HKEx LISTING DECISION
Cite as HKEx-LD65-3 (March 2009)
Withdrawn, superseded by Cyprus Country Guide in December 2013

Summary	
Name of Party	Company X - a company incorporated in Cyprus proposing to list on the Main Board
Subject	Whether the Exchange would consider Cyprus an acceptable jurisdiction of Company X's incorporation under Chapter 19 of the Listing Rules for the purpose of its proposed primary listing? How should the Exchange conduct the vetting process relating to future applicants incorporated in Cyprus for the purpose of primary or secondary listing on the Exchange?
Listing Rules	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; HKEx-LD65-2
Decision	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, Cyprus, in principle, could be considered an acceptable jurisdiction of Company X's incorporation for the purpose of its proposed primary listing. In order to facilitate the vetting process regarding future applicants incorporated in Cyprus 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 Cyprus 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 as set out in the Joint Policy Statement have been duly considered and examined in the light of Cyprus 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 Cyprus 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. 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.

SUMMARY OF FACTS

1. Company X (together with its subsidiaries, collectively referred to as the '**Group**') was incorporated in the Republic of Cyprus ('**Cyprus**') in 2002. The Group's principal business operations were located in Russia. 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 Cyprus as its place of incorporation under Chapter 19 of the Listing Rules.

Shareholder protection in Cyprus

2. Company X submitted a comparison table of the shareholder protection matters ('**Comparison Table**') under the Cyprus Companies Law ('**CCL**') and the Hong Kong Companies Ordinance ('**HKCO**') 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 Cyprus provisions, Company X would amend its articles of association ('**AOA**') to address those differences, except in the following two areas:

(a) where the shortfalls in standards of shareholder protection under the CCL were not considered material (the '**Shortfalls**'); and

(b) where it would not be legally possible for Company X to amend its constitution (the '**Legal Impossibilities**').

Shortfalls

4. Below are the Shortfalls that Company X considered not material in the context of the level of shareholder protection, and as such Company X did not consider it necessary to amend its AOA to mirror those under the HKCO:

(i) Item 1(b) of the Comparison Table – The CCL does not have comparable provisions on variation of class rights of shares if the memorandum and articles are silent on the issue.

(ii) Item 1(g) of the Comparison Table – The CCL does not contain any provisions as to the rights of a company and minority shareholders in case of successful buy out by share repurchase comparable to that under section 168B of the HKCO.

Item 1(b) – Variation of class rights

5. Under the HKCO, where the rights attached to a class of shares are not specified in the company's memorandum and/or AOA, section 63A(1) of the HKCO provides that a variation of the relevant class rights requires either: (i) the written consent of the holders of 75% in nominal value of the issued shares in the relevant class of shares, or (ii) a special resolution (i.e. one that is passed by not less than 75% of the shareholders attending and voting at a shareholders meeting voting in favour) passed by the holders of that class of shares.

6. By contrast, it was submitted that under the CCL, class rights can only be varied: (i) by obtaining not less than a two-thirds majority vote of the shares of the relevant class represented and voting at a class meeting, or (ii) where at least half of the issued share capital is represented at the meeting, by obtaining not less than a simple majority vote of the shares represented and voting. A Cyprus counsel opined that it is not possible to increase the two-thirds statutory threshold under the CCL to mirror the 75% majority required by the HKCO for the variation of class rights.

7. Company X proposed to include an express provision in its AOA prohibiting the issue of a different class of shares unless approved by the consent in writing of the holders of not less than 75% of the shares of the class already in issue (i.e. the ordinary shares) or with the sanction of a special resolution passed at a meeting of the holders of the class of shares already in issue.

8. As a practical matter, it was submitted that it would be highly unlikely that Company X would have different classes of shares in issue or include class rights in its memorandum or AOA, and so the distinction between the HKCO and the CCL as regards the ways in which class rights may be amended would be largely irrelevant.

Item 1(g) – Rights of minority shareholders in case of buy out by share repurchase must be clearly stated

9. In the event that a Hong Kong incorporated company makes a general offer to buy all of its shares, or all of a class of shares, section 168B and Schedule 13 of the HKCO apply, providing, among other things, that (i) a particular shareholder or shareholders of a company can issue a notice to the effect that it will not accept a repurchase offer in respect of its shares; (ii) the company can then make an offer to repurchase all of its other shares. If the offer is accepted by not less then 90% of the holders of those other shares, then the company can compulsorily acquire the remaining 10% minority, and the 10% minority can require that they be bought out by the company.

10. It was submitted that there is no provision equivalent to section 168B in the CCL.

11. However, it was submitted that if a share repurchase offer were made to the shareholders by a listed company, such offer would need to be made in accordance with the requirements of the Code on Share Repurchases (the '**Share Repurchase Code**'). Accordingly, the minority shareholders would have the opportunity to accept that offer if they so wished. In particular, Rule 3.3(b) of the Share Repurchase Code specifies that in the case of a proposed privatisation, the share repurchase by general offer must be approved by (i) at least 75% of the votes attaching to the shares owned by independent shareholders, and (ii) the number of votes cast against the resolution being not more than 10% of the votes attaching to the shares owned by independent shareholders. Under such share repurchase by general offer, minority shareholder can always ensure that he has the opportunity to sell his shares into the general offer at the offer price because it is a requirement of the Code on Takeovers and Mergers (the '**Takeovers Code**') that the offer be made on that basis.

12. It was therefore submitted that, as a practical matter, the only material difference in terms of protection of minority shareholders would be in the context of a privatisation by share repurchase, i.e. absent a provision under the CCL equivalent in effect to that of section 168B of the HKCO, the minority shareholders of a Cyprus company could not be forced out in a share repurchase offer and this could be interpreted as being more beneficial to minority shareholders. In order to achieve a successful buy-out of the interest of minority shareholders, it was envisaged that a company would have no choice but to use a scheme of arrangement pursuant to section 201 of the CCL (see paragraph 13

below) rather than a share repurchase by way of a general offer because if the repurchase of shares were not accepted by minority shareholders, the company would have no other way of acquiring the remainder of the shares by general offer.

13. Section 201 of the CCL sets out the circumstances under which shareholders dissenting from a scheme or contract approved by the majority (being holders of not less than nine-tenths in value of shares), may be bought out or may require an offeror to buyout their interests. In this regard, it was submitted that section 201 of the CCL is comparable to section 168 of the HKCO.

Legal Impossibilities

14. Company X submitted that there are certain areas where the statutory thresholds under the CCL are different from those provided under the HKCO, and it is not/ may not be possible to alter the statutory thresholds under the CCL to mirror those of the HKCO. Such Legal Impossibilities include:

    a. Item 2(b) of the Comparison Table – the HKCO requires 5% of members to be entitled to requisition an extraordinary general meeting ('**EGM**'); whereas the CCL requires 10%.

    b. Item 2(b) of the Comparison Table – the HKCO requires members representing not less than 2.5% of the voting rights or not less than 50 shareholders to circulate a members' resolution, whereas the CCL requires a threshold of not less than 5% or not less than 100 shareholders.

15. Company X submitted the threshold for convening EGMs on requisition in respect of Cyprus incorporated companies is equivalent to that applicable to Bermuda and Cayman Islands incorporated companies. Moreover, the threshold for circulation of members' resolution under Cyprus laws is equivalent to that under Bermuda laws. Accordingly, Company X considered the differences between the positions under the CCL and the HKCO not material in the context of the level of shareholder protection.

Co-operation and information gathering arrangements between Hong Kong and Cyprus

16. Company X submitted that the Cyprus Securities and Exchange Commission ('**CYSEC**'), the statutory securities regulator in Cyprus, concluded a co-operative arrangement with the SFC for the exchange of information.

17. It was submitted that the CYSEC is not a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information ('**IOSCO MMOU**'). Cyprus counsel advised that draft legislation had been prepared to enable CYSEC to apply to IOSCO to become a full signatory to the IOSCO MMOU in the near future.

Nexus with Cyprus

18. On the question of whether Company X had demonstrated that there was a nexus between Cyprus as its place of incorporation and its business operations, it was submitted that Company X was incorporated in Cyprus in 2002 as the holding company of various subsidiaries due to more favourable tax implications there, including a low corporate tax rate for business profits, no withholding taxes on any payments out of Cyprus to persons who are not Cyprus tax resident.

THE ISSUES RAISED FOR CONSIDERATION

19. Whether the Exchange would consider Cyprus an acceptable jurisdiction of Company X's incorporation under Chapter 19 of the Listing Rules for the purpose of its proposed primary listing?

20. How should the Exchange conduct the vetting process relating to future applicants incorporated in Cyprus for the purpose of primary and secondary listings on the Exchange?

APPLICABLE LISTING RULES OR PRINCIPLES

21. Currently, four jurisdictions of incorporation are formally recognised for the purpose of eligibility for listing by 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, Listing Rule 19.05(1)(b) 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.

22. 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.

23. 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 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, 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.

24. References are made to Listing Decisions HKEx-LD65-1 and HKEx-LD65-2 memorialising the decisions of the Exchange regarding potential listing applicants which were incorporated in Singapore and Luxembourg respectively. HKEx-LD65-1 was the first case that applied the principles set out in the Joint Policy Statement.

THE ANALYSIS

Acceptance of Cyprus as Company X's place of incorporation

25. When considering whether to accept Cyprus as Company X's place of incorporation in light of the Shortfalls and Legal Impossibilities, the Exchange considered it appropriate to follow the approach taken in HKEx-LD65-1 and HKEx-LD65-2, that is, the Exchange is of the view that no two jurisdictions would offer identical levels of shareholder protection. Accordingly, the Exchange may permit modifications to be made to the Listing Rules on a case by case basis, for example, if compliance with the Listing Rules is demonstrated to be contrary to the laws of the issuer's home jurisdiction and the differences in the laws do not render shareholders of the overseas issuer receiving materially less protection than that afforded to shareholders of a Hong Kong incorporated company listed on the Exchange.

26. As regards the shareholder protection matters specified in the Joint Policy Statement, the Exchange noted that Company X had undertaken to amend its AOA to the extent that was legally feasible (save for the Shortfalls in Items 1(b) and 1(g)) to compensate for any shortfalls in shareholder protection between Cyprus laws and Hong Kong laws, and to 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.

27. As regards the Shortfall in Item 1(b) of the Comparison Table, the Exchange noted Company X's submissions set out in paragraphs 5 to 8 that:

- Company X would include an express provision in its AOA to include specific provisions to restrict the issue of different classes of shares; and

- Company X would be in contravention of the CCL, if its constitutional documents were amended to incorporate thresholds different from those provided under the CCL in respect of varying class rights.

28. As regards the Shortfall in Item 1(g) of the Comparison Table as described in paragraphs 9 to 13, the Exchange acknowledged that given jurisdictional differences it would not be practicable to require an overseas applicant to demonstrate verbatim comparison of the textual content of the HKCO provisions with those prescribed in the home jurisdiction of the overseas applicant. The

Exchange considered that the requirement in Item 1(g) of the Comparison Table would be satisfied if Company X was able to state clearly in its listing document the effect of the CCL and the differences between the CCL and the HKCO in this regard. Further, the Exchange agreed with Company X's view that general offers to buy back shares are governed by the Share Repurchase Code and the Takeovers Code irrespective of the place of incorporation of Company X. Accordingly, the differences between the HKCO and the CCL in this regard would not have created a material impact on shareholder protection.

29. As regards the Legal Impossibilities in Item 2(b) of the Comparison Table in relation to convening EGMs on requisition and the circulation of members' resolutions, the Exchange noted the submission that Company X would be in contravention of the CCL if its constitutional documents were amended to incorporate thresholds different from those provided under the CCL.

30. As regards whether there would be adequate regulatory co-operation between the securities regulators of Hong Kong and Cyprus for the purposes of enforcement and securing compliance, the fact that the CYSEC had in place a co-operative arrangement with the SFC for the exchange of information and that the CYSEC had undertaken the necessary ground works to apply to become a full signatory to the IOSCO MMOU in the near future were favourable factors for the Exchange's consideration in the present case.

31. As regards whether Company X had demonstrated that there was a sufficient nexus between Cyprus as its place of incorporation and its operations for the purpose of demonstrating sufficiency of shareholder protection standards, the Exchange noted that Company X was incorporated in Cyprus in 2002 as the holding company of various subsidiaries due to more favourable tax implications there for its operations. Taking that into consideration, and in the light of the other shareholder protection measures afforded under the CCL 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.

32. 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 Cyprus

33. 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 Cyprus 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.

34. To facilitate the vetting process regarding future applicants incorporated in Cyprus when applying for a primary or a secondary listing on the Exchange, the Exchange considered certain streamlined vetting processes would be appropriate.

35. While there may be changes in the Cyprus company laws after determining that Cyprus is an acceptable jurisdiction of an issuer's incorporation, the Exchange sees it appropriate to treat Cyprus companies on the same basis as it currently affords to companies incorporated in Bermuda and the Cayman Islands, i.e. Cyprus issuers would not be required to provide a regular update of the development of the Cyprus company laws. In the event that there should be major changes in the Cyprus company laws which render the standards of shareholder protection of Cyprus listed issuers significantly worse than those in Hong Kong, the Exchange would expect such issuers to inform the market of such changes under Main Board 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 Cyprus in light of the applicable laws and regulations.

THE DECISION

36. 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, Cyprus would, in principle be considered an acceptable jurisdiction of Company X's incorporation for the purpose of its proposed primary listing.

37. To facilitate the vetting process regarding future applicants incorporated in Cyprus when 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 Cyprus 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 Cyprus 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 Cyprus laws falling short of those under Hong Kong laws (save for the Shortfalls in Item 1(b) and 1(g)); 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.

38. Where a secondary listing is sought, the applicant would still be required to satisfy the Exchange that the regulatory oversight offered by the regulator of the applicant's primary listing venue is of a standard that is at least equivalent to that of the Exchange.

39. The Exchange would require the following submissions with regard to Chapter 19 of the Listing Rules from the sponsors and Company X to be submitted by no later than the submission of Company X's listing application: -

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 Cyprus 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 sponsors 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.