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Datapulse Technology playing YOYO with disclosure-based regime

The company's confusing and obfuscatory statements make Singapore's system seem as if it might as well be called You're On Your Own. This is bad for the Republic's market and reputation. **BY MAK YUEN TEEN**

The manner through which 29-per cent shareholder Ng Siew Hong was able to seize control of the board by appointing her four nominees, just one month after the company's annual general meeting without other shareholders having a say, leaves much to be desired.
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A more apt name for our disclosure-based regime may be YOYO or You're On Your Own.

On Jan 30, 2018, Datapulse Technology issued a "General Update Announcement" which disclosed some additional information and made certain claims. Like previous disclosures by the current and previous boards, it only served to confuse and further cloud the issues, yet again making a mockery of the disclosure-based regime.

The board said that it is not true that it had not done any due diligence on the acquisition of Wayco Manufacturing because the directors had been furnished with certain information two weeks prior to their appointment and had sufficient time to review and consider before deciding to undertake the transaction. The company also mentioned the "rationale" for the acquisition – the risk of the company becoming a "cash company" and being delisted from the Singapore Exchange (SGX).

This acquisition has been highly contentious since it was first announced on Dec 12. The fact that the company announced the acquisition one day after the current board was formed and completed the acquisition four days later had been repeatedly questioned in the media.

The company had on Dec 28 issued a response to queries from the SGX, including whether the company conducted proper due diligence prior to the acquisition. Why did the board not disclose this information all this time and when it responded to SGX's queries on Dec 28?

Due diligence?

Saying that it is not true that the board did not do any due diligence, but only that it did not do "extensive due diligence", provides scant comfort for shareholders. Due diligence for an acquisition is much more than just reviewing and considering information furnished by the vendor.

This is especially so when we are talking about an acquisition recommended by the controlling shareholder who has extensive business relationships with the sole shareholder of the vendor. Further, the due diligence was undertaken by a board comprising: a chairman who has failed to disclose regulatory actions against one of his companies when he was appointed to Datapulse and two other listed companies; two independent directors who had no prior experience as directors of listed companies and who are business acquaintances of the controlling shareholder; and a CEO/executive director who used to work for the vendor (and who has now resigned). There is also no indication that any of the independent directors has any prior experience in the business of the target company.

While it is technically correct that the controlling shareholder, ex-CEO/executive director and shareholder of the vendor are not "associates" under the SGX Rulebook and therefore the acquisition is not technically an interested person transaction (IPT), it is in substance no different from an IPT.

The reason it is not considered an IPT, which requires the approval of independent shareholders, is because of the narrow definition of "associates" in the SGX Rulebook. If it was caught by the rulebook, the company would also have had to comply with the circular requirements under Rule 921. These include having to seek independent financial advice on the transaction and an opinion from the audit committee if it takes a different view from the independent financial adviser.

Granted, an opinion from the audit committee would be meaningless in this case as it is made up of the three independent directors who were so closely involved in advocating for the acquisition that they were already onto it some two weeks before they were appointed.

The company has also now disclosed that some of Wayco's plant and machinery are almost fully depreciated. Doesn't this mean that additional investment would be required to replace these assets? In this case, wouldn't this further prove the point that the buyback agreement based on the original purchase price is disadvantageous to Datapulse, rather than act as a protection against buying a lemon?

Regarding the "rationale" now given about the risk of the company becoming a cash company, Datapulse can avoid a suspension from SGX if it takes certain steps after it has ceased its existing manufacturing activities. Subject to compliance with these steps, SGX may allow continued trading of the company's shares on a case-by-case basis. The company would have 12 months to find a new business to avoid a delisting and may apply for a six-month extension.

I am sure the intent of the SGX rules on cash companies is not for an issuer to just rush out to buy a company in a new business. In any case, a delisting with a reasonable cash exit offer may be better for shareholders than a series of reckless acquisitions. The board should not belatedly cite the risk of the company becoming a cash company as an excuse for making a hasty acquisition.

Revisiting past disclosures and actions

The new revelation about when the board started considering the acquisition also raises additional questions.

Two weeks before the new directors were appointed, there was an existing board comprising six directors. If Ng Siew Hong, the controlling shareholder, believes that the Wayco acquisition is good for the company, why did she not put the proposal to the then board, which was the proper body to consider the acquisition at that time? If she did not think that she could convince the then board about the acquisition, why should other shareholders be?

It would be of great concern if the appointment of the four directors, three of whom are supposed to be independent, was conditional on them supporting the Wayco acquisition.

Of course, since the previous directors resigned immediately at the appearance of a new controlling shareholder, citing a change of controlling shareholder, they may not be independent either. Had a truly independent board been in place, it may have questioned the merits of spending S$3.5 million to acquire a company that has been in existence for more than 30 years but is making just S$100,000 profits per year.

The company's Dec 14 response to my Dec 13 BT article (*Datapulse Tech: More questions about disclosures, corporate governance*) said: "In relation to the comment made by Ms Ng in her letter of 29 November 2017 to the then board of directors which was disclosed in the company's announcement of 8 December 2017, the Board is not in the position to speculate as to what may have been the information in the possession of, or assumptions made by Ms Ng…"

Since Ms Ng had already introduced the directors to the vendor some two weeks before they were appointed, it means that by the date of Ms Ng's letter on Nov 29, the current directors already knew something about her plans and the proposed Wayco acquisition. Why did the board not say so in its Dec 14 response, but merely say that it was not in a position to speculate about what Ms Ng knew or assumed in her letter?

Regulators should also note that material non-public information was available to certain individuals and there were significant share trades involving some individuals before the acquisition was announced.

Minority shareholders and regulators

Minority shareholders should be aware that there is an estimated S$90 million-plus cash balance in the company. It is critical to have an independent and competent board in place to ensure proper stewardship over the cash and other resources of the company.

They should therefore be pleased that an EGM is being requisitioned, which would now give all shareholders a chance to decide whether to keep the existing directors and to put the company's diversification plans on hold. I would urge all shareholders who care about the future of the company to vote their shares wisely.

The manner through which a 29-per cent shareholder was able to seize control of the board by appointing her four nominees, just one month after the company's annual general meeting without other shareholders having a say, leaves much to be desired. It is also unsatisfactory that a board without a mandate from shareholders as a whole has all the company's resources at its disposal to frustrate the actions of other minority shareholders, as can be seen from the defensive manoeuvres against the requisitioning shareholders.

In Datapulse's case, there has clearly been a change of control, and yet no mandatory general offer was triggered. We should look at whether our takeover rules, which are modelled after those in the United Kingdom, need to be better adapted to our circumstances.

It is interesting that in the UK, the listing rules use a threshold of 30 per cent of the voting rights (or control of majority of the board) to define a controlling shareholder, and 30 per cent of the voting rights is also the threshold for a mandatory general offer under the takeover code.

Here, the SGX rules define a controlling shareholder using a 15 per cent threshold while the threshold for a mandatory general offer under the takeover code is 30 per cent. Perhaps the two thresholds need to be better aligned and, in this regard, the average percentage of shares voted may be a relevant consideration. A recent study shows that about 73 per cent of all shares were voted in the UK in 2017, while in Singapore, an average of only 58 per cent of shares were voted in 2016. This suggests that, on average, control can be achieved with a lower stake in Singapore. The makeup of investors is also generally different in UK compared to Singapore.

Finally, there is general disappointment in the market about the lack of timeliness in the response of regulators throughout this and other recent episodes where there have been clear disclosure lapses and other possible breaches.

Companies sometimes make clearly misleading or contradictory disclosures with apparent impunity, confusing shareholders and potential investors in their decisions as to whether to buy, hold or sell their shares, or how to vote their shares.

While I have some confidence that regulators will eventually take action in some of these cases, by then, the horse would have bolted and the lambs would have been slaughtered. Episodes such as Datapulse unravel in real time and delayed regulatory responses would not address the problems. More timely intervention may be necessary where the interests of minority shareholders and market integrity are at stake.

If companies continue to ride roughshod over minority investors, we will see confidence in our market draining away rapidly. This will in turn adversely affect liquidity and valuations, and make SGX a truly unattractive place to list.

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