

HKEx LISTING DECISION

Cite as HKEx-LD71-1 (September 2009)

Withdrawn, superseded by Germany Country Guide in December 2013

| Summary | |
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| Name of Party | Company X - a company incorporated in Germany proposing to list on the Main Board |
| Subject | <p>Whether the Exchange would consider Germany an acceptable jurisdiction under Chapter 19 of the Listing Rules?</p> <p>How should the Exchange conduct the vetting process for future applicants incorporated in Germany?</p> |
| 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 Exchange on 7 March 2007 (the 'JPS'); HKEx-LD65-1; HKEx-LD65-2 and HKEx-LD65-3. |
| Decision | <p>The Exchange determined that, subject to Company X making certain revisions to its constitutional documents, Germany is an acceptable jurisdiction of an issuer's place of incorporation under Chapter 19 of the Listing Rules.</p> <p>Future applicants incorporated in Germany will not need to complete a detailed line-by-line comparison of the shareholder protection matters set out in the JPS. Instead, the applicant may, before filing its application, confirm that it has made similar arrangements as Company X in the present case to address the differences in shareholder protection matters. In doing so, the applicant has to consider its own constitutional documents to determine what other amendments are necessary or what other means are available to address the differences in shareholder protection.</p> <p>The Exchange does not require the issuer to review German laws and report on compliance with the JPS on a regular basis. If there are any subsequent major changes in German laws which significantly lower shareholder protection standards, the Exchange would expect the German issuer to inform the market of such changes under Rule 13.09.</p> |

SUMMARY OF FACTS

1. Company X started in the 1980's as a German limited partnership and became a joint stock company (AG) in 2008. The majority of Company X's group revenue derived from its business operations in Germany. Its headquarters, principal plant and main offices were based in Germany. Company X was considering a primary listing on the Main Board of the Exchange and made an inquiry with the Exchange before filing a listing application, seeking guidance for Germany to be accepted as a recognised jurisdiction under Chapter 19 of the Listing Rules.
2. An AG has a three-tier structure comprising (i) the management board and authorised representatives, (ii) the supervisory board and (iii) the general meeting of shareholders. The supervisory board's main roles are to supervise and monitor the management board and to safeguard shareholders' interests.

THE ISSUES RAISED FOR CONSIDERATION

3. Whether the Exchange would consider Germany an acceptable jurisdiction under Chapter 19 of the Listing Rules?
4. How should the Exchange conduct the vetting process for future applicants incorporated in Germany?

APPLICABLE LISTING RULES OR PRINCIPLES

5. Chapter 19 provides a general framework for all overseas companies seeking a listing on the Exchange. In particular, under Rule 19.05(1)(b), when approving the primary listing on the Exchange of securities of an overseas issuer, the Exchange reserves the right to be satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to those provided in Hong Kong.
6. Where the Exchange believes that the jurisdiction in which the overseas issuer is incorporated does not provide standards of shareholder protection at least equivalent to those provided in Hong Kong, the Exchange may approve the listing of securities of the overseas issuer subject to such overseas issuer making such variations to its constitutional documents as the Exchange may require (see note to Rule 19.05(1)).
7. The JPS has formalised this process by setting out a list of shareholder protection matters that overseas companies should address.

8. References are made to Listing Decisions HKEx-LD65-1, HKEx-LD65-2 and HKEx-LD65-3 which memorialise the Exchange's decisions to accept Singapore, Luxembourg and Cyprus as recognised jurisdictions under Chapter 19 of the Listing Rules respectively. HKEx-LD65-1 was the first case that applied the JPS principles.

THE ANALYSIS

Shareholder protection in Germany

9. Company X submitted a comparison table of shareholder protection matters (**'Comparison Table'**) under the Hong Kong Companies Ordinance (the **'HKCO'**) and German laws and regulations, mainly the German Stock Corporation Act (the **'AktG'**), German Commercial Code and German Corporate Governance Code on shareholder protection matters based on the JPS framework.
10. Company X submitted that, for the shareholder protection matters set out in the JPS, where Hong Kong laws appear to provide a higher level of shareholder protection than those under the corresponding German provisions, Company X would amend its articles of association (**'AOA'**) to address those differences, except in three areas set out below where Company X could not amend its AOA by laws.

Legal Restriction 1: Item 1(b) of the JPS – Court petition for cancellation of class rights variation

11. Under the HKCO, where a resolution to vary class rights is proposed, members holding not less than 10% of the nominal value of the issued shares of that class may petition the court to cancel the variation if the court is satisfied that it would unfairly prejudice the shareholders.
12. Company X submitted that:
 - a. there is no equivalent requirement under the AktG; and
 - b. instead, the AktG provides that any shareholder may bring a validity action or a contesting action to apply for a class rights variation resolution to be declared invalid due to violation of German laws or a company's articles. The grounds for filing a validity action or a contesting action include (i) passing a resolution in general meeting not convened under the AktG; (ii) misuse of majority voting power towards minority shareholders; (iii) pursuance of special advantages of a shareholder or a third party to the detriment of the company or other shareholders.

13. Based on the submitted facts, the Exchange considered that the right of Company X's shareholders to apply to court to cancel any proposed class rights variation would be secured.

Legal Restriction 2: Items 1(e), 3(a), 3(d) & 3(e) of the JPS – Matters to be approved by shareholders

14. Certain corporate matters which are reserved for shareholder approval under Hong Kong laws are delegated to an AG's supervisory board under German laws. These matters include (i) auditors' remuneration (item 1(e)); (ii) directors' appointment (item 3(a)); (iii) making of loans (including quasi loans or credit transactions) by a company to its directors (item 3(d)); and (iv) payment of compensation to directors or past directors (item 3(e)).
15. Company X submitted that:
 - a. under German laws, matters that are within the delegated functions of the supervisory board cannot be made conditional on approval by the shareholders' meeting. Accordingly, this would contravene German laws to delegate the approval powers on the matters mentioned in paragraph 14 above to Company X's shareholders. Therefore, Company X proposed to apply for a waiver from strict compliance with the shareholders' approval requirements under Chapter 14A of the Listing Rules for matters provided under the AktG which are exclusively reserved for the supervisory board; and
 - b. it did not regard the above differences as deficiencies in shareholder protection standards as compared with Hong Kong laws based on the following:
 - (i) the supervisory board members are appointed by shareholders in a general meeting as their representatives and are entrusted to act in the shareholders' best interests;
 - (ii) there are protection mechanisms under German laws to ensure that the supervisory board will not act against the shareholders' interest. Supervisory board members are required to be independent persons, whose interests must not conflict with those of the company or its management board;
 - (iii) a supervisory board member is required to disclose the nature of conflict before or during the meeting and depending on the degree of conflict, the interested supervisory board member may be required to abstain from voting or even be excluded from discussion in the meeting;

- (iv) supervisory board members may be removed, without the need to give reasons for their removal, before the end of their term by a shareholders' resolution passed with a special majority of 75% of the vote cast, or such lower threshold provided in a company's articles which should be more than 50% of the vote cast; and
 - (v) Supervisory boards are well-recognised among European countries (e.g. Austria and France).
16. Based on the submitted facts, the Exchange did not regard the differences as deficiencies in shareholder protection standards.

Legal Restriction 3: Item 4(b) of the JPS – Court approval for share capital reduction

17. Under the HKCO, any share capital reduction must be confirmed by the court.
18. Company X submitted that:
- a. there is no equivalent requirement under the AktG. However, the AktG requires an AG to register the capital reduction and the consequential amendment to the articles with the commercial register at the local court of the AG's registered office for the capital reduction to be valid. The responsible judge at the commercial register will verify and determine whether the registration is valid;
 - b. AG's shareholders are protected in a capital reduction under the special resolution requirement and the principle of equal treatment requiring that all shareholders must be affected proportionally and equally by the capital reduction. Furthermore, shareholders can bring a validity action or a contesting action to court to invalidate the capital reduction resolution as mentioned in paragraph 12b above; and
 - c. there is also no court process for capital reduction under the laws of the PRC, Bermuda and Luxemburg, which are recognised jurisdictions under Chapter 19 of the Rules.
19. Based on the submitted facts, the Exchange considered that there would be sufficient shareholder protection afforded to Company X's shareholders in a capital reduction case.

Acceptance of Germany under Chapter 19 of the Listing Rules

20. The Exchange considered Germany an acceptable jurisdiction of an issuer's place of incorporation on the basis that:-

- a. the shareholder protection standards set out in the Comparison Table together with the proposed amendments to its AOA should provide a shareholder protection level at least equivalent to that in Hong Kong. Company X should disclose in its prospectus the major jurisdictional or regulatory differences between the German and the Hong Kong requirements, especially on any aspects set out in the JPS; and
- b. Germany is a full signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information, and therefore a reasonable regulatory cooperation between the regulators in Germany and Hong Kong is ensured.

THE DECISION

21. The Exchange determined that, subject to Company X making certain revisions to its constitutional documents, Germany is an acceptable jurisdiction of an issuer's place of incorporation under Chapter 19 of the Listing Rules.
22. Company X would be required to submit the following to the Exchange:
 - a. a confirmation from the sponsor that it has considered and reviewed all material shareholder protection areas with its due diligence review under Practice Notice 21 to the Listing Rules and that it is independently satisfied with the conclusion that the shareholder protection offered in Germany is at least equivalent to that in Hong Kong; and
 - b. a legal opinion and the sponsor's confirmation that Company X's constitutional documents do not contain provisions which will prevent it from complying with the Listing Rules and there is nothing in Company X's constitutional documents that will prevent it from complying with the Securities and Futures Ordinance – Disclosure of Interest, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases, to the extent they apply.

Streamlined process for future applicants

23. Future applicants incorporated in Germany will not need to complete a detailed line-by-line comparison of the shareholder protection matters set out in the JPS. Instead, the Exchange will accept an application for vetting if the applicant, before filing its application, confirms that it has made similar arrangements as Company X in the present case to address the differences in shareholder protection matters. In doing so, the applicant has to consider its own constitutional documents to determine what other amendments are necessary or what other means are available to address the differences in shareholder protection.

24. Upon acceptance of Germany as an issuer's place of incorporation, the Exchange does not require the issuer to review German laws and report on compliance with the JPS on a regular basis. If there are any subsequent major changes in German laws which significantly lower shareholder protection standards, the Exchange would expect the German issuer to inform the market of such changes under Rule 13.09.