Switzerland – Scope of application of Swiss takeover rules

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If an acquisition of a company is subject to the Swiss takeover rules, articles 22 *et seq.* 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. Such legal entities or persons thus have great interest in knowing whether or not (or to which extent) the Swiss takeover rules apply. This article aims to firstly briefly outline the scope of the application of articles 22 *et seq.* SESTA and to secondly allude to the topic of analogous application of such rules.

Scope of application

According to article 22 paragraph 1 SESTA, the Swiss takeover rules shall apply to public takeover offers (PTO) for holdings in Swiss companies whose equity securities are, in whole or in part, listed on a Swiss stock exchange.

Public offer for equity securities

'Equity securities' pursuant to article 22 paragraph 1 SESTA means shares (*Aktien*), 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.

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 of 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.

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 is, the weaker the negotiation power of the individual shareholder is. Therefore, the crucial factor for the Swiss Takeover Board (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 intention 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.

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.

Swiss target company

In accordance with the Swiss principle of incorporation (*Inkorporationsprinzip*) set forth in article 154 of the Swiss Federal Act on International Private Law, a company is deemed a "Swiss" company if it is incorporated under Swiss law, and thus has its registered seat in Switzerland. 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.

In the year 1999 in the matter of TAG Heuer, whose registered seat was in Luxembourg, whereas the place of effective management was in Switzerland, 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. 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.

A positive conflict of competence can occur in case of stapled stock because takeover laws of both jurisdictions are applicable. In such scenarios the TOB admits that foreign law applies, provided that it is more closely connected with the company than Swiss law and that foreign law meets the Swiss minimum standards defined in the SESTA. 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 US. In such cases, the TOB permits the offeror to exclude the shareholders in the US and in other countries in which the Swiss prospectus would not meet local standards for the offer (so-called 'purchase restrictions').

Listing on a Swiss stock exchange

'Listing' in the sense of article 2 *lit. c* SESTA, means admission to trading on the principal or second exchange. Accordingly, all Swiss companies whose equity securities are listed according to one of the standards of the SIX Swiss Exchange or BX Berne eXchange are subject to the Swiss takeover rules. Excluded from this scope of application are securities which are traded over the counter (OTC) only.

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, bypass the minority protection set forth by the takeover rules via resolution taken by the board of directors. 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 or shares of a private Swiss company whose only asset is the participation in a Swiss listed company.

If a Swiss company is listed on a foreign stock exchange only, the Swiss takeover rules do not apply but, provided that 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.

Analogous application of Swiss takeover rules?

By accumulating the two main requirements, i.e. place of incorporation and place of listing in Switzerland, SESTA on the one hand prevents an offer from being subject to contradicting foreign law, but on the other hand accepts that negative conflicts of competence can occur, i.e. that an acquisition is not governed by any takeover laws at all. However both the offeror and the target company which is not a Swiss entity and whose equity securities are not listed on a Swiss stock exchange may – yet for different reasons – feel the want to nevertheless apply the Swiss takeover rules, or at least certain parts of it.

Initiated by the offeror

An offeror may for different reasons, such as adherence to good corporate governance, be interested in applying SESTA despite the fact of occurrence of a negative conflict of competence.

In connection with the aforementioned leading case (TAG Heuer), the TOB considered accepting a request for voluntary submission to articles 22 *et seq.* 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), but acknowledged that, because the Swiss takeover rules impose obligations on both the offeror and the target company, a voluntary submission initiated by the offeror 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.

In the recent BioXell matter, the TOB however 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 with the Swiss takeover rules and not issue a decision regarding the matter. Although the TOB rejected the 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.

In case the TOB does not accept a request for voluntary submission, 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 offeror's obligations. Therefore, an offeror will presumably only aim to follow articles 22 *et seq.* SESTA in case it has the support of the target company's board of directors.

Imposed by the target company

Obviously, since the Swiss takeover rules impose numerous obligations on an acquirer such as the obligation to make a mandatory offer if the $33\frac{1}{3}$% threshold is exceeded, the board of the target company acting in the interest of the shareholders may want to subject an offeror to such rules.

Thus, when becoming aware of a potential takeover, the target company could of course submit a request for voluntary submission to articles 22 *et seq.* SESTA to the TOB. Based on the aforementioned practice of the TOB, it is however questionable whether the TOB would accept assumption of jurisdiction over the matter. This statement applies even more if the offeror does not support the request.

A company could try to force a potential offeror to comply with the (substantive) Swiss takeover rules by imposing consequences if the offeror 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').

Such Forcing-in results *de facto* 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.

If the company in question is a Swiss company which is not listed on a (Swiss or foreign) 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 board of directors of 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 an OTC-traded but non-listed Swiss 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.

Article 685d CO applies not only to Swiss companies which are listed on a Swiss exchange but also to Swiss companies which are listed on a foreign stock exchange. Pursuant to said article, an offeror may only be refused if either the percentage limit provided in the articles of incorporation is exceeded or if the offeror, 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 offeror 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.

If the articles of incorporation of a foreign company aim for the application of the Swiss takeover rules, the permissibility of such Forcing-in clause from a corporate point of view is to be determined by applicable local law.

Notwithstanding the aforesaid, and irrespective of whether or not permitted pursuant to applicable local corporate law, the actual pressure such Forcing-in clause imposes on a potential offeror 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 consider itself bound by the Forcing-in, the imposed application of the Swiss takeover rules would in any case again be limited to not only the substantive rules but also the obligations of the offeror.

Conclusion

For a PTO to fall under the SESTA, the offer must be public and relate to shares in a company incorporated in (or effectively managed from) Switzerland 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. Likewise, Swiss companies which are listed on a foreign stock exchange but not in Switzerland do not fall within the scope of the Swiss takeover rules.

In case the constellation is such that articles 22 *et seq.* SESTA do not apply, 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 rare cases be willing to verify the conformity of an offer with the Swiss takeover rules 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. A target company could try to impose the Swiss takeover rules on potential acquirers, e.g. by threatening them or the shareholders 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.

Walder Wyss – firm overview

Walder Wyss is one of the leading law firms in Switzerland. Our clients include national and international companies, public-law entities and individuals.

Walder Wyss has specialised in selected business sectors and product groups since its founding and we have maintained this focus, systematically expanding our expertise.

Many of our lawyers have industry-specific knowledge gained working for large companies. We can therefore intuitively navigate an organisation's internal structures and rapidly grasp its specific requirements. Through intensive exchanges with our clients' teams we have developed a profound understanding of their business processes, enabling us to make specific, solution-based recommendations.

Our clients also benefit from our corporate culture with its flat hierarchies. This allows us to act rapidly without being encumbered by bureaucracy. Depending on the demands of a particular task, we put together multidisciplinary teams that are best equipped to meet our clients' specific needs. We are flexible in our approach to tasks and time management and work together with our clients to achieve the most efficient processing.

Walder Wyss was established in 1972 in Zurich and has grown steadily since inception. Walder Wyss has also had offices in Berne since 2009.

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