

## HKEx LISTING DECISION

HKEx-LD36-2012

Withdrawn, superseded by Republic of Korea (South Korea) Country Guide in December 2013

<b>Issue</b>	Whether the Exchange would consider the Republic of Korea ( <b>South Korea</b> ) an acceptable jurisdiction under Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"><li>1. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules (<b>Rules</b>)</li><li>2. Joint Policy Statement regarding Listing of Overseas Companies of 7 March 2007 (<b>JPS</b>)</li><li>3. Listing Decisions: HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1, HKEx-LD84-1, HKEx-LD108-1, HKEx-LD109-1, HKEx-LD110-1, HKEx-LD111-1, HKEx-LD1-2011, HKEx-LD4-2011, HKEx-LD10-2011, HKEx-LD11-2011, HKEx-LD24-2012</li><li>4. Guidance Letter HKEx-GL12-09</li></ol>
<b>Decision</b>	<p>The Exchange would consider South Korea an acceptable jurisdiction of an issuer's incorporation, if listing applicants incorporated in South Korea make certain revisions to their constitutive documents or adopt alternative shareholder protection measures to ensure compliance with the JPS, demonstrate a reasonable nexus with South Korea and submit to the non-exclusive jurisdiction of the courts of Hong Kong upon listing on the Exchange. Listing applicants should give reasons for not changing their constitutive documents which the Exchange will assess on a case by case basis</p> <p>Future applicants incorporated in South Korea may follow the streamlined procedures in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

### FACTS

1. The Exchange was requested to consider South Korea an acceptable jurisdiction under the Rules.
2. It was submitted that:
  - a. South Korea adopts a civil law system under which all legal matters and relationships are primarily governed by statutory laws rather than court judgments;
  - b. under South Korean law the corporate form that can publicly issue shares is "*chusik hoesa*", a stock company (**Company**), and the constitutive document of a Company is its articles of incorporation (**AoI**);

- c. the Financial Services Commission (**FSC**) and the Financial Supervisory Service (**FSS**), the statutory financial and securities regulators in South Korea, are full signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information; and
  - d. a Company can maintain a share register in Hong Kong in its Hong Kong branch office or engage an “eligible transfer agent” recognised by FSC to maintain a share register in Hong Kong.
3. The Exchange was provided with a comparison table comparing the Hong Kong Companies Ordinance (**HKCO**) with the relevant South Korean laws and regulations based on the JPS framework.

### **APPLICABLE RULES, REGULATIONS AND PRINCIPLES**

4. All listing applicants must ensure that they are able to and will comply with the Main Board Rules (or the GEM Rules), the Securities and Futures Ordinance (**SFO**) and, if they apply, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules provide a general framework for overseas companies to list on the Exchange. The Exchange may refuse a listing if it is not satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to Hong Kong.
6. Where the Exchange believes that the overseas issuer’s jurisdiction of incorporation does not provide shareholder protection standards equivalent to those in Hong Kong, it may approve the listing of the overseas issuer if it varies its constitutive documents to provide the necessary protection (see Notes to Main Board Rules 19.05(1), 19.30(1) and GEM Rule 24.05(1)).
7. The JPS formalises this process by setting out a list of shareholder protection areas the Exchange takes into account.
8. The standards in the JPS were compared against the standards of different overseas jurisdictions in Listing Decisions HKEEx-LD65-1, HKEEx-LD65-2, HKEEx-LD65-3, HKEEx-LD71-1, HKEEx-LD80-1, HKEEx-LD84-1, HKEEx-LD108-1, HKEEx-LD109-1, HKEEx-LD110-1, HKEEx-LD111-1, HKEEx-LD1-2011, HKEEx-LD4-2011, HKEEx-LD10-2011, HKEEx-LD11-2011, HKEEx-LD24-2012.
9. Guidance Letter HKEEx-GL12-09 sets out streamlined procedures for listing overseas companies (**Streamlined Procedures**). Under it, a potential applicant can benchmark the shareholder protection standards in its home jurisdiction to any one of the recognised or accepted jurisdictions, instead of benchmarking to Hong Kong, as long as it ensures that its shareholder protection standards are not lower than those indicated in the relevant Listing Decisions.

### **ANALYSIS**

10. An overseas applicant’s suitability for listing does not only depend on whether its home

jurisdiction provides comparable shareholder protection as required by the JPS, but also the overseas' applicant's ability to comply with the Main Board Rules or the GEM Rules, unless specific waivers are granted by the Exchange. In relation to shareholder protection matters set out in the JPS, an applicant may adopt any method (e.g. by amending its constitutive documents or administrative procedures) to address all shortfalls in shareholder protection identified in the relevant Listing Decisions to achieve equivalence. The Exchange does not prescribe the method used but recommends that the applicant first consider passing a shareholders' resolution amending its constitutive documents to provide for the protection expected under the JPS. The applicant must give reasons for not changing its constitutive documents and the Exchange will assess them on a case by case basis. An applicant may apply for appropriate waivers of any Main Board Rules or GEM Rules which will be considered by the Exchange on a case by case basis.

11. Based on the comparison table, the Exchange notes certain differences in shareholder protection between the HKCO and South Korean laws and regulations:
  - a. areas where South Korean laws and regulations are considered comparable with or even stricter than the HKCO (Items 1(c), 2(a), 2(b), 2(e), 2(f), 3(e), 4(a), 4(c) and 4(d) of the JPS); and
  - b. areas where the differences in shareholder protection standards under South Korean laws and regulations are considered acceptable even though some differences remain, or where the Exchange considers that a Company must take action to bridge the differences (Items 1(a), 1(b), 1(d), 1(e), 1(f), 2(c), 2(d), 3(a), 3(b), 3(c), 3(d) and 4(b) of the JPS) (see **Appendix**).
12. Where the JPS merely requires clearly stating the circumstances of a particular shareholder protection matter (e.g. Items 1(g) – buy-out provisions and 4(e) – provision of financial assistance for the acquisition of the Company's shares), the Company will make relevant disclosure of any regulatory differences in its listing document.

## CONCLUSION

13. The Exchange considered South Korea an acceptable jurisdiction for an issuer's incorporation on the basis that, in an actual application:
  - a. a Company must address any shareholder protection deficiency based on individual circumstances and, if a Company cannot ensure that its AoI are amended to satisfy a particular shareholder protection requirement, it should provide alternative methods of shareholder protection acceptable to the Exchange;
  - b. a Company must provide in its listing document specific disclosure against each topic by reference to its AoI, the law of South Korea or any applicable regulations, and highlight the major differences from the Hong Kong requirements and the arrangements to address them;

- c. if there are any subsequent major changes in South Korean laws and regulations that significantly worsen shareholder protection standards in South Korea compared to those in Hong Kong, a Company must duly inform the Exchange and make announcement in accordance with the Main Board Rules or GEM Rules to enable the public to appraise the nature of the changes. The Exchange may impose conditions as it sees appropriate or reconsider South Korea as an acceptable jurisdiction of incorporation;
  - d. there are no specific circumstances that render the acceptance of South Korea as an issuer's jurisdiction of incorporation inappropriate;
  - e. a Company must satisfactorily demonstrate that it meets the nexus requirement of the JPS; and
  - f. a Company, once its securities have been admitted to listing on the Exchange, must comply with the Main Board Rules or GEM Rules from time to time in force (except for waived provisions) and submit to the non-exclusive jurisdiction of the courts of Hong Kong.
14. The Exchange requires a Company to submit the following confirmations upon filing its listing application:
- a. a sponsor's confirmation that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Note 21 to the Main Board Rules or Practice Note 2 to the GEM Rules, and that it is independently satisfied that the protection afforded by South Korean laws to the applicant's shareholders is broadly commensurate with that in Hong Kong; and
  - b. a legal opinion and the sponsor's confirmation that the applicant's AoI do not contain provisions preventing it from complying with the Main Board Rules (or the GEM Rules), the SFO – Disclosure of Interests, and the Takeovers Codes.

**NOTES TO ISSUERS AND MARKET PRACTITIONERS**

**For any questions relating to this Listing Decision please feel free to contact the Listing Division.**

**South Korean applicants are expected to address the  
shareholder protection differences as follows**

Item	Shareholder protection matters under HKCO and South Korean laws	Exchange's observation/ Action required
1(a), 1(b), 1(d)	<p><u>The HKCO requirement</u> Under the HKCO, any change in the constitutive documents, a variation of share class rights and a voluntary winding-up must be approved by a three-quarter majority of shareholders present in a general meeting. Under the Streamlined Procedures, the Exchange regards a voting threshold of two-third as acceptable although not strictly equivalent.</p> <p><u>South Korean requirement</u> For all these matters, South Korean laws require a special resolution of the general meeting, i.e. at least two-third majority of the voting shares present in the general meeting, whereas the affirmative votes must also represent at least one-third of the total outstanding voting shares (<b>Special Resolution</b>). In addition to the approval by a Special Resolution of the general meeting, any prejudicial amendment to the AoI concerning a specific share class must be approved by a Special Resolution of holders of this specific share class.</p>	<p><u>Exchange's observation</u> The shareholders' voting threshold of two-third of the voting shares present in the general meeting with the affirmative votes also representing at least one-third of the total outstanding voting shares is acceptable.</p> <p><u>Action required</u> None.</p>
1(b)	<p><u>The HKCO requirement</u> Shareholders of a concerned class holding not less than 10% of the nominal value of the issued shares of that class may petition the court to cancel the variation of the class rights.</p> <p><u>South Korean requirement</u> No equivalent requirement.</p>	<p><u>Exchange's observation</u> Despite the absence of a court petition right South Korean laws provide shareholders with alternative protection, i.e. a general right to contest the resolution of a general meeting if it is in violation of law or the AoI.</p> <p><u>Action required</u> None. This is a legal impossibility, which is compensated for by alternative protection under South Korean laws.</p>
1(e)	<p><u>The HKCO requirement</u> Appointment, removal and remuneration of auditors must be approved by shareholders (i.e. majority vote in general meeting). Under the HKCO auditors are appointed each year.</p> <p><u>South Korean requirement</u> South Korean laws require approval of the appointment and remuneration of auditors by the majority of voting shares represented at the general meeting and the affirmative votes must</p>	<p><u>Exchange's observation</u> The shareholders' voting threshold is comparable to or, with regard to the removal of auditors, even higher than that of the HKCO.</p> <p>The 3%-limit on shares held by one shareholder that can be used for voting on auditors' appointment and the requirement of a Special Resolution for auditors' removal in fact give the minority shareholders more</p>

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	<p>also represent at least one-fourth of the total voting shares then issued and outstanding (<b>Ordinary Resolution</b>). The laws restrict the exercise of the voting rights by each shareholder in the election of auditors to no more than 3% of the outstanding shares, although a lower ratio may be provided in the AoI.</p> <p>The term of office of an auditor expires on the close of the annual general meeting convened with respect to the last fiscal year within three years after the auditor's appointment. Removal of auditors requires a Special Resolution under South Korean laws, as opposed to a simple majority under the HKCO.</p>	<p>protection as they restrict the ability of the controlling shareholder to appoint or remove auditors at will.</p> <p>Although under the South Korean laws auditors may generally remain in office for three years, they can still be removed by a Special Resolution prior to the expiration of the term.</p> <p><u>Action required</u> None.</p>
1(f)	<p><u>The HKCO requirement</u> The register of shareholders can be closed for inspection for up to 30 days.</p> <p><u>South Korean requirement</u> The register of shareholders of a Company can be closed for inspection for a period up to 3 months.</p>	<p><u>Exchange's observation</u> The Exchange does not consider the relevant South Korean laws and regulations comparable.</p> <p><u>Action required</u> A Company is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
2(c)	<p><u>The HKCO requirement</u> The notice period for a meeting approving a special resolution must be at least 21 days, and for any other shareholders' meeting at least 14 days.</p> <p><u>South Korean requirement</u> South Korean laws provide for a notice period of at least 14 days for any shareholders' meeting.</p>	<p><u>Exchange's observation</u> The Exchange does not consider the relevant South Korean laws and regulations comparable.</p> <p><u>Action required</u> A Company is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
2(d)	<p><u>The HKCO requirement</u> The HKCO requires a quorum of two shareholders for all general meetings, subject to the company's articles of association.</p> <p><u>South Korean requirement</u> South Korean laws do not impose any quorum requirement in terms of a minimum number of shareholders, but in terms of a minimum outstanding share capital.</p> <p>It provides that a Special Resolution must be approved by at least two-third majority of the</p>	<p><u>Exchange's observation</u> The Exchange does not consider the difference material. The HKCO quorum requirement is subject to the company's articles of association and is, therefore, not intended as a strict requirement that must be adhered to. Although South Korean laws do not impose any requirement on the minimum number of shareholders, they impose a quorum in terms of a minimum outstanding share capital, which ensures that a resolution is supported by a meaningful amount of voting shares.</p>

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	<p>voting shares present in the general meeting, whereas the affirmative votes must also represent at least one-third of the total voting shares then issued and outstanding. An Ordinary Resolution must be approved by the majority of the voting shares present in the general meeting, whereas the affirmative votes must also represent at least one-quarter of the total voting shares then issued and outstanding.</p>	<p><u>Action required</u> None.</p>
3(a)	<p><u>The HKCO requirement</u> Appointment of a director is required to be voted on individually. Unanimous approval of members is required to pass a resolution permitting appointment of two or more directors by a single resolution.</p> <p><u>South Korean requirement</u> No equivalent requirement.</p>	<p><u>Exchange's observation</u> The Exchange does not consider the relevant South Korean laws and regulations comparable. In addition, Code Provision E1.1 of the Corporate Governance Code set out in Appendix 14 to the Main Board Rules (Code Provision E1.1 of the Corporate Governance Code set out in Appendix 15 to the GEM Rules) requires that a separate resolution should be proposed for each substantially separate issue (e.g. nomination of persons as directors), and "bundling" of resolutions should be avoided unless they are interdependent and linked.</p> <p><u>Action required</u> A Company is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO and to ensure that there is no obstacle for it to comply with the relevant Corporate Governance Codes under the Main Board Rules and the GEM Rules. Applicants should refer to paragraph 10 of this Listing Decision.</p>
3(b)	<p><u>The HKCO requirement</u> Director must declare any material interest in any contract with the company at the earliest board meeting.</p> <p><u>South Korean requirement</u> No equivalent requirement.</p>	<p><u>Exchange's observation</u> The Exchange does not consider the relevant South Korean laws and regulations comparable. In addition, Main Board Rule 13.44 (GEM Rule 17.48A) requires that no director should vote on any board resolution in which he has a material interest nor shall he be counted in the quorum.</p> <p><u>Action required</u> A Company is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO and to ensure that there is no obstacle for it to comply with Main Board Rule 13.44 (GEM Rule 17.48A). Applicants should refer to paragraph 10 of this Listing</p>

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		Decision.
3(c)	<p><u>The HKCO requirement</u> Notices of intention to move a resolution at a general meeting or class meeting must include the particulars of the relevant directors' interests in the matter dealt with by the resolution.</p> <p><u>South Korean requirement</u> No equivalent requirement.</p>	<p><u>Exchange's observation</u> The Exchange does not consider the relevant South Korean laws and regulations comparable. In addition, Main Board Rule 13.73 (GEM Rule 17.46(2)) requires material information on the subject matter to be considered at a general meeting to be provided to shareholders.</p> <p><u>Action required</u> A Company is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO and to ensure that there is no obstacle for it to comply with Main Board Rule 13.73 (GEM Rule 17.46(2)). Applicants should refer to paragraph 10 of this Listing Decision.</p>
3(d)	<p><u>The HKCO requirement</u> Subject to certain exceptions, a public company generally shall not make loans, including quasi loans and credit transactions, to its directors and their associates.</p> <p><u>South Korean requirement</u> There is similar requirement under South Korean laws, but the restriction only applies to Companies listed on the Korean Stock Exchange.</p>	<p><u>Exchange's observation</u> With regards to prohibiting loans to directors, a shareholder protection standard comparable to that under Hong Kong law applies to Companies listed on the Korean Stock Exchange.</p> <p><u>Action required</u> A Company that is not listed on the Korean Stock Exchange is expected to amend its AoI to provide for shareholder protection comparable to that under HKCO. Applicants should refer to paragraph 10 of this Listing Decision.</p>
4(b)	<p><u>The HKCO requirement</u> Any reduction of share capital must be subject to confirmation by the court.</p> <p><u>South Korean requirement</u> No equivalent requirement.</p>	<p><u>Exchange's observation</u> Despite the absence of a court confirmation of share capital reduction South Korean laws provide shareholders with alternative protection, i.e. a general right to contest the resolution of a general meeting if it is in violation of law or the AoI.</p> <p><u>Action required</u> None. This is a legal impossibility, which is compensated by alternative protection under South Korean laws.</p>