

HKEX LISTING DECISION
HKEX-LD129-2020 (Published in September 2020)

Parties	Company A – a Main Board issuer
Issue	Whether Company A's proposal to grant options to a discretionary trust under a share option scheme would meet the requirements under Chapter 17 of the Main Board Rules
Listing Rules	Main Board Rules 17.01 and 17.03
Decision	The proposed discretionary trust arrangements did not meet the requirements under Chapter 17

FACTS

1. Company A proposed to adopt a new share option scheme. The participants of the scheme would include i) the employees of Company A; and ii) a discretionary trust (the **Trust**) whose beneficiaries were employees of Company A. The Trust would be administered by an independent professional trustee.
2. Under the proposal,
 - Company A would grant a certain number of share options to the Trust, which would be reserved for future allocations to beneficiaries to be identified by its board of directors from time to time.
 - Company A would also grant share options to the Trust that are earmarked to specific beneficiaries identified by its board of directors at the time of grant. It would inform those beneficiaries of the number of options allocated to them and the applicable vesting conditions. If any options granted to the Trust were not eventually vested for the benefit of any such beneficiaries, the trustee would continue to hold the unvested options for future allocations to other beneficiaries.
3. Company A was of the view that the proposed discretionary trust arrangements were permitted under Rule 17.01 which expressly provides that *“participant” includes any discretionary object of a participant which is a discretionary trust*. Further, it was an essential feature of a discretionary trust that its beneficiaries and their respective interests need not be fixed from the outset. Company A's directors should have the discretion to allocate options to specific beneficiaries after the grant of the options to the Trust.

APPLICABLE LISTING RULES

4. Rule 17.01 states that:

“(1) The following provisions apply, with appropriate modifications, to all schemes involving the grant by a listed issuer or any of its subsidiaries of options over new shares or other new securities of the listed issuer or any of its subsidiaries to, or for the benefit of, specified participants of such schemes (and, for the purpose of this chapter, “participant” includes any discretionary object of a participant which is a discretionary trust). Any arrangement involving the grant of options to participants over new shares or other new securities of a listed issuer or any of its subsidiaries which, in the opinion of the Exchange, is analogous to a share option scheme as described in this rule 17.01 must comply with the requirements of this chapter.

...”

5. Rule 17.03 states that

“The scheme document must include the following provisions and/or provisions as to the following (as the case may be):

...

(2) the participants of the scheme and the basis of determining the eligibility of participants;

...

(9) the basis of determination of the exercise price;

Notes: (1) ... the exercise price must be at least the higher of: (i) the closing price of the securities as stated in the Exchange’s daily quotations sheet on the date of grant, which must be a business day; and (ii) the average closing price of the securities as stated in the Exchange’s daily quotations sheets for the five business days immediately preceding the date of grant. ...

...

(17) transferability of options; and

Note: Options granted under the scheme must be personal to the respective grantee. No options may be transferred or assigned.

...”

ANALYSIS

6. Under Rule 17.01, all schemes involving the grant of options over new shares of a listed issuer to, or for the benefit of, specified participants must comply with the requirements of Chapter 17. This means that, among others, the exercise price of the options cannot be set at a discount to the market price at the time of grant, and the options cannot be transferred to other persons.
7. Rule 17.01(1) provides that “participant” includes “any discretionary object of a participant which is a discretionary trust”, this clarifies that the requirements of Chapter 17 apply to schemes involving grant of share options to a discretion trust for the benefit of specified participants (e.g. directors or employees). In other words, any grant of options to the trust must comply with the requirements of Chapter 17 as if it were a grant to the beneficiaries directly.
8. In this case, share options granted to the Trust could be further allocated to beneficiaries to be identified by the board of directors from time to time. The proposal did not meet the requirements of Chapter 17 as the participants (for the benefit of whom the options were granted) were not specified at the time of grant. The Trust arrangement could be used to circumvent Rule 17.03(9) as the exercise price fixed at the time of grant to the Trust could be lower than the market price of the shares when the options were eventually allocated to the specific beneficiaries. It would also contravene Rule 17.03(17) which prohibits any transfer of options to other persons.

CONCLUSION

9. The proposed discretionary trust arrangements for the new share option scheme did not meet the requirements under Chapter 17.