

Whether a listed issuer could seek a prior mandate from its shareholders to issue new shares over a period of time under a share issuance proposal

Facts

1. A GEM issuer (**Company X**) entered with an independent investment fund a “share subscription facility” arrangement (**Facility**). Under the Facility, Company X might request the fund to subscribe for new shares in Company X from time to time over a three-year period.
2. The new shares would be issued at a 10% discount to Company X’s share price over the ten trading days following the request, subject to a fixed minimum price. The maximum number of shares issuable under the Facility was approximately two times Company X’s existing issued shares. Company X intended to utilize the proceeds for debt repayment, acquisitions of new businesses and expansion of existing businesses.
3. Company X proposed to seek a one-off advance mandate from its shareholders to issue new shares under the Facility over the next three years under GEM Rule 17.39. Company X represented that the Facility would allow it to have control throughout the three-year period as to when and how to draw down the Facility under specified limits.

Relevant Listing Rules

4. GEM Rule 17.39 states that:

Except in the circumstances mentioned in rule 17.41, the directors of an issuer (other than a PRC issuer, to which the provisions of rule 25.23 apply) shall obtain the consent of shareholders in general meeting prior to allotting, issuing or granting: -

(1) 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 17.41 and 17.42.”

5. GEM Rule 17.41 states that:

No such consent as is referred to in rule 17.39 shall be required:

- (1) ...
- (2) 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...

6. GEM Rule 17.42 states that:

A general mandate given under rule 17.41(2) shall only continue in force until:

- (1) 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
- (2) revoked or varied by ordinary resolution of the shareholders in general meeting, whichever occurs first.

7. GEM Rule 17.42B states that:

In the case of a placing or open offer of securities for cash consideration, the issuer may not issue any securities pursuant to general mandate given under rule 17.41(2) if the relevant price represents a discount of 20% or more to the benchmarked prices of the securities, such benchmarked price being the higher of:...

[\(GEM Rules 17.39, 17.41 and 17.42B were amended on 11 June 2024. See Note below.\)](#)

Analysis

8. Under GEM Rule 17.39, a shareholder should be able to protect his proportion of total equity by having the opportunity to subscribe for all new issues of equity securities. This preemptive right may be waived by shareholders themselves on a general basis but only within the limits of GEM Rules 17.41 and 17.42 (these rules describe a general mandate and allow share issuance subject to limits on the number of new shares and other restrictions such as price limits).
9. Accordingly, any issuance of new shares which exceeds the limits of GEM Rule 17.41(2) should be approved by shareholders on each occasion of share issuance under GEM Rule 17.39. The Exchange would not grant listing approval for the new shares if the mandate is in substance a "general" one and yet does not meet the requirements set out in GEM Rules 17.41(2) and 17.42B.
10. In this case, Company X proposed to seek a prior mandate from its shareholders for the possible issuance of new shares under the Facility. The prior mandate would give the directors the discretion to issue new shares under the Facility from time to time, with the size and issue price for each share issuance to be determined as and when Company X exercised its rights under the Facility. However, this mandate did not meet the size and price limits set out in GEM Rules 17.41(2) and 17.42B.

Conclusion

11. Company X cannot seek a prior mandate for the Facility on a one-off basis.
12. Company X subsequently announced that it would issue new shares under the Facility using the general mandate available at the time of each issuance.

Note: GEM Rules 17.39, 17.41 and 17.42B were amended and/or modified by GEM Rule 17.39A 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.