

**HKEx LISTING DECISION**  
**HKEx-LD1-2011 (January 2011)**

<b>Issues</b>	Whether the Exchange would consider Italy an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"> <li>1. Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules (<b>Rules</b>)</li> <li>2. Joint Policy Statement Regarding the 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 and HKEx-LD111-1</li> <li>4. Guidance Letter HKEx-GL12-09</li> </ol>
<b>Decision</b>	<p>Italy is an acceptable jurisdiction of an issuer's incorporation if potential applicants incorporated in Italy make certain revisions to their constitutive documents and demonstrate a reasonable nexus with Italy</p> <p>Future applicants incorporated in Italy 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 invited to consider Italy an acceptable jurisdiction under the Rules.
2. It was submitted that:
  - a. Italy adopts a civil law system, under which all legal matters and relationships are primarily governed by statutory laws rather than through the impact of court judgments;
  - b. Italian laws provide for several types of companies. The standard type of company used for listing on regulated markets is the joint stock company (*società per azioni*) (**Company** or **Companies**). Italian laws generally provide greater shareholder protection in Companies listed on Italian regulated markets or with shares widely distributed among the public;
  - c. a Company may have one of three different management and control structures: a default, a one-tier or a two-tier structure. The majority of Companies adopt the default structure, under which a Company is managed by a sole director or a board of directors (**Board**), with the board of statutory auditors supervising compliance with the laws and the articles of association and an external auditor carrying out the accounting control; and

- d. Commissione Nazionale per le Società e la Borsa (**Consob**), the Italian Securities and Exchange Commission, is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. It also entered into a Memorandum of Understanding with the Securities and Futures Commission of Hong Kong for the purposes of exchange of information and investigatory assistance.
3. The Exchange was provided with a comparison table of the Hong Kong Companies Ordinance (**HKCO**) and Italian laws and regulations applicable to Companies with the default structure, mainly, the Italian Civil Code, the Italian Consolidated Financial Act and the Consob Regulation implementing the provisions of the Italian Civil Code regarding related party transactions, on shareholder protection matters in the JPS framework as supplemented by Guidance Letter HKEx-GL12-09.

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

4. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance and 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 seeking a listing on the Exchange. In particular, under Main Board Rule 19.05(1)(b) and GEM Rules 24.05(1)(b), the Exchange, when considering primary listing of securities of an overseas issuer, may refuse the 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 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 makes the variations to its constitutive document the Exchange requires (see Notes to Main Board Rule 19.05(1) and GEM Rule 24.05(1)).
7. The JPS formalised 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 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 and HKEx-LD111-1.
9. Guidance Letter HKEx-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.
10. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with the

shareholder protection standards of Hong Kong or another recognised or accepted jurisdiction, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.

## ANALYSIS

### *Matters under the JPS*

11. It was submitted that, for the purpose of the JPS, where Hong Kong laws appear to provide a higher level of shareholder protection than under Italian laws and regulations, a potential listing applicant incorporated in Italy would need to amend its constitutive document to address the differences except where:
  - a. the shortfall in shareholder protection was not material (**Immaterial Shortfall**); and
  - b. the shortfalls in shareholder protection could not be remedied by amending its constitutive document (**Legal Impossibilities**).
12. Where the JPS requires only disclosure of regulatory differences (e.g., Items 1(g) and 4(e) of the JPS), a potential listing applicant incorporated in Italy would make the relevant disclosures in its listing document.
13. It was submitted that, subject to the amendments to its constitutive document, a potential listing applicant incorporated in Italy should be able to demonstrate a shareholder protection level at least equivalent to or broadly commensurate with that in Hong Kong.

***Immaterial Shortfall:** Items 1(a), 1(b), 1(d) and 4(b) of the JPS – Voting threshold for change of constitutive documents, variation of share class rights, voluntary winding-up and share capital reduction*

### Companies not listed on a regulated market in Italy

14. Under the HKCO, these matters must be approved by a three-quarter majority of the share capital present in the general meeting. In Italy, the above matters are resolved in an extraordinary general meeting (**EGM**). The EGM approval threshold in the first call of EGM is a “majority of the subscribed share capital”, and in the second and subsequent calls of EGM (i.e., when the first call of EGM did not meet the quorum) is a two-third majority vote of the share capital present in the meeting.
15. The threshold approval in the second and subsequent calls of EGM complies with the JPS as supplemented by the Streamlined Procedures, according to which where the HKCO requires a three-quarter majority vote, the Exchange regards a voting threshold of two-third as acceptable though not strictly equivalent.
16. The Exchange considers that the threshold approval in the first call of EGM affords comparable shareholder protection to that in Hong Kong due to the manner in which thresholds are calculated. In Italy, the votes required in the first call of EGM represent

the subscribed share capital as opposed to the share capital present at the general meeting under HKCO. Only if the participation rate in an EGM was unusually high (e.g., over 75% of the existing shareholders cast votes) would the majority of the subscribed share capital fall below the acceptable two-third majority of the share capital present at the meeting.

#### Companies listed on a regulated market in Italy

17. The voting threshold in any EGM of Companies listed on a regulated market in Italy is a two-third majority in line with the JPS as supplemented by the Streamlined Procedures.

#### ***Legal Impossibility 1: Item 1 (b) of the JPS – Court petition to cancel class rights variation***

18. Unlike the HKCO, Italian laws do not provide for the right of the holders of the concerned share class to petition the court to cancel a class rights variation. However, they afford alternative protection that includes:
  - a. approval of the share class variation by the shareholders of the affected class;
  - b. a right of dissenting shareholders of the affected class to challenge in court the relevant resolution adopted contrary to the laws or Company's constitutive document; and
  - c. a right of shareholders of the affected class to withdraw from the Company at the share price determined by the Board that has considered the opinions of the board of statutory auditors and the Company's auditor. If the affected shareholders object to the withdrawal price determined by the Board, it will be set by an expert appointed by court.

#### ***Legal Impossibility 2: Item 2 (b) of the JPS – Shareholders' requesting to convene an extraordinary general meeting***

19. Unlike the HKCO, under Italian laws shareholders may not request the Company to convene an EGM to approve certain matters, for instance, mergers, spin-offs, reorganisation into another company type, share capital increase for subscription by third parties. It was submitted that these matters require specific knowledge of directors about the Company's affairs who must prepare a proposal, project or report on these matters for consideration by the Company's shareholders and creditors prior to the meeting. If shareholders disagree with the directors' approach in dealing with any of these matters, they may call a general meeting to remove them.

#### ***Legal Impossibility 3: Item 2 (e) of the JPS – Right of shareholders to appoint a proxy***

#### Companies not listed on a regulated market in Italy

20. It was submitted to the satisfaction of the Exchange that, under Italian laws, any Company's member with the right to vote, including a recognised clearing house as defined in the JPS, may be represented in a shareholders' meeting in compliance with

the JPS. However, it was submitted that Italian laws restrict the identity of proxies to exclude Company's directors, members of the board of statutory auditors and employees, the Company's subsidiaries and their directors, members of their boards of statutory auditors and their employees, whereas the HKCO is silent in this regard. It was further submitted that the limitation seeks to prevent directors, members of the board of statutory auditors or employees from becoming an instrument of the dominant shareholders to increase their influence in a general meeting.

21. Although the proxy restriction could not be altered by a change to the Company's constitutive document, the Exchange did not consider the restriction a shareholder protection shortfall.

#### Companies listed on a regulated market in Italy

22. In line with the HKCO, Italian laws do not restrict the identity of proxies of Companies listed on a regulated market in Italy.

#### *Legal Impossibility 4: Item 4 (b) of the JPS – Court confirmation of share capital reduction*

23. Unlike the HKCO, the Italian laws do not require the court to confirm a share capital reduction, but afford an alternative protection. This includes the Company's minimum share capital requirement of EUR 120,000, the right of dissenting shareholders to challenge in court the relevant resolution adopted contrary to the laws or Company's constitutive document, and the right of creditors whose interests are prejudiced by the share capital reduction to challenge it in court.

#### *Nexus to be established*

24. A potential applicant incorporated in Italy needs to demonstrate to the Exchange that there is a reasonable nexus between its operations and Italy.

#### **CONCLUSION**

25. Based on the submission, the Exchange considered that Italy is an acceptable overseas jurisdiction if the potential listing applicant makes certain revisions to its constitutive document and demonstrates a reasonable nexus with Italy.
26. It would be required to submit at the time of filing its listing application:
  - a. a confirmation from the sponsor 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 the Italian laws to the applicant's shareholders is at least equivalent to or broadly commensurate with that in Hong Kong; and
  - b. a legal opinion and the sponsor's confirmation that the applicant's constitutive document does not contain provisions preventing it from complying with the

Rules, the Securities and Futures Ordinance – Part XV, and the Takeovers Codes.

27. A potential applicant of a corporate type other than joint stock company, or with a management and control structure other than the default structure, will have to address further differences, if any, in protection afforded to its shareholders.
28. Future applicants incorporated in Italy may follow the Streamlined Procedures and need not complete a detailed line-by-line comparison with the JPS.

#### **NOTES TO ISSUERS AND MARKET PRACTITIONERS**

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