# Opting-out clauses in Swiss takeover law

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## Introduction

Swiss takeover law provides for an offer obligation for shareholders exceeding the threshold of 33.3% of the voting rights in a listed company. If this threshold is exceeded, the relevant shareholder must submit an offer for all of the company's listed shares. However, the law provides for the possibility to raise the threshold to 49% (opting-in) or to completely waive the offer obligation (opting-out).

In a recent decision, the Takeover Board had to assess whether adopting an opting-out clause which will apply only to two specific investors and only for a period of five years is permissible from a takeover law perspective (Decision 0686/01 *in the matter of Addex Therapeutics SA*, rendered 20 March 2018).

Against this background, this update:

- provides an overview on the different forms of opting-out clause and their requirements; and
- summarises the main considerations and conclusions from *Addex*.

## Opting-out clause before listing shares

Under Article 125(3) of the Financial Market Infrastructure Act, companies may, before listing their shares, adopt in their articles of association a provision that the offer obligation will not apply. The introduction of an opting-out clause before a listing requires only the general quorum of an absolute majority of the votes represented in the general meeting and, subject to reasons of invalidity, the Takeover Board will not examine whether an opting-out clause adopted before a listing is valid.

## Opting-out clause after listing shares

Article 125(4) of the Financial Market Infrastructure Act allows companies to adopt opting-out clauses also after their shares have been listed, provided that the shareholders will not be disadvantaged. Such subsequent opting-out clauses are valid under Swiss takeover law if the following conditions are met:

- Transparency**:** shareholders must be transparently informed about the introduction of the opting-out and its consequences. Therefore, the intentions of the shareholder putting forward the motion and of the controlling shareholder(s), if any, as well as the consequences of the opting-out, must be explained. This information must be communicated in the invitation to the general meeting.
- Approval of minority shareholders: the adoption of the opting-out clause must be approved by a majority of the votes represented and also by a majority of the minority shareholders. For voting purposes, any shareholder whose stake is less than 33.3% qualifies as a minority shareholder.

If these conditions are met, it is assumed that the opting-out will not result in a disadvantage for the minority shareholders and is thus considered valid.

For opting-out clauses that apply only to specific shareholders and only for a limited time (selective opting-out clauses), it is additionally required that the unequal treatment of the shareholders, which is inherent to a selective opting-out clause, is justified by the interests of the company as in the concrete case at hand.

**Opting-out clause in *Addex***

Addex Pharmaceuticals SA concluded an investment agreement with two new strategic investors that committed to invest in Addex an aggregate amount of Sfr20 million. Further, it was agreed that such strategic investors would commit – together with other investors – to subscribe in the framework of a capital increase where only 25% other commitments have been obtained and where each subscriber would receive 0.45 warrants with a seven-year term for each subscribed share.

It was expected that the two investors would hold together, following the implementation of the capital increase, in aggregate approximately 23% and, assuming full exercise of the all warrants (by all investors), approximately 27% of the then-outstanding voting rights in Addex, respectively.

Neither investor held any shares, derivatives or voting rights in Addex prior to the capital increase.

Neither investor could reach or exceed the relevant threshold individually, even if no other new investors exercised their warrants and even though, besides the subscription of the new shares, there were no coordinated actions among the two investors and the concurrent subscription of the new shares in itself was unlikely to qualify as an acting in concert that would trigger a mandatory offer.

In light of recent Takeover Board practice relating to the existence of a group, in order to avoid the risk of having to make a mandatory offer to all Addex shareholders, following the exercise of the warrants in case their combined holdings would exceed 33.3% of the then-outstanding voting rights of Addex, the investors made the transaction dependent on the condition that Addex adopt a (selective) opting-out clause, exempting them from the obligation to make an offer when exceeding 33.3% of the voting rights, even though:

- the investment would not lead *per se* to a stake of more than 33.3%; and
- the investors purportedly did not intend to increase their participation following the transaction.

Against this background, the Addex board proposed to the general meeting the adoption of a selective opting-out clause limited to a five year period in favour of the strategic partners in order to:

- facilitate the financing of the company by the investors; and
- provide legal certainty in connection with the possible legal consequences under Swiss takeover law of their commitment to subscribe for, and their acquisition of, the new shares and, if and when the warrants are exercised, the shares to be acquired under the warrants.

In parallel, Addex had submitted an application to the Takeover Board to determine the validity of the proposed opting-out clause.

The selective opting-out clause as proposed by the board entailed, if approved by the general meeting of shareholders of Addex, the following consequences for Addex' shareholders:

- Neither investor (nor their respective affiliates) would have a duty to make a mandatory offer for five years in case any of them acquired (either alone or acting in concert pursuant) 33.3% or more of the outstanding voting rights of Addex. As a consequence, Addex shareholders would be deprived of their right to tender their shares in a mandatory offer triggered by a change of control in Addex caused by any of the investors.
- Because neither investor would have a duty to make a mandatory offer, the related provisions

of the Financial Market Infrastructure Act would not apply. In particular, neither investor would have a duty to extend an offer to all shareholders of Addex and, in connection therewith, to offer a minimum price pursuant to the minimum price rules applicable under the act – in other words, the higher of the following two amounts:
    - the highest price directly or indirectly paid by the offeror or by persons acting in concert with the offeror for equity securities of the target in the preceding 12 months before submitting the offer; and
    - the then-current stock exchange price of Addex shares (based on the 60-day volume-weighted average price).
- Since the opting-out would be selective, it would be limited in time and scope (ie, it would apply only to the two investors and their affiliates, whereby (existing or future) shareholders other than these two investors, assuming such shareholders reached or exceeded the threshold of 33.3% of the then-outstanding voting rights, would be unable to rely on the opting-out clause and would have the duty to make a mandatory offer to all the shareholders in accordance with the applicable provisions of the Financial Market Infrastructure Act.

In its decision, the Takeover Board held that the requirement of transparency had been met. In its invitation to the general meeting and at the general meeting itself, Addex's board of directors set out the reasons and intentions that it believed spoke in favour of the adoption of an opting-out clause. Further, the effects of the opting-out were described in the invitation to the meeting and explained at the meeting by the chair of the board of directors.

With respect to the requirement of the approval by the minority shareholders, the board stated that the largest shareholder holds 31.15% of the voting rights and that there are thus no minority shareholders in terms of takeover law. Therefore, all votes represented at the meeting needed to be considered. As the proposed opting-out clause was approved by 94.2% of the votes, the requirement of the approval by the shareholders and by the majority of the minority shareholders was met.

Finally, the board examined the additional requirement for the valid introduction of a selective opting-out clause (ie, whether the unequal treatment of the shareholders was justified by the interests of the company).

While the opting-out clause would deprive Addex shareholders from their right to tender their shares in a mandatory offer if any of the investors or their respective affiliates acquired (either alone or acting in concert) 33.3% or more of the outstanding voting rights of Addex, the capital increase as a whole allowed the shareholders to participate in a potential financial upside as a consequence of the transaction and also the from the value growth potential through the intended transaction.

The Takeover Board concluded that the selective opting-out clause was permissible.

**Comment**

In *Addex*, the Takeover Board confirmed its case law on selective opting-out clauses. However, the fact that Addex had requested a declarative opinion from the board confirming the permissibility of the opting-out clause shows that there is still considerable legal uncertainty in this area. Thus, prerequisites must be assessed on a case-by-case basis (eg, whether the transparency requirement is met in a specific case or whether the unequal treatment associated with a selective opting-out clause is justified by the interests of the company).

Therefore, it remains highly advisable to seek for an advanced opinion from the Takeover Board confirming the permissibility of an opting-out clause before entering into a transaction that could possibly trigger the offer obligation.

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