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Acquisitions on the verge of Swiss takeover rules

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I. Introduction

Whether or not an acquisition of a company is subject to the Swiss takeover rules is a question of considerable importance. Because if so, articles 22 et seqq. of the Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act, SESTA) and the Ordinance of the Takeover Board on Public Takeover Offers (Takeover Ordinance, TOO) impose a number of obligations on the offeror, the persons acting in concert with the offeror as well as the board of directors and significant shareholders of the target company.

The Swiss takeover rules provide, *inter alia*, that if a person acquires shares of a company, when added to the shares already held by such person, and such shares exceed the threshold of 33¹/₃ percent of the voting rights of such company, that person must make a public tender offer (PTO) to acquire all of the listed shares of that company. Further, also in case of voluntary offers, the offeror must publish a prospectus which must contain true and complete information in order to enable the shareholders of the target company to reach an informed decision. A PTO under the SESTA and the TOO may only be launched if the financing is secured and, upon pre-announcement, it may not be withdrawn unless one or several (permissible) conditions of the offer are not met. The offeror is further required to treat all shareholders of the target company equally, which in relation to the offer price means that all shareholders of the target company are entitled to get paid the best price. If the offeror acquires securities of the target company in the period running from the publication of the offer (or pre-announcement) until six months after the offer period has expired at a price that exceeds the offer price, the offeror must offer this price to all recipients of the offer («Best Price Rule»). In addition, in case of mandatory offers or «mixed-voluntary»[1] offers, the offer price may not be lower than the current market price and may not be more than 25 percent below the highest price paid by the offeror in the preceding 12 months for equity securities of the target company («Minimum Price Rule»). Further, the offeror and any other person holding at least 3 percent of the voting rights of the target company must report all purchases and sales of equity securities of the target company to the Swiss Takeover

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1 The majority of voluntary offers are «mixed-voluntary» offers. A «pure» voluntary offer only exists if (i) the offer is solely made with regard to a number of equity securities which is below the 33¹/₃ percent threshold relevant for mandatory offers, (ii) the offeror, prior to the offer, already holds a percentage of equity securities which is higher than the 33¹/₃ percent threshold (or, in the event of an opting-up, the 49 percent threshold), or (iii) the target company's articles of incorporation contain an opting-out clause; for details see Rudolf Tschäni/Jacques Iffland/Hans-Jakob Diem, Öffentliche Kaufangebote, 2nd ed., Zürich/Basel/Genf 2010, note 107 et seq.

Board (TOB) and the SIX Swiss Exchange during the period from publication (or pre-announcement) until the expiry of the offer (article 31 SESTA and article 38 et seq. TOO).

The Swiss takeover rules also request a certain conduct of the target company. The board of directors of the target company must, *inter alia,* issue a special report in which it usually recommends to its shareholders whether to accept or reject the offer or, in rare cases, instead of making any recommendations, merely enumerates the pros and cons of the offer. During the course of the offer, the board of directors is further restricted in entering into legal transactions which would have the effect of significantly altering the target company's assets or liabilities without the approval of the shareholders' meeting (article 29 SESTA and articles 35 et seq. TOO).

From this follows that any legal entity or person that envisages an acquisition of shares in a company as well as the target company itself have a great interest in knowing the exact scope of application of the Swiss takeover rules, and, if an acquisition in principle does not fall within this scope of application, may want or have to consider possible transaction alternatives. This article briefly analyzes the scope of application of articles 22 et seq. SESTA and then, by means of two case studies, considers selected action alternatives from the acquirer's perspective. Finally, the target company's power to impose the Swiss takeover rules on potential acquirers shall be assessed.

II. Scope of application of Swiss takeover rules

Pursuant to article 22 paragraph 1 SESTA, the Swiss takeover rules shall apply to PTOs for partipations in *Swiss companies* whose equity securities are, in whole or in part, listed on a *Swiss stock exchange* (target companies)[2].

1. Swiss target company

As the wording of the aforementioned article implies, the Swiss takeover rules shall apply to Swiss (target[3]) companies only[4]. A company is deemed a «Swiss» company if it is incorporated under Swiss law, and thus has its registered seat in Switzerland[5]. This means that in contrast, foreign companies are in principle not subject to the Swiss takeover rules even if they are primary (or even solely) listed in Switzerland. If the jurisdictions of such foreign companies do not provide for any takeover rules at all, or if foreign takeover rules are applicable only in case equity securities are (primary) listed in the respective country, a negative conflict of competence occurs, which means that such foreign companies are neither subject to Swiss nor to foreign takeover rules[6].

The Federal Banking Commission (FBC, now Swiss Financial Market Supervisory Authority, FINMA), however, ruled that the Swiss takeover rules are applicable to foreign target companies if they are effectively managed from Switzerland[7]. The TOB has established that such exceptional application of Swiss law to foreign target companies shall be limited to cases where there are strong links to Switzerland, which are readily identifiable from the outside, such as the place of residence of the members of the board of directors and the management[8].

A positive conflict of competence can occur in case of stapled stock[9] because takeover laws of both jurisdictions are applicable. In such scenarios the TOB admits that foreign law applies, provided it is more closely connected with the company than Swiss law and that foreign law meets the Swiss minimum standards defined in the SESTA[10]. Positive conflicts of competence can further occur in case foreign law claims applicability merely because an offer is made to investors resident in the respective country, such as the United States. In such cases, the TOB permits the offeror to exclude the shareholders in the United States and in other countries in which the Swiss prospectus would not meet local standards from the offer (so-called purchase restrictions)[11].

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2 For details see Pascal Rüedi, Der örtliche und sachliche Anwendungsbereich des Schweizer Übernahmerechts, Diss. Bern 2011.

3 The domicile of the offeror and of the shareholders of the target company is irrelevant for the question of whether or not the Swiss takeover rules are applicable.

4 Cf. the EU conflict rules pursuant to which the authorities at the place of primary listing have jurisdiction over a matter if the place of registration and the place of listing are not identical, article 4 paragraph 2 lit. b and c of the directive 2004/25/EG; as for corporate matters see however lit. e of said article.

5 See the Swiss principle of incorporation *(Inkorporationsprinzip)* set forth in article 154 of the Swiss Federal Act on International Private Law.

6 See recommendation 0053/01 Hilti AG of 1 September 1999 and recommendation 0151/01 Hilti AG of 10 February 2003.

7 See decision FBC of 20 September 1999 in the matter of TAG Heuer, whose registered seat was in Luxembourg, whereas the place of effective management was in Switzerland; for a detailed analysis of this decision of FBC see Urs Brügger/Dieter Dubs, Zum internationalen Anwendungsbereich der börsenrechtlichen Übernahmeverordnung bei freiwilligen Übernahmeangeboten, in: Schweizerische Zeitschrift für Wirtschaftsrecht (SZW) 2/2000 69 et seq.

8 Claudia Schärer/Thomas Aregger, Aus der Praxis der Übernahmekommission, in: SZW 3/2003, 147.

9 Shares of two publicly traded companies operating under the same management that are traded as if they were one stock.

10 See Rudolf Tschäni, M&A Transaktionen nach Schweizer Recht, Zürich/Basel/Genf 2003, 337, with reference to the recommendation of the TOB of 20 March 2001 in the matter De Beers Centenary AG.

11 For details see Urs Schenker, Schweizerisches Übernahmerecht, Bern 2009, 209 and 253 et seq.

2. Listing on a Swiss stock exchange

The Swiss takeover rules only apply if the Swiss target company's equity securities are, in whole or in part, listed on a Swiss stock exchange. «Equity securities» means shares, participation certificates *(Partizipationsscheine)* and bonus certificates *(Genussscheine).* Unless combined with option or convertible rights, bonds and other debt instruments are not subject to the Swiss takeover rules[12].

Pursuant to article 2 lit. c SESTA, «listing» means admission to trading on the principal or second exchange. This means that all Swiss companies whose equity securities are listed according to one of the standards of the SIX Swiss Exchange or on the BX Berne eXchange[13] are subject to the Swiss takeover rules. Excluded from this scope of application are securities which are traded over the counter (OTC)[14].

According to the TOB's practice, the Swiss takeover rules may also apply if the equity securities of the target company have been delisted in view of a PTO. Otherwise an existing major shareholder could, in view of going private transactions, by-pass the minority protection set forth by the takeover rules via control over the board of directors[15]. The TOB further applies the takeover rules to the offer for shares which are not listed if the target company was demerged from the listed offeror[16] or shares of a private Swiss company whose only asset is the participation in a Swiss listed company[17].

If a Swiss company is listed on a foreign stock exchange only, the Swiss rules do not apply but, provided the application of foreign law is not limited to local companies, the local takeover rules apply instead. In case local law is not applicable to foreign companies, a negative conflict of competence occurs.

3. Public offer for shares

PTOs are widely defined to cover offers to purchase or exchange shares. SESTA does not necessarily require a formal «offer» in the sense of article 3 paragraph 1 of the Swiss Code of Obligations (CO) for a contract to be concluded, but rather focuses on the question whether the shareholders are in fact invited to tender their shares, irrespective of the form and shape of such invitation. Accordingly, an offeror may not escape the Swiss takeover rules if it structures the transaction as an invitation to make an offer or issuance of derivatives. In order to qualify as an offer pursuant to article 2 lit. e SESTA, a public announcement regarding an offer must, from an offeree's perspective, to a certain minimum degree, be considered binding and sufficiently concrete[18].

Further, it is unclear what the term «public» precisely means and depends on the particular circumstances, especially on whether the offerees are in a position to negotiate rather than merely accept or reject an offer. Obviously, the more fragmented the shareholder base, the worse the negotiation power of the individual shareholder. Therefore, the crucial factor for the TOB is the quantity of offerees, whereas the quality of the offerees (i.e. whether the offerees are institutional investors or not) is irrelevant. This means that if a shareholder does not publicly communicate its purchase intentions but rather purchases shares via single block trades (at the or outside the stock exchange), the transaction is not deemed a public offer even if large numbers of shares are acquired according to a plan[19].

It is not always easy to distinguish PTOs from other transaction structures. For the TOB, it is essential that the shareholders are offered a choice, i.e. to either keep or tender their shares. Thus, a merger for example is not subject to the Swiss takeover rules because for the shareholders of the transferring entity the exchange of shares is compulsory[20].

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12 Cf. article 2 lit. e SESTA and 2 lit. a TOO; for details see also Tschäni/Iffland/Diem (FN 1) note 24 and Dieter Gericke/Karin Wiedmer, Kommentar Übernahmeverordnung (UEV), note 3 et seq.; cf. also Schenker (FN 11) 217, who is of the opinion that, as a consequence of the (as per the recently revised) wording of article 2 lit. a TOO, convertible bonds or other financial instruments are not subject to the Swiss takeover rules.

13 Although the BX Berne eXchange is only a stock exchange-like institution, the TOB is of the opinion that Swiss takeover law applies, Tschäni/Iffland/Diem (FN 1) note 34.

14 Rüedi (FN 2) notes 586, 671.

15 Cf. the recommendations of the TOB of 2 December 2003 in the Rentenanstalt matter and of 31 March 2004 in the Clair Finanz Holding matter; a delisting lies within the competence of the board of directors, which can resolve upon the matter anytime and without meeting any pre-conditions.

16 See Schenker (FN 11) 211 et seq. and Rudolf Tschäni/Jacques Iffland/Hans-Jakob Diem, in: Watter/Vogt (Hrsg.), Basler Kommentar zum Börsengesetz/Finanzmarktgesetz, 2nd ed., note 13 to article 22 with further references.

17 Cf. decision 422/01 of 19 August 2009 in the Mobimo Holding AG matter.

18 Regarding the delicate differentiation between public offers in the sense of article 2 lit. e SESTA and so-called «virtual offers» see Frank Gerhard, Das virtuelle Übernahmeangebot, in: Gesellschafts- und Kapitalmarktrecht (GesKR) 2–3/2006 216 et seqq.; respective uncertainties may be resolved by the recently introduced article 53 TOO, pursuant to which the TOB may, if anyone announces a potential offer, require such person within a certain period to either publish an offer or to publicly declare that for 6 months it will neither make an offer nor cross a shareholding threshold that entails an obligation to make an offer (so-called «put-up or shut-up» clause).

19 However, such transactions may, if the 33$^{1}/_{3}$ threshold is crossed, lead to the obligation to make a mandatory offer for all shares outstanding.

20 See recommendation 0189/01 CiCG Holding SA et SGPR Holding SA of 15 April 2004; see also Tschäni/Iffland/Diem (FN 1) FN 43, claiming that the options provided for in article 8 paragraph 2 of the Swiss Merger Act are insufficient to justify the application of the Swiss takeover rules.

4. Conclusion

For a PTO to fall under the SESTA, the offer must be public and relate to shares in a Swiss company which are listed on a Swiss stock exchange. Foreign companies, however, even if (primary) listed on a Swiss stock exchange, are in principle not subject to the Swiss takeover rules. By accumulating the two requirements (i.e. place of incorporation and place of listing), the Swiss legislator on the one hand prevents an acquistion from being subject to contradicting foreign law, but on the other hand it accepts that negative conflicts of competence can occur, i.e. that a PTO is not governed by any takeover rules at all[21].

III. The acquirer's choice

1. Merger as an alternative

1.1 The Alcon case

In April 2008, Novartis AG (Novartis) and Nestlé AG entered into an agreement for the sale of Nestlé AG's 77 percent majority stake in Alcon, Inc. (Alcon) to Novartis in two steps. In July 2008, Novartis acquired in a first step a 25 percent stake in Alcon. In January 2010, by triggering an option to acquire the additional 52 percent stake, Novartis completed its purchase of Alcon shares from Nestlé and proposed to simplify Alcon's ownership structure by offering to acquire the remaining 23 percent held by minority shareholders. To attain full ownership, a statutory merger of Alcon into Novartis was proposed under the Swiss Merger Act (MA). After minority shareholders had begun filing class action lawsuits in the United States, complaining that they were being offered less cash for their stake than Nestlé, and after a committee of independent directors to protect the rights of smaller shareholders had been installed, Novartis announced on 15 December 2010 that it entered into a definitive agreement with Alcon to merge Alcon into Novartis for Novartis shares and a Contingent Value Amount (CVA)[22].

Alcon is a Swiss stock corporation with registered seat in Hünenberg (canton of Zug), and its shares are listed on the New York Stock Exchange, but not on one of the Swiss stock exchanges. The Swiss takeover rules could therefore not have applied to the acquisition of more than 33¹/₃ percent of shares in Alcon by Novartis irrespective of the transaction structure chosen. Instead, the MA applied. As there are certain U.S. rules[23] also for foreign companies which may be avoided if the shares are acquired through a merger instead of a PTO, U.S. law may have helped influence Novartis to choose the merger structure. Irrespective of the fact that an offer pursuant to the Swiss takeover rules was no real option because of the lack of a listing in Switzerland, the Novartis/Alcon case gives reason to provide a short overview over the main differences between a merger pursuant to the MA and a PTO[24],[25].

1.2 Differences between statutory merger and public offer

a. Structural differences

A statutory merger requires a merger agreement in written form, which must comply with certain minimum content requirements and which needs a resolution by the shareholders' meeting of the merging entities passed by a qualified majority of at least two thirds of the votes represented and the absolute majority of the par value of shares represented[26]. The equivalent of a merger agreement is a transaction agreement, the content of which is, because not explicitly regulated by statutory law, and because PTOs are generally structured more individually than mergers, less standardized than a merger agreement[27]. While a statutory merger requires approval of the shareholders' meeting of both merging entities, in a PTO a resolution of the shareholders' meeting of the target company[28] is not required. In contrast, in a PTO the shareholders (i.e. each shareholder individually) may accept or reject the offer. Because meeting the quorum of article 704 CO guarantees full control over the company to acquire, in many cases a bidder will make its offer subject to the condition that at least two thirds (or more) of the target company's shareholders accept the offer. The difference with regard to approval requirements will often be decisive for the choice of a

[21] Or that foreign takeover rules may be by-passed by choosing another transaction structure, cf. section III.1.1.

[22] Under the terms of the merger agreement, the merger consideration includes up to 2.8 Novartis shares and a CVA to be settled in cash that will in aggregate equal USD 168. If the value of 2.8 Novartis shares is more than USD 168, the number of shares will be reduced accordingly, see http://www.novartis.ch/media/releases/de/2010/1472600.shtml.

[23] The Williams Act (USA) refers to amendments to the Securities Exchange Act of 1934 enacted in 1968 regarding tender offers.

[24] The following assumes a pure share offer.

[25] For a detailed comparison see Tschäni/Iffland/Diem (FN 1) note 272 et seqq; Rudolf Tschäni, Fusionen versus öffentliche Tauschangebote bei Publikumsgesellschaften, in: Vogt/Stupp/Dubs (Hrsg.), Unternehmen – Transaktion – Recht, Liber Amoricum für Rolf Watter zum 50. Geburtstag, Zürich/St. Gallen 2008, 429 et seqq.

[26] Article 12 paragraph 2 MA i.c.w. article 18 MA.

[27] Although practice has shaped a standard document also for transaction agreements, for details see Markus Vischer/Andrin Schnydrig, Die Transaktionsvereinbarung bei öffentlichen Übernahmen, in: Aktuelle Juristische Praxis (AJP) 2006, 1192 et seqq.

[28] In order to create the shares that will be offered to the shareholders of the target company, the offering company will in most cases need to increase its share capital, which must be approved by the shareholders' meeting (article 704 paragraph 1 cf. 6 CO).

transaction structure. Another important difference is the fact that a statutory merger leaves no potential for minority shareholders, whereas in a PTO minority shareholders may in principle[29] not be forced to tender even if the offeror has acquired two thirds or more of voting rights in the target company.

b. Exchange ratio and premium

Pursuant to article 7 paragraph 1 MA, the shareholders of the transferring company have a claim for shares in the surviving entity equal to their former participation rights, taking into account the assets and liabilities of the merging companies, the allocation of voting rights as well as all other relevant circumstances. For the purpose of calculating the exchange ratio, the merging entities must be valuated, applying in principle the same recognized methods. There is no equivalent provision in the SESTA or the TOO. PTOs are, however, subject to the Minimum Price Rule (see section 1), which is why the payment of a premium within the scope of article 32 paragraph 4 SESTA is permissible[30]. In contrast, the exchange ratio in a merger applies to all shareholders equally. However, it is possible to acquire a controlling stake from a large shareholder prior to the merger and pay a premium (cf. Novartis' purchase of the 77 percent stake in Alcon from Nestlé)[31]. Further, the Best Price Rule (see section 1) does not apply to mergers.

c. Deal certainty

Because the merger agreement must be entered into between the companies, mergers are in principle only possible in friendly scenarios[32]. Yet the merger agreement requires approval of the shareholders' meeting of both entities, and thereafter until the closing of the transaction there is a risk that a third party may launch a PTO for the shares in one of the entities to merge. The often agreed compensation payments that become due in case of such third party PTO may not ensure deal certainty. In addition, transaction agreements often provide for clauses for the purpose of deal certainty, such as the undertaking of the target company to recommend the offer, break fees, no-shop obligation, etc. In a PTO the interloper risk is even higher than in a merger structure because the Swiss takeover rules aim at allowing auctions[33].

d. Challenge by shareholders

In case of a merger, any shareholder may, within two months after the publication of the merger, request a court to review and fix an adequate compensation payment (article 105 MA). A PTO, on the other hand, is subject to the recently introduced petition rights and right to appeal of qualified shareholders[34].

e. Cross-border transactions

While in a PTO the place of incorporation (or effective management) of only the target company is relevant for the determination of the applicable rules, the permissibility of a merger must be assessed pursuant to the Swiss Federal Act on International Private Law (PILA) if at least one of the merging entities is a foreign company. An «immigrant» merger of a foreign company into a Swiss company is permissible if the applicable foreign law also allows the foreign (disappearing) entity to merge into a Swiss company and if the requirements arising under foreign law are met. Apart from this provision, the merger will be subject to Swiss law[35]. Conversely, in an «emigrant merger» a Swiss company will be able to be merged into a company domiciled abroad, provided that the Swiss company can prove that with the merger its assets and liabilities are transferred to the foreign company and the rights of the shareholders in the foreign company will be adequately maintained[36]. Apart from this provision, the merger will be subject to foreign law.

2. Analogous application of Swiss takeover rules?

2.1 The Alu Menziken case

In the years 2006 and 2007, Montana Tech Components AG, Menziken (MTC) acquired in a private deal all 400'000 registered shares of series B with a par value of CHF 2 each[37] and 129'000 registered shares of series A with a par value of CHF 10 each in Alu Menziken Holding AG (as of 3 June 2010: Alu Menziken Extrusion AG), Menziken (AM), in total representing 52,3 percent of the share capital and 73,5 percent of voting

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29 If 98 (or more) percent of shares are acquired in the PTO, the remaining 2 percent can be squeezed-out by way of cancellation of shares (article 33 SESTA); if 90 (or more) percent of shares are acquired, the 10 percent minorities may be squeezed-out by way of squeeze-out merger (article 8 paragraph 2 MA).

30 In January 2011, the TOB however proposed to abolish the premium. The State Secretariat for International Financial Matters is examining whether this matter shall be incorporated in the revision of SESTA currently under way.

31 Tschäni/Iffland/Diem (FN 1) note 292, who assume that such acquisition will have an impact on the valuation of the transferring company, which is why the premium (or a part thereof) will be accorded to the shareholders of the transferring company.

32 The hostility of the Alcon minority shareholders, and the formation and the power of the independent committee respectively, are rather untypical for a merger structure.

33 For example, a large shareholder who has agreed to accept the offer is no longer bound to such agreement in case a competitive bid is launched, i.e. any «hard irrevocable» would not be enforceable, see recommendation 0161/02 InCentive Capital AG of 11 June 2003 E. 5.4.3.

34 Article 56 et seq. TOO.

35 Article 163a PILA.

36 Article 163b PILA.

37 Shares with preferred voting rights *(Stimmrechtsaktien).*

rights in AM. On 12 November 2009, MTC launched an offer to the shareholders of AM to acquire all outstanding 190'900 registered shares of series A of AM. On 12 January 2010, MTC announced that as per 8 January 2010, the date of expiry of the additional offer period *(Nachfrist),* it held 99,77 percent of the share capital and 99,31 percent of voting rights in AM.

AM is a Swiss stock corporation with registered seat in Menziken (canton of Aargau). The shares in AM are not listed on a Swiss stock exchange in the sense of article 2 lit. c SESTA[38] but, at the time of the offer, traded OTC with Bernese Cantonal Bank[39]. The Swiss takeover rules did not apply. MTC had nevertheless chosen a PTO(-like) structure and thereby to «do the offer by the book»[40]. Apart from the disadvantages outlined in section III.1.2, another reason why a merger structure was not chosen could have been that MTC wanted to avoid the adverse tax consequences of the indirect partial liquidation rules[41].

The MTC offer was published on 12 November 2009 by means of an offer notice[42] in the Swiss Commercial Gazette *(SHAB)* and certain newspapers as well as on the Bloomberg and Reuters. The complete offer prospectus could be requested from MTC, and basically contained all the information required by article 19 et seqq. TOO, i.e. information on the offeror, information about the subject matter of the offer and the price, information about the target company, and information on the MTC shares as consideration for the AM shares. The prospectus also included the report of the board of directors of AM, in which it recommended that the offer be accepted. As the recommendation was based on a Fairness Opinion, the latter formed an integral part of the report. The report stated that certain board members had a conflict of interest, and indicated the measures taken by AM in order to prevent the recipients of the offer from being prejudiced with respect to the conflict of interest.

The prospectus did however neither include a report of a review body pursuant to articles 26 et seqq. TOO nor has it been reviewed by the TOB prior or subsequent to the offer. The authorities have not been involved, and the proceedings set forth in articles 54 TOO have not been followed. Accordingly, the analogous application of the Swiss takeover rules was limited to obligations which are imposed on offerors, and there was no supervision by the TOB and the review body.

The Alu Menziken case gives cause to briefly analyze the TOB's practice in similar cases.

2.2 Extent of applicability

In 1999 the TOB considered accepting a request for voluntary submission to articles 22 et seqq. SESTA and supervising the offer under circumstances similar to the TAG Heuer case (i.e. in the event of an offer for shares in a foreign company)[43], but acknowledged that, because the Swiss takeover rules impose obligations on both the acquirer and the target company, a voluntary submission initiated by the acquirer is problematic in case of an unfriendly PTO, and thus concluded that such voluntary submission would not lead to the application of the rules that impose obligations on the target company.

However, in the BioXell matter the TOB deviated from the position taken in the TAG Heuer case and stated that the offer did not fall within the scope of article 22 SESTA, and that it would therefore not verify the conformity of this offer and not issue a decision regarding the matter[44]. Although the TOB rejected assumption of jurisdiction and thus the application of procedural rules in the BioXell case, it seemed to accept that the offeror declared the substantive rules to be applicable[45].

In case the TOB does not accept a request for voluntary submission[46], or if such request is not submitted in the first place but the Swiss takeover rules are said to be applicable via a declaration of a party, the extent of applicability of the Swiss takeover rules is always limited not only to the substantive rules but also to the acquirer's obligations[47]. Therefore, an acquirer will presumably

38 Cf. section II.2.

39 http://www.otc-x.ch.

40 Cf. the public offer by Cosmo Pharmaceuticals S.p.a. for all publicly held registered shares of BioXell S.p.A., an Italian company listed on the SIX Swiss Exchange, in November 2009, in which Cosmo Pharmaceuticals S.p.A. stated that the Swiss provisions regarding tender offers were not applicable. Nevertheless, it declared that it would voluntarily submit to the material provisions of this law.

41 If an individual shareholder resident in Switzerland (such as the Gautschi family members) sells shares in a business which were the shareholder's private assets and after the sale of shares become part of the business assets of the purchaser, then the seller may be required to pay income tax on the capital gain realized from the sale of shares if assets are thereafter removed from the business. Such sale of shares would then be considered an indirect partial liquidation for tax purposes. As a result, a normally tax-free private capital gain is converted into taxable investment income in the hands of the individual shareholder.

42 Cf. article 18 paragraph 2 TOO.

43 See FN 7.

44 Cf. the information provided on 20 November 2009 by the TOB under http://www.takeover.ch/news.

45 See Rüedi (FN 2) note 469 et seqq. with a detailed explanation as to why he deems a voluntary submission (be it by way of request for submission to the TOB or by mere declaration) not permissible.

46 Rüedi (FN 2) is of the opinion that there is no legal basis for a request for voluntary submission to the TOB, and thus concludes that such request is not permissible, see note 495 et seqq.

47 Cf. Rüedi (FN 2) note 486 regarding the problematic choice of private instead of administrative procedural rules. One out of many consequences of such alternative procedure is the different mechanics to squeeze-out minority shareholders, see Christian Staub/Georg Gotschev, Der Ausschluss von Minderheitsaktionären nach Art. 33 Börsengesetz und durch squeeze-out merg-

only aim to follow articles 22 et seqq. SESTA in case it has the support of the target company's board of directors.

IV. The target company's choice?

1. Starting point

The action alternatives under section III. have been considered mainly from an acquirer's perspective, for the most part leaving aside the target company's potential power to influence the transaction structure. The possibilities of a (potential target) company, which in principle[48] is not subject to articles 22 et seqq. SESTA, to impose the Swiss takeover rules on a potential acquirer shall be briefly looked at hereinafter.

2. Voluntary submission

When becoming aware of a potential takeover, the target company could of course submit a request for voluntary submission to articles 22 et seqq. SESTA to the TOB. Based on the aforementioned practice of the TOB[49], it is however questionable whether the TOB would accept assumption of jurisdiction over the matter. This statement applies all the more if the acquirer does not support the request.

3. Forcing-in

3.1 Restriction of transferability of shares?

A company could try to force a potential acquirer to comply with the (substantive) Swiss takeover rules by providing for consequences if the acquirer fails to do so. A company could for instance provide in its articles of incorporation that any shareholder who does not comply with these rules will be prohibited from voting any shares (such method hereinafter referred to as «Forcing-in»[50]).

Such Forcing-in *de facto* results in a restriction of transferability of shares, the permissibility of which may depend on whether or not the (potential) target company is a Swiss or a foreign company.

3.2 Swiss target company

a. Not listed

If the company in question is a Swiss company which is not listed on a (Swiss or foreign[51]) stock exchange, article 685b CO regarding restrictions in the articles of incorporation of non-listed companies applies. Pursuant to paragraph 1 of said article, the company may refuse its consent for the transfer if it gives a valid reason which is mentioned in the articles of incorporation, or if it offers to the alienator of the shares to take over the shares for its own account or for the account of other shareholders or for the account of third parties at the real value at the time of the request. Paragraph 2 stipulates that valid reasons are deemed to be provisions regarding the composition of the shareholders' circle which justify the refusal in view of the company's purpose or the economic independence of the enterprise. Pursuant to paragraph 7 of article 685b CO, the articles of incorporation shall not make the prerequisites for transferability more difficult.

It is thus assumed that a company that does not permit a shareholder to vote its shares (merely) based on the argument that such shareholder did not comply with the Forcing-in clause, and the Swiss takeover rules respectively, would violate article 685b paragraph 7 CO.

b. Listed

If the Swiss company is listed on a stock exchange, article 685d CO applies. Pursuant to said article, an acquirer may only be refused if either the percentage limit provided in the articles of incorporation is exceeded or if the acquirer, upon request, does not expressly declare that he acquired the shares in his own name and for his own account.

From the statement above, it follows that even if the company were listed, it could not prohibit an acquirer from voting the shares (merely) based on the allegation that he did not comply with the Swiss takeover rules as prescribed in the Forcing-in clause[52].

3.3 Foreign target company

If the articles of incorporation of a foreign company aim for the application of the Swiss takeover rules, the per-

er gemäss Fusionsgesetz, in: Gesellschafts- und Kapitalmarktrecht (GesKR) 2006, 265 et seqq.

48 Because it is a foreign company and/or not listed on a Swiss stock exchange.

49 Cf. section III.2.2.

50 «Forcing-in» as described herein is not to be mistaken for «Opting-in», a term which is commonly used in situations where the shareholders' meeting of a Swiss company resolves upon the abolishment of an «Opting-out» clause, which in turn commonly stands for the provision in the articles of incorporation stating that an acquirer who crosses the relevant threshold is not required to make a mandatory PTO, see article 22 paragraph 2 SESTA.

51 Matthias Oertle/Shelby Du Pasquier, in: Honsell/Vogt/Watter (Hrsg.), Basler Kommentar Obligationenrecht II, Art. 530 – 1186 OR, 3rd ed., Basel 2008, note 2 to article 685d.

52 Worth mentioning in this context are however the views taken by Rolf Watter/Dieter Dubs in constellations where they supported target companies (namely Sulzer and Implenia) that rejected an acquirer as a shareholder with voting rights because of an alleged violation of the law (e.g. omission of merger filing) or compromise of certain business sectors (Lex Koller), see their article «Was bedeuted Fairplay beim Kampf um die Kontrolle von Firmen» in: Neue Zürcher Zeitung of 23 November 2007, 29.

missibility of such Forcing-in clause from a corporate point of view is to be determined by applicable local law[53].

3.4 Assessment

It is assumed that Swiss corporate law does not allow a Swiss company (irrespective of whether it is listed or not) to provide for a Forcing-in clause. Local law would have to be consulted if the company in question were a foreign entity. In any case, the question of whether or not a Forcing-in clause is permitted under applicable corporate law must be distinguished from the question whether the TOB considers itself bound to such Forcing-in clause and thus agrees to verify the conformity of such «forced-in» offer and issues a decision regarding the matter. Based on the practice of the TOB outlined above, this seems very unlikely.

Notwithstanding the aforesaid, and irrespective of whether or not[54] permitted pursuant to applicable local corporate law, the actual pressure such Forcing-in clause imposes on a potential acquirer should not be underestimated. Any challenge to the Forcing-in clause could result in lengthy and costly proceedings, which an acquirer may not be willing to endure.

Assuming that the TOB would not consider itself bound by the Forcing-in, the imposed application of the Swiss takeover rules would in any case be limited again to not only the substantive rules but also the obligations of the acquirer[55].

V. Concluding remark

Articles 22 et seqq. SESTA apply only to public offers relating to shares in a company incorporated in (or effectively managed from) Switzerland which are listed on either SIX Swiss Stock Exchange or BX Berne eXchange. Due to the accumulation of the two prerequisites, i.e. place of incorporation and place of listing, the Swiss takeover rules do not apply to transactions where the target company is either a foreign company listed in Switzerland or, subject to certain exemptions, a Swiss company not listed on a Swiss stock exchange.

The merger structure can always be considered as a possible alternative to (Swiss and foreign) takeover law. In case the constellation is such that articles 22 et seqq. SESTA do not apply, and a merger is for some reason not a viable option, an acquirer may nevertheless want to structure the transaction pursuant to, or at least along the lines of, Swiss takeover law. Assuming that the TOB would, if at all, only in very rare cases be willing to verify the conformity of an offer and issue a decision, and thereby assume jurisdiction, the extent of such «analogous» application will however be limited to the obligations of the acquirer under the substantive rules and therefore only be considered if the offer is friendly. In principle, the transaction structure is determined by the acquirer and not the target company's choice. A target company could try to impose the Swiss takeover rules on potential acquirers, e.g. by threatening them with certain consequences if these rules are not complied with. Although the permissibility of such Forcing-in will in most cases be questionable, it may to a certain extent have a deterrent effect.

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53 See article 155 lit. f PILA which provides that the law governing a company shall particularly determine, *inter alia,* the internal relationships, especially the relationships between the company and its shareholders.

54 It must however be noted that if a Forcing-in is not permitted pursuant to local law, it means that the implementation thereof lies outside the competence of the board of directors and may thus lead to respective management liability.

55 Such as the obligation to make a mandatory offer if the 33$^{1}/_{3}$ percent threshold is crossed and the actions described under section III.2.1.