

HKEx LISTING DECISION

Cite as HKEx-LD59-7 (August 2007) (Withdrawn in October 2012; Superseded by GL43-12)

Summary	
Name of Parties	Company A - a GEM Board listing applicant Company B - an investor and a member of a listed international banking group which was independent of Company A
Subject	Whether Company B would be regarded as a member of the public at the time of listing and whether shares held by it should be subject to lock-up in a case where Company B was entitled to hold approximately over 10% shareholding interest in Company A upon the conversion of the convertible bonds subscribed by it prior to listing
Listing Rule	GEM Listing Rules 1.01, 11.23, 13.16 and 13.17 Listing Decision HKEx-LD36-2
Decision	The Exchange determined that: (i) Company B, on exercise of its conversion rights attached to the convertible bonds entitling it to hold more than 10% shareholding interest in Company A, would not be regarded as a member of the “public”; (ii) shares held by Company B would be subject to lock-up at the time of listing and for the duration of the applicable lock-up period as stipulated under the GEM Listing Rules; and (iii) Company A’s prospectus should include relevant information relating to the details of the arrangement, contribution by Company B, benefits which the issue of the Convertible Bonds to Company B was expected to bring to Company A and the justification of the placing price.

SUMMARY OF FACTS

1. This matter arose for decision by the GEM Listing Committee in considering a new GEM listing application. Company A had entered into a memorandum of understanding with Company B prior to listing, under which Company B would subscribe for certain amount of redeemable convertible bonds of Company A (the “Convertible Bonds”). The Convertible Bonds would be converted into shares of Company A upon the Share Offer becoming unconditional.

2. Upon conversion of the Convertible Bonds in full, Company B would have approximately over 10% shareholding interest in Company A. According to the estimated total issued share capital of Company A at the time of listing, such shareholding interest would translate into shares of Company A at a price being the same as the lowest point of the offer price range or at around 20% discount to the highest point of the offer price range.
3. Based on the representation of the sponsor, the Exchange noted the following relevant material facts:
 - a. Company B was a member of a listed international banking group and was independent of Company A, directors of Company A and their respective associates. Company B confirmed that its proposed investment in Company A by way of the Convertible Bonds was not for the benefit of any initial management shareholder or significant shareholder of Company A. Although Company B had appointed a representative to the board of directors of Company A, such director would resign automatically upon the listing. Company B would not actively participate in the management of Company A's business.
 - b. Upon full conversion of the Convertible Bonds, Company B would fall under the definition of a substantial shareholder and thus would be a connected person as set out under the GEM Listing Rules. Company B would not be considered as part of the public.
 - c. The directors of Company A confirmed that the subscription price was arrived at after arm's length negotiation between Company B and Company A.
 - d. The relevant information relating to the details of the arrangement, including the lock up arrangement, and the statement giving reasons for the issue of the Convertible Bonds to Company B, contribution of Company A, the benefits which the issue of the Convertible Bonds was expected to bring to Company A, together with the justification of the conversion price had been disclosed in the "Summary" section of the prospectus.
 - e. Company B had agreed to have its interest locked-up for a period commencing from the date of the prospectus up to the date falling six months after the listing date.

THE ISSUE RAISED FOR CONSIDERATION

4. Whether Company B would be regarded as a member of the public at the time of listing and whether shares held by it should be subject to lock-up in a case where Company B was entitled to hold approximately over 10% shareholding interest in Company A upon the conversion of the convertible bonds subscribed by it prior to listing.

APPLICABLE LISTING RULE OR PRINCIPLE

5. GEM Listing Rule 1.01 defines ‘substantial shareholder’ in relation to a company as:

a person who is entitled to exercise, or control the exercise of, 10% or more of the voting power at any general meeting of the company.
6. GEM Listing Rule 1.01 defines ‘significant shareholder’ as:

any person other than a management shareholder who, immediately prior to the date of the new applicant’s initial listing document and immediately prior to the date on which securities of the new applicant commence trading on GEM, is (or group of persons who together are) entitled to exercise or control the exercise of 5% or more of the voting power at general meetings of the new applicant.
7. The definition of ‘connected person’ under GEM Listing Rule 1.01 includes a management shareholder and a substantial shareholder.
8. GEM Listing Rules, Note number 2 of Rule 11.23(5) provides that:

the Exchange will not regard:

 - (a) at any time, any connected person of the issuer;
 - (b) at the time of listing and for the duration of the periods referred to in rule 13.16, any initial management shareholder (as defined in rule 13.15);
 - (c) at the time of listing and for the duration of the 6-month period referred to in rule 13.17, any significant shareholder; or

as a member of “the public”
9. GEM Listing Rules 13.16(1)(a) and 13.16(2) require a listing applicant to procure that every initial management shareholder who is a shareholder immediately prior to the listing date to place in escrow all his relevant securities, and undertake not to dispose of (or enter into any agreement to dispose of) his interest in the relevant securities, for a period ending on the 12 months from the listing date.
10. GEM Listing Rule 13.16(1)(b), however, provides for a shorter period of 6 months from the listing date in the case of an initial management shareholder having no more than 1% of the issued share capital of the listing applicant as at the listing date.

11. GEM Listing Rules 13.17(1) and 13.17(2) require a listing applicant to procure that every significant shareholder to place in escrow all his relevant securities, and undertake not to dispose of (or enter into any agreement to dispose of) his interest in the relevant securities, for a period ending on the 6 months from the listing date.
12. The Listing Decision HKEx-LD36-2 (the “HKEx-LD36-2”) stipulates that:

as a general principle on GEM, 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....
13. It is also stated in HKEx-LD36-2 that:
 - the greater the amount of any discount to the IPO price and/or the greater the proximity in time of the placing to the date of the listing application, the greater would be the doubt as to the genuine nature of the transaction such that a lock-up of the shares would be warranted;
 - in all cases, the prospectus should include a prominent statement giving the reasons for the placing, including any contribution which the placee has made to the company, any benefits which the placing is expected to bring to the company and a justification of the placing price.

ANALYSIS

14. In the present case, the Exchange noted that upon conversion of the Convertible Bonds, Company B would fall under the definition of substantial shareholder and thus would be a connected person under the GEM Listing Rules. Separately, given that more than 10% shareholding interest in Company A would be held by Company B upon conversion of the Convertible Bonds, Company B would be regarded as a significant shareholder. On that basis, the Exchange determined that Company B would not be considered as part of the public and would be subject to the applicable lock-up period as stipulated under the GEM Listing Rules.
15. Given that Company B had described itself as a “financial” investor in the prospectus and that the relevant information relating to the details of the arrangement, including the lock up arrangement, and the statement giving reasons for the issue of the Convertible Bonds to Company B, contribution of Company B, the benefits which the issue of the Convertible Bonds to

Company B was expected to bring to Company A, together with the justification of the placing price had been disclosed in the “Summary” section of the prospectus, the Exchange considered its decision to be consistent with the principles as set out in HKEx-LD36-2.

DECISION

16. Based on the above analysis and having regard to the material facts, the Exchange determined that:
 - (i) Company B, on exercise of its conversion rights attached to the Convertible Bonds entitling it to hold more than 10% shareholding interest in Company A, would not be regarded as a member of the “public”;
 - (ii) shares held by Company B would be subject to lock-up at the time of listing and for the duration of the applicable lock-up period as stipulated under the GEM Listing Rules; and
 - (iii) Company A’s prospectus should include relevant information relating to the details of the arrangement, contribution by Company B, benefits which the issue of the Convertible Bonds to Company B was expected to bring to Company A and the justification of the conversion price.