions; and

(d) requiring additional disclosures by the company.

4. Should other WVR structures be permissible (see Chapter 5 of the Concept Paper for examples), and, if so, which ones and under what circumstances?

Please give reasons for your views below. In particular, how would you answer Question 2 and Question 3 in relation to such structures?

4.1 Yes, we agree in principle that the Rules should be flexible enough to allow different types of WVR structures.

4.2 However, the scope of "WVR structures" in the Concept Paper is very wide and may include:

(a) dual class structures with:

(i) "B" shares that are listed (like Swire Pacific Limited);

(ii) "B" shares that are unlisted (with weighted voting or special management entrenchment rights) and convert into OSOV shares on the occurrence of certain trigger events; and

(iii) voting and non-voting shares; and

(b) structures that give special management entrenchment rights to certain persons in the company's articles or by separate agreement.

(See the different WVR structures of US-listed companies referred to in paragraphs 28 and 120, chapter 5 and appendix II of the Concept Paper.)

4.3 Note that in the case of a Hong Kong-incorporated company, certain WVR structures that entrench a director's office in the company will not be allowed under the Companies Ordinance ("CO").

4.4 The CO provides that a company can by an ordinary resolution in general meeting remove a director before the end of his term of office, despite anything in its articles or any agreement between it and the director. Furthermore, no share may (on a poll) have a greater number of votes when voting on that resolution than it would have when voting on other general matters in a general meeting. (See s. 462 of the CO.)

4.5 An agreement that a director cannot be removed by ordinary resolution may not be enforceable against the company and, in certain cases, against a shareholder if it constitutes an unlawful fetter on the statutory power of the company to remove the director. There is a conceptual difference between weighted voting rights and an absolute agreement prohibiting the removal of a director. In the latter case, the conflict with the relevant statutory provision is more acute and direct. (See the High Court case of *Muir v Lampl* [2005] 1 HKLRD 338.)

5. Do you believe changes to the corporate governance and regulatory framework in Hong Kong are necessary to allow companies to use WVR structures (see paragraphs 67 to 74 and Appendix V of the Concept Paper)?

Yes

No

If so, please specify these changes with reasons below.

Please see 3.3 above.

Amendments may also be necessary to other parts of the Listing Rules, the Takeovers Code, the Securities and Futures Ordinance and the CO to cater for dual class structures of listed companies.

6. Do you have any comments or suggestions regarding the additional matters discussed in paragraphs 33 to 47 of the Concept Paper:

- (a) using GEM, a separate board, or a professional board to list companies with WVR structures (paragraphs 33 to 41 of the Concept Paper); and

We do not believe at this stage that GEM, a separate board or a professional board should be used to list companies with WVR structures. We believe that it would be sufficient to segregate these companies by giving them a distinguishing stock short name or stock code, similar to what was suggested in paragraph 154 of the Concept Paper.

The Exchange could revisit this point later if there is strong interest from listing applicants for WVR structures.

- (b) the prospect of overseas companies seeking to list for the first time on the Exchange with a WVR structure or seeking a further primary or secondary listing here (see paragraphs 44 to 47 of the Concept Paper)?

Our preliminary view is that, in principle, overseas companies (other than the PRC, Bermuda and Cayman Islands) on the Exchange's List of Acceptable Overseas Jurisdictions with a WVR structure should be allowed to apply for a primary or secondary listing here, provided that they comply with the additional restrictions and safeguards for new applicants with WVR structures (see 3.1 to 3.3 and 6(a) above).

7. Do you have any other comments or suggestions regarding WVR structures?

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