

HKEx LISTING DECISION

Cite as HKEx-LD40-3 (October 2004) (Withdrawn in January 2023)

[This Listing Decision is withdrawn following the amendments of Chapter 17 of the Rules to govern both share option schemes and share award schemes of issuers. The amended Rules became effective on 1 January 2023]

Summary	
Category	Listing Decisions Series 40-3 (LD40-3)
Name of Party	Company A - a Main Board listing applicant
Subject	Whether the mandate given by the existing shareholders of Company A prior to listing to authorise the grant of shares under a share-based remuneration plan (the “Plan”) would have a binding effect on future shareholders of Company A
Listing Rules	Rules 8.20; 13.36(1)(a)
Decision	Company A would be allowed to adopt the Plan, including the mandate to directors to issue new shares pursuant to the Plan. However, the Exchange required there to be prominent disclosure of the terms of the Plan and the potential maximum dilution effect in the prospectus and subsequent annual reports

Summary of Facts

Company A proposed to adopt an equity incentive plan (the “Plan”) to remunerate the employees of the Group (including the directors of Company A) prior to listing. As the Plan did not involve any grant of options to purchase shares of Company A, the Plan was not subject to the requirements of Chapter 17 of the Listing Rules. The Plan was intended to be the only share scheme of Company A.

The principal terms of the Plan were as follow:-

- (1) Full time employees of Company A and its subsidiaries, including the directors of the Company, would be entitled to participate in the Plan;
- (2) Before the listing of Company A, the shareholders of Company A would approve an initial pool of shares (“Share Pool”), representing 10% of the issued share capital of Company A upon listing;

- (3) Company A had already given commitments to its employees in relation to the allocation of a portion of the shares under the Share Pool, representing approximately 8% of the issued share capital of Company A upon listing (the “Existing Commitments”) and those shares would be allotted and issued to the employees under the Plan after listing;
- (4) The total number of shares that could be issued under the Plan in any financial year would not exceed 3% of the total issued share capital;
- (5) The total amount of shares issued and to be issued to a grantee in any 12-month period would not exceed 1% of the total number of shares in issue;
- (6) Company A might from time to time after listing seek approval from independent shareholders in general meeting (i) to refresh the Share Pool and (ii) for an unconditional mandate to allot and issue shares which might fall to be issued following a refresher of the Share Pool;
- (7) Immediately upon the vesting of any shares granted to the grantees, such shares would be allotted and issued to the grantees at nil consideration (the shares would be paid up by capitalisation of the share premium account and/or the retained earnings account of Company A);
- (8) The allotment and issue of any shares under the Plan would be made in compliance with all applicable laws and regulations, including the Listing Rules and Company A’s Articles of Association; and
- (9) The life of the Plan would be 10 years from the date of adoption.

Question Presented

Whether the mandate given by the existing shareholders of Company A prior to listing to authorise the grant of shares under the Plan would have a binding effect on future shareholders of Company A?

Applicable Listing Rules

Rule 8.20 provides that “[L]isting must be sought for all further issues of securities of a class already listed prior to the issue of the securities.”

Rule 13.36(1)(a) provides that, except in the circumstances mentioned in Rule 13.36(2), the directors of the issuer shall obtain the consent of shareholders in general meeting prior to allotting, issuing or granting shares of the issuer.

Rule 13.36(2) provides for two circumstances under which no consent from shareholders

is required for an allotment, issue or grant of shares. The first circumstance is where the allotment, issue or grant of shares is made pursuant to an offer made to the shareholders of the issuer (excluding those residing outside Hong Kong) on a pro-rata basis (see Rule 13.36(2)(a)); and the second circumstance is where the existing shareholders have previously approved by ordinary resolution in general meeting a general mandate to the directors of the issuer to allot or issue shares not exceeding 20% of the existing issued share capital of the issuer (see Rule 13.36(2)(b)).

Analysis

In order to obtain listing approval for further issues of shares, an issuer is required under the Listing Rules to obtain a mandate from its shareholders for the issue, unless the shares are issued on a pro-rata basis to existing shareholders (excluding those residing outside Hong Kong). In order to qualify as a specific mandate from shareholders, as opposed to a general mandate, for an issue of shares pursuant to Rule 13.36(1), the Exchange normally expects a mandate from existing shareholders of an issuer to be specific in terms of (i) number of shares; (ii) issue price; and (iii) time frame. The Exchange considered that the life of the mandate was particularly material to investors and shareholders for assessing the dilution effect and profitability impact (with reference to the fair value/market value/net asset value of the shares of Company A) caused by an issue of shares under the Plan. The longer the life of the specific mandate, the more difficult it would be for an investor/shareholder to assess the resulting dilution effect and profitability impact.

The Exchange was initially concerned that the Share Pool which constituted approximately 10% of the enlarged issued share capital of Company A might be unreasonably high. This was because as the Plan advanced in time, investors of Company A might not be able to assess, with reasonable certainty, the dilution effect and the profitability impact of the Plan. However, the Exchange noted that any refreshment of the initial 10% limit under the Plan would require independent shareholders' approval and the Plan would be subject to a 3% annual limit.

The Exchange also noted Company A's submission that, because Company A had adopted and intended to adopt only one scheme, the dilution effect of the Plan could be sufficiently contained. After considering the level of disclosure offered by Company A in its prospectus and future annual reports regarding the potential dilution effect arising from the issue of new shares under the Plan, the Exchange determined to allow the adoption of the Plan by Company A, including the mandate to directors to authorise issues of new shares pursuant to the Plan.

Decision

Based on the analysis set out above and the facts and circumstances of the case, the Exchange decided that Company A would be allowed to adopt the Plan, including the mandate to directors to authorise issues of shares under the Plan which would be binding on future shareholders of Company A. However, there was required to be prominent

disclosure of the terms of the Plan and the potential maximum dilution effect in the prospectus and in subsequent annual reports as follows:-

- In the prospectus: disclosure of the potential dilution effect over the first four years of the vesting period after listing. Such disclosure also was required to appear in the risk factors section of the prospectus.
- In future annual reports: disclosure of, among other things (i) the number of shares to be issued pursuant to the Plan for the following financial year; and (ii) the maximum dilution effect on the shareholders as a result.