

## HKEx LISTING DECISION

Cite as HKEx-LD65-2 (March 2009)

Withdrawn, superseded by Luxembourg Country Guide in December 2013

<b>Summary</b>	
<b>Name of Party</b>	Company X - a company incorporated in Luxembourg proposing to list on the Main Board
<b>Subject</b>	<p>Whether the Exchange would consider Luxembourg an acceptable jurisdiction of Company X's incorporation under Chapter 19 of the Listing Rules for the purpose of its proposed primary listing?</p> <p>How should the Exchange conduct the vetting process relating to future applicants incorporated in Luxembourg for the purpose of primary and secondary listings on the Exchange?</p>
<b>Listing Rules</b>	Chapter 19 of the Listing Rules; Joint Policy Statement Regarding the Listing of Overseas Companies issued jointly by the Securities and Futures Commission and the Stock Exchange of Hong Kong Limited on 7 March 2007; HKEx-LD65-1
<b>Decision</b>	<p>Following the principles set out in the Joint Policy Statement, the Exchange determined that, subject to Company X making certain revisions to its constitutional documents, Luxembourg, in principle, could be considered an acceptable jurisdiction of Company X's incorporation for the purpose of its proposed primary listing.</p> <p>In order to facilitate the vetting process regarding future applicants incorporated in Luxembourg applying for a primary or a secondary listing on the Exchange, the Exchange indicated that it would, in principle, consider any such applicant to have satisfied the requirements set out in the Joint Policy Statement for the purpose of demonstrating that Luxembourg is an acceptable jurisdiction of incorporation of such applicant without the need to complete a detailed line-by-line comparison of the shareholder protection matters therein upon the applicant satisfactorily demonstrating (normally with the support of legal opinions and sponsor's confirmation) to the Exchange that: -</p> <p>a. all areas of shareholder protection as set out in the Joint Policy Statement have been duly considered and examined in the light of the Luxembourg laws as supplemented by</p>

	<p>the applicant's constitutional documents;</p> <p>b. there are no matters that should be brought to the attention of the Exchange that may render the applicant not satisfying the shareholder protection matters set out in the Joint Policy Statement, or the applicant's standards of shareholder protection afforded under the Luxembourg laws falling short of those under Hong Kong laws; and</p> <p>c. the constitutional documents of the applicant are consistent with the requirements of the Listing Rules, the Securities and Futures Ordinance-Disclosure of Interests, Code on Takeovers and Mergers and Code on Share Repurchases.</p> <p>Where a secondary listing is sought, the Exchange would still be required to be satisfied that the regulatory oversight offered by the regulator of the issuer's primary listing venue is of a standard that is at least equivalent to that of the Exchange.</p>
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## SUMMARY OF FACTS

1. Company X (together with its subsidiaries, collectively referred to as the '**Group**') was incorporated in the Grand Duchy of Luxembourg ('**Luxembourg**') in 2000, and it had business operations in over 20 countries worldwide. Company X was considering a primary listing on the Main Board of the Exchange and made an inquiry with the Exchange prior to filing a listing application seeking guidance with respect to the acceptance of Luxembourg as its place of incorporation under Chapter 19 of the Listing Rules.

### *Shareholder protection in Luxembourg*

2. Company X submitted a comparison table of the shareholder protection matters ('**Comparison Table**') under the Luxembourg laws and the Hong Kong Companies Ordinance in accordance with the Joint Policy Statement Regarding the Listing of Overseas Companies issued jointly by the Securities and Futures Commission ('**SFC**') and the Exchange on 7 March 2007 (the '**Joint Policy Statement**').
3. Company X submitted that, in respect of the shareholder protection matters set out in the Joint Policy Statement, where Hong Kong laws appear to provide a higher level of shareholder protection than that under the corresponding Luxembourg provisions, Company X would amend its articles of association

- (‘AOA’) to address those differences, save for the provision in respect of a reduction of share capital.
4. Company X submitted the following explanation for not procuring a change to the AOA to make up the difference between Hong Kong and Luxembourg laws with regard to a reduction of share capital:
    - a. under Hong Kong laws, any reduction of share capital in a company must be subject to confirmation by the court. Without the court’s confirmation, any reduction of capital will be unlawful. However, there is no equivalent requirement under Luxembourg laws to seek confirmation of the courts of Luxembourg regarding a reduction in share capital. Luxembourg courts do not have jurisdiction nor an established process in respect of capital reduction of companies, and a Luxembourg counsel advised that it would not be legally possible for Company X to create such jurisdiction in a Luxembourg court by amending its AOA (e.g. to include a requirement of seeking court approval) where this is not provided by law;
    - b. under Luxembourg laws, a reduction of capital must be approved by shareholders in a shareholders’ meeting, which must be held in the presence of a notary, who is a public officer appointed by the Grand-Duke of Luxembourg and is completely independent from and unrelated to the company in question. The notary attending such a meeting is responsible for ensuring that the laws applicable to a reduction of capital are complied with. As advised by a Luxembourg counsel, any share capital reduction has to be made on equal terms for each shareholder of the company. The shareholders who suffered damage in a share capital reduction of a company may take legal action in the Luxembourg courts for violation of the principle of equal treatment of the shareholders and to obtain the cancellation of the decision or compensation. It was therefore submitted that Luxembourg laws provide adequate protection for shareholders in circumstances where there is a proposal for a reduction of share capital; and
    - c. companies incorporated in Bermuda and the PRC are also not required to seek a confirmation from the Bermudan or PRC courts (as the case may be) in respect of a reduction of capital. Company X was given to understand that a PRC-incorporated company is only required to register with the Administrative Bureau for Industry and Commerce regarding a reduction in registered capital; whereas a Bermudan company is only required to file a memorandum and a notice with the Bermudan Companies Registrar stating that the relevant provisions of the Bermuda Companies Act 1981 regarding a reduction of capital have been duly complied with.
  5. As regards the shareholder protection matters specified in the Joint Policy Statement, it was submitted that the state of the Luxembourg laws as

supplemented by the proposed amendments to Company X's AOA would afford its shareholders a level of shareholder protection equivalent to that afforded to shareholders of a Hong Kong incorporated listed company.

### ***Co-operation and information gathering arrangements between Hong Kong and Luxembourg***

6. It was submitted that the Commission de Surveillance du Secteur Financier (the 'CSSF'), the statutory securities regulator in Luxembourg, is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information ('IOSCO MMOU') for the purpose of ensuring reasonable regulatory co-operation between the SFC in Hong Kong and its counterpart in Luxembourg (i.e. the CSSF).

### ***Nexus with Luxembourg***

7. On the question of whether Company X had demonstrated that there was a nexus between Luxembourg as its place of incorporation and its business operations, it was submitted that Company X was the holding company of various subsidiaries incorporated in over 20 jurisdictions for the worldwide operations of the Group. Although the Group's principal operations were based outside of Luxembourg, Company X had been incorporated in Luxembourg since 2000 as the holding company of the Group due to relatively more favourable tax implications there.

## **THE ISSUES RAISED FOR CONSIDERATION**

8. Whether the Exchange would consider Luxembourg an acceptable jurisdiction of Company X's incorporation under Chapter 19 of the Listing Rules for the purpose of its proposed primary listing?
9. How should the Exchange conduct the vetting process relating to future applicants incorporated in Luxembourg for the purpose of primary and secondary listings on the Exchange?

## **APPLICABLE LISTING RULES OR PRINCIPLES**

10. Currently, four jurisdictions of incorporation are formally recognised under the Listing Rules, namely Hong Kong, the PRC, Bermuda and the Cayman Islands ('Recognised Jurisdictions'). Chapter 19 of the Listing Rules provides a general framework applicable to all overseas companies seeking a listing on the Exchange. In particular, Rule 19.05(1)(b) of the Listing Rules sets out the shareholder protection standards that are expected of an overseas company seeking a primary listing on the Exchange. Under this requirement, an overseas applicant is expected to benchmark the shareholder protection standards of its home

jurisdiction to those standards of Hong Kong, and in case of any shortfall in the standards of the applicant's home jurisdiction, an overseas applicant is expected to compensate for such shortfalls by making changes to its constitutional documents.

11. In case of a secondary listing (i.e. where an overseas issuer whose primary listing is or is to be on another stock exchange), Listing Rule 19.30(1)(b) further provides that the Exchange is to be satisfied that the exchange on which an overseas issuer is or is to be primarily listed, and the jurisdiction in which such an overseas issuer is incorporated, offer standards of shareholder protection at least equivalent to those provided in Hong Kong.
12. The Joint Policy Statement provides a roadmap for potential issuers and their advisers to refer to regarding key shareholder protection matters. The purpose of the roadmap is aimed at facilitating and hopefully reducing the amount of work required for overseas companies seeking to list on the Exchange. The principal issues dealt with in the Joint Policy Statement are summarised as follows: -
  - a. the roadmap in the form of a schedule sets forth the several key aspects of shareholder protection matters that the Exchange expects overseas companies to address when seeking a primary listing on the Exchange. Such matters, however, do not exonerate an overseas company from seeking a primary listing on the Exchange from complying with the Listing Rules, Securities and Futures Ordinance, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases and other applicable laws and regulations which are applicable to overseas companies. Nor are such matters intended to be exhaustive. Modifications may be necessary where the overseas applicant can demonstrate to the satisfaction of the Exchange that compliance with the Listing Rules is contrary to the laws of the country of its incorporation;
  - b. it is important that Hong Kong regulators have reasonable access to information relating to the conduct of a listed overseas company in its home or governing jurisdiction to facilitate the taking of any regulatory action against a non-complying listed overseas company. Accordingly, a practical factor that the Exchange ordinarily views favourably when considering applications from overseas companies seeking a primary listing on the Exchange's markets is whether the applicant is incorporated in a jurisdiction of which the statutory securities regulator has adequate arrangements with the SFC for mutual assistance and exchange of information for the purpose of enforcing and securing compliance with the laws and regulations of that jurisdiction and Hong Kong either by way of the IOSCO MMOU or an adequately comprehensive bilateral agreement with the SFC; and

- c. regulatory co-operation from the securities regulator in the jurisdiction where a company is incorporated becomes less meaningful where the company concerned does not have its operations, assets or management presence in the jurisdiction. Accordingly, one of the policy objectives of the Listing Rules is to ensure that applicants may incorporate in jurisdictions that are reasonably related to their principal business operations absent other substantive concerns. In certain circumstances, a jurisdiction of incorporation (other than one of the Recognised Jurisdictions) which is totally unrelated to an applicant's place of principal business operations, its principal assets and its principal executive offices, may lead the listing applicant to be considered unsuitable for listing under the Listing Rules.
13. References are made to Listing Decisions HKEx-LD57-1, HKEx-LD58-1 and HKEx-LD65-1 memorialising the decisions of the Exchange regarding potential listing applicants which were incorporated in Australia, Canada (British Columbia) and Singapore respectively. HKEx-LD65-1 was the first case that applied the principles set out in the Joint Policy Statement.

## **THE ANALYSIS**

### ***Acceptance of Luxembourg as Company X's place of incorporation***

14. When giving guidance in the present case, the Exchange took into consideration the following:
- a. the approach in the previous case memorialised in HKEx-LD65-1 should be followed. In particular, the Exchange noted that the Joint Policy Statement states that the Exchange may permit modifications to be made to the Listing Rules on a case by case basis if compliance with the Listing Rules is demonstrated to be contrary to the laws of the issuer's home jurisdiction;
  - b. the submissions of Company X that:
    - (i) as regards the shareholder protection matters specified in the Joint Policy Statement, the Luxembourg laws as supplemented by the proposed amendments to Company X's AOA would afford shareholders of Company X a level of shareholder protection at least equivalent to that afforded to shareholders of a Hong Kong incorporated listed company;
    - (ii) it would be legally impossible for Company X to amend its AOA to include a requirement to require Company X to seek court approval to confirm a reduction of capital. Notwithstanding the

absence of an equivalent requirement under Luxembourg laws to seek confirmation by the courts of a reduction in share capital, there were alternative measures under Luxembourg laws to provide comparable shareholder protection, as set out in paragraph 4, such as:-

- the presence of a notary, who is a public officer, at a shareholders' meeting to approve the reduction in share capital in a company. The notary attending such a meeting is responsible for ensuring that the laws applicable to a reduction of capital are complied with; and
  - the application of the principle of equal treatment of the shareholders, the breach of which will entitle the minority shareholders to take legal action against Company X and/or the majority shareholder(s) in the Luxembourg courts;
- c. Company X would amend its AOA to the extent that was legally feasible (i.e. save for the provision in respect of a reduction of capital) to compensate for any shortfalls in shareholder protection between Luxembourg laws and Hong Kong laws;
- d. Luxembourg is a signatory to the IOSCO MMOU and therefore a reasonable regulatory co-operation between the regulators in Luxembourg and Hong Kong could be ensured; and
- e. As regards whether Company X had demonstrated that there was a sufficient nexus between Luxembourg as its place of incorporation and its operations worldwide for the purpose of demonstrating sufficiency of shareholder protection standards, the Exchange noted that Company X was incorporated in Luxembourg in 2000 as the holding company of various subsidiaries due to more favourable tax implications there for its worldwide operations. Taking that into consideration, and in the light of the other shareholder protection measures afforded under the Luxembourg laws and Company X's constitutional documents, the Exchange was satisfied that Company X was not engaged in forum-shopping practices with a view to depriving shareholders of the necessary protection which the nexus factor enunciated in the Joint Policy Statement seeks to discourage.
15. Based on the foregoing analysis, the Exchange considered that Company X was able to comply with the requirements of Listing Rule 19.05(1)(b) and address the principal issues pertaining to shareholder protection matters set forth in the Joint Policy Statement.

***Primary / Secondary listing of future applicants incorporated in Luxembourg***

16. Given that the rule requirements and principles for demonstrating eligibility of an issuer's jurisdiction of incorporation are the same for both primary and secondary listings, the Exchange considers that the Joint Policy Statement and the present decision are equally applicable to a Luxembourg company seeking a secondary listing on the Exchange. However, such applicant would still need to demonstrate that the regulatory oversight offered by the regulator of its primary listing venue is of a standard that is at least equivalent to that of the Exchange.
17. To facilitate the vetting process regarding future applicants incorporated in Luxembourg when applying for a primary or a secondary listing on the Exchange, the Exchange considered certain streamlined vetting processes would be appropriate.
18. While there may be changes in the Luxembourg company laws after determining that Luxembourg is an acceptable jurisdiction of an issuer's incorporation, the Exchange sees it appropriate to treat Luxembourg companies on the same basis as it currently affords to companies incorporated in Bermuda and the Cayman Islands, i.e. Luxembourg issuers would not be required to provide a regular update of the development of the Luxembourg company laws. In the event that there should be major changes in the Luxembourg company laws which render the standards of shareholder protection of Luxembourg listed issuers significantly worse than those in Hong Kong, the Exchange would expect such issuers to inform the market of such changes under Listing Rule 13.09, and the Exchange would also consider imposing further conditions as appropriate, or reconsider accepting any future application where the applicant is incorporated in Luxembourg in light of the applicable laws and regulations.

**THE DECISION**

19. Following the principles set out in the Joint Policy Statement, the Exchange determined that, subject to Company X making certain revisions to its constitutional documents, Luxembourg would, in principle be considered an acceptable jurisdiction of Company X's incorporation for the purpose of its proposed primary listing.
20. To facilitate the vetting process regarding future applicants incorporated in Luxembourg applying for a primary or a secondary listing on the Exchange, the Exchange indicated that it would, in principle, consider any such applicant to have satisfied the requirements set out in the Joint Policy Statement for the purpose of demonstrating that Luxembourg is an acceptable jurisdiction of incorporation of such applicant, without the need to complete a detailed line-by-line comparison of the shareholder protection matters therein upon the applicant satisfactorily

demonstrating (normally with the support of legal opinions and sponsor's confirmation) to the Exchange that: -

- a. all areas of shareholder protection set out in the Joint Policy Statement have been duly considered and examined in the light of the Luxembourg laws as supplemented by the applicant's constitutional documents;
  - b. there are no matters that should be brought to the attention of the Exchange that may render the applicant not satisfying the shareholder protection matters set out in the Joint Policy Statement, or the applicant's standards of shareholder protection afforded under the Luxembourg laws falling short of those under Hong Kong laws; and
  - c. the constitutional documents of the applicant are consistent with the requirements of the Listing Rules, the Securities and Futures Ordinance-Disclosure of Interests, Code on Takeovers and Mergers and Code on Share Repurchases.
21. Where a secondary listing is sought, the Exchange would still be required to be satisfied that the regulatory oversight offered by the regulator of the issuer's primary listing venue is of a standard that is at least equivalent to that of the Exchange.
22. The Exchange would require the following submissions with regard to Chapter 19 of the Listing Rules from the sponsor and Company X to be submitted by no later than one week before the hearing by the Listing Committee of Company X's application for its proposed listing on the Exchange: -
- a. a confirmation from the sponsor that all material areas regarding shareholder protection have been considered and reviewed by the sponsor in connection with its due diligence review pursuant to Practice Notice 21 of the Listing Rules and that they are independently satisfied with the conclusion that the shareholder protection offered in Luxembourg is at least equivalent to that in Hong Kong; and
  - b. a legal opinion from Company X's legal adviser and a confirmation from the sponsor that Company X's constitutional documents are consistent with the requirements of the Listing Rules, the Securities and Futures Ordinance – Disclosure of Interests, Code on Takeovers and Mergers and Code on Share Repurchases, and that execution of company affairs pursuant thereto will not violate the aforementioned Rules, Ordinance and Codes.