

**HKE<sub>x</sub> LISTING DECISION**  
**HKE<sub>x</sub>-LD4-2011 (March 2011)**

<b>Parties</b>	Company A – a company incorporated in France proposing to list on the Main Board
<b>Issues</b>	Whether the Exchange would consider France 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: HKE<sub>x</sub>-LD65-1; HKE<sub>x</sub>-LD65-2, HKE<sub>x</sub>-LD65-3, HKE<sub>x</sub>-LD71-1, HKE<sub>x</sub>-LD80-1, HKE<sub>x</sub>-LD84-1, HKE<sub>x</sub>-LD108-1, HKE<sub>x</sub>-LD109-1, HKE<sub>x</sub>-LD110-1, HKE<sub>x</sub>-LD111-1 and HKE<sub>x</sub>-LD1-2011</li> <li>4. Guidance Letter HKE<sub>x</sub>-GL12-09</li> </ol>
<b>Decision</b>	<p>France is an acceptable jurisdiction of an issuer’s incorporation for applicants incorporated in France as a <i>société anonyme</i> with a single-board structure that are subject to the requirements of the French statutory securities regulator and demonstrate a reasonable nexus with France</p> <p>These applicants may follow the streamlined procedures in Guidance Letter HKE<sub>x</sub>-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

**FACTS**

1. Company A was a *société anonyme*, a joint stock company, incorporated and listed in France. Before filing its listing application, Company A enquired whether France would be an acceptable jurisdiction under the Rules.
2. It submitted that:
  - a. France 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. French law recognises a variety of business entities. General commercial companies include the general partnership, the limited partnership, the partnership limited by shares, the limited liability company, the simplified stock company and the joint stock company (*société anonyme*) (**SA** or **SAs**);
  - c. SAs may have different management and control structures. Company A adopted a single-board structure and is managed by a board of directors (**Board**), a chairman of the Board and a chief executive officer who is not necessarily a Board member; and

- d. Autorité des marchés financiers (**AMF**), the statutory securities regulator in France, is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (**IOSCO MMoU**). It also maintains a Memorandum Regarding Administrative Arrangements with the Securities and Futures Commission (**SFC**) for the purposes of exchange of information and investigatory assistance.
3. Company A submitted a comparison table comparing the Hong Kong Companies Ordinance (**HKCO**) with the relevant French laws and regulations, including the AMF regulations applicable to it, on shareholder protection matters based on the JPS.

## **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 (**SFO**) 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), when considering the primary listing of securities of an overseas issuer, the Exchange 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 documents the Exchange requires (see Notes to Main Board Rule 19.05(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 and HKEEx-LD1-2011.
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.
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. The Exchange noted certain differences in shareholder protection standards between the HKCO and French laws and regulations:
  - a. areas where the shareholder protection standards under French laws and regulations are considered comparable with or even more stringent than the HKCO (**Appendix I**); and
  - b. areas where amending the articles of association to achieve shareholder protection standards at least equivalent to or broadly commensurate with those under the HKCO is not legally possible (**Legal Impossibilities**).
12. Where the JPS merely requires clearly stating the circumstances of a particular shareholder protection matter (e.g., Items 1(g) and 4(e) of the JPS), Company A would make relevant disclosures of any regulatory differences in its listing document.
13. With France being a historical base for its headquarters and operations, Company A demonstrated that there was a reasonable nexus between its place of incorporation and its operations.
14. Company A submitted that French laws and regulations and the proposed disclosure in the listing document would provide a shareholder protection level comparable to that in Hong Kong.

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

15. Unlike the HKCO, French law does not expressly provide the shareholders of the concerned class with a right to petition the court to cancel the class rights variation. However, it gives them a general right to contest the abuse by the majority shareholders to the detriment of the minority and the interests of SA.
16. Company A submitted that it was not legally possible under French law to amend its articles of association to provide for the right of the affected class members to petition the court to cancel the class rights variation. Despite the absence of a court petition right, the Exchange considered that the alternative protection under French law was comparable to that under Hong Kong law.

### *Legal Impossibility 2: Item 1(e) of the JPS – Removal of auditors*

17. While under the HKCO the removal of auditors must be approved by a majority vote in a general shareholder meeting, under French law the auditors may only be removed through a court order upon request by different bodies, including shareholders

representing at least 5% of the share capital or a duly qualified association of shareholders.

18. Company A submitted that it was not legally possible under French law to amend its articles of association to provide for the right to remove the auditors in a shareholder meeting. The Exchange considered that the shareholder protection under French law was comparable to that under Hong Kong law.

***Legal Impossibility 3: Item 1(e) of the JPS – Remuneration of auditors***

19. Under the HKCO, remuneration of auditors is approved by a majority vote in a general shareholder meeting. However, under French law the auditors' remuneration in listed companies is agreed upon between the auditors and SA represented by the CEO. French law affords alternative protection which includes (i) the duty of the CEO to act in the SA's best interests in negotiations with the auditors regarding their remuneration, (ii) the requirement that a listed SA must maintain an audit committee to ensure that the remuneration paid to the auditors does not affect their independence, and (iii) a full disclosure of the auditors' remuneration.
20. Company A submitted that under French law the CEO had the authority to approve the auditors' remuneration and it was not legally possible to amend its articles of association to provide for a shareholders' approval of the auditors' remuneration. Taking into account the legal impossibility and that Company A would be under the supervision of the AMF, the Exchange considered that the alternative protection under French law was comparable to that under Hong Kong law.

***Legal Impossibility 4: Item 1(f) of the JPS – Availability of members' register***

21. Under the HKCO, the members' register must be open for inspection by members although a temporary closure of the register is allowed.
22. French law allows any member to access the list of members holding shares in registered form only within fifteen days before the general meeting. It is unclear whether the list of members may be made available outside the SA's registered office in France. Adopting a prudent approach, Company A would maintain the list of members at its registered office in France only.
23. French law also requires the Company to disclose beneficial shareholdings above 5%.
24. Company A would maintain in Hong Kong a branch register of Hong Kong members open for inspection by members on conditions comparable to those under Hong Kong law. The fifteen-day access limit under French law would not apply to this register. The Exchange considered that French law and the alternative measures would provide a comparable level of shareholder protection to that in Hong Kong.

***Legal Impossibility 5: Item 2(e) of the JPS – Right of a recognised clearing house to appoint proxies/corporate representatives***

25. Under the HKCO, any member of a company, including a recognised clearing house within the meaning of the SFO or its nominee (i.e., HKSCC Nominees Limited), may appoint a corporate representative or a proxy to attend general meetings on the member's behalf with rights to speak and vote on proposed resolutions. However, under French law, the right to attend and vote, either in person or by proxy, at general meetings belongs to the beneficial owners only. HKSCC Nominees Limited holding shares on behalf its participants in a nominee capacity would not have such right under French law.
26. The rationale of Item 2(e) of the JPS is to ensure that a member holding shares through HKSCC Nominees Limited may vote, attend and speak at the issuer's general meetings as a corporate representative of HKSCC Nominees Limited. Company A demonstrated that the French system, though different from Hong Kong, equally enables any member of an SA to exercise the rights to vote, attend and speak at all general meetings and to receive corporate communication materials.
27. However, Company A must cooperate with HKSCC Nominees Limited and other parties to adopt logistical arrangements to enable its members holding shares through HKSCC Nominees Limited to enjoy all rights of a member. These arrangements would include alternative ways to pass the voting instructions that HKSCC Nominees Limited collected from its participants to Company A, and new forms of attendance permit to enable the rightful members to identify themselves to Company A to attend general meetings.

***Legal Impossibility 6: Item 3(e) of the JPS – Payment to a director as compensation for loss of office or retirement***

28. Under the HKCO, any payment to directors as compensation for loss of office or retirement must be approved by the shareholders. French law distinguishes between “executives” (i.e., Chairman of the Board, CEO and Deputy CEO) whose compensation agreements must be approved by the shareholders, and “directors” whose compensation is provided by law. French law does not provide for any specific directors' compensation for loss of office or retirement.
29. Company A submitted that it was not legally possible to amend its articles of association to provide for the shareholders' approval of directors' compensation for loss of office or retirement. The Exchange did not consider that the French law approach prejudices shareholder protection as compared to Hong Kong law.

***Legal Impossibility 7: Item 4(b) of the JPS – Court confirmation of share capital reduction***

30. Unlike the HKCO, French law does not require the court confirmation of share capital reduction, but affords alternative protection which includes (i) observance of a mandatory solvency ratio and the principle of equality among shareholders, (ii) presenting the assessment of and the reasons for the share capital reduction in the auditors' report at the shareholder meeting, (iii) general right of shareholders to

contest the abuse by the majority shareholders, and (iv) filing the minutes of the shareholder meeting approving the share capital reduction with the court registrar except for the share capital reduction due to accumulated losses.

31. Company A submitted that it was not legally possible under French law to amend its articles of association to provide for the court confirmation of share capital reduction. In light of the alternative protection the Exchange considered that the overall protection under French law was comparable to that under Hong Kong law.

## **CONCLUSION**

32. France is an acceptable jurisdiction of an issuer's incorporation for applicants incorporated in France as an SA with a single-board structure that are subject to the requirements of the AMF and demonstrate a reasonable nexus with France.
33. They will be required to submit at the time of filing their 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 to the applicant's shareholders by French laws and regulations 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 documents do not contain provisions preventing it from complying with the Rules, the SFO – Part XV, and the Takeovers Codes.
34. Applicants of other corporate types or management structure that are not subject to the regulation by the AMF or have not implemented specific shareholder protection measures adopted by Company A must consider the JPS and address any further differences in shareholder protections.

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

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

**Areas where the shareholder protection standards under French laws and regulations are considered comparable with or even more stringent than that the HKCO**

<b>JPS Item</b>	<b>Shareholder protection standards applicable to SAs subject to the regulation and compliance requirements of the AMF</b>
<b>1</b>	<b><i>Corporate structure that clearly protects principal shareholder rights</i></b>
<b>1(a)</b>	The shareholder approval threshold for the amendments of the articles of association is a two-third majority vote. Under the Streamlined Procedures, where the HKCO requires a three-quarter majority vote for passing certain resolutions, the Exchange regards a voting threshold of two-third as acceptable though not strictly equivalent.
<b>1(b)</b>	The shareholder approval threshold for the variation of the share class rights is a two- third majority vote in compliance with the Streamlined Procedures.
<b>1(c)</b>	The liability of a shareholder may not be increased without her/his prior consent.
<b>1(d)</b>	The shareholder approval threshold for the voluntary winding-up is a two-third majority vote in compliance with the Streamlined Procedures.
<b>1(e)</b>	Statutory auditors are appointed by a majority vote in a general meeting.
<b>2</b>	<b><i>Fair proceedings for general meetings to enable shareholders to utilise their rights in full</i></b>
<b>2(a)</b>	Under French law, an annual general meeting must be held within six months from the end of financial year. For a listed SA, it is practically not possible to hold an annual general meeting within the first quarter after the end of financial year, and the time period between two annual general meetings of listed companies would not exceed fifteen months. In practice, Company A usually holds its annual meetings around the same date every twelve months.
<b>2 (b)</b>	Shareholders or a duly qualified association of shareholders holding more than 5% of SA's share capital may request convening a shareholder meeting through a judicially appointed representative. Shareholders holding at least 5% of the share capital may propose items or draft resolutions at general meetings even if convened by others. The shareholding threshold for SAs with a share capital exceeding Euro 750,000 is lower.
<b>2(c)</b>	Under a double notice system a notice of the shareholder meeting ( <i>avis de réunion</i> ) is given at least thirty five days before the meeting and a convening notice ( <i>avis de convocation</i> ) is given at least fifteen days before the meeting.
<b>2(d)</b>	French laws and regulations applicable to a listed SA set forths the provisions as to meetings and votes comparable to those under the HKCO.
<b>2(f)</b>	The rationale of the right to demand a poll is to ensure the voting in proportion to the shareholding (i.e., maintenance of the "one share, one vote" principle irrespective of the number of attendees at a shareholder meeting). SA's shareholders have one vote per share held, except for the shares with double voting rights or preferred shares without voting rights, if applicable.

<b>3</b>	<b><i>Corporate governance measures that ensure the powers of directors are reasonably contained and subject to reasonable scrutiny</i></b>
<b>3(a)</b>	An appointment of Company A's directors is approved individually in separate resolutions in accordance with the recommendations of the AMF.
<b>3(b)</b>	SA's directors, CEO, deputy general managers and officers, as well as shareholders holding more than 10% of the issuer's voting rights must immediately inform the Board when they become aware of a proposed contract to be entered into, whether directly or indirectly, between him/her or related entities and SA ( <i>convention réglementée</i> ).
<b>3 (c)</b>	The shareholder meeting agenda must identify the related party transactions that will be submitted for approval. Resolutions to approve the related party transactions explain why the transactions qualify as related party transactions and include details of the interested persons. Auditors must present at the shareholder meeting a special report including a list of the related party transactions to be approved, names of the interested persons, type, subject and principal terms and conditions of the transactions, and an assessment of the importance of the previously approved transactions in effect during the financial year.
<b>3 (d)</b>	SA's directors are prohibited from benefiting personally, either directly or indirectly, from a loan, quasi loan, guarantee or credit transaction by SA.
<b>4</b>	<b><i>The notion of capital maintenance is enshrined in the corporate structure and with respect to all corporate actions</i></b>
<b>4(a)</b>	The shareholder approval threshold for the share capital alteration is a two-third majority vote and more stringent than under the HKCO.
<b>4(b)</b>	The shareholder approval threshold for the share capital reduction is a two-third majority vote in compliance with the Streamlined Procedures.
<b>4 (c)</b>	An SA may not repurchase its shares if the repurchase would reduce its net assets below its issued share capital plus the amount of non-distributable reserves.
<b>4(d)</b>	An SA may only pay dividends out of its distributable profits, and may not do so if, as a result of the dividends payment, its net assets would fall below its issued share capital plus the amount of non-distributable reserves.