

## HKEx LISTING DECISION

Cite as HKEx-LD55-2 (June 2006) (Withdrawn in October 2012; Superseded by GL43-12)

<b>Summary</b>	
<b>Name of Parties</b>	Company A - a Main Board listing applicant and its subsidiaries (the 'Group')  Pre-IPO Investor – a proposed investor in the shares of Company A prior to the IPO
<b>Subject</b>	Whether a placing of Company A's shares to the Pre-IPO Investor prior to listing that met the technical requirements regarding disclosure, lock-up and public-float as memorialised in Listing Decision HKEx-LD36-1 complied with Listing Rule 2.03, where  (a) the Pre-IPO Investor would receive a potential discount to the IPO offer price of the shares upon listing;  (b) the Pre-IPO Investor would defer payment of its investment in Company A until in-principle approval for listing was granted by the Listing Committee; and  (c) the Pre-IPO Investor would be entitled to sell the shares back to the controlling shareholder at the original cost if final listing approval was not granted by the Listing Committee?
<b>Listing Rules</b>	Listing Rules 2.03(2) and (4); Listing Decision HKEx-LD36-1 (October, 2003); and Listing Decision HKEx-LD55-1 (June 2006)
<b>Decision</b>	The Exchange determined that the terms of the placing were contrary to the principles of Listing Rule 2.03 because they were conditional on milestones of the listing approval process and resulted in the Pre-IPO Investor taking investment risks no different than those of IPO Investors. The proposal was subsequently withdrawn and the listing was permitted to proceed.

### SUMMARY OF FACTS

1. Shortly before the listing Company A and its controlling shareholder (the 'Controlling Shareholder') entered into a placing agreement (the 'Pre-IPO Placing Agreement') with the Pre-IPO Investor. Pursuant to the Pre-IPO Placing

Agreement, the Pre-IPO Investor subscribed for new shares in Company A (the ‘Subscription Shares’) at a fixed price which was approximately equivalent to the middle point of the intended offer price range. Immediately after the subscription and the IPO share offer, the Pre-IPO Investor would hold less than 5% interest in Company A.

2. Details of the Pre-IPO Placing Agreement were disclosed in the draft prospectus, including the terms of the Pre-IPO Placing Agreement and the beneficial owners of the Pre-IPO Investor.
3. The Pre-IPO Placing Agreement contained the following material terms:

*Lock-up and Placing Shares not counted as public shares*

- a. the Subscription Shares would be subject to a lock-up period of six months from the listing date and the Subscription Shares would not be counted as part of the public float at the time of listing;

*Deferred payment until ‘in-principal’ approval was given by the Listing Committee*

- b. payment for the Subscription Shares by the Pre-IPO Investor would be deferred until the listing hearing by the Listing Committee. The Pre-IPO Investor would finance the subscription of the Subscription Shares by bank loans which would be conditional on the ‘in-principle’ listing approval being given by the Listing Committee and;

*Exit option if listing did not proceed*

- c. the Controlling Shareholder agreed to repurchase all the Subscription Shares from the Pre-IPO Investor at the original subscription price if final listing approval for Company A’s shares was not granted.

## **THE ISSUE RAISED FOR CONSIDERATION**

4. Whether a placing of Company A’s shares to the Pre-IPO Investor shortly prior to listing that met the technical requirements regarding disclosure, lock-up and public-float as memorialised in Listing Decision HKEx-LD36-1 complied with Listing Rule 2.03, where
  - a. the Pre-IPO Investor would receive a potential discount to the IPO offer price of the shares upon listing;

- b. the Pre-IPO Investor would defer payment of its investment in Company A until in-principle approval for listing was granted by the Listing Committee; and
- c. the Pre-IPO Investor would be entitled to sell the shares back to the controlling shareholder at the original cost if final listing approval was not granted by the Listing Committee?

#### **APPLICABLE LISTING RULES OR PRINCIPLE**

- 5. Listing Rules 2.03(2) and (4) require that:
  - (2) the issue and marketing of securities is conducted in a fair and orderly manner and that potential investors are given sufficient information to enable them to make a properly informed assessment of an issuer...and
  - (4) all holders of listed securities are treated fairly and evenly...
- 6. Listing Decision Series 36-1 (October, 2003) ('HKEx-LD36-1') states the following regarding pre-IPO placing:

The Exchange was of the view that, as a general principle on the Main Board, placings of shares shortly before a listing application should be permitted subject to full disclosure in the prospectus. However, the placee may be subject to a lock-up of his shares. The question of whether the placee should be subject to a lock-up is determined on a case-by-case basis having regard to all the circumstances of the case.

- 7. The Exchange reviewed the rationale of its earlier decision made in HKEx-LD36-1 when considering the case in HKEx-LD55-1 (published in June 2006) and observed that:

#### ***HKEx-LD36-1***

- 8. However, the Exchange considered that the scenario contemplated in HKEx-LD36-1 was a 'simple' scenario where a pre-IPO placing was conclusively completed before listing with price and commitments affixed on the relevant parties.

## **THE ANALYSIS**

8. In coming to its decision in the present case, the Exchange took into consideration the facts and circumstances of the case and the rationale for the decisions in previous cases including HKEx-LD36-1 and HKEx-LD55-1.
9. The Exchange noted the following unusual features in the Pre-IPO Placing were sufficient to distinguish the Pre-IPO Placing from a conventional pre-IPO placing scenario contemplated in HKEx-LD36-1:
  - a. it would be inappropriate for a pre-IPO investment, including the timing of payment and financing arrangements, to be conditional on milestones of the listing approval process. Any reference to the listing approval process as conditions for pre-IPO investment may attract actual or potential concern on the possibility of bribery and corruption in the listing process and create undesirable pressure on the Listing Division and the Listing Committee; and
  - b. the combined effect of the deferred payment feature and the ‘repurchase’ provision if listing did not proceed would effectively mean that the Pre-IPO Investor would take no equity investment risk. This was different from a conventional pre-IPO investment where the pre-IPO investor would be exposed to equity investment risks before the IPO.
10. Given these concerns of the Exchange, the Exchange requested the sponsor to address the unusual features in the Pre-IPO Placing.

## **THE DECISION**

11. The Exchange determined that that the terms of the placing were contrary to the principles of Listing Rule 2.03 because they were conditional on milestones of the listing approval process and resulted in the Pre-IPO Investor taking investment risks no different than those of IPO Investors. The proposal (regarding the deferred payment provision and the repurchase provision) was subsequently withdrawn and the listing was permitted to proceed.