



Datapulse Technology saga presents a challenge to SGX rules

Lapses in disclosure and due diligence continue to undermine minority shareholders' interests. **BY MAK YUEN TEEN**

THE ongoing Datapulse Technology saga raises questions about the effectiveness of the Singapore Exchange (SGX) rules in protecting minority shareholders' interests.

To recap, it all started with questionable disclosures relating to the company's existing manufacturing activities, the sale of its existing property and the purchase of a new property. In the midst of these developments, a new controlling shareholder appeared, having bought a 29 per cent stake from the previous controlling shareholder/CEO and other shareholders at a significant premium through several married deals.

The three independent directors on the board at that time suddenly resigned, citing a change in controlling shareholder. The following day, a new board was hastily constituted through the appointment of three new independent directors and a new CEO/executive director. This was done by the three remaining executive directors, all of whom then proceeded to resign.

The day after the new board was formed, it entered into an agreement to buy a Malaysian company, Wayco Manufacturing, which is in a new business of haircare products. This was done without any due diligence and using an "independent valuation" of properties provided by the vendor, which also happened to be essentially Wayco's sole customer. The sale was completed just four days later.

CLOSE RELATIONSHIPS

Publicly available information shows close relationships involving the new controlling shareholder, Ng Siew Hong; the new CEO, Kee Swee Ann; and the vendor, Ang Kong Meng.

Mr Kee used to be the general manager of Wayco and therefore worked for Mr Ang. He is also director and/or shareholder of two private companies – Captaino Pte Ltd and Great Rich Pte Ltd – audited by Ang & Co, which was founded by Mr Ang. Mr Ang is a controlling shareholder and non-executive chairman of a Cayman Islands-incorporated company called HKE Holdings which is proposing to list in Hong Kong, and Mr Kee has been named an independent director. Ms Ng and Mr Ang are joint shareholders of a private company called Anone Investment Pte Ltd, where Ms Ng is also a director.

Ms Ng and her siblings used to be substantial shareholders and/or key management at an SGX-listed company called HLN Technologies, which was later renamed

Sinjia Land. Some time between 2014 and 2015, the Ngs disappeared from the list of top 20 shareholders at Sinjia Land and Mr Ang became a substantial shareholder. I should clarify that it has not been confirmed if the Ngs were the ones who sold their shares to Mr Ang.

SMALL ACQUISITION, BIG RISK

Let's now look at the applicability of the SGX rules to the Wayco acquisition.

Rule 1006 in chapter 10 determines whether an acquisition needs to comply with the disclosure or shareholder approval requirements in that chapter. The rule provides for five possible methods of computing the size of relative figures, including the following which are relevant for the acquisition of Wayco: the net profits attributable to the assets acquired or disposed of, compared with the group's net profits; and the aggregate value of the consideration given or received, compared with the issuer's market capitalisation.

Based on net profits, the relative figure is about 3.5 per cent, while based on the consideration paid, it is about 4.8 per cent. Since they are below 5 per cent, the requirements in chapter 10 would not apply.

The acquisition amount may only be a fraction of the total amount that Datapulse will end up spending on Wayco. For example, there may be further operating and capital expenditures after the acquisition. Therefore, Datapulse shareholders should not assume that their total exposure is the acquisition cost of S\$3.5 million.

The Datapulse board makes a big deal about the "buy-back agreement" it has put in place. Under this agreement, the vendor will buy back 100 per cent of Wayco at the same price paid by Datapulse if there are any "material adverse findings" in relation to Wayco within one year after the completion of the acquisition. It remains unclear as to what "material adverse findings" will trigger the buyback. Further, the buyback could be detrimental to Datapulse shareholders. Let's assume that Datapulse spends a further S\$5 million in Wayco during the next 12 months and then discovers "material adverse findings". How is selling it back at S\$3.5 million protecting Datapulse shareholders if Datapulse has now spent another S\$5 million?

IPT RULES

Despite the relationships involving Mr Ang, Mr Kee and Ms Ng, the Wayco acquisition is not technically an interested

person transaction (IPT) under chapter 9 of the SGX Rulebook. Under rule 904(4), an interested person in the case of a company means a director, chief executive officer or controlling shareholder of the issuer, or their associates. Associates refer to immediate family members; trustees of a trust for the benefit of a director, CEO or controlling shareholder or his immediate family members; and any company in which these individuals together have an interest of 30 per cent, or more.

If the Wayco acquisition had been considered an IPT under SGX rules by virtue of the relationships involving Mr Ang, Mr Kee and Ms Ng, it would have required the approval of independent shareholders under rule 906 and Ms Ng would not have been able to vote (Mr Kee is not a Datapulse shareholder).

This is because the consideration for Wayco constitutes almost 7 per cent of the net tangible assets of Datapulse – above the 5 per cent threshold which requires independent shareholders' approval. In that case, I believe that the acquisition would have been rejected by the independent shareholders.

Unlike the SGX rules, under the listing rules of the Stock Exchange of Hong Kong, the Exchange has the power to deem any person to be a connected person. A deemed connected person specifically includes a person who has entered, or proposes to enter, into (a) a transaction with the listed issuer's group; and (b) an agreement, arrangement, understanding or undertaking (whether formal or informal and whether express or implied) with a connected person with respect to the transaction; and (c) who in the Exchange's opinion, should be considered as a connected person. In Hong Kong, it is likely that Mr Ang would have been deemed a connected person.

If the acquisition does not meet the requirements for the *de minimis* exemptions and shareholders' approval is required, Ms Ng, as a connected person with material interests, would likely not be able to vote. In my view, SGX should review its IPT rules, including the definition of interested person.

SPIRIT AND SUBSTANCE

Chapter 1 of the SGX Listing Rulebook sets out General Principles on compliance with the listing rules. These include Rule 103(4) which states "all holders of listed securities shall be treated fairly and equitably"; and Rule 103(5) which states that "directors of an issuer shall act in the interests of shareholders as a whole, particularly where a dir-

ector or substantial shareholder has a material interest in a transaction entered into by the issuer". Rule 105 (2) says that an issuer "must comply with the listing rules: (a) in accordance with the spirit, intention and purpose; and (b) by looking beyond form to substance".

Rule 104(1) states: "The Exchange reserves the right to subject a listed issuer's change in principal business to the Exchange's approval if in the Exchange's opinion... the integrity of the market may be adversely affected; or... it is in the interests of the public to do so."

SGX can demonstrate that the general principles are not mere platitudes by acting in cases where issuers have clearly not treated all shareholders fairly and equitably and directors have not acted in the interests of shareholders as a whole. Otherwise, issuers would ignore these general principles.

THE "UNSTRATEGIC" BOARD

The board recently announced that it is reviewing its strategic options, including whether to take over the existing distribution channels by buying Way, the previous parent company of Wayco, and Wayco Trading. The board has so far demonstrated little strategic thinking. Rather than looking at the new business holistically and strategically before investing, it rushed out to buy the captive manufacturing part of the business before deciding on what to do next. This is like rushing into Ikea, randomly grabbing a leg of a chair, and then going back later to see which chair it fits.

The recently announced strategic review by Ernst & Young Solutions commissioned by the board appears to be limited in scope and constrained by the hasty acquisition of Wayco. More importantly, the S\$3.5 million question remains unanswered: why did the board make such a hasty acquisition involving connected parties without any due diligence?

THE MINORITY CONTROLLING SHAREHOLDER

Some minority investors may think that the fact that Ms Ng was prepared to pay about 53 per cent above the then market price to buy her 29 per cent stake suggests that she has great plans for Datapulse which would see the share price increase, thereby benefiting all shareholders. This is not necessarily the case.

As I explained in a recent *Business Times* article, *The risks of having minority controlling shareholders in firms* (Dec 28, 2017), controlling shareholders can exploit their control at the expense of the company and other shareholders. For example, they could do so by influencing the board to engage in transactions with related entities that transfer resources from the company to these other entities, or appointing family members or close associates to key management positions and paying them excessive remuneration. This will reduce the company's profits and drive down the share price. In that article, I explained that shareholders who are able to control a firm with relatively small stakes can be particularly hazardous to other minority shareholders because their gains from such actions far outweigh their share of the losses.

It is interesting that Ms Ng has chosen not to appoint herself to the board. Since she is not named as a director, it may appear that she does not have the fiduciary duties of directors – and controlling shareholders in Singapore do not owe fiduciary duties to the company. Nevertheless, if she is found to be making decisions that are normally made by directors or the board is acting under her instructions or directions, she could be liable as a *de facto* or shadow director.

SHAREHOLDERS' REQUISITION

I fully support the attempt by the requisitioning shareholders to remove the entire board and to block any further diversification by the current board. Given what has transpired, there is little reason for shareholders to have any confidence in the ability of the current board to enhance shareholder value. Most key decisions of a company are made by the board so it is critical to have a board that is independent and competent that acts in the interests of the company and all shareholders.

What makes Datapulse's board worse is that its chairman, Low Beng Tin, not only failed to disclose regulatory actions by SGX and MAS against one of the companies where he was the lead independent director when he was appointed as Datapulse chairman, he also failed to disclose it when he was appointed as an independent director at Fuji Offset Manufacturing and Lian Beng Group. Yet, the board claimed that he is "well-versed with listing compliance and corporate governance matters". If he cannot even ensure that his own appointment template is not misleading, how can shareholders be confident that he will set the right tone and ensure compliance with the letter and spirit of the listing rules?

■ The writer is an associate professor of accounting at the NUS Business School where he specialises in corporate governance.