

HKEx LISTING DECISION

Cite as HKEx-LD59-4 (August 2007) (Withdrawn in October 2012; Superseded by GL43-12)

Summary	
Name of Party	Company A and its subsidiaries (the “Group”) - a Main Board listing applicant Investors - pre-IPO investors of the Company A
Subject	Whether the grant of veto rights over certain major corporate matters to the Investors of the Convertible Instruments prior to listing would violate the requirement to treat all holders of listed securities fairly and equally under Listing Rule 2.03(4) given the Investors had reserved veto rights over the following major corporate matters upon listing on the Exchange: (i) the making of any petition or passing of any resolution for winding-up, or the making of an application for an administrative order in respect of any member of the Group; (ii) any amendment to the memorandum or articles of association (or equivalent constitutional documents) of any member of the Group or alteration of the name of any member of the Group; (iii) the carrying on of any business other than the business being carried on by the Group, or carrying on any business outside the PRC (Mainland China) by any member of the Group; and (iv) the amalgamation or merger by any member of the Group with any other company or legal entity.
Listing Rule	Listing Rule 2.03(4)
Decision	The Exchange considered that the veto rights granted to Investors of certain Convertible Instruments over major corporate matters prior to listing of Company A conferred additional rights to the Investors which were not otherwise available to minority shareholders and hence, would violate the general principle that all holders of listed securities are to be treated fairly and equally under Listing Rule 2.03(4). It was made a condition of listing that such veto rights should not survive after listing of Company A.

SUMMARY OF FACTS

1. This matter arose for decision by the Listing Committee in considering a new listing application. Prior to listing, Company A had sought financings whereby Company A had issued and several Investors had subscribed for certain convertible instruments (the “Convertible Instruments”). The Investors held the right at any time after the period of six months commencing on the listing date and up to 4 years after the listing date to convert their Convertible Instruments into the shares of Company A. It was originally planned to have the Convertible Instruments partially converted before the Global Offering and that such conversion shares would be offered as sale shares in the Global Offering. The plan and the terms were revised subsequently to the effect that all Convertible Instruments would be fully converted upon listing of Company A on the Exchange.
2. The principal terms of the Convertible Instruments included, among other things, the Investors having veto rights over the following major corporate matters upon listing of Company A on the Exchange:
 - (i) the making of any petition or passing of any resolution for winding-up, or the making of an application for an administrative order in respect of any member of the Group;
 - (ii) any amendment to the memorandum or articles of association (or equivalent constitutional documents) of any member of the Group or alteration of the name of any member of the Group;
 - (iii) the carrying on of any business other than the business being carried on by the Group, or carrying on any business outside the PRC by any member of the Group; and
 - (iv) the amalgamation or merger by any member of the Group with any other company or legal entity.
3. The sponsor of Company A submitted the following:
 - a. the purpose of veto rights was to afford a certain level of comfort to the Investors, who were merely minority shareholders and were not expected to influence management of the Group. The actual business would continue to be run by the majority owner controlled management;
 - b. the veto rights were typical of private equity investments and were consistent with standard market protection rights given to a significant minority investor; and
 - c. the major corporate matters to which the veto rights concerned related to macro matters such as sale of major assets, mergers and takeovers. They had no implication over the day-to-day management control of the Group’s business.

THE ISSUE RAISED FOR CONSIDERATION

4. Whether the grant of veto rights over certain major corporate matters to the Investors of the Convertible Instruments prior to listing would violate the requirement to treat all holders of listed securities fairly and equally under Listing Rule 2.03(4).

APPLICABLE LISTING RULE OR PRINCIPLE

5. Listing Rule 2.03(4) requires that:

all holders of listed securities are treated fairly and equally.

ANALYSIS

6. Listing Rule 2.03 sets out the general principles of the current standards acceptable to the Exchange which are designed to ensure that investors have and can maintain confidence in the market. Among these general principles is the even treatment of all shareholders. Listing Rule 2.03(4) is in place to ensure that all holders of listed securities are treated fairly and equally.
7. Notwithstanding the sponsor's submission that the veto rights were standard provisions designed to protect minority shareholders interests in the case of significant private equity investments, the Exchange remained unconvinced given that the veto rights conferred to the Investors were not otherwise available to minority shareholders of Company A. These veto rights were additional rights available to the Investors over and above the rights of other shareholders of Company A.
8. The Exchange noted that the veto rights may be typical of private equity investments. However, Company A would no longer be a private equity investment after listing. Given that the Convertible Instruments were to be fully converted upon listing of Company A on the Exchange, the Investors will become shareholders at the time of the IPO. As a listed issuer, Company A was expected to be responsible to all shareholders, including minority shareholders, alike. Accordingly, it was seen as appropriate to make it a condition of listing that such veto rights not survive after listing having regard to the general principle under Listing Rule 2.03(4) that all shareholders should be treated fairly and equally.

DECISION

9. Based on the above analysis and having regard to the facts, the Exchange considered that the veto rights granted to the Investors of the Convertible Instruments over certain major corporate matters prior to listing of Company A conferred additional rights to the Investors which were not otherwise available to minority shareholders and hence, would violate the general principle of even treatment of shareholders under Listing Rule 2.03(4). It was

made a condition of listing that such veto rights should not survive after listing of Company A.