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**LIQUIDATION OF UNPROFITABLE BUSINESS BY THE
TARGET COMPANY AS A PERMISSIBLE CONDITION
TO A PUBLIC TAKEOVER OFFER**

In a leading case, the Swiss Takeover Board (TOB) approves a condition of a public takeover offer that the target company divests or liquidates a significant part of its business.



By Alex Nikitine

Dr. iur., LL.M., Attorney at Law
Partner

Direct phone: +41 58 658 56 32
alex.nikitine@walderwyss.com



Christian A. Schmid

Attorney at Law
Associate

Direct phone: +41 58 658 52 70
christian.schmid@walderwyss.com



and Arbër Hyseni

MLaw
Trainee Lawyer

Direct phone: +41 58 658 55 86
arber.hyseni@walderwyss.com

Liquidation of unprofitable business by the target company as a permissible condition to a public offer

In its decision dated June 5, 2023, the Swiss Takeover Board (TOB) approved a condition of a public offer that the target company divests or liquidates a significant part of its business. It is a landmark decision of the TOB.

Background

With the publication of its pre-announcement published on May 4, 2023, UK-based Liontrust Asset Management Plc has announced to make a public exchange offer in the amount of approximately CHF 107 million for all GAM shares (0.0589 common shares of Liontrust for one share of GAM) to the shareholders of Zurich-based GAM Holding AG, listed on the SIX Swiss Exchange.¹ The Board of Directors of GAM has unanimously recommended the offer for acceptance.

However, the takeover shall only take place if the Fund Management Services (FMS) business in relation to all third-party funds without GAM branding is sold or terminated or divested beforehand – the FMS business accounted for around CHF 51.8 billion of GAM's total assets under management of around CHF 75 billion as of December 31, 2022. Against this background, Liontrust has made its offer conditional on GAM exiting the FMS business. The investor group NewGAM around Xavier Niel has criticized the offer in general and the mentioned condition as being unfair and incompatible with Swiss takeover law. Rock Investment SAS, also a member of the NewGAM group, had filed an objection with the TOB on May 9, 2023.

In its decision of June 5, 2023, published on June 7, 2023, the TOB confirmed, among other things, that the FMS liquidation condition was lawful.

Permissible conditions of public takeover offers

In the present case, a condition terms an objectively uncertain future event upon which the offeror wants to make validity of the public takeover offer conditional. Since the bidder may waive the conditions individually or in their entirety at any time, the non-fulfillment of a condition allows the bidder to withdraw from the offer. Consequently, the stipulation of the conditions and thereby the circumstances under which the bidder is not bound by its offer is of central importance for a bidder. Based on the view that a public offer should in principle be binding or unconditional, as well as on the principles of fairness and transparency, under Swiss takeover law, conditions in voluntary offers are only permissible under the four cumulative conditions set out below. Inadmissible conditions, on the other hand, are generally deemed not to exist, i.e., the offer is deemed to have been made without the inadmissible condition.²

¹ Cf. on public takeover offers under Swiss law https://www.walderwyss.com/user_assets/publications/Doing-Business-in-Switzerland-2.-Auflage.pdf

² It is therefore crucial that the offering process is set up carefully from the outset and, if necessary, in consultation with the TOB. After all, an offeror may include a condition, which it has listed in the pre-announcement and which has been declared inadmissible prior to publication of the offer, in an amended form in the prospectus, provided that the amended version of the condition is a permissible condition.

(i) Reasonable interest of the bidder

According to the first requirement, conditions are only permissible in voluntary offers³ to the extent that the bidder can show a legitimate interest in such conditions. A condition must have a connection to the offer or, according to doctrine, be objectively justifiable. The TOB affirms a connection to the offer, for example, if the condition is aimed at the takeover of control over the target company, the smooth implementation of the takeover offer or the prevention of a loss of substance or assets of the target company.

In the present case, Rock Investment claimed, among other things, that the FMS liquidation condition was unfair because it would allow Liontrust to keep the profits from the divestiture or liquidation of the FMS business for itself, while the risks of a failure of the divestiture were borne exclusively by the shareholders of GAM. Liontrust, for its part, argued that without the FMS liquidation condition, Liontrust would not have submitted the public takeover offer, which is why the legitimate interest was given.

(ii) No potestative conditions

Secondly, the condition must not be of a potestative nature, which means that the condition must be a condition that cannot be influenced by the bidder itself in a material manner. If conditions whose satisfaction the bidder can significantly influence (so-called potestative conditions) were permitted, the bidder could withdraw its bid at will, which would contradict the principle that public takeover offers are binding. Consequently, conditions that are impossible to be satisfied from the outset are also inadmissible, since otherwise the validity of the offer would in such cases depend solely on the offeror's will or on whether the offeror

waives the impossible condition (and pursues the offer) or insists on the condition (with the consequence that the offer is not pursued).

Rock Investment argued that the condition in question was of potestative nature because the satisfaction of the condition depended on the behavior of GAM, which in turn acted in concert with Liontrust. Liontrust claimed that acting in concert did not mean that Liontrust could influence GAM's operating business.

(iii) Clearly and definitely formulated condition

Thirdly, the condition must be worded in a clear and definite manner so that it can be assessed objectively at the relevant point in time whether the condition is met or not.

Rock Investment claimed that the condition was unclear because the FMS business was insufficiently defined. Liontrust disputed this as well.

(iv) No unfair condition

The fourth requirement is that the condition must not be unfair. According to the practice of the TOB, a condition is considered unfair if its occurrence requires unlawful conduct or a breach of contract on the part of the target company or its executive bodies.

In its objection, Rock Investment argued that the condition was unfair because it put pressure on GAM's Board of Directors or created an incentive to divest the FMS business hastily and at an unfavorable price. Liontrust countered that GAM had tried for some time to find a solution for individual business units without success. It was therefore not true that Liontrust had forced GAM to divest or liquidate the FMS business. Rather, GAM itself had come to the conclusion that there

was no way around an exit from the FMS business and that the exit from the FMS business is part of GAM's strategic realignment.

Preliminary examination and proceedings before the Takeover Board

An offeror may submit the pre-announcement or the offer prospectus (including any conditions) to the TOB in advance for review. The TOB publishes its decision on its website immediately after publication of the pre-announcement or the offer prospectus. Qualified shareholders⁴ will not be heard in the preliminary examination procedure but must file an objection against the decision within five trading days of publication of the decision. The consequence of such an objection is that the objector (and the other parties) is granted the right to be heard. The procedure before the TOB is characterized by its rapidity.

Liontrust submitted its pre-announcement and the FMS liquidation condition contained therein to the TOB for preliminary examination. On May 4, 2023, the TOB published its decision in which it declared the offer and in particular the FMS liquidation condition admissible. Rock Investment, a member of the investor group NewGAM around Xavier Niel, which according to the disclosure notice of April 29, 2023, holds a 7.5% stake in GAM, filed an objection with the TOB on May 9, 2023, and applied for the right to become party to the proceedings. By decision of May 25, 2023, the TOB granted Rock Investment the status of a party to the proceedings. Rock Investment claimed, inter alia, that the FMS liquidation condition was inadmissible and therefore not to be included in the offer prospectus.

³ Mandatory offers, on the other hand, require good cause within the meaning of article 38 of the FINMA Financial Market Infrastructure Ordinance.

⁴ Any shareholder holding at least 3% of the voting rights of the target company at the relevant time (article 56 para. 4 of the Takeover Ordinance).

Decision of the Swiss Takeover Board in the matter of GAM

In the decision of June 5, 2023, published on June 7, 2023, the TOB now confirms its decision of May 4, 2023, and the validity of the FMS liquidation condition according to the pre-announcement. The TOB affirmed that Liontrust had a legitimate interest in the condition. The FMS liquidation condition is comparable to the interest of a bidder to prevent a loss of substance of the target company or the non-disposal of certain assets ("crown jewels") by means of a condition, albeit under reversed circumstances. In particular, in circumstances such as in the case at hand, in which the target company is in financial difficulties, a condition such as the FMS liquidation condition may enable a public takeover offer which an offeror without the condition might not make or would not make on the same terms. The FMS liquidation condition is thus also in the interest of the GAM shareholders.

Furthermore, the FMS liquidation condition was not a prohibited potestative condition. Acting in concert does not mean that every condition requiring action by the Board of Directors becomes a potestative condition. Also in the present case, the transaction agreement does not provide the possibility to instruct the Board of Directors of GAM in order to prevent the occurrence of the condition – on the contrary, the transaction agreement provides that each party shall procure that the offer conditions are duly satisfied as expeditiously as reasonably possible. Furthermore, the FMS liquidation condition was sufficiently clear defined. Finally, there is no apparent reason why the FMS liquidation condition would be unfair. Rather, the liquidation of the loss-making FMS business would (also) be in the interest of GAM.

Outlook and summary

The parties involved in the proceedings before the TOB may appeal the decision to the Swiss Financial Market Supervisory Authority FINMA within five trading days after the decision has been delivered. An appeal against the decision of FINMA could then be filed with the Federal Administrative Court within ten days.

The decision of the TOB is remarkable in that the TOB has so far regularly approved conditions that there is no loss of substance or sale of certain assets ("crown jewels"). The FMS liquidation condition was, to a certain extent, the reverse situation or, as the TOB calls it, a case with "reversed signs". One may wonder how the TOB would decide in cases where the target company is not in financial difficulties or in cases where the business to be divested is not an unprofitable business generating losses.

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