

Competing public offers in Switzerland – recent case law

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Public takeover offers are regarded as competing offers if, at the time of their publication, another offer in relation to the target has already been launched. Competing offers are subject to the general provisions governing public offers. However, to guarantee freedom of choice of the recipients of the offers (ie, the target's shareholders), and to avoid the sequence of offers influencing the shareholders' decision, the Swiss takeover provisions set forth certain specific rules for competing offers.

In a recent case (offer of AEVIS VICTORIA SA, launched in February 2017, and offer of BioTelemetry, Inc (as competing offer), launched in April 2017, regarding LifeWatch AG), the Takeover Board took its position on several issues relating to a situation of multiple offerors. Among other things, the board had to deal with:

- the alleged violation of the target against the principle of equal treatment; and
- requests of the competing offeror regarding amendments to the offer schedule.

Specific rules for competing offers

Equal treatment

The target must treat all offerors equally. This principle is to be understood in a broad sense and prohibits any measure by the target that favours one of several offerors, particularly in relation to the disclosing of information. For example, if one offeror is allowed to conduct due diligence with regard to the target, the other offerors are entitled to receive the same information on the same conditions.

Offer schedule

The publication of a competing offer impacts on the timetable of the transaction. In particular, the schedules of the offers are aligned so that the offer deadlines expire simultaneously. While in deviation to the general rules, the extension of an offer requires the board's approval.

Minimum price

Notwithstanding the general rule, to avoid disadvantages to the competing offeror in case of an increase of the stock price after publication of the initial offer, the minimum price of a competing offer should be calculated as per publication of the initial offer (instead of as per publication of the competing offer).

Right of revocation

The shareholders of the target are entitled to freely choose between the two offers, irrespective of whether they have already accepted the initial offer (ie, they are, in deviation of the principles of contract law, entitled to revoke their declarations of acceptance regarding the first offer).

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Equal treatment

In *LifeWatch*, AEVIS (the initial offeror) claimed a violation of the principle of equal treatment by being refused access during the course of its due diligence to a 'clean room' containing important and sensitive business information relating to the target. To access the clean room, LifeWatch requested that AEVIS sign a specific confidentiality agreement. AEVIS refused to sign the agreement, claiming that the necessity of a specific confidentiality agreement constituted a breach of the principle of equal treatment and argued that LifeWatch's conduct implied that the information contained in the clean room was likely to prove that the statements made in the target's board report were incorrect or misleading. LifeWatch rejected AEVIS' arguments and stated that the exact same confidentiality agreements were sent to each potential third-party offeror in order to obtain access to the clean room.

The Takeover Board held that the principle of equal treatment was not violated in the case of AEVIS. The board particularly stressed that the target was free to decide on the procedure and modalities of disclosing information to possible offerors, provided that each possible offeror had the same possibilities to access information under the same conditions as applicable to any other offeror. Further, the board held that it regularly received information from the target regarding the ongoing auction process, especially confidentiality agreements entered into between the target and potential offerors governing access to the clean room. The board confirmed that LifeWatch had requested that each possible offeror sign the same confidentiality agreement, such as the one sent to AEVIS. The board therefore concluded that LifeWatch fully respected the duty of equal treatment. AEVIS was free to decide whether to sign the respective agreement and thus to get access to the clean room. However, AEVIS could not request access to sensitive information from the target without the prior signing of a confidentiality agreement. Had this been the case, AEVIS would have been in a privileged position compared to the other offerors.

Offer schedule

In case a competing offer is announced by way of a pre-announcement, the offer prospectus must be published within five trading days. This deadline may be extended by the board for good reasons. In *LifeWatch*, BioTelemetry requested that the board extend this deadline by a further five trading days. As there were no precedents dealing with the question regarding the circumstances under which such an extension would be granted, the board first summarised the respective legal doctrine and concluded that the question must be answered by balancing the interests. The board held that BioTelemetry's request was justified by objective reasons, particularly the fact that BioTelemetry:

- had limited control on the timing, as it had to follow a strictly structured auction process controlled by the target;
- is a legal entity under US law and thus subject to the Securities and Exchange Commission reporting rules, which complicated and prolonged the process; and
- had to obtain a specific Israeli tax ruling regarding a tax exemption of minority shareholders from withholding tax in connection with an Israeli subsidiary of the target.

On the other hand, there were no substantial disadvantages for the target, its shareholders or AEVIS. Based on these considerations, the board allowed the deadline extension.

BioTelemetry requested to prolong the offer period by a further five trading days, subject to board approval. BioTelemetry mainly argued that its offer was particularly complex as it included an option for two combinations with different cash and exchange components, which required reasonable time for the shareholders to obtain professional advice in order to make an informed decision. Following these arguments and considering the short initial offer period of 10 trading days, the board also allowed this extension.

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