

FEBRUARY 2010



Newsletter

Authors:Lorenzo Olgiati
Martin Weber

MERGERS & ACQUISITIONS, PRIVATE EQUITY AND VENTURE CAPITAL

The Qualified Shareholder as a New Player in Public Takeover Bids – Early Experiences with the Revision of 2009

In early 2009, the law of public takeover bids in Switzerland was considerably revised. The changes affect the regulatory bodies as well as bidders and target companies. The “qualified shareholder” newly enjoys the position of a party to the proceedings. Early experiences in practice confirm that a new player has entered the arena of public takeovers who should be taken seriously.

1 REVISION OF 2009 AS FIRST MATERIAL REGULATORY AMENDMENT

The coming into effect of the revised Securities and Stock Exchange Ordinance of the Swiss Financial Market Supervisory Authority (SESTO-FINMA) as well as the Ordinance on Public Takeover Offers of the Takeover Board (OTB) constitute the first material amendments to the public takeover legislation since the adoption of the Federal Securities and Stock Exchange Act (SESTA) in 1998. The legislator did not seek legislative amendments earlier largely due to the fact that since 1998, the Takeover Board (TB) has developed and made publicly available extensive interpretations and guidance of the takeover laws (www.takeover.ch).

2 CHANGES FOR EXISTING PARTIES TO THE PROCEEDINGS

2.1 CHANGES AFFECTING REGULATORY BODIES

The TB is the central supervisory body for public takeovers. Whereas to date it could only make recommendations, it is now empowered to issue and enforce binding decisions (*Verfügungen*). This aims at increasing the authority of the TB as a first instance and, at the same time, at reducing the number of cases on appeal.

Following the 1 January 2007 amendment of the Federal procedural laws and the entry into force of the Federal Act concerning the Swiss Financial Market Supervisory Authority (FINMA-Act), there are now three instances:

- > The TB reviews compliance with the provisions concerning public takeover offers and issues a decision.

- > Decisions of the TB can be challenged before the Swiss Financial Market Supervisory Authority (FINMA) by means of an appeal. Such an appeal has to be filed within 5 trading days and generally has a suspensive effect.
- > Decisions of the FINMA can be challenged before the Federal Administrative Court (FAC) within 10 calendar days (without suspensive effect, cf. interim decision of the FAC of 11 May 2009, in the matter of Harwanne (B-2414/2009)). A further appeal to the Swiss Federal Tribunal is no longer possible.

Given the short periods for appeal, it is of particular importance to note that correspondence with the TB and FINMA, including the filing of legal submissions, may be made by fax and electronically (e-mail). The regulatory bodies themselves frequently use such means of communication.

2.2 CHANGES FOR BIDDERS

A bidder in the sense of Swiss public takeover law is every person who publicly makes an offer to purchase equity securities of a Swiss company that is listed on a Swiss stock exchange. On the one hand, such an offer can be launched voluntarily and also only with regard to a part of the equity securities of the target company. On the other hand, the acquisition of more than 33 $\frac{1}{3}$ percent of the voting rights obliges the bidder to submit a takeover offer for all the listed equity securities of the target company (mandatory offer).

Potential Offer. Bidders should be aware that the public announcement by a party that it is considering making a public takeover bid may already trigger consequences under the takeover law. Following such a communication, the TB can require the potential bidder to either publicly announce a corresponding (voluntary or mandatory) offer, or to announce that within the next 6 months, it will not submit a public offer or cross the participation threshold for the triggering of the mandatory offer (the so-called “put up or shut up”-rule).

Offer prospectus. Previously, to comply with the publication obligation, the bidder had to publish the full offer prospectus in German and in French in the print and electronic media across the country. Since 2009, it suffices to only publish an offer advertisement instead of the full offer prospectus. The advertisement must contain a defined minimum standard of information and has to specify where the full report can be obtained (exact URL and order address). This relaxed publication obligation has been well received by the market.

Modification of the offer. The revised law abolished the option previously available (within strict limits) to the bidder to reserve, in the preliminary announcement

(*Voranmeldung*), the right to reduce the offer. Now, modifications of the offer from the preliminary announcement or following the publication of the offer prospectus are only permitted if their overall effect is favorable to the offerees (cf. decision of 14 September 2009, TB 416/02, Jelmoli Holding).

Cash alternative for exchange offers. The prior system governing the offer price was very liberal compared to other jurisdictions. Previously, voluntary and mandatory offers could be submitted as pure exchange offers, i.e. instead of cash, other equity securities (most frequently shares of the bidder) could be offered as consideration for the tender of the shares of the target company.

Following the revision of 2009, consideration in the form of an exchange of securities is only permissible if a cash payment is offered in the alternative. This requirement primarily applies to mandatory offers. Voluntary, or so-called mixed voluntary offers, i.e. voluntary offers that (potentially) exceed the threshold for a mandatory offer, are not required to contain a cash alternative. However, in the view of the TB there is an exception to this rule if, between the date of the publication of the offer and six months following the expiration of the supplementary acceptance period, the bidder acquires equity securities relating to the offer for cash. In this case, the principle of equal treatment requires that, irrespective of the type of offer, all offerees be offered a cash alternative (“Best Price Rule”).

Competing Offers. The last of multiple (competing) offers can now be published up until the last trading day of the offer period of the preceding offer. The reference date for calculating the minimum offer price is now the date of the preceding offer, and no longer the date of the subsequent offer. The right of the preceding bidder to withdraw its offer in the event of a competing offer has been abolished.

2.3 CHANGES FOR THE TARGET COMPANY

Report of the board of directors. The board of directors (BoD) of the target company must publish a report in which it comments on the offer. The BoD-report comments on the effects of an offer on the target company and on the shareholders. It can either propose to accept or decline the offer, or present advantages and disadvantages without making a recommendation as to whether or not the offer should be accepted. The option of a neutral report, which was available before the 2009 revision, was deleted from the draft OTB. Following the legislative consultation process, however, it was reinserted and therefore remains available under the revised law. The report also has to contain the Board’s reasoning, showing the relevant elements that influenced it, including newly the disclosure of the vote within the BoD.

Defensive measures. In the case of an unfriendly takeover, the target company can resort to certain defensive measures. The OTB has interpreted this rule by issuing a non-exclusive list of unlawful defensive measures. As a result of the 2009 revision, two important defensive measures were added to this list. According to the OTB, the purchase of the company's own shares or related financial instruments by the target company now also constitutes an unlawful defensive measure, as long as the company's shareholders meeting (*Generalversammlung*) has not approved it. This means that where it used to be possible for the target company to make such an offer for a share-buy-back during a pending offer without the approval of the shareholders' meeting, today, such a possibility does not exist anymore. The same should hold true for price smoothing activities (*Kurspflege*) by the target company. Secondly, the BoD is not allowed to sell or purchase assets that contribute more than 10 percent to the "earning power" of the target company. What exactly is meant by the term earning power was, however, left open.

3 PARTY STATUS AND RIGHT OF APPEAL FOR QUALIFIED SHAREHOLDERS

Before the 2009 revision, only the bidder, persons acting in concert with the bidder, and the target company were granted the status of a party in the public takeover proceedings. The possibilities of other shareholders of the target company to participate in the proceedings were limited. Under the revised OTB, shareholders holding a stake of at least 2 percent of the voting rights (qualified shareholders) are granted the right to participate in the proceedings as a formal party. As a result, they enjoy full procedural guarantees, in particular the right to be heard including access to the records at the TB, and the right to appeal.

In order to gain the status of a party, however, the qualified shareholder has to apply for it in due time. A petition to be granted party status has to be filed with the TB within 5 trading days after the publication of the offer prospectus (or offer advertisement). If the TB issues a decision concerning the offer before such publication, the 5-trading-day-period starts with the date of publication of such decision. In addition, a qualified shareholder who is not yet a party to the proceedings has the right to file an appeal against decisions of the TB concerning the offer prospectus within 5 trading days.

The possibility to file an appeal serves the purpose of allowing the TB to decide efficiently even without having granted to qualified shareholders the right to be heard. By providing for a right to appeal, the right to be heard can then still be granted at the first instance. If the decision is validly appealed, the TB always has to issue a new decision.

The shareholder has to hold a required minimum stake of 2 percent of the voting rights on the day the preliminary announcement is published, or, if there is no preliminary announcement, on the day of publication of the offer prospectus. Evidence of the required stake has to be provided simultaneously with the filing of the petition. A detailed explanatory statement, however, is not necessary. A short letter with a copy of the bank deposit statement suffices. Once granted, the status of party remains for the rest of the procedure. However, the TB can at any time ask for evidence showing that the qualified stake is still existing.

In our view, the pooling of several shareholders with the aim to jointly reach the required threshold of 2 percent likely will not be admissible, at least to the extent the purpose of the pooling is limited to gaining party status. Where the shareholders were already an organized group in the sense of SESTO-FINMA at the time of the preliminary announcement, it would, however, be conceivable to grant such shareholders a joint status of party. So far, the TB has not had the opportunity to decide this question.

If a bidder wants to be exempted from the (principally existing) obligation to make an offer, or wants to receive from the TB a declaration that no obligation to make an offer applies at all, it has to file a request with the TB in accordance with the "procedure relating to the obligation to make an offer" pursuant to Article 61 of the OTB. If the TB grants an exemption or establishes that no obligation to make an offer exists, it requires the target company to publish a formal opinion of the BoD as well as the decision itself. In this procedure, the qualified shareholder can also file a petition for party status or can file an appeal against the decision, both within a period of 5 trading days, starting with the publication of the opinion of the BoD.

4 APPRAISAL AND FIRST EXPERIENCES

The granting of party status to qualified shareholders and their right to file an appeal are without doubt one of the most important amendments to the revised takeover regulation. Two recent, prominent cases put these new rights to the test: In Harwanne Compagnie de participations industrielles et financières SA (cf. decision of 16 March 2009, TB 403/2) and in Quadrant AG (cf. decision of 16 June 2009, TB 410/2), qualified shareholders filed appeals with the TB. In both cases, the amount of the offer price was the main subject of the dispute.

The Harwanne case is especially instructive. In this case, two shareholders with a 10.6 and 6.61 percent stake, respectively, successfully claimed that in order to verify the reasonableness of the offer price, an independent valuation was necessary since the shares of the target company were illiquid. This case exemplifies that if a qualified shareholder

appeals against a decision of the TB and continues through all the available instances (appeal to the FINMA and afterwards to the Federal Administrative Court [FAC]), the proceedings can be substantially delayed. This despite the fact that the legislator aims at an expeditious administrative procedure with short appeal periods of merely 5 days to the exclusion of a stay of proceedings due to recess. Delays of proceedings occur particularly when, as seen in the Harwanne case, the regular appeal period of 10 days for the appeal to the FAC is extended due to court recess applicable before the FAC. Also, the contradictory procedure before the FAC may take substantially more time than the procedures before the TB and the FINMA. In the abovementioned case, this led to the consequence that the offer period would not have commenced for a long time due to the proceedings before the FAC, had the bidder not given in and accepted the claims of the appellants.

The 2 percent threshold further fuels the discussion surrounding the new possibility of qualified shareholders actively participating in public takeover procedures. The disclosure obligation for significant shareholders under

the SESTA, by contrast, is only triggered by stakes exceeding 3 percent of voting rights. As a consequence, in companies with widespread shareholdings, it is virtually impossible for a bidder to identify in advance shareholders who hold a stake between 2 and 3 percent and who are thereby potential parties to the takeover proceedings. From the bidder's point of view, this unknown factor, as well as the potential for appeals-induced delays may reduce the certainty of the transaction.

In conclusion, over the past year the implementation of the 2009 revision of the public takeover law did not fundamentally change the Swiss takeover practice. However, with the appearance of the qualified shareholder as a new and sometimes unpredictable party to the proceedings, and due to the establishment of an extraordinarily expeditious procedure also with respect to appeals, the ability of parties involved in takeover proceedings to react to changes quickly, at any time, and with specific know-how and readily available resources becomes even more important for a successful public takeover.

CONTACTS

The contents of this newsletter do not constitute any legal or tax advice and may not be used as such. If you would like related consultation based on your personal circumstances, please contact your contact person at Schellenberg Wittmer, or one of the following persons:

In Zurich:



Lorenzo Olgiati

Partner
lorenzo.olgiati@swlegal.ch



Martin Weber

Partner
martin.weber@swlegal.ch

In Geneva:



Jean Jacques Ah Choon

Partner
jean-jacques.ahchoon@swlegal.ch



Jean-Yves De Both

Partner
jean-yves.deboth@swlegal.ch

Schellenberg Wittmer
Attorneys at Law

ZURICH

Löwenstrasse 19/P.O. Box 1876
8021 Zurich/Switzerland
T +41 44 215 5252
F +41 44 215 5200
zurich@swlegal.ch

GENEVA

15bis, rue des Alpes/P.O. Box 2088
1211 Geneva 1/Switzerland
T +41 22 707 8000
F +41 22 707 8001
geneva@swlegal.ch