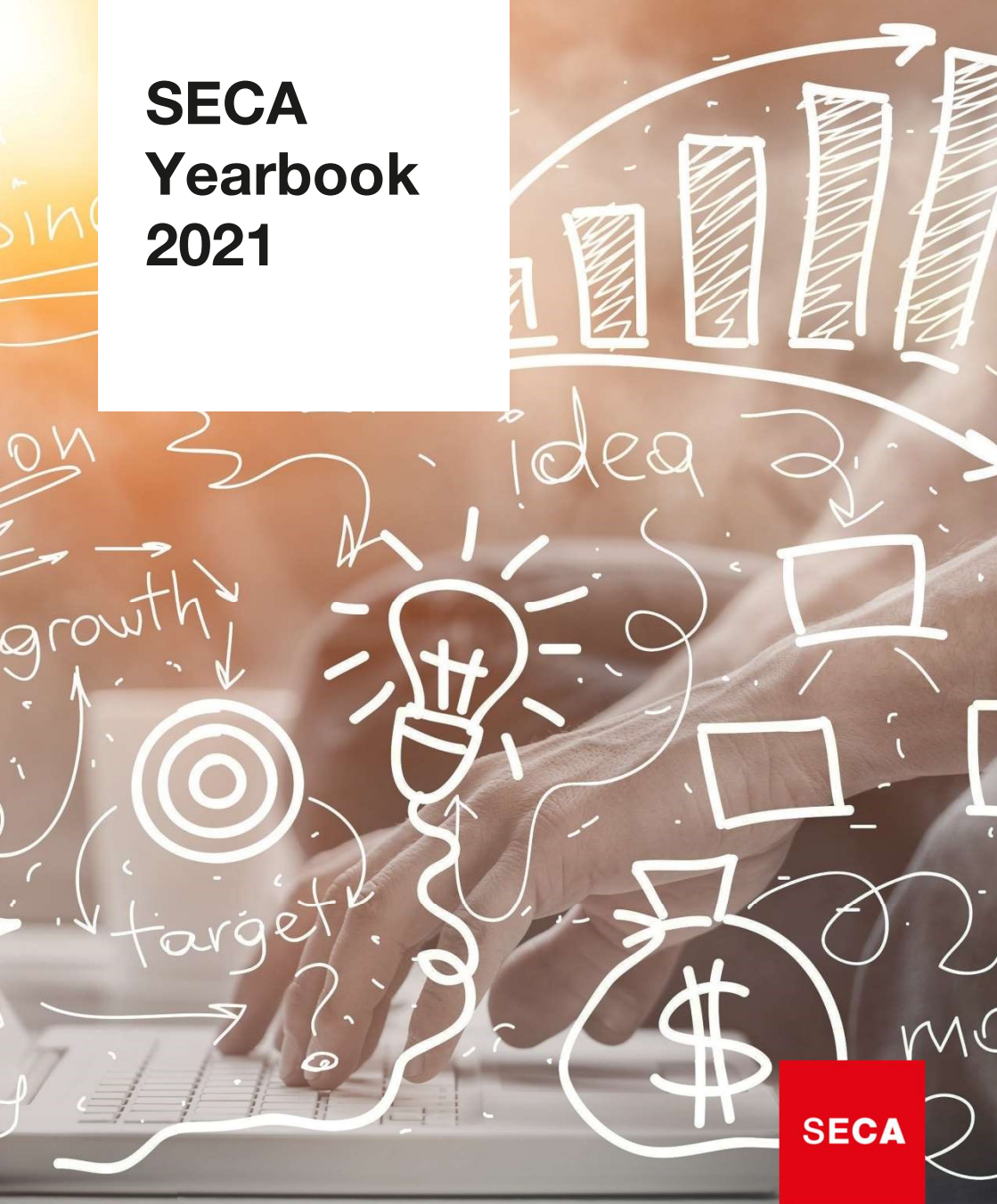


SECA Yearbook 2021



Swiss Private Equity & Corporate Finance Association
Schweizerische Vereinigung für Unternehmensfinanzierung
Association Suisse des Investisseurs en Capital et de Financement

Public Tender Offers in Switzerland – Legal Background and Development Since 2010

Analysis of Public Tender Offers in Switzerland

This chapter gives an overview on Public Tender Offers (PTO) in Switzerland by outlining the legal principles applying to PTOs and by analyzing PTOs involving Swiss targets that have taken place from 2010 to 2020. While this chapter is limited to PTOs, it should, however, be noted that under Swiss law, takeovers can be achieved in a number of ways. For instance, Swiss law also allows quasi-mergers, in which a subsidiary of the bidder or offeror is taking over the target company by way of merger and the target company's shareholders receive shares in the offeror (reverse triangular merger). Statutory mergers in turn are governed by the Swiss act on mergers, de-mergers, transformation and asset transfers (Merger Act).

Legal Framework

The provisions on public takeovers apply to all public offers for equity securities in companies (i) domiciled in Switzerland whose equity securities are at least partly listed on a stock exchange in Switzerland or (ii) not domiciled in Switzerland whose equity securities are at least in part mainly listed on a stock exchange in Switzerland.

The principal statutory provisions governing PTOs are set out in the following acts and ordinances:

- Financial Market Infrastructure Act (FMIA)
- Financial Market Infrastructure Ordinance (FMIO)
- FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA)
- Takeover Ordinance (TOO) issued by the Swiss Takeover Board (Takeover Board or TOB) detailing the different rules provided for in the FMIA
- Stock Exchange regulation, such as the Listing Rules (LR), the Directive Ad hoc Publicity (DAH) or the Delisting Directive (DD) of SIX Swiss Exchange

Terminology and Categories of PTOs

PTOs can be categorized as follows:

- mandatory offers vs. voluntary offers
- friendly offers vs. unfriendly offers
- cash offers (compensation in cash) vs. exchange offers (exchange for shares of another company) vs. mixed offers (compensation partially in cash and partially in shares)

PTOs are public offers to all (or sometimes to the minority) shareholders of a listed company to tender their shares at a price determined in the offer. Tender offers which do not qualify as mandatory tender offers are considered to be voluntary tender offers. The legal framework governing voluntary tender offers gives the bidder more flexibility than in a mandatory offer:

- voluntary tender offers may be subject to conditions and the offer price can be set freely subject to few exceptions (e.g. best price rule)

- a voluntary tender offer may be a partial offer, what means that it may be limited to only a certain number of shares of the target company
- a voluntary tender offer may be an exchange offer only

Circumstances Triggering a Mandatory Offer

An acquirer of shares which directly, indirectly or in collaboration with other parties acquires shares which, added to the shares already held, exceed the threshold of 33.3% of the voting rights of a target company must submit an offer to the remaining shareholders of the target company to acquire all listed shares or other equity securities of the target company. This also applies to voluntary offers which, when closed, would result in the threshold triggering a mandatory offer being exceeded. However, a target company may have (i) raised this threshold in its articles of association to up to 49% of the voting rights (opting up) or (ii) stated in its articles of association that an offeror shall not be bound by the obligation to make a public offer (opting out) (art. 135 para. 1 FMIA).

No mandatory offer has to be submitted, however, if an existing shareholder holding more than 50% of the outstanding shares of the target company acquires additional shares through individual purchases on the stock exchange or off exchange. Conversely, if such majority shareholder sells its participation to a third party or even a member of the same group, the acquirer has to submit a mandatory offer unless (i) the articles of association of the target company provide otherwise or (ii) an exemption is granted by the TOB.

Timeline

The following chart shows a typical procedural timeline of a PTO:

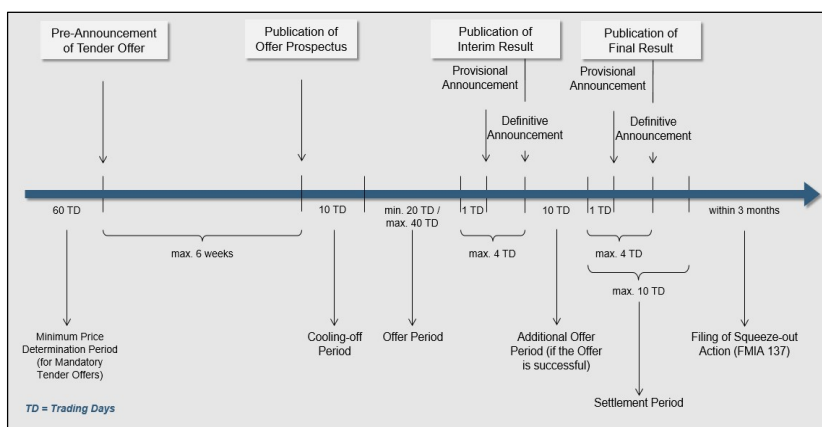


Figure 1: Typical procedural timeline of a PTO

Duties of the Offeror

The main duties of the offeror are the following:

- prepare an offer prospectus (art. 127 para. 1 FMIA)
- treat all shareholders equally (art. 127 para. 2 FMIA)
- comply with the minimum and the best price rules (art. 42-43 FMIO-FINMA) (see the next section for details)
- under certain conditions submit a mandatory offer to all the shareholders of the target company at a minimum price (art. 135 FMIA)
- in any case, submit the offer to an external review body and publish the report of such review body in the prospectus (art. 128 FMIA and art. 27 para. 2 TOO)
- publish the interim results of the offer (art. 44 TOO)
- extend the offer period after such publication for 10 trading days if all conditions of the offer are met or if the offer was unconditional (art. 46 TOO)
- publish the final results of the offer (art. 47 TOO)
- notify the Takeover Board and the Disclosure Office of the respective stock exchange of any acquisition or sale of shares of the target company during the offer period (art. 38-39 TOO)
- keep the offer strictly confidential during the time of its preparation or, if a leak has occurred, inform the market immediately about its intentions (art. 53 LR and art. 3 et seqq. DAH)

Principles regarding the Offer Price

An aspect of the obligation to treat all shareholders equally is the best price rule. The rule states that once an offer is published, the offeror is not allowed to acquire any shares above the price (and/or value of any consideration in kind, i.e. securities) offered in the PTO. If the offeror nevertheless acquires equity securities of the target company at a price higher than the price offered in the public offer, that higher price must be paid to all recipients of the offer (art. 10 TOO).

Conversely, the offeror is allowed to acquire shares in the market through the stock exchange or bilateral at a price below the price offered in the public offer. The best price rule becomes effective with the pre-announcement or the publication of the offer and stays effective during the whole offering period as well as six months after the expiration of the extended offer (art. 8 para. 3 lit. d TOO). However, if the offeror acquires equity securities of the target company before (or after) the mentioned period, the best price rule does not apply.

In the event of a mandatory offer (including voluntary offers which, when closed, would result in the threshold triggering a mandatory offer being exceeded), the price offered for the securities to be purchased must comply with the minimum price rule and equal or exceed the higher of the following amounts (art. 135 para. 2 FMIA):

- the volume-weighted average stock price on the relevant Swiss exchange for the last 60 trading days prior to the formal pre-announcement (if any) or the publication of the offer prospectus or
- the highest price that the offeror or a person acting in concert with him has paid for equity security of the target company during the last 12 months (including private block trades)

Duties of the Target Company

The main duties of the target company are the following:

- the preparation by the board of a report to the shareholders stating its position with regard to the offer (art. 132 para. 1 and 3 FMIA)
- notify the Takeover Board in advance of any defence measure considered (art. 35 TOO)
- refrain from certain unlawful defence measures (art. 132 para. 2 FMIA)
- obligations with regard to equal treatment of all offerors by the target company in case of competing offers (art. 49 TOO)

Squeeze-out and Delisting

If in the event of a successful offer the offeror intends to fully own the target company, there are two options:

- if the offeror holds more than 98% of the voting rights of the target company, the offeror may, within three months, petition the court to cancel the “outstanding equity securities” (art. 137 FMIA)
- if the offeror holds more than 90% of the voting rights of the target company, the offeror may (usually) through a subsidiary take over the target company by way of a squeeze-out merger (art. 8 para. 2 Merger Act)

Following a successful PTO, the listing of the shares of the target company at a stock exchange may not be appropriate anymore and the target company may apply for a delisting of its shares at the stock exchange. Upon entry into force of the revised Swiss company law on 1 January 2022, the delisting of shares will require a decision of the shareholders’ meeting (today, a resolution of the board of directors is usually sufficient). At SIX Swiss Exchange, the Regulatory Board decides upon the continued listing period which, in principle, may be no less than three and no more than 12 months from the delisting announcement (art. 4 para. 2 DD). However, if the delisting is a result of a PTO, the continued listing period may be shortened to as little as five exchange days. Trading in the shares of the target company will end as soon as the merger is effective and the target company struck-off the Commercial Register.

Statistical Findings

In the following, PTOs involving Swiss targets that have taken place from 2010 to 2020 are analyzed and statistical findings concerning the share price development, the trading volumes as well as the offer premia for takeover targets in PTOs are presented. As a result of the offer being made to all (or sometimes to the minority) shareholders of a listed company and the inherent publicity, PTOs often receive considerable public interest as well as extensive media coverage. Moreover, PTOs are comparably rare phenomena in the Swiss market: Of all the M&A transactions involving Swiss targets that have occurred from 2010 until 2020, only around 3% qualified as public takeover situations. PTOs frequently take place in a cross-border context and are often larger than M&A transactions involving private target companies.

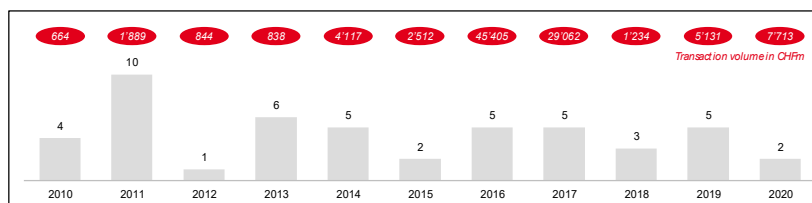


Figure 2: Number of PTOs per year from 2010 until 2020 and total annual transaction volumes (in CHFm)

The data sample ranges from 2010 to 2020 and includes 48 transactions with a total transaction volume of almost CHF 100bn. Instead of examining individual transactions, the data presented on the following pages focuses on an evaluation of PTOs in Switzerland on an aggregated level. While this type of analysis enables the identification of general trends and tendencies in the past, it restricts and limits interpretations on a transaction-specific level. During the time period from 2010 to 2020, an average of four to five PTOs took place in Switzerland per year. 2011 was the year with the highest number of PTOs (10), followed by the least active year in terms of number of PTOs (2012 with one transaction). Total yearly transaction volumes ranged from CHF 664m in 2010 to CHF 45,405m in 2016, thus exceeding the minimum of 2010 by almost 70 times.

PTOs in Switzerland Since 2010: Most Recent Transactions				PTOs in Switzerland Since 2010: Largest Transactions			
No.	Company	Year	Volume (CHFm)	No.	Company	Year	Volume (CHFm)
1	Sunrise Communications Group	2020	4,979.2	1	Syngenta	2016	42,404.8
2	Pargesa Holding	2020	2,733.7	2	Actelion	2017	28,333.4
3	BFW Liegenschaften	2019	112.0	3	Sunrise Communications Group	2020	4,979.2
4	Groupe Baumgartner Holding	2019	1.5	4	Panalpina Welttransport (Holding)	2019	4,691.6
5	Alpik Holding	2019	226.0	5	Pargesa Holding	2020	2,733.7
6	Panalpina Welttransport (Holding)	2019	4,691.6	6	Sulzer	2015	2,295.3
7	Edmond de Rothschild (Suisse)	2019	99.7	7	Nobel Biocare Holding	2014	2,019.4
8	CEVA Logistics	2018	818.7	8	Gategroup Holding	2016	1,408.6
9	Bank Cler	2018	197.3	9	Kuoni Reisen Holding	2016	1,360.1
10	Hügli Holding	2018	218.5	10	Nationale Suisse	2014	1,243.7
Transactions 1-10 Total			14,078.2	Transactions 1-10 Total			91,469.9
Transactions 11-20 Total			74,467.7	Transactions 11-20 Total			4,819.6
Other Transactions			10,864.2	Other Transactions			3,120.6

Figure 3: Most recent and largest PTOs in Switzerland from 2010 until 2020

The highest aggregated transaction volume in 2016, however, was largely driven by Syngenta, which was acquired by ChemChina for more than CHF 42bn. Together with Actelion, which was acquired by Johnson & Johnson for CHF 28bn in 2017, the two largest transactions contributed more than 70% to the overall transaction volume. The offer for Groupe Baumgartner Holding in 2019, on the other hand, represents the smallest transaction in the sample with a transaction volume of CHF 1.5m. Each of the ten largest transactions exceeded the one-billion Swiss franc threshold and with a combined volume of CHF 91bn, the top 10 transactions accounted for 92% of the total transaction volume since 2010. Interestingly, three of the six most recent transactions surpassed CHF 2bn in terms of transaction size. As a result of the accumulation of larger transactions in recent years, three among the five biggest transactions since 2010 took place in 2019 or later.

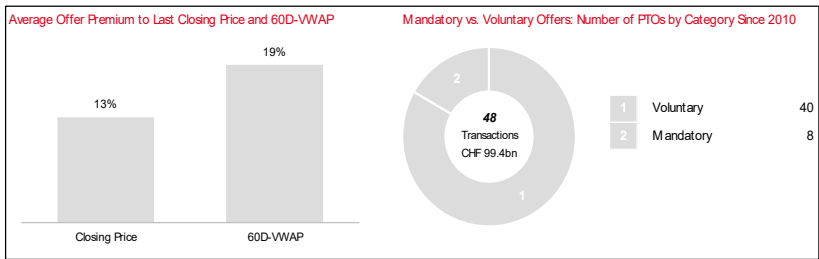


Figure 4: PTOs in Switzerland - average offer premia and different offer types

One in six PTOs in Switzerland from 2010 to 2020 qualified as a mandatory offer, which is subject to specific legal procedures as outlined above. In other words, a vast majority of 40 transactions were voluntary offers (graph on the right-hand side of Figure 4). The economic terms of voluntary and mandatory offers will be examined in further detail at a later stage in this article (see Figure 7). In order to induce shareholders of takeover targets to trade into the offer, the price offered by an acquiror typically includes a premium to the market price. Compared to the last closing price prior to the publication of the pre-announcement, the offer price represented an average premium of approximately 13%. The average offer premium of 19% to the 60-day volume-weighted average price (60D-VWAP) surpasses the premium to the last closing price by around six percentage points (graph on the left-hand side of Figure 4). This difference indicates a positive share price development of takeover targets for the time period from 60 days before pre-announcement until the last closing price before publication of the pre-announcement. The share price development of takeover candidates will be examined more thoroughly in the next section.

Share Price Development of Takeover Targets

Figure 5 illustrates the average indexed share price development of takeover targets for the time period of 100 trading days before pre-announcement until 100 trading days after pre-announcement. The graph reveals three interesting phases during the takeover process. The first noteworthy phase covers the period from 60 trading days before until the last trading day before the pre-announcement. After initially moving sideways until 60 trading days before pre-announcement, the average takeover candidate experiences a positive share price development of around +10% until the last trading day before the publication of the pre-announcement. The positive share price development during this time period is in line with the previous finding that the offer premium to the 60D-VWAP is higher than the premium to the last closing price prior to the pre-announcement of the transaction (see Figure 4). The second

and most apparent phase is related to the 11% price increase on the first trading day after publication of the pre-announcement. On this day, the average indexed share price jumps from slightly below 89 to more than 99 points, meaning that the average takeover candidate will be approximately 1% below the offer price. During the third phase, which concerns the time after the price increase of 11% on the first trading day following the pre-announcement, the indexed share price gradually approaches the offer price with increasing transaction certainty.

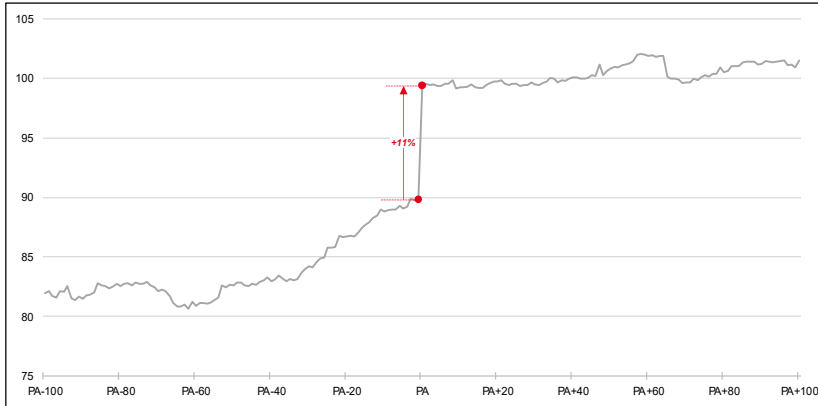


Figure 5: Average share price development of takeover targets for time period from pre-announcement (PA) +/-100 trading days indexed to the offer price (=100)

Figure 5 gives rise to the question, whether the share price performance before the pre-announcement may be caused by an overall upward trend in the market. To address this question, the share price performance of takeover candidates was compared to the development of the relevant broader industry indices. The results indicate that the average takeover target outperformed the broader industry index on more than two of three trading days during the 60 trading days preceding the publication of the pre-announcement. This finding thus suggests that the share price development illustrated in Figure 5 is much rather driven by company-specific factors than by positive momentum in the wider market.

Average Trading Volumes of Takeover Targets

The graph below compares the average trading volumes of takeover candidates during the PTO process to their relevant 12-month average trading volumes before publication of the pre-announcement. Bars exceeding the zero point in the graph are trading days on which the takeover target's trading volume was above the 12-month average.

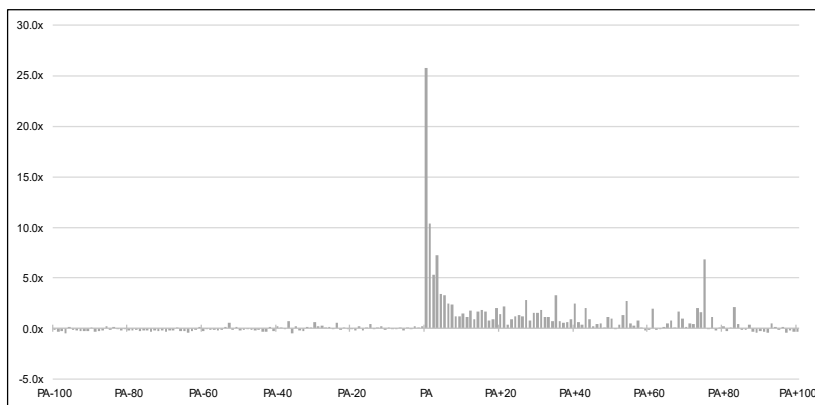


Figure 6: Average trading volumes of takeover targets for the time period from pre-announcement (PA) +/-100 trading days compared to 12-month average

The graph shows that for the time before the pre-announcement, the trading volumes tend to be around the 365-day average until approximately 40 days before the pre-announcement. During the 40 days that precede the pre-announcement, trading volumes seem to increase slightly but stay at moderate levels. On the first trading day after the pre-announcement, however, trading activity is extremely high with trading volumes that are more than 25 times above the 12-month average. The spike in trading volumes is due to the market absorbing the information of the announced PTO and investors taking positions in takeover candidates. Thereafter, trading volumes remain at above-average levels for a long period of time and exceed the 12-month average on every day for the next forty trading days or on nine of ten trading days for the next eighty trading days. The continued increase in trading volumes following the pre-announcement of PTOs may be caused by investors reassessing their opinions on the likelihood of the transaction being successful as well as the occurrence of potential counter bids.

Premia and Success Rates After Main Acceptance Period and Additional Acceptance Period

While the analyses concerning share price development and trading volumes of takeover targets were conducted for a 200 trading day period, the following graph represents an analysis for a specific cutoff date. Figure 7 thus shows a comparison of the success rates of the offers after the main acceptance period and the offered premia to the 60D-VWAP. The objective is to identify the relationship between the offer premium and the resulting success rate after the main acceptance period and to determine if there is a minimum premium that should be offered to attain a certain success rate. The success rate is defined as the percentage of shares that were tendered under the offer to the number of shares, to which the offer extended.

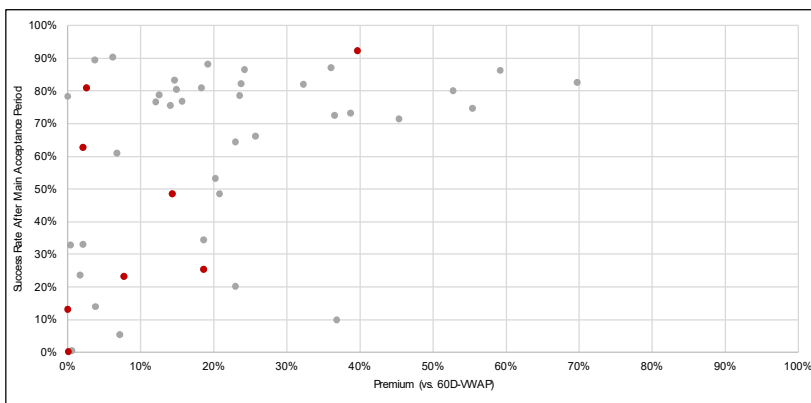


Figure 7: Comparison of success rates after the main acceptance period and positive offer premia (voluntary offers marked grey, mandatory offers marked red)

Four main conclusions can be drawn from Figure 7. First, as the points are spread out over the graph, there does not seem to be a clear rule regarding the premium that should be paid to ensure a high success rate. However, success rates tend to be higher with increasing premia, indicating a positive correlation between the premium and the success rate. Second, all but one offers with a premium of 30% or more over the 60D-VWAP demonstrated success rates in excess of 70% after the main acceptance period. Shareholders were thus more inclined to tender their shares, if the premium was substantial. Third, however, a premium of 30% or more is not necessarily required to attain a high success rate. A significant number of PTOs with premia between 10% and 25% or even lower had success rates beyond 70%. Fourth, the premia offered under mandatory offers is lower than the average premium of voluntary offers. Swiss takeover law requires the offer price under mandatory takeover offers to be at least as high as the 60D-VWAP. As a result, these transactions tend to be around the legal minimum requirement. To summarize, there does not seem to be a perfect correlation between offer premia and success rates but higher offer premia seem to be helpful in realizing higher success rates.

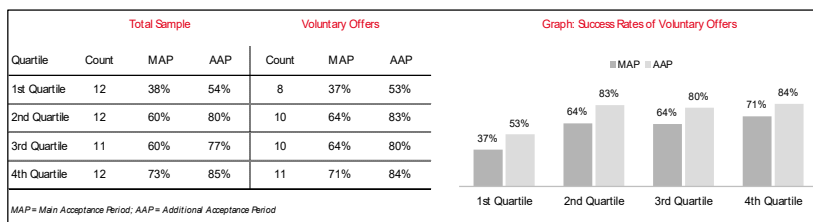


Figure 8: Average success rates of PTOs after the main acceptance period (MAP) and the additional acceptance period (AAP)

To further examine the positive yet not perfect correlation between offer premia and success rates, the takeover offers were categorized into quartiles based on their offer premia. The graph on the right-hand side of Figure 8 confirms that the success rates of voluntary offers increase with the offer premium. While the success rates after the main acceptance period increase or

stay the same for every quartile, the largest difference is between the first and the second quartiles. This result also persists for the success rates after the additional acceptance period. For the second, third and fourth quartiles, however, the resulting success rates amounted to 80% or more and are within a relatively small range of four percentage points. Hence, as long as the offer premium of voluntary offers is reasonably high and not part of the quartile with the smallest offer premia, the differences in success rates balance out after the additional acceptance period. With some limitations, the same findings apply to the total sample including mandatory offers (see table on the left-hand side of Figure 8).

Summary and Conclusion

PTOs are regulated in an extensive legal framework and are subject to specific rules, procedures and timelines. PTOs can be categorized depending on different parameters, such as whether a mandatory offer was triggered, the offer was perceived to be friendly by the board of directors of the target company or the consideration was paid in cash. Based on an analysis of 48 transactions in Switzerland since 2010, a large majority of the transactions were considered to be voluntary offers. During the time period from 2010 to 2020, the average offer price represented a premium of approximately 19% to the 60D-VWAP prior to the publication of the pre-announcement and a premium of around 13% compared to the last closing price. A comparison of the offer premia and success rates suggests that a premium of around 20% to the 60D-VWAP is often required to reach a success rate of the PTOs of around 80% after the main acceptance period.

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