Datapulse Technology playing YOYO with disclosure-based regime

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

BY MAX YUEN TEE

Due diligence

Saying that it is not true that the board did not do any due diligence, but do “extensive due diligence”, provides scant comfort for shareholders. Due diligence was 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 significant transactions against one of his companies when he was appointed to Datapulse and two other independent directors who had no prior experience as directors of listed companies and who are not members of the controlling shareholder’s family.

A CEO/executive director who used to work for the vendor told us how this is much higher than normal. There is no indication that any of the independent directors had any prior experience in the business of the target company.

While it is technically correct that the controlling shareholder, as executive director and shareholder of the vendor are not “associates” under the SCA Rule 16.3, the situation is not technologically as an interested person transaction (IPT), it is also substantially 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 SCA Rule 16.3. This is a major flaw in the structure, because the company would have had to comply with the circular requirements under Rule 16.3. The company had to seek independent financial advice on the transaction and an opinion from the audit committee if it makes a different view from the independent financial advisor.

Consequently, an opinion from the audit committee would be meaningless in this case as it is made up of the three independent directors who were as clearly involved in advocating for the acquisition that they were already bona fide shareholders, before the acquisition.

The company has also now disclosed that some of the independent directors were fully informed and acknowledged. Doesn’t this mean that additional involvement would be required? If it’s the same independent directors, this would further prove the point that the board’s agreement based on the original purchase price is disadvantageous in Datapulse, rather than as a business opportunity by buying a company.

Regarding the “terms” now given about the risk of the company becoming a cash company. Datapulse can avoid a suspension from SFC if it takes certain steps after it has ceased its existing manufacturing activities. Subject to compliance with these steps, SFC may allow continued trading of the company’s shares on a case-by-case basis. The company has 12 months to find a new business to avoid delisting and may apply for a re-admission.

I am sure the intent of the SFC rules on cash companies is not for an issuer to push itself to become a company in a new business. In any case, a defining with a reasonable cash buffer may be fairer for shareholders than a series of preceding acquisitions. The board should not be involved in any new business of becoming a cash company as an excuse for making a hasty acquisition.

Revisiting past disclosures and actions

The board should reflect on the confusion 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 Hsing, the controlling shareholder, believes that the Woyuo acquisition is good for the company, who did not put the proposal in the first board, which was the proper body to consider the acquisition at that time? If she did not think that she could convince the first board about the acquisition, why should other shareholders be interested?

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 Woyuo acquisition.

Of course, since the previous directors resigned immediately after the appearance of the 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 terms of spending $5.3 million to acquire a company that has been in existence for more than 10 years but is making just $530,000 profit per year.

The company’s SFC response to its Dec 31 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 that was disclosed in the company’s announcement of 4 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 the date of Ms Ng’s letter on Nov 29, the current directors already knew something about her plan and the proposed Woyuo 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 about her plan?

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$50 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 SFC 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 25-cent shareholder was able to secure 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 was able to block a requisition 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 defenestrative 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 for 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 31.8 per cent rule defines a controlling shareholder using a 31.7 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 77 per cent of all shares were voted in the UK in 2017, while in Singapore, an average of only 38 per cent of shares were voted in 2016. This suggests that, overall, control can be achieved with a lower stake in Singapore. The making 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, causing shareholders and potential investors in their decision 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 unset in real time and delayed regulatory responses would not address the problems. More timely interventions 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 certainly be in a confidence in our market and reputation drainably rapidly. This will in turn adversely affect liquidity and valuations, and make SCA a truly unattractive place to list.