

NewsLetter

No. 57 April 2005

Recent Developments in Swiss Takeover Law

Swiss takeover law imposes duties on the acquirer of a qualified participation in a Swiss company which is listed on a stock exchange in Switzerland. Recent developments in Swiss takeover law based on selected recommendations from the Takeover Board and decisions of the Federal Supreme Court are discussed below.

Acting in Concert with Third Parties

Whosoever, directly, indirectly or acting in concert with third parties, acquires equity securities which, added to equity securities already owned, exceed the threshold of 33 $\frac{1}{3}$ % of the voting rights of a company, whether or not such rights are exercisable, shall be under an obligation to make an offer to acquire all listed equity securities of that company. A person acts in concert with third parties if it coordinates its actions in respect of the acquisition or sale of securities or the exercise of voting rights with third parties through an agreement or other coordinated measures. Such coordination exists, inter alia, in the event of legal relationships for

the acquisition or sale of securities, legal relationships regarding the exercise of voting rights or the constitution by individuals and/or legal entities of a group of companies or other types of firms controlled through possession of the majority of voting rights or capital or in any other way.



by Dr. Urs P. Gnos
+41 1 265 75 39
ugnos@wwp.ch

A contractual relationship among the shareholders is not necessary for an acting in concert. Social connections, if they are significant enough that the shareholders no longer vote fully independently, are sufficient. This includes gentlemen's agreements, in which the parties consciously intend to avoid a legal obligation but instead trust the other party to observe the "agreement". The person who provides assurances in this way is no longer fully independent, even though the violation of the agreement lacks legal, and has only social, consequences, such as an impact on business relationships.

An acting in concert is given if several business partners each acquire roughly the same number of shares in a target company, acquire shares through a company which they own in common, agree on a common business strategy in respect of the target company, implement this strategy through membership on the board of directors and pursue their common goals over a period of years. The law only imposes a duty to make a tender offer if the transaction, objectively considered, can have effects on the control of the target company.

The amendment of shareholder agreements (whether in respect of the participating shareholders or in the material terms of the shareholders' agreement) can lead to a duty to make a tender offer, although not every insignificant change among the shareholders' group will produce this result.

A group of shareholders and the underwriting banks do not act in concert if, in the course of a capital increase with a firm underwriting the underwriting banks arrange agreements concerning the exercise of preemptive rights and market-standard lock-up agreements with the existing shareholders and the target company.

Determination of the Offer Price

In the case of a mandatory tender offer or a voluntary tender offer which will result in the acquisition of control over the target company, the offer price must be at least equal to the average opening price during the last 30 trading days prior to the publication of the offer prospectus and must not be more than 25% below the highest price that the offeror paid for the target company's securities during the last 12 months.

In calculating the average opening price, only days on which the securities of the target company were traded will be counted. An illiquid market is not a reliable basis for the calculation. In such a situation, a fairness opinion on the valuation of the target company is required.

In determining the highest previously paid price, the highest price paid by a group member at a time when

the group was in existence is the price that will be used. If the offeror and the target company agree on an offer and its terms, then the target company becomes a person acting in concert with the offeror, with the consequence that the target company's purchases of its own securities will be counted in determining the price to be paid by the offeror.

Best Price Rule

According to the "best price rule", the offeror and persons acting in concert with the offeror may not, after the publication of the offer prospectus, acquire securities of the target company at a price higher than the offer price unless this price is offered to everyone to whom the tender offer was made. This rule applies during the entire tender offer period and during a period of six months after the expiration of the term of the tender offer.

The "best price rule" is to be distinguished from the "previous acquisition" of securities. The "best price rule" is relevant for transactions made by the offeror in securities of the target company after the publication of the offer prospectus, while the "previous acquisition" of securities applies to transactions made by the offeror before such publication.

If the offeror enters into an agreement for the acquisition of a controlling interest which is closed before the publication of the offer prospectus, then this is considered a previous acquisition of securities. The same applies, in principle, if such agreement is entered into before the publication of the offer prospectus, but is closed at a later time. In this situation, a "previous transaction" exists only if such acquisition of the securities of the target company is not subject to suspension or termination if the tender offer is not successful.

Conditions

Conditions can protect the offeror against surprises in takeover transactions. Conditions precedent are permitted, if the offeror has no decisive control over such conditions. Conditions subsequent, the occurrence of which can only be determined after the lapse of the offer period, are permitted only with the approval of the Takeover Board which will be given if the advantages inuring to the benefit of the offeror can be considered to outweigh the disadvantages borne by the recipients of the offer.

The existence of approvals from antitrust authorities or the valid completion of a capital increase on the part

of the offeror for the financing of the tender offer are considered permissible conditions subsequent, the replacement of the board of directors of the target company or the removal of a statutory transfer restriction will be considered permissible conditions precedent. The offeror can also make its offer conditional on its acquisition of a minimum number of shares of the target company, provided that the threshold is not too high because otherwise the fulfilment of the condition would be at discretion of the offeror.

Compensation for the Offeror for an unsuccessful Tender Offer

The goal of the takeover procedures is to ensure that the shareholders are fully informed and can freely choose whether they want to accept an offer.

If the target company and the offeror agree that the offeror is entitled to compensation if the tender offer is not successful, then funds are lost by the target company if the tender offer is not successful, which accordingly results in a devaluation of the shares. This can limit the freedom of action of the shareholders. It must be determined on a case-by-case basis whether, on account of the extent of the agreed compensation, the shareholders see themselves as compelled to accept the offer in order to prevent the loss of value.

NewsLetter

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.

© Walder Wyss & Partners, Zurich, 2005



Walder Wyss & Partners
Attorneys at Law

Münstergasse 2
P.O. Box 2990
CH-8022 Zurich
Phone +41 44 265 75 11
Fax +41 44 265 75 50
reception@wwp.ch
www.wwp.ch

London Representative Office
9 Gray's Inn Square
London WC1R 5JQ
Phone +44 20 7405 2043
Fax +44 20 7405 0605