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Swiss public take-over market – overview and developments

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The year 2011 is already showing take-over activities on the Swiss markets which may well exceed the very active years of 2008 and 2009. By the end of August 2011, there were already 10 take-over offers that have been submitted to the Swiss Takeover Board (TB). These latest take-overs have also allowed the TB, as well as the Swiss Financial Market Authority (FINMA), as supervisory authority of the TB, to clarify certain legal issues related to the take-over procedure.

Scope

Public offer

Swiss public take-over rules are stipulated in the Swiss Stock Exchange and Securities Traders Act (SESTA) and in the Ordinance of the TB on public take-over offers (TOO). These rules apply if either a compulsory offer for equity securities must be made to the public as certain conditions are fulfilled, or if a bidder voluntarily decides to submit an offer for equity securities under the public take-over rules.

Likewise, a bidder would be required to adhere to the take-over rules if he makes an offer for equity securities to a circle of addressees and this offer is deemed to be a public offer by the TB, even if this was not the intention of the bidder. This is the case if the offer is: (i) addressed to a large number of persons; or (ii) published in a manner, that enables it to reach a large number of persons, e.g., by way of electronic media or press. However, the number of persons actually reached is irrelevant. The TB stated in an earlier case that even an offer addressed to 64 people qualifies as a public offer.

Finally, the TB may require a person announcing that he is considering a take-over of a publicly listed company to either publish a TOO for the target or to publicly declare that he will neither make a voluntary take-over offer nor exceed the threshold requiring him to submit a compulsory take-over offer during a six months period.


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Equity securities

According to the law, the take-over rules apply to the purchase or exchange of equity securities, including shares, participation, bonus certificates or any other participation rights. Even if the law enumerates specific types of equity securities, the expression 'equity securities' must be interpreted in a broad manner, and in particular also includes rights related to participation rights, such as conversion rights and warrants, but also certificates representing underlying equity securities, such as American depositary shares.

Listing

Swiss take-over rules are only applicable to Swiss companies whose equity securities are listed at least partially on the Swiss Stock Exchange. Foreign companies, in principle, are not affected even if their equity securities have a primary listing on the Swiss Stock Exchange.

However, the domicile requirement is not reviewed from a purely formal point of view. Swiss take-over law was declared applicable by the former Swiss Federal Banking Commission (FBC, replaced by FINMA) in a controversial decision related to the take-over of TAG Heuer by LVMH Moët Hennessy Louis Vuitton, if the target, although formally domiciled abroad, actually is managed out of Switzerland and is listed in Switzerland. On the other hand, Swiss companies being listed in Switzerland and having their statutory offices in Switzerland would remain subject to SESTA even if their actual offices were abroad.

On the other hand, the lack of a Swiss listing will always lead to the non-applicability of Swiss take-over law. This was particularly disputed and criticised by the minority shareholders of the foreign listed but Swiss-domiciled Alcon, after Novartis offered a significantly lower price than the price paid to a majority shareholder of Alcon.

Compulsory offer

In principle

Whosoever, directly, indirectly or acting in concert with third parties, acquires equity securities which, when added to equity securities already owned, exceed the threshold of 33⅓% of the voting rights of the target company, whether or not such rights may be exercisable, is obliged to make an offer to acquire all listed equity securities of the target company. The threshold may be exceeded not only by way of an acquisition of equity securities but also in the event of a capital reduction of the target company. In terms of timing, the offering obligation is generally triggered at the time of closing. However, there are exceptions, e.g., where several persons reach an agreement with a view to control the target company. In such cases, the obligation is already triggered upon entering into the agreement, forming the basis of the arrangement.

The transfer of voting rights within a group is organised pursuant to an agreement, as otherwise it does not trigger an offering obligation of the individual group member exceeding the threshold due to group internal transfers. According to the TB's practice however, internal movements of shareholdings (e.g., entry of new shareholders and shifts of shareholdings among existing members) within a group may nevertheless trigger an offering obligation if the circumstances change significantly within the group to the extent that a new group is created, and thus a change of control with respect to the shares of the target company held by the group has taken place.

Opting up, out, in and down

The target company may raise the threshold in its articles of association from 33⅓% up to 49% of the voting rights ('opting up') or may even completely abolish the duty to submit an offer ('opting out'). Reciprocally, the target company may at any time decide, by way of a decision of the general meeting of shareholders, to delete the opting out clause ('opting in') or to reduce the threshold ('opting down'). Such opting in or opting down, however, has no retroactive effect.

Opting up and opting out are valid if they operate as a general rule. Therefore they are unlawful if they are formally selective, e.g., only benefit a specific shareholder (in practice the majority shareholder), are limited in time,

or apply only to specific transactions. The same applies if the opting up or opting out is materially selective, i.e., while not being formally selective, it still operates like a formally selective clause when taking into consideration the specific circumstances of the company.

Based on two recent decisions taken, it seems as if the TB has changed its former practice on selective clauses. While the TB in principle confirmed that selective clauses are prohibited, it also stated that selective opting out clauses may be valid provided they are justified by an overwhelming valid corporate interest (and not just by the interests of the majority shareholder benefiting from the selective opting out or opting up).

Minimum price

The minimum price offered per share must be: (i) at least as high as the stock exchange price; and (ii) shall not be lower than 75% of the highest price paid by the bidder or any third party acting in concert with the bidder for equity securities of the target company in the preceding 12 months ('minimum price rule').

The stock exchange price corresponds to the volume-weighted average price of all on-exchange transactions executed during the 60 trading days prior to the publication of the offer or the advance announcement, as the case may be. The price must be adjusted to take into account any sizeable fluctuations owing to special events, such as dividend payments or capital transactions during this period.

In its report, an auditor must set out the relevant data relating to the stock exchange prices and must confirm that any adjustments made are reasonable. If, prior to the publication of the offer or the advance announcement, the listed equity securities are illiquid, the stock exchange price must be based on the valuation established by an auditor. In its report, the auditor must indicate the valuation method as well as the underlying criteria for such a valuation.

The offer price may be settled by cash payment or in the form of an exchange of equity securities. Settlement by means of exchange against securities is only permitted provided cash payment is offered as an alternative.

The fact that the minimum price may be set at 75% of the highest price paid gives the bidder the opportunity to acquire blocks of shares from other shareholders prior to the take-over offer by paying a premium for a controlling equity stake ('control premium'). In connection with the planned revision of SESTA, the TB submitted several amendment proposals relating to the take-over law. Besides proposals of a technical nature (i.e., revising the scope of take-over law and take-over procedures), the TB expressed its opinion that the concept relating to the control premium is no longer viable and should therefore be amended. Two proposals were submitted by the TB: (i) either any control premium paid in the last 12 months is fully taken into account when determining the offer price; or (ii) the control premium in principle remains in force but shall only be accepted if it relates to the purchase of a controlling stake of no less than 33⅓%.

Best price rule

Once the offer has been launched up to six months after the expiry of any supplementary acceptance period, any higher price paid automatically triggers the obligation to adjust the offer to that higher price for all shareholders ('best price rule'). Therefore the payment of control premiums is not possible following the publication of the offer. The best price rule also applies to the acquisition of financial instruments and to offers relating to such instruments. It is applicable to both compulsory and voluntary offers.

In the public take-over offer of Aquamit BV to the shareholders of Quadrant AG, the Federal Administrative Court clarified that a qualified shareholder, i.e., holding shares in excess of 2% of the total voting rights during the offer period (but not necessarily when filing the claim), may claim that the share price violates the price rules only to the extent of his own share tendered, but not with respect to shares of other shareholders. This decision has led to certain criticism as the decision was not rendered

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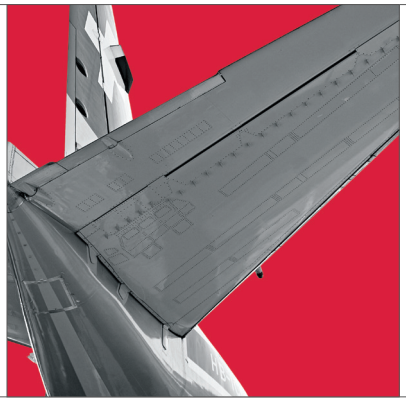

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with obligations *erga omnes* and thus may result in a higher share price being paid to the claimant than to the other shareholders.

Exemptions from compulsory offer

Beside the possibilities of an opting up or an opting out, Swiss take-over law provides for additional exemptions from the obligation to make an offer. These can be classified either as:

i. mandatory exemptions by law in cases of donation, succession or partition of an estate, matrimonial property law or execution proceedings;
ii. general exemptions granted upon request by the TB in justified cases within the framework of corporate restructuring (i.e., capital reduction followed by an immediate capital increase in order to offset a loss) or if banks or securities dealers undertake to resell, no later than three months after the threshold has been exceeded, the number of equity securities exceeding the threshold, and if the resale in fact takes place within such a period; or
iii. special exemptions granted upon request by the TB in justified cases, in particular if
    - no control over the target company is possible due to another controlling shareholder
    - a member of a group individually exceeds the threshold or
    - the previous acquisition has taken place indirectly, was not one of the main purposes of the transaction and the interests of shareholders of the target company are safeguarded.

Permitted defence measures

From the moment an offer is published until the announcement of the final results, the board of directors of the target company shall not enter into any legal transactions which would have the effect of significantly altering the assets or liabilities of the company. This relates to purchases or sales of businesses worth more than 10% of the consolidated assets or contributing more than 10% to the earning power of the company. Decisions taken by the general meeting of shareholders are not subject to this restriction and may be implemented irrespective of whether they were adopted before or after publication of the offer.

Nevertheless, the board may take certain limited defence measures in cases of unfriendly take-over offers. Announcement of a share buy-back during a pending offer is deemed to be an allowed defence measure, provided that the target company remains independent and that the general meeting of shareholders approved such buy-back. However, such an announcement would be deemed as an offer for own shares and must therefore meet the requirements of TB's Circular No. 1 regarding buy-back programmes. Further defence measures could be the addition of clauses in the articles of association, stipulating restrictions of transferability of and/or voting rights pertaining to equity securities, enhanced requirements for amending the articles of association or deferred election of the board of directors.

Voluntary offer

Voluntary offers (i.e., offers which do not qualify as compulsory offers) are not subject to the restrictions applicable to compulsory offers. While certain rules remain applicable, such as the best price rule, the bidder has significantly more freedom as long as he does not exceed the threshold which would trigger the compulsory offer. Therefore, a voluntary offer can also be made for a limited number of equity securities. The bidder is free to determine the offering price since the minimum price rule is not applicable. A voluntary offer may be subject to conditions, and a settlement by means of exchange against securities is permitted even if no cash payment is offered as an alternative.

If a voluntary offer would lead to the threshold to be exceeded if successful, then the voluntary offer must already meet certain requirements pertaining to compulsory offers, in particular the offer must adhere to

The take-over procedure

Exhibit 1

Drafting of pre-notification	The date of pre-notification replaces the date of publication for the purposes of the calculation of the offer price. The offer price in principle may later only be changed to the advantage of the potential sellers.
Submission of the pre-notification to the Take-over Commission for review	Legally not necessary. It is however accepted practice to informally discuss the pre-notification with the Take-over Commission one to three days prior to its publication.
Publication of the pre-notification	In no less than one German and one French newspaper, ensuring a nationwide publication, as well as two electronic stock exchange information providers.
Drafting of Offer Prospectus and of the summary to be published	Contents of the Offer Prospectus: information on bidder, target company, financing of offer price and deadline for the offer as well as terms and conditions.
Verification by audit body	The audit body is either an auditor licensed to audit security traders or a security trader. The audit body has to verify if the Prospectus and the summary to be published correspond to legal requirements.
Submissi on of the Prospectus to the Take-over Commission	The Take-over Commission then reviews the offer and issues a recommendation. Usually the prospectus is submitted to the Take-over Commission before its publication.
Publication of the offer	It is sufficient to publish a summary of the Prospectus in at least one German and one French newspaper, ensuring a nationwide publication. Additionally, the summary must be sent to two electronic stock exchange information providers. The offer must be published within six weeks following a pre-notification (if any).
Waiting period: 10 trading days	Usually, after the publication a waiting period of 10 trading days starts, during which the offer cannot be accepted.
Report by the board of directors of the target company within 15 trading days from the publication	The report must contain all information necessary for the addressees of the offer to make a decision based on the factual situation. The report may recommend to accept or to refuse the offer; it may also only list the pros and cons of the offer. The report has to disclose any defensive measures planned by the target company.
Expiry of the waiting period	After the expiry of the waiting period (usually 10 trading days), the offer is effective for a period of 20 to 40 trading days.
Potential extension of the offer period in the event of a competing offer	A competing offer is possible up to the last day of the offer period. The offer period can be extended until the competing offer expires. During the competing offer period, acceptance declarations already made may be withdrawn. The original offer may be withdrawn or modified until five trading days prior to the end of the offer period .
Disclosure of tentative interim results to the Take-over Commission, electronic media and the stock exchange	On the first trading day after the expiry of the offering period. It also has to be mentioned whether the conditions have been met.
Publication of the precise interim result	On the fourth trading day after the expiry of the offering period, the interim result must be published in all newspapers where the offer was published. The publications must contain information on the participation held in the target company and the total shareholdings in terms of capital and votes.
Prolongation period if a conditional offer is successful	The offer may be made conditional on the reaching of a certain shareholding quota. If this quota is reached, there is a prolongation period of 10 trading days after the publication of the precise interim result for acceptance of the offer by further shareholders
Publication of the final result	Tentative result to be published one trading day after the end of the additional period; final result to be published four trading days after the end of the additional period.
Execution of the offer	The timing for the execution of the offer has to be published in the Prospectus.

Source: Froriep Renggli

the minimum price rule and must cover all listed equity securities of the target company. Such 'mixed' voluntary offers may still be subject to conditions and can also be arranged as mere exchange offers (i.e., without cash payment alternative). If a bidder during a voluntary offer actually exceeds the threshold to a compulsory offer, those initial terms and conditions of the voluntary offer that are not compliant with the provisions regarding compulsory offers must then be amended.

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