

Whether a listed issuer could seek a prior mandate from its shareholders for a proposed placing of new shares to finance an acquisition

Facts

1. A Main Board issuer (**Company X**) entered into a very substantial acquisition of a target engaged in natural resources exploitation. The consideration would be in cash, consideration shares and convertible securities.
2. It proposed to raise funds to finance the acquisition and the target's business by issuing new shares to independent placees (the **Placing**). It was discussing this with placing agents but had yet to enter into any agreement for the Placing.
3. To facilitate the fund raising exercise, Company X proposed to seek a specific mandate from its shareholders for the Placing at the same general meeting to consider the acquisition. The Placing would be made under the following framework:
 - a. There was a limit on the number of shares to be issued, which represented approximately 35% of Company X's then issued share capital.
 - b. The issue price would be determined on an arm's length basis with reference to the prevailing market conditions. In any event, it would be no less than the higher of:
 - a fixed amount; and
 - 80% of the higher of (i) the market price of the shares on the date of the relevant placing agreement; and (ii) the average market price of the shares for 5 trading days immediately before the Placing.
 - c. Over 90% of the net proceeds were to be assigned to (i) settle the cash consideration for the acquisition; and (ii) finance the target's capital expenditure and specific expenses. Any remaining proceeds would be used for the target's working capital.
 - d. Given the estimated time for Company X to negotiate and conclude the placing agreement and the timetable for the acquisition, the specific mandate was proposed to last three months.

Relevant Listing Rules

4. Rule 2.03 states that the Rules reflect currently acceptable standards in the market place and are designed to ensure that investors have and can maintain confidence in the market and in particular that:

...

- (2) the issue and marketing of securities is conducted in a fair and orderly manner and that potential investors are given sufficient information to enable them to make a properly informed assessment of an issuer ... ;
- (3) ...
- (4) all holders of listed securities are treated fairly and equally;
- (5) directors of a listed issuer act in the interests of its shareholders as a whole – particularly where the public represents only a minority of the shareholders; and
- (6) all new issues of equity securities by a listed issuer are first offered to the existing shareholders by way of rights unless they have agreed otherwise.

5. Rule 13.36 states that:

“(1) (a) Except in the circumstances mentioned in rule 13.36(2), the directors of the issuer ... shall obtain the consent of shareholders in general meeting prior to allotting, issuing or granting:-

- (i) shares;

...

Note: Importance is attached to the principle that a shareholder should be able to protect his proportion of the total equity by having the opportunity to subscribe for any new issue of equity securities. Accordingly, unless shareholders otherwise permit, all issues of equity securities by the issuer must be offered to the existing shareholders (and, where appropriate, to holders of other equity securities of the issuer entitled to be offered them) pro rata to their existing holdings, and only to the extent that the securities offered are not taken up by such persons may they be allotted or issued to other persons or otherwise than pro rata to their existing holdings. This principle may be waived by the shareholders themselves on a general basis, but only within the limits of rules 13.36(2) and (3).

- (b) ...

- (2) No such consent as is referred to in rule 13.36(1)(a) shall be required:

- (a) ...

- (b) If, ... the aggregate number of securities allotted or agreed to be allotted must not exceed the aggregate of (i) 20% of the number of issued shares of the issuer as at the date of the resolution granting the general mandate ...

...

- (3) A general mandate given under rule 13.36(2) shall only continue in force until:
 - (a) the conclusion of the first annual general meeting of the issuer following the passing of the resolution at which time it shall lapse unless, by ordinary resolution passed at that meeting, the mandate is renewed, either unconditionally or subject to conditions; or
 - (b) revoked or varied by ordinary resolution of the shareholders in general meeting, whichever occurs first.

...

(Rules 2.03 and 13.36 were amended on 11 June 2024. See Note below.)

Analysis

- 6. Under the Rules, a shareholder should be able to protect his proportion of total equity by having the opportunity to subscribe for any new issue of equity securities, unless shareholders otherwise permit. The pre-emptive rights may be waived by shareholders on a general basis but only under Rules 13.36(2) and (3) (i.e. a general mandate) which restrict the size and price for the new shares that can be issued.
- 7. Accordingly, any proposal to issue new shares which exceed the limits of Rule 13.36(2) should be considered by shareholders on a case by case basis under Rule 13.36(1). In seeking the specific approval, the issuer must give shareholders sufficient information to enable them to make an informed assessment of the issue. The Exchange would not grant listing approval for the new shares if the mandate is in substance a “general” one and a means to circumvent Rule 13.36(2).
- 8. Here, Company X proposed to seek a mandate for the Placing with a specific purpose, i.e. to finance the acquisition and the target’s business development. While Company X had yet to enter into any placing agreement, it had taken reasonable steps to ensure that sufficient information about the Placing would be provided to its shareholders to make an informed assessment, including the framework for determining the terms of the Placing and the specific use of proceeds. The case could be distinguished from a general mandate, which should follow the requirements under Rule 13.36(2).

Conclusion

- 9. The proposed specific mandate for the Placing would meet Rule 13.36(1)(a).

Note: Rules 2.03 and 13.36 were amended on 11 June 2024 to, among others, (i) apply the existing requirements for an issue of new shares to a resale of treasury shares; and (ii) exclude treasury shares in the calculation of issued shares for the purpose of determining the general mandate limit. The Rule amendments would not change the analysis and conclusion in this case.