

NewsLetter

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Basic Features of Swiss Takeover Law

The Swiss Stock Exchange Act imposes obligations on the purchaser of a qualified interest in a Swiss company listed on a Swiss stock exchange. The following presents some basic elements of the Swiss takeover law, along with recent decisions of the Takeover Board.

Disclosure of Participations

The Swiss Stock Exchange Act stipulates that whoever directly, indirectly or in concert with third parties, acquires shares of a listed company domiciled in Switzerland and thereby attains or exceeds the threshold of 5, 10, 20, 33- $\frac{1}{3}$ %, 50 or 66- $\frac{2}{3}$ % of the voting rights, has the obligation to notify this fact to the company and the exchanges on which the equity securities are listed. It is irrelevant whether such voting rights are exercisable or whether the equity securities acquired are listed. The signing of the purchase agreement is the event which

gives rise to the notification obligation; the notification must follow within four stock exchange trading days from the date the notification obligation arises. The notification will be published. Exemptions from the notification obligation and the publication obligation may be granted for important reasons.



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Obligation to Make a Public Tender Offer

Whoever directly, indirectly or in concert with third parties, acquires equity securities which, when added to securities already owned, exceed the threshold of 33- $\frac{1}{3}$ % of the voting rights of a company, is obliged to submit a tender offer to purchase all of the equity securities listed of this so-called target company. Whoever is not required to submit an obligatory tender offer but nevertheless wishes to acquire equity securities of a listed Swiss company by means of a tender offer, may submit a voluntary tender offer.

The threshold of 33- $\frac{1}{3}$ % is raised to up to 49% if the target company has specified this in its articles of incor-

poration (Opting-Up). As with the disclosure obligation, it is irrelevant whether the voting rights are exercisable or whether the equity securities are listed. The tender offer obligation exists only in relation to the equity securities listed on a Swiss stock exchange. The obligatory tender offer must be submitted at the latest two months after the threshold has been exceeded. On request, exemptions may be granted from the duty to make a tender offer. The tender offer obligation does not exist if the target company has stipulated in its articles of incorporation before the listing of its equity securities that an acquirer shall not be obliged to submit a tender offer (Opting-Out).

Definition of the Offering Price

In case of an obligatory tender offer, the offer price must be at least equivalent to the average of the opening quotations established during the last 30 trading days on a Swiss stock exchange prior to the publication of the tender offer and must not be more than 25% below the highest price which the offeror has paid during the last twelve months for equity securities of the target company. In accordance with the "Best Price Rule", the offeror and those persons acting in concert with it may not acquire equity securities of the target company after the publication of the tender offer at a price above the price of the tender offer without offering this price to all recipients of the tender offer. According to the practice of the Takeover Board, this rule applies during the entire period while the tender offer is outstanding and six months after expiration of the tender period.

Advance Notice of Public Tender Offer

The different deadlines for notification of share ownership and making an obligatory tender offer have the result that the offeror must disclose the relevant share ownership prior to its obligation to submit an obligatory tender offer. This might have as a consequence that the equity securities which are subject to the obligatory tender offer are exposed to speculation and that the tender offer price will be sharply increased. The offeror may,

therefore, give advance notice of the tender offer before the publication of the tender offer prospectus and thereby fix the tender offer price because the calculation of the tender offer price is determined at the date of the advance notice. The offeror must, within six weeks after the publication of the advance notice, publish a tender offer that is consistent with the terms of the advance notice.

Prospectus – Conditions – Sales Restrictions

A public offer to purchase must be submitted in the form of a tender offer prospectus. The tender offer prospectus must contain, among other details, statements on the terms and price of the tender offer, the offeror, the target company and the financing of the tender offer. The tender offer prospectus must be submitted for examination to an accounting firm recognized by the Federal Banking Commission, or a stock broker, prior to its publication.

The offeror can protect itself against surprises in the takeover process by placing conditions on the public tender offer. Conditions precedent are permissible as long as the offeror cannot significantly influence the circumstances, which would cause such condition to apply. In case of conditions where the offeror has to participate in their taking effect, the latter must take all reasonable measures therefor. Conditions subsequent, which can be ascertained only after expiration of the offering period, are permissible only with the consent of the Takeover Board. The Takeover Board has recognized the existence of Swiss or foreign antitrust concessions or the legal process for a capital increase of the offeror for the purpose of financing the offer as permissible conditions subsequent and new appointments to the Board of Directors of the target company or the lifting of a provision in the articles of incorporation requiring the approval of the target company's board of directors for the transfer of shares as permissible conditions precedent.

Tender offer prospectuses often contain sales restrictions excluding as recipients of the offer shareholders with residence or legal domicile outside Switzerland. Such sales restrictions are permissible according to the Takeover Board, however, the differential treatment of the shareholders must not occur without a compelling reason nor may the restrictions extend beyond what is absolutely necessary to avoid potential liabilities. The Takeover Board recently decided that sales restrictions in respect of US shareholders would not be permitted in the future if such shareholders will hold fewer than 10% of the shares, if the target company has made significant efforts in the past to place its shares with US investors and if the public has been informed of such efforts.

Duty to Notify Transactions During Tender Offers

If the offeror or persons acting in concert with the offeror purchases or sells equity securities of the target company while the tender offer is pending, it must report this to the Takeover Board and the stock exchanges on which the securities are listed. The notification must reach the Takeover Board and the stock exchange at noon on the trading day following the relevant transaction. Third parties are also subject to a notification obligation, but only if they dispose directly or indirectly of a share of at least 5% of the voting rights of the target company – regardless of whether such rights are exercisable.

Squeeze-Out

If after the tender offer period the offeror holds more than 98% of the voting rights of the target company, it may demand that the remaining equity securities be declared void. To achieve this, the offeror must file lawsuit against the target company. After such equity securities are declared void, the target company shall re-issue them and transfer them to the offeror in exchange for payment by the offeror of the tender offer price. This payment is then remitted to the owners of the voided equity securities.

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The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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